

Issue: Separation from State (unable to meet work conditions); Hearing Date: 02/26/18; Decision Issued: 02/28/18; Agency: VSP; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 11072; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11072

Hearing Date: February 26, 2018
Decision Issued: February 28, 2018

PROCEDURAL HISTORY

Grievant was a special agent with the Virginia State Police (the Agency), with many years of service. On June 23, 2017, the Agency informed Grievant he was being removed from employment effective September 1, 2017. On July 24, 2017, Grievant timely filed a grievance to challenge the Agency's action. On October 16, 2017, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management (EEDR), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for February 26, 2018 (to allow ample time for pre-hearing procedures and developments), on which date the grievance hearing was held, at the Agency's designated location.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits as numbered, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Advocate for Agency
Witnesses

ISSUES

1. Whether the Grievant's removal was in accord with State and Agency Policy?

Through his grievance filings and presentation, the Grievant seeks reinstatement to his job, back pay, applicable benefits, and attorney's fees. The Grievant asserts that the examining

psychiatrist was biased, that his assessment was incorrect, that the Agency retaliated against him, that the fitness for duty issue is based on the ulterior motive of discipline, and that he was denied due process.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency acted contrary to policy and that the relief he seeks should be granted. Grievance Procedure Manual (GPM) § 5.8. 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.

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. The hearing officer is charged with the responsibility to determine the application of all written personnel policies, procedures, rules and regulations and whether it can be shown that policy was misapplied or unfairly applied. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies.

General Order ADM 14.10 governs *Fitness for Duty* assessments. This policy provides:

Purpose:

To describe mental and physical examinations which may be required to ensure an employee is competent to perform the assigned job, and to explain conditions under which these tests may be required.

1. The Superintendent may require mental or physical examinations of an employee by a designated psychiatrist, psychologist, or physician when, in the Superintendent's estimation, it is to the best interest of the employee or the Department. The purpose of these examinations is to assist the Department in making decisions to determine an employee's mental and physical fitness to perform his/her job. Beyond this assessment, however, it is the employee's responsibility to maintain fitness for duty.
2. The necessity for mental or physical fitness of duty examination may be based upon:
 - a. Personal observation of general appearance or unusual actions or behavior. ***
 - e. Other information determined reasonable and sufficient by the Superintendent to justify the need for an examination. ***
 - g. If the designated psychiatrist, psychologist, or physician determines the employee is not fit for duty, a recommendation will be provided regarding whether the employee is able to work in a light-duty status or is unable to work at that time. ***
7. Any examinations or tests required by the Superintendent or his/her designee shall be provided at no cost to the employee as listed below.

Agency Exh. 3.

Many courts have held that, because law-enforcement officers have unique public safety responsibilities, fitness for duty evaluations of such employees are generally consistent with business necessity, provided the employer has some legitimate reason to question the officer's ability to adequately and safely carry out his or her responsibilities. *See* EEDR Ruling No. 2018-4595 (Aug. 30, 2017). The Grievant was involved in a previous grievance hearing on the fitness for duty issue, and the previous hearing officer held that the Agency's decision to order the fitness for duty evaluation was job-related, reasonable, and consistent with business necessity. *See* Hearing Decision, EEDR No. 10927 (March 10, 2017). Agency Exh. 4. The Agency's decision to require Grievant to participate in a fitness for duty examination is consistent with General Order ADM 14.10.

The Agency presented evidence, including testimony from a First Sergeant, that the Grievant made statements consistent with unusual actions or behavior. The Agency's concerns regarding whether the Grievant was fit for duty were logical, reasonable, and reflected the Agency's desire, and responsibility, to protect the Grievant, the Agency, and the citizens of Virginia—a business necessity. The prior hearing decision, while finding the fitness for duty

examination did not meet policy requirements, specifically held that the Agency retained the discretion for another fitness for duty examination. Agency Exh. 4, at p. 6.¹

Accordingly, the Agency's fitness for duty psychiatric examination was conducted on April 25, 2017. The Agency's examining psychiatrist's report was not produced to the Grievant or for the grievance hearing, based on the examining physician's determination under Va. Code § 32.1-127.1:03(F). Ultimately, the examining physician prepared a one-page summary memo of his findings from the April 25, 2017, examination that was produced to the Grievant with the Agency's exhibits. Agency Exh. 1. The summary report included:

Summary of Psychological Findings for Opinion: [The Grievant] was found to have impairments in organizing and presenting information, recalling the chronology of important personal events of the last 9-years, and avoidance of exploration of topics relevant to this evaluation. While he was pleasant and cooperative, he is either unaware of, or unable or unwilling to accept and discuss documented problems both at work and in his personal life. In this evaluation, he took a concrete view of issues that led to the fitness for duty evaluation.

Assessment: The psychiatric assessment is Problems Related to Employment (Z56.9). Other possibilities include Unspecified Trauma and Stressor Related Disorder (F43.9) and Unspecified Neurocognitive Disorder (R41.9). One or more of these conditions might be leading to compartmentalization of stresses, inability to connect the dots, disorganized thinking and difficulty recalling select areas of his recent life, avoidance of exploring their impact on his emotions and work performance, and limited or poor insight into the above.

Opinion on Fitness for Duty: [The Grievant] is assessed as Not Fit for his usual duties as trooper at this time.

The examining physician testified consistently with his summary report. He also testified that he did not medically treat the Grievant and was not acting in the role of a treating physician. Even though he was not the Grievant's treating physician, he testified that he restricted the dissemination of his report under Va. Code § 32.1-127.1:03(F) because his report "named names" regarding his sources of information, and he believed there was the possibility of harm from providing the report even to the Grievant. Despite the disadvantage to the Grievant presented by not having the examining psychiatrist's report, the record does not show that the Grievant pursued the report through the alternative means prescribed in Va. Code § 32.1-127.1:03(F). See EEDR Ruling No. 2018-4636 (Nov. 17, 2017).

The Grievant ultimately obtained his own evaluation from a licensed clinical psychologist, who examined the Grievant on January 16, 2018. The psychologist opined that there was no evidence of cognitive impairment or psychological illness that would hinder the

¹ In his opinion, the prior hearing officer also held that the evidence did not support the Grievant's contention that the Agency's unfitness for duty removal was disciplinary. Agency Exh. 4, at p. 3.

Grievant's ability to carry out duties outlined in the employee work profile. Grievant Exh. 5. The testimony at hearing confirmed that the Grievant's job entailed carrying and using a gun.

Both the psychiatrist and the psychologist are well-qualified, but their opinions are not reconcilable on the issue of fitness for duty. Of course, the psychiatrist's opinion acted upon was from April 2017 and the psychologist's assessment was in January 2018, nearly nine months apart. While the psychologist's opinion was contrary to the psychiatrist's, the psychologist's opinion and testimony did not discredit the psychiatrist's assessment from April 2017, nearly nine months earlier. The psychologist presented a differing medical opinion, but there no basis to consider the psychologist's opinion retroactive to April 2017 or the ensuing months to the effective date of the Grievant's removal, September 1, 2017. The psychiatrist relied on test results and other information provided by others, as well as an in-depth interview of the Grievant. The psychologist relied on his own testing and interview of the Grievant, and he did not receive input from others. The question before the hearing officer is whether the Agency misapplied policy in its reliance on the psychiatrist's April 2017 opinion that the Grievant was not fit for duty.

Under DHRM Policy 1.60, *Standards of Conduct*, an agency may remove an employee who is "unable to meet the working conditions of his . . . employment" for certain specified reasons, including the employee's "inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered . . ." DHRM Policy 1.60, *Standards of Conduct* § H(1). Grievant's Exh. 2. The *Standards of Conduct* does not, however, address how an agency should resolve conflicting reports from medical professionals on the issue of whether an employee is actually able to perform the essential functions of his position. The relevant agency policy, General Order ADM 14.10, *Fitness for Duty*, describes the circumstances under which fitness for duty evaluations may be ordered and the manner in which they should be completed, but does not discuss the removal process or provide guidance for resolving conflicts between medical reports.

While the Grievant argues that the psychiatrist was biased, incorrectly referred to the Grievant as a "trooper," and that his opinion was unreliable, there is insufficient evidence to show the psychiatrist's opinion was biased or so flawed that it should be ignored. The Agency, having the solemn responsibility for safety and security within the Commonwealth, could not ignore such medical opinion on fitness for duty. Of course, such a finding for the Grievant is a significant blow to his long-term career with the Agency, and the severe consequence of losing his job under these circumstances is not unnoticed or minimized. This record is rather silent regarding exploration of alternative assignments within the Agency, but the Grievant sought full reinstatement based on a misapplication or unfair application of policy—not an accommodation.

The Grievant testified that his behavior and comments that led the Agency to seek the fitness for duty examination were caused by the combined effects of illness and prescribed medications. The Grievant testified that he had been under an internal affairs investigation at the time of the psychiatrist's evaluation in April 2017, and that the fitness for duty examination and ultimate removal were disciplinary or retaliatory in nature. The Grievant presented the recording from the prior grievance hearing, specifically an excerpt of the recording that captured an "off the record" conversation between the Agency's advocate and Human Resources Director.

Grievant's Exhs. 7 and 9. In that conversation, the Human Resources Director stated that if the removal based on unfitness for duty failed, the Grievant would be fired because of the matter under investigation. The internal affairs investigation was suspended because of the Grievant's removal decision and his ultimate election for retirement. The Human Resources Director testified that he does not make disciplinary determinations, but he is involved at the process end to review Written Notices for accuracy and policy consistency. The conversation caught on the recording was an expression of a frank viewpoint by the Human Resources Officer, and it presented a reasonable suspicion by the Grievant regarding the Agency's motives. Alone, however, it does not show any improper motive by the Agency for seeking the fitness for duty evaluation or by the psychiatrist in rendering his ultimate medical opinion.

A master trooper testified for the Grievant, and he credibly testified to his full confidence in the abilities of the Grievant to do his job.

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).

Pursuant to applicable policy, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60.

EEDR's *Rules for Conducting Grievance Hearings (Rules)* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A). Without finding bias or improper motive underlying the psychiatrist's opinion, for the hearing officer to substitute the psychologist's opinion in place of the Agency's reliance on the psychiatrist's opinion would invade the province of Agency management by improperly acting as "super-personnel officer." Under the circumstances presented here, the Agency notified the Grievant of its removal decision on June 23, 2017, with the effective date of September 1, 2017. The Grievant's contrary medical opinion from the psychologist was not in existence until January 2018, and the Agency did not have such medical opinion to weigh before September 1, 2017.

Thus, the Grievant has not borne his burden of proving the Agency misapplied or applied unfairly Agency policy. I find the Agency has complied with its policy, General Order ADM 14.10 and the *Standards of Conduct*. While acting on reasonable basis and suspicions in bringing his grievance, I find the Grievant presented insufficient evidence of misapplication or unfair application of policy to reverse the Agency's action.

DECISION

For the reasons stated herein, I uphold the Agency's removal action.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

² Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

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

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written in a cursive style.

Cecil H. Creasey, Jr.
Hearing Officer