

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 01/07/16; Decision Issued: 01/11/16; Agency: DOC; AHO: Cecil H. Creasey, Jr.; Case No. 10725; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 01/25/16; EDR Ruling No. 2016- 4298 issued 02/12/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 01/25/16; DHRM Ruling issued 02/18/16; Outcome: AHO's decision affirmed.**

**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 10687

Hearing Date: January 7, 2016  
Decision Issued: January 11, 2016

PROCEDURAL HISTORY

Grievant was a K-9 captain for the Department of Corrections (“the Agency”), with over 20 years tenure. On September 2, 2015, the Grievant was issued a Group I Written Notice, for unsatisfactory work performance. The offense dates were June 5, 2015 to July 5, 2015.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On December 2, 2015, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for January 7, 2016, the first date available for the parties, on which date the grievance hearing was held, at the Agency’s designated location.

Both the Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s exhibits, respectively. The Agency’s Exhibit No. 3 was withdrawn; the Grievant’s Exhibits Nos. 9A and 9B were refused. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant  
Advocate for Grievant  
Advocate for Agency  
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through his grievance filings and presentation, the Grievant requested rescission of the Group I Written Notice and available relief.

### BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. However, § 5.8 states "[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its Standards of Conduct, Operating Procedure 135.1, which defines Group I Offenses to include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force. The purpose of the policy is stated:

The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Agency Exh. 8. Inadequate or unsatisfactory job performance is specifically stated to be a Group I offense.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

#### The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as a K-9 captain, and he had been employed there for over 20 years as of the offense date. The current Written Notice charged the Grievant as follows:

Since [the Grievant] has assumed the role and duties as the [ ] K9 Coordinator (Captain) he has failed to turn in the monthly K9 reports to his immediate supervisor on time, meeting the scheduled deadline of the 5<sup>th</sup> of each month. See attached report.

The attachment contained the following:

Deficiencies include:

- Failure to complete and/or turn in monthly K9 reports within the prescribed deadlines,
- Incomplete or inaccurate reports submitted,

- Mismanagement of K9 Handlers['] schedules (sending to wrong facility on wrong day/time, sending some handlers to work alone in cases when more than one handler is required, sending the wrong type of handlers to manage an institutional issue, and not sending the schedule out to handlers in a reasonable/timely manner).
- Restricting handlers['] ability to make decisions and build relationships with field staff,
- Failure to manage and communicate in a timely manner with handlers, and
- Failure to be available to handlers which causes issues to move up to the next staffing level (major)

Many of these matters [were] discussed and documented when you received a “needs improvement” in the last quarter of 2014. Many of these noted concerns [were] carried over from your assignment in the [former location] to your current assignment in the [current location].

As circumstances considered, the Written Notice provided:

Normally, this would result in a Group II, however, with your years of [] service and your rebuttal I have reduced to a Group I.

The Agency’s witnesses, the statewide coordinator (major) who issued the Written Notice and the security operations manager, testified consistently with the terms of the Written Notice offense, including the instruction and counseling to the Grievant. The Agency relied on documentation of complaints from staff members, but none of those staff members were called to testify on behalf of the Agency. The major testified directly to her instruction to the Grievant regarding the timely submission of monthly reports and the Grievant’s failure to comply with timely submission.

The major testified that she issued to the Grievant an undated performance management memo on March 7, 2014 (Agency Exh. 4A). Among the improvement goals was the directive to submit monthly reports by the 5<sup>th</sup> of each month. The major issued a memo to the Grievant on June 5, 2015, regarding complaints from handlers. In disagreement, the Grievant refused to sign the memo. Agency Exh. 4B. The major made notes of another meeting with the Grievant on June 19, 2015, regarding performance issues and staff complaints. Agency Exh. 4C. Written incident reports from staff were also presented. Agency Exhs. 5A, 5B, 5C and 5D. The major testified and presented documentation that the Grievant’s submissions of the monthly reports were late for June and July 2015. She also testified that she consistently expects the same performance from all of the captains under her supervision and applies her supervision and discipline consistently.

The Grievant presented one complaining handler, PS, to testify on his behalf. However, PS testified that she had problems with the Grievant’s responsiveness and scheduling, corroborating the incident complaints she made. Agency Exhs. 5A, 5D.

Also testifying for the Grievant were handlers, OJ and SF. Both testified in support of the Grievant and his management capabilities. SF faulted the major's management style rather than the Grievant's management.

The Grievant admitted that his May and June 2015 reports were submitted late. However, he blamed his late reports on the late submission of data from his handlers. The Grievant also acknowledged some mistakes in schedules and assignments. The Grievant, however, took issue with the complaints about his competence and asserted that the major was retaliating against him and treated him in a disparate manner compared to her favorites. The Grievant presented a detailed narrative of his points against the discipline. Grievant Exh. 11.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the manner, tone, and demeanor of the witnesses, I find all the witnesses credible. The witnesses' testimony and the Grievant's tacit admission of at least some of the offending conduct satisfy the Agency's burden to show unsatisfactory work performance by the Grievant, constituting a Group I offense. Certainly, management's judgment of work performance necessarily entails some subjective measure, but the late report submission by the Grievant is an objective measure of performance. While some handlers testified in support of the Grievant, one handler called to testify by the Grievant highlighted her complaints and gave credence to the Agency's discipline. The Agency's evidence, however, did not preponderate in establishing the disciplinary point asserting that the Grievant restricted the handlers' ability to make decisions and build relationships with field staff. Thus, in this regard, the Written Notice must be revised to delete this offense description. The Agency's evidence preponderated in showing the other elements noted as unsatisfactory work performance.

#### Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g., EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at \*18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution.” Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. I find no such circumstances. Although the Grievant asserted an ulterior motive for the discipline, after many years of supervision, this is the major’s first discipline issued to the Grievant. The discipline was based on objective as well as subjective reasons, issued in a progressive manner, and the Grievant’s evidence did not preponderate in showing any ulterior motive.

While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency’s discipline falls within the limits of reasonableness. A Group I Written Notice following prior counseling in this instance is consistent with issuing progressive discipline.

#### DECISION

For the reasons stated herein, I uphold the Agency’s discipline of Group I Written Notice, with the revision to the Written Notice removing the following disciplinary point:

- Restricting handlers[’] ability to make decisions and build relationships with field staff,

#### APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>1</sup>

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.