

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11762**

Hearing Date: January 10, 2022
Decision Issued: January 13, 2022

PROCEDURAL HISTORY

On September 1, 2021, Grievant received a single Group II Written Notice for violation of the Virginia Department of State Police Standards of Conduct, General Order ADM 11.00, namely failing to reside in the Commonwealth of Virginia for an extended period of time and unauthorized use of a patrol vehicle outside the Commonwealth of Virginia. No discipline was taken in addition to the single Written Notice.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter upon being appointed effective November 26, 2021, conducted a pre-hearing telephone conference on November 22, 2021 and set a hearing date of January 10, 2022.

In the letter from the Hearing Officer dated November 23, 2021 it was set out that a copy of exhibits, in the form of hard copy, a party intends to introduce at hearing and a list of witnesses to be called was to be provided to the Hearing Officer and the other party no later than January 3, 2022. The Agency provided a notebook with the Agency's exhibits and list of witnesses to be called. The Grievant did not submit any exhibits or a list of witnesses to be called.

APPEARANCES

Grievant
Agency's Party Designee
Agency's Advocate

ISSUES

1. Whether Grievant behaved or acted in the manner set out in the Written Notice?
2. If so, whether the Grievant's actions or behaviors violated the Standards of Conduct?
3. If the Grievant's actions or behavior did violate the Standards of Conduct, did the alleged actions or behavior constitute a Group II offense?
4. Whether the Agency's issuing the Group II Written Notice was consistent with law and policy?
5. 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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

- A. Written Notice
- B. Grievant's Form A
- C. Grievant's Form B
- D. Agency Witness List and timeline of events
- E. State Police Manual-Ford
- F. General Order ADM 1.00-Agency Roll
- G. General Order ADM 1.01-Written Directives
- H. General Order ADM 11.00-Standards of Conduct
- I. General Order ADM 12.00-Administrative Investigations
- J. General Order ADM 12.02-Disciplinary Measures
- K. General Order ADM 13.00-Grievance Procedure
- L. General Order ADM 6.01-Residency Policy
- M. Virginia State Police Bureau of Field Operations Map
- N. Illustrations pertaining to 1291 Town Creek Road, Eden, North Carolina
- O. Training division materials
- P. Copy of operator's license

- Q. Virginia State Police Manual-Code of Ethics
- R. Employee Work Profiles
- S. Administrative Investigation
- T. Interview of Grievant (CD)
- U. Internal Affairs Concise Officer History
- V. Internal Affairs Case Comparison
- W. Email
- X. Grievant's request for expedited transfer

The Grievant did not submit any exhibits.

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 Agency employed Grievant as a State Police Trooper. As such, Grievant was to perform the duties set out in the Employee Work Profile (Agency Exhibit R) and abide by Agency General Orders, including the Agency Standards of Conduct.

The Agency's first witness was the Grievant. The Grievant admitted the following:

1. The Grievant did not abide by the Residency Policy set out in General Order ADM 6.01 (Agency Exhibit L). The Grievant admitted that for over a year the Grievant resided in North Carolina, rather than in Virginia.
2. The Grievant falsely represented to the Agency that the Grievant was residing in Virginia and complying with the residency requirements.
3. The Grievant was without authorization commuting back and forth from North Carolina in the Virginia police cruiser.

The Grievant during the Grievant's testimony did not dispute or object to any of the Agency exhibits. The Grievant did not dispute that the misconduct was correctly deemed a Group II offense under General Order ADM 12.02 (Agency Exhibit H).

The Agency's second witness was a Sergeant who had been with the Virginia State Police for a number of years and had been the Grievant's supervisor for over a year. The Sergeant testified that the Sergeant received a complaint regarding the possibility that the Grievant was residing in North Carolina and commuting back and forth in a state police cruiser at the expense of the Commonwealth of Virginia.

The Agency's third witness did not provide any additional material testimony.

The Agency's final witness was a Captain who has been a Virginia State Trooper for thirty-four years. The Captain testified that after reviewing the Investigation the Captain concluded that the allegations were not disputed by the Grievant and could have been the basis of three separate Group II Written Notices. The Captain testified that the offenses are aggravated in that the Grievant failed to abide by the residency requirement for over fifteen months made willful misrepresentations to the Grievant's superiors, and misrepresented where he was residing.

CONCLUSIONS

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency's evidence, especially the Grievant's admissions reflected in the exhibits and by the Grievant's testimony at hearing, established by a preponderance of the evidence that the Grievant did behave in the manner set out in the Written Notice and that the Grievant's conduct was a violation of General Order ADM 6.01-Residency Policy (Agency Exhibit L) and General Order ADM 11.00-Standard of Conduct. The Agency's evidence established by a preponderance of the evidence that the Agency had the authority to classify the Grievant's behavior as a Group II offense. In addition, the Agency established by a preponderance of the evidence that the Agency could have issued three separate Group II Written Notices. Finally, the Agency proved by a preponderance of the evidence that the Grievant's misconduct was of the more serious nature, with Grievant failing to comply with the residency requirement for over fifteen months and misrepresenting residency status.

Virginia Code Section 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 Resources Management

...”. Under the rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the 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 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.

The Hearing Officer finds no mitigating circumstances which exist to further reduce the disciplinary action imposed by the Agency.

DECISION

For the reasons stated herein, the Agency’s issuance of each of the Group II Written Notice is upheld.

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 Resources 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.

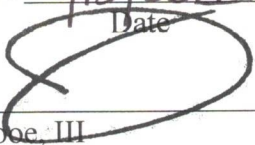
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer’s **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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].

ENTERED: 1/13/2022
Date



John R. Hooe, III
Hearing Officer

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