

Issue: Two Group III Written Notices with Termination (conduct that undermines the Agency's effectiveness and efficiency); Hearing Date: 10/16/17; Decision Issued: 02/07/18; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 11081; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11081

Hearing Date: October 16, 2017
Decision Issued: February 7, 2018

PROCEDURAL HISTORY

On July 11, 2017, Grievant was issued two Group III Written Notices of disciplinary action with removal for undermining the effectiveness or efficiency of the Department's activities.

On August 9, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 28, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 16, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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.

FINDINGS OF FACT

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

The Virginia State Police employed Grievant as a Senior Trooper at one of its regions. He began working for the Agency in 2004. His supervisors described him as an informal leader who had earned the respect of his supervisors and coworkers. He was recognized as reliable, hardworking, and a good shift partner. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant lived in a house in a rural area. His property had an approximately one mile long driveway.

On January 20, 2017, Grievant was off-duty. He decided he wanted to harm himself. He consumed an excessive amount of alcohol "to give me courage to drive the vehicle into the tree." Grievant entered his personal vehicle and drove it at an excessive speed down the driveway and into a tree. He passed through a Stop sign without stopping. There were no skid marks made by the vehicle. Grievant's vehicle had extensive front end damage. The airbags deployed and blood was found in the vehicle including a deployed airbag showing that Grievant was injured.

Grievant left the crash scene and walked approximately one mile to his residence.

Trooper F arrived at the crash scene. Trooper F drove to Grievant's residence. Trooper F repeatedly knocked on the door of Grievant's residence, but Grievant did not respond. Because of the extensive damage to the vehicle and blood found at the crash scene, Trooper F decided to enter Grievant's residence through an unlocked door to determine if Grievant was all right. Once he was inside the house, Trooper F observed Grievant fully clothed asleep in his bed with blood on his face. Trooper F took several minutes to awaken Grievant. Grievant's speech was slurred. He was unsteady on his feet. His eyes were bloodshot and he smelled of alcohol. The local Fire and Rescue paramedics were called to evaluate Grievant. They knew Grievant was a State Trooper. Grievant refused to be transported to the hospital.

Grievant returned with Trooper F to the crash scene. Grievant agreed to take a breath test given by Sergeant B. Grievant registered a reading of .07 Blood Alcohol Content. The test was taken approximately three and a half hours after the crash.

Grievant told Sergeant B he was not driving the vehicle that crashed into the tree. If he had admitted to driving the vehicle, he would have been charged at the crash scene with Driving Under the Influence of alcohol. When Grievant was interviewed by Sergeant M on February 28, 2017, Grievant admitted he admitted consuming alcohol, driving his vehicle into the tree, and leaving the scene of the crash.

The US Department of Veterans Affairs determined that Grievant suffered a disability of Post Traumatic Stress Disorder.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order ADM 12.02(12)(a). Group II offenses "include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal." General Order ADM 12.02(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order ADM 12.02(14)(a).

First Group III Written Notice

Group III offenses include:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.¹

¹ General Order ADM 12.02(14)(b)(20).

On January 20, 2017, Grievant unlawfully intentionally crashed his vehicle into a tree. He unlawfully left the scene of the crash without reporting the crash.² He was untruthful regarding whether he was driving the vehicle. If he had been truthful, he would have been charged with Driving Under the Influence of alcohol. These actions undermined the effectiveness and efficiency of the Department. The Department was unable to fully investigate and charge Grievant for his unlawful actions. The Agency is a law enforcement agency devoted to enforcing criminal laws for which Grievant otherwise would have been charged. The Agency holds Troopers to high standards regarding compliance with Virginia criminal laws. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that he was denied a reasonable accommodation for his disability. Grievant bravely served the United States of American in combat in the Middle East. He nearly died in a mortar attack on his vehicle. He was able to save the life of another service member with him. As a State Trooper, Grievant came close to shooting a person whom he suspected had killed another Trooper. Grievant later learned that the suspect had not killed his friend. Grievant suffered post traumatic stress disorder. His disability was validated and confirmed by the US Department of Veterans Affairs.

Under the Americans with Disabilities Act, Grievant was entitled to reasonable accommodation for his disability. A reasonable accommodation, however, does not include ignoring or excusing violations of the Standards of Conduct. In other words, Grievant's disability does not prohibit the Agency from taking disciplinary action against Grievant.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"³ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. 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

² Va. Code § 46.2-894 required Grievant to immediately report the crash to the State Police or local law enforcement.

³ Va. Code § 2.2-3005.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Second Group III Written Notice

The Agency issued two Group III Written Notices for violating General Order ADM 12.02 (14)(b)(20). The Written Notices are nearly identical in their wording and related to the same set of events on January 20, 2017. An agency may not issue two written notices for the same events and violation of policy. Accordingly, the second Group III Written Notice must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a First Group III Written Notice of disciplinary action with removal is **upheld**. The Agency's issuance to the Grievant of a Second Group III Written Notice of disciplinary action is **rescinded**.

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.^[1]

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.