



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11683**

Hearing Date: July 29, 2021  
Decision Issued: November 22, 2021

**PROCEDURAL HISTORY**

On February 23, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for using obscene or abusive language and threats and coercion.

On March 19, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 5, 2021 the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 29, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
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?

### **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 Trooper at one of its locations. He began working for the Agency on October 10, 2010. Grievant consistently received favorable annual performance evaluations. The Agency described Grievant's prior work performance as "devoted to his duties in that he consistently and fairly promoted highway safety, enforced traffic and criminal laws, investigated crashes, maintained his uniforms and equipment, and was polite and fair with his dealings with the public." Grievant was a "highly regarded Field Training Officer."<sup>1</sup> Grievant received eight commendations for exemplary performance including the Medal of Valor from another police department. Grievant had given tickets to several motorists who later called the Agency to compliment Grievant on his professionalism during their traffic stops. Grievant received a rating of "Major Contributor" on his 2020 annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant transferred from one Agency division to another to be in a location where he could gain access to long-term specialized medical care for his young child.

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<sup>1</sup> Agency Exhibit p. 41.

Before joining the Department, Grievant served in the United States Army. He was stationed in Iraq for 15 months. He served in combat. In February 2007, Grievant was in a military vehicle hit by an improvised explosive device which “ripped to shreds” him and the other four men inside. He received numerous awards and metals for his military service.

On April 19, 2019, the Driver was operating his vehicle on a busy Virginia highway. Trooper A observed the vehicle with an expired inspection sticker and initiated a traffic stop. The Driver began using his cell phone video camera to record the stop. When Trooper A approached the vehicle, she noticed a strong odor of marijuana coming from the vehicle which suggested that the Driver may be in possession or under the influence of marijuana. The Driver presented a public safety risk to himself and other drivers. Trooper A had probable cause to search the Driver’s vehicle without his consent.

Trooper A asked the Driver if he had marijuana in the vehicle and he said “No.” Trooper A told the Driver she had probable cause to search his vehicle. The Driver said he did not give consent to the search and he wanted a lawyer.

The Driver did not have the right to have a lawyer present on the side of a highway during the vehicle search. The Agency was not obligated to provide the Driver with an attorney or wait for an attorney to appear on the side of the road to speak with the Driver. The Driver developed a fanciful narrative of him being denied his legal rights.

Trooper A called Grievant for assistance in order to conduct a probable cause search of the vehicle. Grievant and Trooper K responded and arrived at the vehicle location.<sup>2</sup>

Trooper A repeatedly instructed the Driver to exit the vehicle, but he refused.

Grievant approached the vehicle. Grievant detected the odor of marijuana.<sup>3</sup> Grievant began speaking with the Driver. The Driver held his cell phone in his right hand and used the camera to record his interaction with Grievant.

The Driver’s cell phone video showed that Grievant approached the vehicle and told the Driver to unlock the door. The Driver told Grievant he refused to consent to a search. Grievant told the Driver, “It smells like marijuana in here, you don’t have to consent to a search.” Grievant identified himself and attempt to build a rapport with the Driver, but the Driver continued to talk over Grievant.

The Driver demanded two forms of identification from Grievant. Grievant returned to his police vehicle to obtain his wallet. Grievant returned to the Driver’s vehicle and

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<sup>2</sup> Trooper K was Grievant’s trainee. Grievant had released Trooper A from training a week earlier.

<sup>3</sup> Trooper K described the odor of marijuana from the Driver’s vehicle as “a lot.”

informed the Driver of the badge numbers of Trooper A and Trooper K. Grievant again identified himself to the Driver.

The Driver demanded two forms of identification from Trooper A and Trooper K. Grievant responded, "No." The Driver said, "You can't tell me what I need, I'm a law paying citizen I pay your taxes which pays your job." Grievant replied, "How much State taxes? You pay about 40 cents of State taxes to pay my job." Grievant said, "But look I'm going above and beyond." The Driver said, "I don't answer questions." "I want my lawyer here. Like I said, I don't consent to any searches and have the right to have a lawyer here." The Driver looked at the camera and shook his head.

Grievant displayed his Military identification and said, "Here's my military id. Hold on. I'm just giving you more."

Grievant looked at the camera and said "I'm going above and beyond right now." The Driver said, "I don't answer questions. You are doing your job; this isn't above and beyond." While Grievant responded to a radio call, the Driver looked at the camera, shook his head, and said, "This is stupid."

Grievant displayed his Virginia State Police identification to the Driver. The Driver moved the camera closer to the identification to record a clearer view of the identification. Grievant said, "Ok?" Grievant displayed his driver's license. The Driver demanded to see the identification of Trooper A and Trooper K. The Driver said, "What you showed me I need to see from them." He added, "I am not asking anything that is out of my law, out of my rights."

Grievant asked, "[H]ow do you think this is going to end?" The Driver replied, "I don't answer questions. Like I said this is all being recorded. Sir, I don't answer any questions."

Grievant asked, "Are you ready to go through all this today? Just for that." The Driver said he does not answer any questions. Grievant asked, "Are you ready to go through all this today? There is probably not any weed in here."

The Driver replied that he does not answer any questions. The Driver said he does not have the two other officers' identification and "I don't wish to engage in a conversation with you. I would like my lawyer present to do so."

Grievant told the Driver he was "ruining your chance; ruining your chance." The Driver continued to interrupt Grievant.

Grievant said, "This is going to get posted on YouTube. You are going to post this after all of this. And I guarantee." Grievant turned to the camera and said, "Look at me, everybody's who's going to see this. I guarantee, they're going to say you sir, you got the coolest Cop in the whole nation. The most coolest, calmest, collected Cop." Grievant turned to the Driver and added, "There will be all 2000 comments saying you (referring to

the Driver) -- what a dumb-ass. You what a dumb-ass. You asked for my id, two forms. I showed you military id. I showed you my driver's license. I showed you my State Police id." The Driver interrupted and disregarded Grievant's comments as he began narrating to the camera.

The Driver said if he is being detained or arrested, he would like a lawyer.

Grievant said, "You are being detained for investigative purposes so we can search this car." The Driver narrated to the camera that, "I am being detained for investigative purposes that is not a crime. Being detained for investigative purposes is not a crime. So I am being illegally detained just to correct that. I want that noted coming from the officer's mouth himself."

The Driver narrated that he still did not get "this lady's name and badge number here." The Driver turned the camera towards the passenger side window and Trooper A stated her name and badge number. The Driver asked Trooper K for his information again and Trooper K stated his name and badge number. The Driver then narrated to the camera that, "Since I am being detained I do not wish to conversate with anyone further." Grievant said, "I can't hear you. Louder." The Driver said to Grievant, "I am not speaking to you, sir." The Driver continued to narrate to the camera that, "Since I am being detained ill-lawfully as you guys already heard for investigative purposes I don't wish to conversate with these three officers until I have a lawyer present."

Grievant said, "Well look, I'm going to pull you out of the car. Just don't fight me back. Don't make it any worse." The Driver said to the camera, "You all hear this -- I am being threatened."

Grievant reached through an opening in the driver's side window and unlocked the door. The Driver attempted to block Grievant's hand. The Driver narrated that, "This officer is unlocking my car." The Driver said, "They just illegally entered my car. And I am being forcefully removed."

Grievant opened the driver's side door and looked at the Driver.

Grievant looked at the Driver and pointed his finger to his own face. Grievant says, "Take a look at me. I'm a f—king specimen right here buddy. You have gotten on my last nerve." Grievant briefly turned to the camera and said "You are going to get your ass whooped in front of f—king Lord and all creation. I'm gonna give you one more chance. You can bring that thing with you. I'll let you film the whole thing." The Driver narrated to the camera, "I am not doing anything. I feel unsafe. My hands are up. I'm doing nothing wrong to provoke it. Making sure this is all recorded. I have just been threatened by a lawful officer." The Driver continued to narrate. Grievant said, "You can take your phone with you."

Grievant said, "I'm giving you to the count of three." Grievant reached his right hand in front of the Driver to grasp the seat belt buckle and unhooked the seat belt.

Grievant said “Come on out; keep your phone out.” The Driver continued to disregard Grievant’s instruction. The Driver said, “Please do not touch me.” Grievant said, “See that’s where we are coming to a disagreement.”

Grievant yelled<sup>4</sup> at the Driver, “I’m giving you to the count of three!” Grievant looked at the camera and said, “Don’t do it. Don’t do it.” He turned to the Driver and said, “Step out of the car right now.” When the Driver failed to comply, Grievant said “Now you’re under arrest. Now you are under arrest for disobeying a lawful command from an officer.” The Driver disregarded Grievant and continued rambling to the camera. Grievant said, “I’m giving you to the count of three.” While Grievant was looking at the Driver he said “One.” Grievant turned to the camera, smiled, and said “Two” and then said “Just watch the show folks.”

Grievant used his left hand to take control of the Driver’s left forearm. Grievant then moved his right arm around the Driver’s head and face and joined his right hand with his left hand. Grievant pulled the Driver out of the vehicle and onto the ground.

Grievant and the Driver were no longer visible on the cell phone camera but the cell phone continued to record their voices.

Grievant told the Driver, “How do you like this mother-f—ker; how do you like this. Put your hands behind your back. Put your hands behind your back.” The Driver said, “My hands are behind my back, get off me. I am not resisting. Please get off my neck. I’m not resisting. Get off my neck you are harming me. You are harming me. You are harming me, sir. You are harming me. Sir, this is all being recorded. Facebook live; this is live. You are all being recorded and I am being harmed.”

Trooper A and Trooper K assisted with trying to hold and handcuff the Driver. Once the Driver was handcuffed, he was assisted quickly to his feet. Grievant moved the Driver away from the Driver’s vehicle and to Trooper K’s Police vehicle. The cell phone video ended.

The Driver continued to ramble and yell as he was escorted to Trooper K’s vehicle.<sup>5</sup> Trooper K’s vehicle had an initially outward facing camera with a microphone. Once placed in the vehicle, the Driver continued to rant even though no one else was inside the vehicle.

Trooper A and Trooper K searched the Driver’s vehicle.

Sergeant F arrived at the location after the Driver had been arrested and was in custody. She noticed a strong odor of marijuana.

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<sup>4</sup> Grievant was giving a command instruction consistent with his training.

<sup>5</sup> A microphone was not available to record the Driver’s statements as he was being escorted.

Grievant and Trooper K returned to the vehicle and began driving the Driver to jail. The Driver fell asleep during the ride.

The Driver received two small scrapes above his left eye from the extraction maneuver used by Grievant and the subsequent contact of the Driver's face with the asphalt.

Shortly after the incident, Trooper A showed Sergeant F a screen shot of the Driver's cell phone video. It was a still image.

On May 20, 2019, First Sergeant B asked Sergeant F if she had given Grievant a written counseling for use of profanity. Sergeant F said she had not done so. First Sergeant B said counseling was necessary and he would take care of it.

On May 23, 2019, First Sergeant B gave Grievant a written counseling for "using profane language repeatedly". First Sergeant B based his counseling on "associated videos" which did not include the cell phone video of the Driver.<sup>6</sup> Grievant agreed he should have set a better example. Under the Agency's policy, documentation of a counseling was supposed to be held in a supervisor's file and not an employee's personnel file.

On May 31, 2019, First Sergeant B submitted an SP-103 form alleging Grievant was disrespectful and not courteous when he screamed obscene and abusive language directed at the Driver.

On June 3, 2019, Sergeant F was assigned responsibility to investigate the allegation that "on or about April 19, 2019, while speaking to a subject in custody you were disrespectful and not courteous when you screamed obscene and abusive language directed at him." Sergeant F reviewed the in-car video for Trooper A's vehicle and Trooper K's vehicle. Not all of the equipment was working properly. Sergeant F observed in the videos that after placing the Driver in handcuffs, Grievant walked the Driver to Trooper K's vehicle. Grievant and the Driver were yelling but what was said as they walked could not be heard. When the in-vehicle audio began picking up the conversation, the Driver could be heard claiming he had not resisted, "You guys are not the law", "You guys are dirty", and "I was just harmed." The Driver asked Grievant what happened to his phone. Grievant said it would be brought to him. Grievant said, "Did I hurt you" and then called the Driver a "weak ass bi—h", and said, "you wouldn't have lasted five f—king seconds in Iraq, mother f—ker." Grievant yelled at the Driver, called him a "mother f—ker", and told the Driver to "Shut the f—k up." The Driver continued to state he was "ill-lawfully detained" and said, "You are not the law." When Sergeant F later asked Grievant to explain this verbal outburst toward the Driver, Grievant replied the Driver told Grievant, "Some ni—er

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<sup>6</sup> Agency Exhibit p. 74.

like me is home f—king your wife right now.”<sup>7</sup> Sergeant F concluded Grievant extracted the Driver “using the minimum force necessary.”<sup>8</sup>

In a memorandum to Captain D dated June 12, 2019, Grievant stated that the Driver had his cell phone out and was recording.

On July 23, 2019, Captain K sent Grievant a memorandum informing Grievant that the allegation against him had been sustained and that his behavior constituted a Group I offense for use of obscene or abusive language. Captain K wrote, “I am convinced that this behavior was an aberration.”<sup>9</sup> Captain K said no further action would be taken against Grievant. Thus, the outcome of the Agency’s 2019 investigations was a counseling.

The Driver pled guilty to a misdemeanor for resisting arrest. He was convicted and fined on August 23, 2019.<sup>10</sup>

Sergeant F testified that the Agency did not want Troopers to use profanity but sometimes using certain profane words caused non-compliant individuals to comply. She testified that Troopers were taught pain compliance techniques such as grabbing an individual’s arms and wrists and turning them so that the individual’s shoulder rotated and the individual moved in a desired direction.

The social climate in the summer of 2020 involved close scrutiny of police behavior and extensive discussion about police behavior and police reform.

In July 2020, the Driver’s cell phone video was posted on the internet and “went viral.” It was viewed by hundreds of thousands of people. Many of those who watched the video wrote negative comments about Grievant. Television stations in Virginia and across the country replayed the video as part of news stories about police behavior towards the public.

Grievant received numerous unsolicited emails containing threats. On July 15, 2020, Grievant received an email stating, “blue lives don’t matter and you and anyone else like you needs TO DIE SWIFTLY!” Grievant received another email with the subject line, “GO KILL YOURSELF RACIST PIECE OF S—T.” One person sent Grievant an email saying, “your family will never be safe.”<sup>11</sup>

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<sup>7</sup> Agency Exhibit p. 62.

<sup>8</sup> Agency Exhibit p. 64.

<sup>9</sup> Grievant Exhibit 4.

<sup>10</sup> The Driver had an extensive arrest record. He had been convicted of numerous misdemeanors including possession of marijuana, petit larceny, and embezzlement. After the April 2019 incident, the Driver continued his criminal behavior and was convicted for failing to stop at an accident and driving while intoxicated. See, Grievant Exhibit 22.

<sup>11</sup> Grievant Exhibit 20.



Many Members of the General Assembly learned of and watched the cell phone video online or television stories about Grievant's behavior.

Captain H appeared before the Virginia General Assembly to speak regarding issues of police reform. After presenting the Agency's view on police reform, Captain H listened to Members of the General Assembly use Grievant's treatment of the Driver as a rebuttal to the Agency's position. One Member said that Grievant was mistreating members of the public. Captain H believed Members who discussed the video were doing so to delegitimize the Agency's opinions regarding police reform. Captain H felt the video hampered the Agency's ability to have a "voice at the table" because the video made the Agency appear to be part of the problem. The Agency Head, however, did not believe that the Agency's funding was adversely affected by Members' knowledge of Grievant's interaction with the Driver.

The Agency received numerous emails and telephone calls from the public in response to the video. Some emailers questioned why the Agency did not have training regarding deescalating conflicts. Some people questioned why the Agency was mistreating people during traffic stops. Captain K received over 500 emails questioning why he had not done more to discipline Grievant for his behavior.

In November 2020, the Driver's Attorney provided the Agency with a copy of the Driver's cell phone video.<sup>12</sup>

The Agency conducted a Supplemental Investigation which was assigned on November 19, 2020 to Sergeant H and completed on December 16, 2020. The investigation focused on Grievant's use of threatening and profane language. Sergeant H reviewed the cell phone video provided by the Driver's lawyer to the Agency.

## **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).

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<sup>12</sup> Grievant objected to the Agency's videos. Grievant asserted they Agency's videos were contradictory and unreliable. The Hearing Officer finds that the Agency's videos are sufficiently reliable to show the interaction between Grievant and the Driver.

General Order ADM 11, paragraph 11 provides, “Employees will at all times be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of their official duties earnestly strive to win the approval of all law-abiding citizens.”<sup>13</sup>

Group III offenses include “[t]hreatening or coercing employees, supervision, or the public”<sup>14</sup> and “[e]ngaging 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.”<sup>15</sup>

On May 19, 2019, Grievant was not courteous and respectful to the Driver. Grievant called the Driver a “mother—ker”, told the Driver to “Shut the f—k up” and implied that the Driver was a “dumb-ass.” Grievant threatened the Driver when he said, “You are going to get your ass whooped in front of f—king Lord and all creation.” Grievant was authorized to use force to remove the Driver from the vehicle. Grievant was not authorized to fight the Driver. Telling the Driver the Driver was going to get his “ass whooped” was a threat to fight the Driver. Grievant treated his encounter with the Driver as a performance or “show.” For example, at one point, Grievant turned to the camera, smiled, and said “Two” and then said “Just watch the show folks.” By treating the interaction with the Driver as an entertainment for a Facebook live audience, Grievant undermined the seriousness of his official duties.

For many disciplinary offenses, the focus is on the employee’s behavior without regard to the impact that behavior had on an agency’s operations. For example, falsifying a record can be a Group III offense even if an employee falsified a timesheet resulting in overpayment of an amount insignificant to an agency’s operations. General Order ADM 12.02(14)(b)(12), however, primarily looks at employee behavior from the Agency’s perspective. The impact behavior has on the Agency is more significant than the seriousness of the underlying behavior. Even behavior that might otherwise be minor can justify disciplinary action if the impact of the behavior is significantly detrimental to the Agency.

In this case, the Agency has established Grievant’s interaction with the Driver caused a significant impact to its reputation as a professional law enforcement agency. Grievant was in uniform and representing the Agency. His interaction with the Driver resulted in negative comments from the public about Grievant and the Agency. Grievant caused negative media coverage of the Agency. General Assembly Members became aware of Grievant’s behavior and questioned whether the Agency was part of the problem rather than part of the solution for police reform.

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<sup>13</sup> Agency Exhibit p. 181.

<sup>14</sup> See, General Order ADM 12.02 (b)(14).

<sup>15</sup> See, General Order ADM 12.02(b)(20).

Grievant argued he did not threaten the Driver because he was authorized to use force to remove the Driver from the vehicle. Grievant correctly asserted that Grievant's use of force was appropriate and that he was being disciplined solely for the words he used. Grievant's threat to fight the Driver was not justified simply because he was entitled to use force to remove the Driver.

Grievant argued that the Agency's discipline was excessive. Grievant established that the Agency considered issuing discipline without removal and that such discipline would be appropriate. It is clear that Grievant could continue adequately performing his work duties as a Trooper for the Agency. Captain K recommended Grievant be given a Group III Written Notice with transfer to another division. Although the Agency could have issued disciplinary action without removal, its decision to remove Grievant is supported by the Disciplinary Measures and within its discretion.

### Due Process

Grievant argued that once the Agency counseled him in 2019, it could not later discipline him for the same offense. Prior to this grievance, the Agency's practice was to refrain from taking disciplinary action against an employee who had been previously counseled. Agency managers contacted DHRM and then concluded that their practice was not required by State policy. The Agency decided to issue Grievant a Group III Written Notice with removal for his interaction with the Driver even though he had been previously counseled.

A written counseling and a Written Notice are both corrective actions under State policy. Only a Written Notice, however, is disciplinary action.<sup>16</sup> Only disciplinary action is an adverse employment action. When the Agency counseled Grievant, it did not take disciplinary action or impose an adverse employment action. State policy does not prohibit an agency from counseling an employee and subsequently issuing that employee a Written Notice for the same behavior. Thus, the Agency's counseling of Grievant in April 2019 did not preclude it from issuing a Written Notice in February 2021.

### Mitigation

The standard to determine whether an employee's work performance should mitigate disciplinary action is not set by the Hearing Officer. It is set by the Office of Employment Dispute Resolution within the Department of Human Resource Management.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to mitigate disciplinary action. Va. Code § 2.2-3005 grants Hearing Officers the powers and duties to:

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<sup>16</sup> See, General Order ADM 12.02(6)(c).

Receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The Department of Human Resource Management severely restricts a Hearing Officer's ability to mitigate disciplinary action. Under the Rules for Conduct Grievance Hearings:

Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to:

- whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule;
- whether the discipline is consistent with the agency's treatment of other similarly situated employees; or
- whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.

In making such a determination the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness. 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.

In numerous Rulings, EDR has concluded as it did in Ruling 2016-4305:

While it cannot be said that either length of service or otherwise satisfactory work performance are never relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.

Although EDR does not foreclose the possibility that an employee's exemplary work performance could be a mitigating factor, it has not articulated when such circumstances might exist and the Hearing Officer is unaware of EDR ever allowing an employee's work performance to be a singular basis for mitigating disciplinary action.

The Hearing Officer does not agree with the Agency's decision to remove Grievant from employment. Grievant's prior exemplary work performance showed that the events of April 19, 2019 were an aberration as described by Captain K. Once Grievant's inappropriate behavior was identified to Grievant, he admitted his mistake and did not

repeat it. The ongoing harm to the Agency's reputation of continuing Grievant's employment could have been reduced or eliminated by transferring Grievant to another Division. The public reaction was influenced by several factors. Watching physical conflict can make viewers uncomfortable. In the summer of 2020, media coverage, protests, and public dialog placed intense scrutiny on police treatment of citizens. Had the cell phone video become public in 2019 instead of 2020, it is not likely that the public reaction and reaction of General Assembly Members would have been as severe. Grievant exerted physical control over the Driver solely because of the Driver's unlawful refusal to comply with Grievant's lawfully given order. It is not fair to Grievant that his April 19, 2019 behavior was judged with a 2020 lens of public perception.

The Agency considered Grievant's prior work performance, military service, and family circumstances to conclude that the disciplinary action should not be mitigated. Grievant asserted that the Agency failed to properly consider mitigating and aggravating circumstances. For example, Grievant claims the Agency improperly disregarded Grievant's mitigating circumstances because it viewed him with a picture of a "challenge coin" containing some of the words he used on April 19, 2019. The evidence showed that another employee presented him with the coin and Grievant was not celebrating his behavior on April 19, 2019, rather he was responding to the fact that a co-worker presented him with the coin. How Agency managers weighed mitigating factors was within the Agency's discretion. Although the Hearing Officer does not consider Grievant's receipt of a "challenge coin" as significant because it was given to him by another employee, the Agency considered Grievant's display of the coin in a picture as significant. The Agency's conclusion was within its discretion. The Hearing Officer must defer to the Agency's decision to remove Grievant from employment. The Agency's discipline does not exceed the limits of reasonableness.

Grievant alleged the Agency inconsistently applied disciplinary action. Grievant presented examples of 30 troopers who had impaired the Department's reputation but did not receive Group III Written Notices with removal. For example, a Trooper was in a bar and became belligerent. He showed his badge and became physical. The Agency issued him a Group III Written Notice but did not remove him from employment despite the fact that he impaired the Agency's reputation. The difference between those cases and Grievant's case is the degree to which the Department's reputation was impaired. In those examples, fewer people observed the improper behavior. The damage to the Agency's reputation in other cases was limited by the number of people who observed the behavior. In Grievant's case, the damage to the Agency's reputation was of a greater magnitude because the cell phone video was viewed widely on the internet and broadcasted by Virginia television stations. The video was so widely viewed that it became an issue for several General Assembly Members.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## **DECISION**

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

### **APPEAL RIGHTS**

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

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 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.<sup>[1]</sup>

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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