



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11743**

Hearing Date: February 9, 2022

Decision Issued: March 1, 2022

**PROCEDURAL HISTORY**

On July 1, 2021, Grievant was issued a Group II Written Notice of disciplinary action for violating a safety rule where a threat of bodily harm exists.

On July 29, 2021 Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 4, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 9, 2022, 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 employs Grievant as a Trooper II at one of its locations. He has been employed by the Agency for approximately nine years. Grievant had prior active disciplinary action. He received a Group II Written Notice on June 21, 2018 for failing to submit crash reports as required by law, policy, and instructions.

On April 28, 2020 shortly after midnight, Trooper H began pursuing a Motorcycle Rider who ignored Trooper's emergency lights and siren and continued to speed on an Interstate. The Motorcycle Rider drove off of the Interstate and onto a Highway. The Highway had three lanes eastbound and three lanes westbound. Between the lanes was a median with turn lanes to allow motorists to make 90 degree turns onto intersecting roads. The speed limit on the Highway was 45 miles per hour.

Trooper H was pursuing a Motorcycle Rider travelling west on the Highway. The Rider was travelling well in excess of the speed limit in order to elude Trooper H.

Grievant heard Trooper H's radio call that he was pursuing the motorcycle. Grievant decided to assist Trooper H by driving to the Highway. Grievant activated his emergency lights and siren. Grievant began heading west on the Highway in order to catch up with Trooper H. Grievant was "far behind" Trooper H.

Trooper H announced on the radio that the Motorcycle Rider was turning left onto Road Mac. Instead of making a left turn and continuing on Road Mac, the Motorcycle Rider completed a U-turn and remained on the Highway heading eastbound. Trooper H announced on the radio that the Motorcycle Rider “actually was pulling a U-turn on [Road Mac] and heading back towards [the Highway].”

When Grievant heard Trooper H say the Motorcycle Rider was making a U-turn on the Highway, the Motorcycle Rider had already completed the turn and was heading eastbound on the Highway. Grievant was approaching the intersection of the Highway and Road Man. The distance between that intersection and the intersection of Road Mac was approximately two tenths of a mile. When Trooper H announced that the Motorcycle Rider was making a U-turn, Grievant believed the Motorcycle Rider was at the intersection of the Highway and Road Mac. Actually, the Motorcycle Rider had already completed the U-turn and was moving away from the Road Mac intersection.

Grievant believed he was far enough away from the Road Mac intersection, that he could use the Road Man intersection to cross from the westbound to the eastbound lanes on the Highway.

Grievant did not observe any traffic on the eastbound lanes of the Highway approaching his location. He did not observe any pedestrians. Grievant was travelling at approximately 80 miles per hour. He slowed quickly and attempted to make a “wide U-turn” so he would not have to brake.<sup>1</sup> He moved into the right lane of the westbound lanes, turned left to cross the median turn lane and into the eastbound lanes of the Highway. Grievant’s objective was for his vehicle to end up in the right lane of the three eastbound lanes of the Highway and be facing east. If properly positioned, Grievant believed his vehicle could block the motorcycle from making a right turn into a neighborhood thereby forcing the motorcycle to continue travelling east on the Highway. Grievant intended to continue with Trooper H in his pursuit of the Motorcycle Rider. Grievant did not want to be “so far behind” Trooper H in the pursuit and making the U-turn at the intersection allowed him to join the pursuit.

Grievant continued his U-turn and entered the left lane of the eastbound lanes of the Highway. He noticed the motorcycle’s light. Grievant attempted to stop to permit the Motorcycle Rider to pass him safely. As Grievant entered the center lane of the eastbound lanes of the Highway, the Motorcycle Rider did not slow down or attempt to change lanes. Grievant braced for impact. The Motorcycle Rider continued straight and hit Grievant’s vehicle. The motorcycle was travelling in excess of 90 miles per hour in a 45 mile per hour zone. The Rider was ejected and fell into the roadway suffering injuries. Grievant and Trooper H rendered assistance to the injured Rider.

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<sup>1</sup> Grievant was making a “legal” U-turn.

Grievant did not intend to block the road or put his vehicle in the path of the motorcycle. Because the Motorcycle Rider was travelling well in excess of the speed limit, he did not have the right-of-way under Virginia law.<sup>2</sup>

Grievant did not realize the motorcycle was traveling so fast. Grievant told the Investigator, "Had I known the motorcycle would come up that quickly, I would have waited for it to pass."

The Sergeant began an investigation on May 11, 2020 and completed it on June 9, 2020.

### **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).

"[U]nsatisfactory job performance" is a Group I offense.<sup>3</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On April 28, 2020, Grievant was operating his State Police Vehicle in pursuit of a Motorcycle Rider. Grievant misjudged the distance between Road Man where he was turning and where the Motorcycle Rider made a U-turn. Grievant misjudged the speed at which the Motorcycle Rider was moving. Grievant turned his vehicle into the eastbound lane of the Highway which resulted in the Motorcycle Rider hitting Grievant's State Police Vehicle. The collision resulted in injury to the Motorcycle Rider and damage to the State Police Vehicle and the motorcycle. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

The Hearing Officer will not elevate the Group I Written Notice to a Group II Written Notice. The collision occurred at night when it was dark and difficult to judge distance and speed. Grievant had a prior Written Notice for failing to submit crash reports. Failing to submit crash reports is significantly different from misjudging the speed and distance of

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<sup>2</sup> Va. Code § 46.2-823 provides "[t]he driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have under this article."

<sup>3</sup> See, Attachment A, General Order ADM 12.02.

a motorcycle and the Hearing Officer cannot conclude Grievant engaged in repeated similar behavior. Grievant's prior discipline was in 2018.

The Agency argued Grievant acted contrary to General Order ADM 12.02, Attachment A which lists Group II offenses to include violation of "safety rules where threat of bodily harm exists." The Agency argued Grievant acted contrary to General Order ADM 3.11 which requires, "[s]worn employees operating the issued vehicle shall be ever mindful of their operation ...." The Agency alleges Grievant violated this safety rule.

Grievant did not violate a safety rule. The phrase, "[s]worn employees operating the issued vehicle shall be ever mindful of their operation" is not a safety rule for several reasons. First, the phrase is not designated as a safety rule by the Agency. Second, the phrase is aspirational in nature. It is intended to set a goal and does not describe a behavior in detail. Third, the phrase is not oriented towards a specific task or procedure designed to reduce the risk of injury or damage to property.

Grievant argued that the Written Notice was untimely issued. The Sergeant's investigation was completed June 9, 2020. The Group II Written Notice was issued July 1, 2021. Although the Agency could have issued the Written Notice sooner, nothing in policy permits the Hearing Officer to punish the Agency for its delay by reversing disciplinary action. The Agency did not act in bad faith. In addition, several months of delay was because Grievant was on leave. For example, Grievant began leave on July 29, 2020 and returned to light duty work on February 4, 2021. The Agency devoted a significant amount of supervisors' time for a full review of possible disciplinary action. Furthermore, the delay did not diminish any witness recollection to the point that Grievant's procedural due process rights could be undermined.

*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 ...."<sup>4</sup> 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 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 further the disciplinary action.

## DECISION

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<sup>4</sup> Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

### 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.