

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. 11749

Hearing Date: December 13, 2021
Decision Issued: December 27, 2021

PROCEDURAL HISTORY

On September 15, 2021, Grievant was issued five Group II Written Notices of disciplinary action and terminated from employment. Four Written Notices are for violations of the vehicle use policy and one is for falsification of time record.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 26, 2021, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On December 13, 2021, a hearing was held via remote video.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant did not submit separate documents for exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
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

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 her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, 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.

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 action. Implicit in the hearing officer’s statutory authority is the ability to determine independently whether the employee’s alleged situation, if otherwise properly before the hearing officer, justifies relief. 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.”

Policy 1.60, Standards of Conduct, provides that failure to follow supervisor’s instructions or comply with written policy and unauthorized use or misuse of state property are typical Group II offenses. Falsification of records is typically a Group III offense. Agency Exh. 9.

A Group II offense includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. A single Group II Written Notice may include suspension of up to 10 workdays. A second Group II offense normally results in discharge. Agency Exh. 9.

Agency Policy and Procedure 4.5 specifically addresses the use of state issued vehicles. The policy provides:

Vehicles may only be used for official state purposes. Unauthorized use or negligence when operating a state vehicle may result in disciplinary action, up to and including dismissal.

Agency Exh. 11.

The Offenses

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 meat and poultry inspector. On March 23, 2021, the Grievant’s supervisor and the agency human resource director met with the Grievant to discuss, among other things, the agency’s Policy 4.5 and the Grievant’s reluctance to comply with the policy and supervisor’s instructions. During the meeting, the human resource director addressed the Grievant’s unauthorized use of his assigned vehicle and directly explained that unauthorized use of the state issued vehicle was in violation of policy. The director explained the policy and emphasized that the vehicle could not be used for personal use and that violation of Policy 4.5 could result in termination. The director explained that the vehicle could not be driven to conduct personal/unauthorized activities under any circumstances. The meeting addressed the Grievant’s placement on the state vehicle of a neighborhood parking permit unconnected to any work purpose, and the Grievant was directed to remove the permit from the vehicle.

Following the meeting, the human resource director and supervisor elected to place a GPS tracker in the Grievant's assigned vehicle. Agency Exh. 20. The GPS tracker documented multiple instances of the Grievant's misuse of the state issued vehicle.

For offense date June 17, 2021 (Agency Exh. 2):

On June 17, 2021, you used the state issued vehicle to conduct personal activities during off duty hours. At approximately 8:04 PM, you drove the Ford Taurus P-17834 to Kroger located at 901 N Lombardy Street, Richmond, VA 23220 without authorization. Your official work hours are from 7:00 AM to 3:30 PM with a 30 minute lunch. This unauthorized use of state property is in violation of the Virginia Department of Agriculture and Consumer Services Policy and Procedure 4.5 Obtaining and Operating State Vehicles and the Department of Human Resource Management Policy 1.60, Standards of Conduct.

For offense date July 7, 2021 (Agency Exh. 3):

On July 7, 2021, you used the state issued vehicle to conduct personal activities during off duty hours. At approximately 4:22 PM, you drove the Ford Taurus P-17834 to a residence located at near 660 Riverside Drive, Deltaville, VA 23040 and returned to your base point in Richmond, VA at 11:30 PM without authorization. Your official work hours are from 7:00 AM to 3:30 PM with a 30 minute lunch. This unauthorized use of state property is in violation of the Virginia Department of Agriculture and Consumer Services Policy and Procedure 4.5 Obtaining and Operating State Vehicles and the Department of Human Resource Management Policy 1.60, Standards of Conduct.

For offense date July 13, 2021 (Agency Exh. 4):

On July 13, 2021, you attended a meeting with me in Lynchburg, Virginia and reported on your official Employee Direct TAL timesheet that you returned to your base point at 5:30 PM. Records indicate that you returned to Richmond and parked the state vehicle at 7 W 13th Street at about 4:21 PM and remained parked there at least until 6:28 PM. This is a discrepancy in your timesheet that indicates that you were not working during this time but have been compensated for those work hours. Falsification of records is a violation of the Department of Human Resource Management Policy 1.60, Standards of Conduct.

For offense date August 13, 2021 (Agency Exh. 5):

On August 13, 2021, you used the state issued vehicle to conduct personal activities during off duty hours. At approximately 5:50 PM, you drove the Ford Taurus P-17834 to New Grand Mart located at 9035 West Broad Street, Richmond, Virginia 23294 and returned to your base point in Richmond, Virginia at 6:29 PM without authorization. Your official work hours are from 7:00AM to 3:30 PM with a 30 minute lunch. This unauthorized use of state property is in violation of Virginia Department of Agriculture and Consumer Services Policy and Procedure 4.5, Obtaining and Operating State Vehicles, and the Department of Human Resource Management Policy 1.60, Standards of Conduct.

For offense date August 19, 2021 (Agency Exh. 6):

On August 19, 2021, you used the state issued vehicle to conduct personal activities during off duty hours. At approximately 5:11 PM, you drove the Ford Taurus P-17834 to Restaurant Depot located at 7951 Brook Road, Richmond, Virginia 23227 and returned to your base point in Richmond, Virginia at 5:48 PM without authorization. Your official work hours are from 7:00AM to 3:30 PM with a 30 minute lunch. This unauthorized use of state property is in violation of Virginia Department of Agriculture and Consumer Services Policy and Procedure 4.5, Obtaining and Operating State Vehicles, and the Department of Human Resource Management Policy 1.60, Standards of Conduct.

The agency witnesses testified that the Grievant was provided training specifically about the use and misuse of state issued vehicles. Based on the GPS data, the agency obtained video corroboration of the vehicle location and the Grievant's activities at such locations, performing activities that were not authorized agency business. The business was personal. Agency Exh.13, 18, 19. In one instance, the agency witnesses physically found the Grievant's vehicle at an unauthorized location in Deltaville, Virginia.

The Grievant did not dispute the essential facts of the written notices. His testimony was that these violations he was simply taking lunch or exercising his discretion to make rest stops at places such as his parents' house or parent's restaurant. The Grievant expressed that the Agency was retaliating against him for making a complaint that he was placed on the Agency's interview panels because of his race—to be a token of diversity.

The Grievant was unsatisfied with the Agency's production of telephone records. Telephone records in the form of spreadsheets were provided by the Agency, but the Grievant did not submit any documents prior to the grievance hearing, as ordered by the pre-hearing scheduling order. The Grievant was advised that he could use during the grievance hearing the information and documentation provided to him, but there were no documents submitted to include in the grievance hearing record. The Grievant proffered that he stayed in phone contact with his supervisor and that his supervisor was aware of all of his work schedule adjustments and use of the state vehicle. The supervisor denied this contention. (Phone records would not include content of conversations.) On rebuttal, the Agency produced email messages that documented the Grievant was expressly informed, at least in June 2021, that any such requests for authorization must be by text message or email. Agency Rebuttal Exhs. A, B.

As circumstances considered, all Group II Written Notices reflected that the factual defenses made by the Grievant during the due process meeting were insufficient to warrant reduction of the offense, noting that the Grievant was provided counseling to correct the behaviors. The July 13, 2021, offense of falsification of records actually is a typical Group III offense.

The Grievant's supervisor testified that the Agency is one based on trust, and that the Grievant's conduct is inexcusably untrustworthy. Aside from the behavior offenses, the Agency's evidence was that the Grievant was competent at his job.

Because of the misconduct record, the Agency terminated the Grievant's employment based on the cumulation of five Group II Written Notices. Under the Standards of Conduct, two active Group II Written Notices are sufficient to support termination.

Analysis

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 (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

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. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide 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).

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. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, 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 notices. 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 testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct of the five Group II Written Notices.

The Grievant, while not admitting, failed to rebut the essential facts of the offenses. I find the multiple Agency witnesses' testimony credible, and based on the witnesses, the offending conduct consistent with the Grievant's pattern of behavior. The testimony, manner, tone, and demeanor of the testifying witnesses sufficiently prove by a preponderance that the Grievant committed the misconduct of each written notice. The Grievant's general denials of the allegations and allegation of retaliation are insufficient to rebut the Agency's evidence. The demonstrated deviations and vehicle use, and time recordation, are not just for personal comfort or *de minimis* usage.

Thus, the Agency has proved behavior concerns that the Agency and the supervisor are positioned and obligated to address. Group II offenses include, specifically, violations of policy and failure to follow supervisor's instruction. Policy 1.60, Standards of Conduct. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group II Written Notices. The Agency conceivably could have imposed lesser discipline, but its election for five Group II Written Notices and job termination is within its discretion to impose progressive discipline, particularly in light of the repeated pattern of behavior reflected in the offenses.

The Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level for each offense. I find the circumstances support the Agency's election to issue five Group II Written Notices, and job termination is the normal result.

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules*, § VI.B.1.

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 [DHRM]." 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that it could have imposed a Group III for at least one of the Written Notices based on the falsification offense. Given the nature of the Written Notices, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The Agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the

discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Termination is the normal disciplinary action for two Group II Written Notices unless mitigation weighs in favor of a reduction of discipline. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.

Under the *Rules*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient for a hearing officer to mitigate disciplinary action. *Thus, the hearing officer lacks authority to reduce the discipline on these bases.* On the issue of mitigation, the Grievant bears the burden of proof, and he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing Rules, the hearing officer must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's five Group II Written Notices with termination must be and are 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 14th St., 12th Floor
Richmond, VA 23219

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

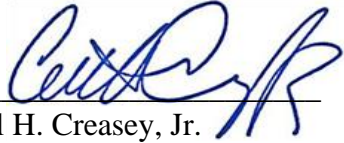
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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 EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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

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