



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12062

Hearing Date: March 20, 2024

Decision Issued: April 23, 2024

PROCEDURAL HISTORY

On November 16, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for "fail[ing] to follow and comply with agency policies [and] procedures, to report to work as scheduled without proper notice or approval from your supervisor, and . . . unauthorized absences for three or more workdays without approval."¹

On November 16, 2023, Grievant was issued a Group II Written Notice of disciplinary action with termination for "fail[ing] to comply with agency policies [and] procedures and fail[ing] to report criminal charges which significantly impacts the essential functions of your position."²

On November 16, 2023, Grievant was issued a Group II Written Notice of disciplinary action with termination for "a willful attempt to falsify/mislead [Agency] management on matters that may impact elements of job performance and related expectations as an employee of the Commonwealth of Virginia."³

On December 13, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 16, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On March 20, 2024, a hearing was held at Agency offices in Norfolk, Virginia.

¹ Agency Ex. 4.

² Agency Ex. 2.

³ Agency Ex. 3.

During the hearing, the Agency presented documents in Agency Exhibit 26 that the Grievant had provided to the Agency pursuant to an order of production issued by the Hearing Officer. The Grievant argued that the documents in the exhibit were not relevant to the proceeding and asked that if Agency Exhibit 26 was admitted into the record, that it be subject to a protective order. The Hearing Officer admitted Agency Exhibit 26 into the record and reminded the parties that documents obtained pursuant to the grievance procedure are to be used for grievance purposes only.

APPEARANCES

Grievant
Grievant's Counsel
Agency Counsel
Agency Party Designee
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:

Prior to his dismissal, the Agency employed Grievant as an Environmental Health Specialist Supervisor in the District. No evidence of prior active disciplinary action was

introduced during the hearing. Annual performance evaluations for Grievant showed that the Agency considered Grievant's performance to be satisfactory.⁴

The Employee Work Profile for Grievant's position required that he "be able to obtain and maintain a [City] Special Police Commission."⁵ Grievant's duties included supervising staff and ensuring compliance and enforcement of Federal and state laws and regulations and local codes and ordinances.⁶

City Police Officer oversees the City's Special Police Officer Program.⁷ The Special Police Officer program provides summons training for employees of various agencies across the City charged with enforcing City ordinances, including employees from the Agency. After successfully completing the summons training, the Special Police Officer candidates are read paragraphs (a) through (c) of § 33-38 of the City Code regarding requirements for Special Police Officers.⁸ The Special Police Officers are then sworn in as Special Police Officers.

Grievant received a Warrant of Appointment as a Special Police Officer for the City on January 28, 2021.⁹

On September 9, 2023, Grievant was arrested and charged with a misdemeanor for the alleged assault and battery of a family member.¹⁰ Grievant was not taken into custody for the misdemeanor charge.

⁴ Agency Ex. 11 at 9-20 and Grievant's Ex. at 108-166.

⁵ Agency Ex. 11 at 1.

⁶ See Agency Ex. 11.

⁷ Hearing recording at 5:14:53-5:15:30.

⁸ Hearing recording at 5:15:30-5:19:36. Section 33-38 of the City's Code of Ordinances provides that: (a) The chief of police shall have the authority to confer upon qualified persons the privilege of acting as special police officers, and he shall sign and issue to such persons a warrant of appointment for a specified time, which shall be issued only to persons who satisfactorily meet the following criteria: (1) Are persons of established good moral character who are over the age of eighteen (18) years; (2) Are free from any felony convictions; (3) Are free from any misdemeanor convictions involving crimes of violence, crimes of a sexual nature, or larceny within ten (10) years from the date of application; (4) Are free from any misdemeanor convictions to include threats of assaults within five (5) years from the date of application; (5) Are free from any restraining or protective orders involving acts of violence, threats of assaults or the use of illegal drugs; and (6) Have satisfactorily completed the [City] Police Department's special police officer training course. No person shall be deemed qualified while a charge for an offense enumerated above is pending adjudication. The privilege of acting as a special police officer shall be exercised only under the direction and control of the chief of police. (b) The chief of police shall issue to all persons appointed under this section appropriate special police badges, which he shall cause to be returned when the appointments expire or are revoked. Possession, sale or exchange of such badge, without authority, shall be unlawful. (c) All special police officers, before entering upon the duties of such office, shall take and subscribe an oath, before some person authorized to administer oaths, that he will faithfully, without fear or favor, perform the duties of his office, and such oath shall be filed and preserved with the records of the police department. Agency Ex. 17 at 4.

⁹ Agency Ex. 24 at 14.

¹⁰ Agency Ex. 13.

On Sunday, October 1, 2023, Grievant was arrested on two felony charges related to the domestic situation that had led to the September 9 misdemeanor charge. Following his arrest on October 1, Grievant was taken into custody.¹¹ Grievant's cell phone was taken away from him. That evening, Grievant called his Father from a phone in the jail. Grievant asked his Father to call Supervisor on Monday morning. Grievant was unable to provide his Father with a phone number for Supervisor.¹²

On Monday, October 2, 2023, Grievant's Father called Supervisor. Grievant's Father identified himself to Supervisor and advised Supervisor that he was calling on Grievant's behalf. Grievant's Father told Supervisor that Grievant would not be available to work that week and that Grievant would not be reachable for the duration of the week.¹³ Grievant's Father credibly testified that Supervisor told him that it was no problem, Grievant had plenty of leave,¹⁴ and he, Supervisor, would take care of it.¹⁵ Supervisor testified that Grievant's Father also told him that Grievant's absence related to a domestic situation.¹⁶

Later that day, Supervisor spoke with District Business Manager and someone from the Agency's human resources staff about the call he had received from Grievant's Father. Supervisor testified that the human resources staff recommended that Supervisor "close the loop" with Grievant and not someone claiming to be Grievant's Father.¹⁷

On Tuesday, October 3, 2023, Supervisor called Grievant's cell phone and left a message. Supervisor stated:

Hi [Grievant]. This is [Supervisor]. It's about 12:07. It is Tuesday, October 3rd. Just wanted to give you a quick call. I was wondering if you could give me a call back ASAP. I have a question for you. Just give me a call back as soon as you can. Alright thanks [Grievant], Bye.¹⁸

On Wednesday, October 4, 2023, Supervisor queried the internet to try to find information related to Grievant's unexpected absence. As a result of his internet search, Supervisor discovered that Grievant had been arrested and taken into custody on October 1, 2023.¹⁹ Supervisor also discovered that Grievant had been charged with a misdemeanor on September 9, 2024.

Grievant was released from custody on the evening of Friday, October 6, 2023.²⁰

¹¹ Agency Ex. 14.

¹² Hearing recording at 7:03:20-7:04:11.

¹³ Hearing recording at 3:03:57-3:04:23, 7:05:02-7:05:37.

¹⁴ Hearing recording at 3:04:58-3:05:09.

¹⁵ Hearing recording at 7:05:40-7:05:48, 7:06:40-7:07:37.

¹⁶ Hearing recording at 3:04:45-3:04:55.

¹⁷ Hearing recording at 3:05:37-3:06:12.

¹⁸ Agency Ex. 12.

¹⁹ Hearing recording at 3:10:48-3:12:24.

²⁰ Hearing recording at 7:10:23-7:11:14.

Agency offices were closed on Monday, October 9, 2023, in observance of a state holiday.

Following his release from custody, Grievant's first regularly scheduled workday was Tuesday, October 10, 2023.

At 6:00 a.m. on October 10, 2023, Grievant sent Supervisor an email with a subject line titled "Oct 10, return to work." In the email, Grievant stated the following:

Good morning [Supervisor]. I am on full duty today. I apologize for the sudden and unplanned time-off. I had to go out of state for family emergency issues, then I lost my cell phone. I have returned connection with the same cell number. Thank you.²¹

Supervisor testified that he believed that he acknowledged receipt of the email from Grievant. Supervisor did not advise Grievant of any concerns related to Grievant's absences the previous week. Supervisor forwarded the email he received from Grievant to District Business Manager.²²

During the afternoon of October 10, 2023, District HR Representative and District Business Manager called Grievant. District HR Representative testified that the purpose of the call was to "get [Grievant's] side of the story and to put him on pre-disciplinary leave."²³

District HR Representative and District Business Manager both testified that when they initially asked Grievant about his absence from work during the period October 2, 2023 through October 6, 2023, Grievant confirmed what he had included in his email to Supervisor, that he had been out of town on a family emergency and did not have his phone.²⁴ When District HR Representative advised Grievant that they had information that he might have been in custody during that time, Grievant then admitted that he had been in jail.²⁵

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."²⁶ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

²¹ Agency Ex. 19.

²² Hearing recording 4:39:18-4:42:30.

²³ Hearing recording at 7:16:52-7:17:10.

²⁴ Hearing recording at 6:01:52-6:02:35, 7:17:16-7:17:15.

²⁵ Hearing recording at 6:02:35-6:03:13, 7:17:55-7:18:34.

²⁶ The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group III Written Notice – Unauthorized absence for 3 or more workdays

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

Grievant was expected to report to work on October 2, 2023. Grievant did not report to work on October 2, 2023. There is no dispute that Grievant’s Father called Supervisor on the morning of October 2, 2023, and notified Supervisor that (i) Grievant was unable to report to work on October 2, 2023, October 3, 2023, October 4, 2023, October 5, 2023, and October 6, 2023, and (ii) Grievant would be unreachable during that same time period. There also appeared to be no dispute that Supervisor told Grievant’s Father that Grievant had plenty of leave.

Grievant’s Father credibly testified that Supervisor indicated Grievant taking leave that week was “no problem” and that Supervisor would “take care of it.”

Supervisor testified that he “thought [he] made a reference at the end that [he] needed to close the loop with HR on this.”²⁷ Grievant’s Father’s testimony, however, was clear, unequivocal and largely corroborated by Supervisor. Based on Grievant’s Father’s credible testimony and the fact that Supervisor had no reason to discuss that Grievant had plenty of leave with Grievant’s Father if Supervisor was not approving Grievant’s leave, the Hearing Officer finds that the preponderance of the evidence suggests that Supervisor effectively approved Grievant’s use of leave for the period of October 2, 2023, through October 6, 2023, when Supervisor spoke with Grievant’s Father.

Supervisor and the Agency argued that Grievant’s absences were considered unauthorized because Supervisor “could not” approve Grievant’s leave because Grievant had not requested leave in advance of October 2, 2023, and because only Grievant, the Agency’s employee, could notify Supervisor of Grievant’s need to use leave that week. This Hearing Officer is not persuaded. The unrefuted evidence is that Grievant took reasonable steps under the circumstances to notify his Supervisor of his emergency need to use leave in order to minimize adverse impacts to the Agency’s operations and any misunderstanding that Grievant was abandoning his job.

The Agency has not met its burden of proving by a preponderance of evidence that Grievant engaged in the misconduct alleged in the Group III Written Notice. Because the Agency has not met its burden of proving that Grievant engaged in misconduct, the Agency’s discipline in issuing the Group III Written Notice is not consistent with policy and must be rescinded.

²⁷ Hearing recording at 3:04:40-3:04:44.

Because the Agency has not met its burden of proof, this Hearing Officer does not need to consider mitigating or aggravating factors with respect to the discipline issued pursuant to the Group III Written Notice.

Group II Written Notice – Failure to report criminal charges

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

Employees must maintain qualifications, certification, licensure, and/or training requirements identified for their positions.²⁸ Employees are expected to report circumstances or concerns that may affect satisfactory performance to management.²⁹

The Agency asserted that Grievant engaged in misconduct when he failed to notify his Supervisor of the two felony charges for which he was arrested on October 1, 2023, and the misdemeanor charge he received on September 9, 2023.

The Employee Work Profile for Grievant's position required that he "be able to obtain and maintain a [City] Special Police Commission."³⁰

The City's ordinances bestow upon the chief of police the authority to confer upon qualified persons the privilege of acting as special police officers. In order to qualify to receive a commission as a special police officer under the City's ordinance, an individual must satisfactorily meet the following criteria:

- (1) Are persons of established good moral character who are over the age of eighteen (18) years;
- (2) Are free from any felony convictions;
- (3) Are free from any misdemeanor convictions involving crimes of violence, crimes of a sexual nature, or larceny within ten (10) years from the date of application;
- (4) Are free from any misdemeanor convictions to included threats of assaults within five (5) years from the date of application;
- (5) Are free from any restraining or protective orders involving acts of violence, threats of assaults or the use of illegal drugs; and
- (6) Have satisfactorily completed the Norfolk Police Department's special police officer training course.³¹

"No person shall be deemed qualified while a charge for an offense enumerated above is pending adjudication."³²

²⁸ See DHRM Policy 1.60, Standards of Conduct.

²⁹ See DHRM Policy 1.60, Standards of Conduct.

³⁰ Agency Ex. 11 at 1.

³¹ Agency Ex. 17, City Ordinance § 33-38.

³² Agency Ex. 17, City Ordinance § 33-38.

City Police Officer credibly testified that since taking over the program in early 2019, he verbally advises candidates for Special Police Officer commissions to familiarize themselves with the provisions of City Code § 33-38 and reminds them that they must notify their supervisors if they receive alleged criminal charges, including traffic violations so City Police Officer can be notified and a determination can be made as to whether their commission needs to be suspended while the matter is adjudicated. City Police Officer credibly testified that he would have been the officer who administered the oath to Grievant and under cross-examination confirmed that belief based on the name of the individual who had notarized Grievant's Warrant of Appointment as a Special Police Officer.³³

Grievant argued that because none of Grievant's cases had ever required him to issue a summons pursuant to his Special Police Officer powers, his job did not in fact necessitate him having or using such powers.

Grievant also appeared to argue that he did not recall that City Police Officer was the officer that administered the oath for Grievant to receive his commission as a Special Police Officer and that no one advised him of a requirement to report arrests to his Supervisor. Grievant asserted that because the charges against him had not yet been adjudicated, he did not believe he was under any requirement to report the charges.

Grievant knew that his job required him to have and maintain a City Special Police Commission.³⁴ Grievant knew that he was approved for the commission as a Special Police Officer pursuant to § 33-38 of the City Code which makes clear that individuals with misdemeanor charges pending adjudication are not qualified to hold such a commission. Grievant did not notify the Agency of the misdemeanor charges that impacted his commission as a Special Police Officer at any time during the period from September 9, 2023, until October 10, 2023. The Agency has proved by a preponderance of the evidence that Grievant engaged in misconduct when he failed to notify the Agency of circumstances that affected his commission as a Special Police Officer by failing to report within a reasonable period of time that he had been charged with a misdemeanor on September 9, 2023.

Based on the evidence presented at the hearing, it appeared that Grievant discussed the October 1, 2023, felony charges with District Business Manager and District HR Representative on October 10, 2023, which was Grievant's first workday following his release from custody. Therefore, this Hearing Officer finds that the Agency has not met its burden of proving that Grievant engaged in misconduct with respect to a failure to notify the Agency of the October 1, 2023, felony charges within a reasonable time period.

³³ Hearing recording at 5:35:34-5:40:20, and see Agency Ex. 24 at 14.

³⁴ Agency Ex. 11.

Whether the Agency's discipline was consistent with law and policy

Group II offenses include acts of misconduct of a more serious nature. This level is appropriate for offenses that significantly impact the agency's services and operations.

Grievant's failure to notify the Agency of the September 9, 2023, misdemeanor charge which was a circumstance impacting the commission Grievant held as a requirement of his job, prevented the Agency from appropriately reassessing Grievant's job duties to ensure that the Agency was not requiring Grievant to perform duties outside of his authority.

The Agency's issuance of a Group II Written Notice of disciplinary action to Grievant was consistent with law and policy.

Group II Written Notice – Providing misleading or false statements

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

At 6:00 a.m. on October 10, 2023, Grievant sent Supervisor an email with a subject line titled "Oct 10, return to work." In the email, Grievant stated the following:

Good morning [Supervisor]. I am on full duty today. I apologize for the sudden and unplanned time-off. I had to go out of state for family emergency issues, then I lost my cell phone. I have returned connection with the same cell number. Thank you.³⁵

Grievant's sudden and unplanned time-off was not because he was "out of state for family emergency issues" and Grievant had not "lost" his cell phone during that time. Grievant's email was false and misleading.

Grievant testified that the intent of his email was to advise his Supervisor that he had returned to work and to apologize for the unplanned absence. Grievant did not need to provide false and misleading information in order to let his Supervisor know he had returned to work. Indeed, Grievant had accomplished that purpose with the statements "I am on full duty today" and "I apologize for the sudden and unplanned time-off." Grievant, however, chose to provide additional and false information that was designed to mislead when he went on to write: "I had to go out of state for family emergency issues, then I lost my cell phone. I have returned connection with the same cell number."

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct when he sent an email to his Supervisor that provided false and misleading information.

³⁵ Agency Ex. 19.

Whether the Agency's discipline was consistent with law and policy

Group II offenses include acts of misconduct of a more serious nature. This level is appropriate for offenses that significantly impact the agency's services and operations.

Grievant chose to provide false and misleading information to his Supervisor. The nature and purpose of Grievant's conduct was to deceive. Deception undermines and significantly impacts Agency operations.

The Agency's issuance of a Group II Written Notice of disciplinary action to Grievant was consistent with law and policy.

The accumulation of two or more active Group II Written Notices normally warrants termination. The Agency has met its burden.

Grievant's Retaliation Defense

In order to succeed with a retaliation defense, Grievant must show that (1) he engaged in a protected activity; (2) he experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.³⁶ If the Agency presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.³⁷ Grievant experienced an adverse employment action when he was removed from his employment on November 16, 2023. The unrefuted testimony was that Grievant had at some point previously submitted a grievance alleging that Supervisor had misapplied policy related to a request for telework. It was not clear when the Grievant had engaged in this protected activity, but accepting that Grievant had engaged in protected activity, it remains clear that the Agency had non-retaliatory business reasons for the disciplinary action taken against Grievant. The Agency has demonstrated that Grievant engaged in misconduct when he provided false and misleading information to his Supervisor and when he failed to notify the Agency of circumstances that affected the Special Police Officer commission required for his job. Because the Agency had non-retaliatory reasons for its disciplinary action and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met his burden to prove the Agency's disciplinary action was retaliation.

Mitigation

Virginia 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

³⁶ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

³⁷ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

Management....”³⁸ 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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to Grievant of two Group II Written Notices with termination are **upheld**.

For the reasons stated herein, the Agency’s issuance to Grievant of a Group III Written Notice is **rescinded**.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has not substantially prevailed on the merits of the grievance because his termination 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 14th St., 12th Floor
Richmond, VA 23219

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

³⁸ Va. Code § 2.2-3005.

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.³⁹

Angela L. Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

³⁹ 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.