

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. 12075

Hearing Date: April 1, 2024
Decision Issued: April 4, 2024

PROCEDURAL HISTORY

On January 9, 2024, Grievant was issued a Group II Written Notice of disciplinary action. The offense was failure to follow instructions or policy, occurring October 13, 2023.¹ On January 9, 2024, Grievant was issued a Group III Written Notice of disciplinary action. The offense was a safety rule violation, occurring October 10, 2023.² The disciplinary action was job termination effective January 9, 2024.

The Grievant timely filed a grievance to challenge the Agency's actions for both written notices. The matter advanced to hearing. On February 5, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On April 1, 2024, the hearing was held in person.

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

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

¹ The offense date on the written notice incorrectly states October 10, 2023.

² The offense date on the written notice incorrectly states October 13, 2023.

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

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."

Under Operating Procedure 135.1, *Standards of Conduct*, leaving the work site during working hours without permission is specifically listed as a Group II offense. Agency Exh. 18. Further, relative to the firearm Written Notice, Group III offenses specifically list both

- violating safety rules where there is a threat of physical harm

and

- negligence on the job that results (or could have resulted) in the death, or serious injury of persons, including, but not limited to, employees, supervisors, volunteers, inmates/probationers/parolees, visitors, and/or students, or the escaping/absconding of inmates/probationers/parolees.

The Offense

The Group II Written Notice, issued by the assistant warden on January 9, 2024, detailed the facts of the offense, and concluded:

The issuance of this Group II Written Notice is for violation of Operating Procedure 135.1 - Leaving the worksite during working hours without permission. [The Grievant] requested to leave work for personal reasons. Sergeant [] informed you once she finished discharging an inmate and cleared count she would discuss your request to leave. You stated "Nah, I'm out," walked away, cleared your locker, and left the premises without permission.

Agency Exh. 1. For circumstances considered, the Written Notice stated, "[The Grievant] has been employed with the department since January 10, 2021."

The Group III Written Notice, issued by the assistant warden on January 9, 2024, detailed the facts of the offense, and concluded:

The issuance of this Group III Written Notice with Termination for violation of Operating Procedure 350.3 – Firearms, Chemical Agents, and Less Lethal Training, violation of Operating Procedure 410.1 - Control Center and violation of 135.1. 1. Violating safety rules where there is a threat of physical harm; and 2. Negligence on the job that results (or could have resulted) in the death, or serious injury of persons, including, but not limited to, employees, supervisors, volunteers, inmates/probationers/parolees, visitors, and/or students, or the escaping/absconding of inmates/probationers/parolees. The Procedures established with these policies address in detail firearms safety, firearms handling and storage of firearms. [The Grievant] placed the firearm that was issued to him in a bag left unattended in the Front Entry conference room, which is accessible to non-correctional staff and inmates when movement on and off unit occurs.

Agency Exh. 2. For circumstances considered, the Written Notice stated, “[The Grievant] has been employed with the department since January 10, 2021.”

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 corrections officer, since January 10, 2021, without other active disciplinary actions.

The assistant warden who issued the discipline testified consistently with the offenses noted in the Written Notices. He testified to the seriousness of the safety violation involving the firearm. The Grievant never denied the two offenses. Another assistant warden testified consistently with the charged offenses and the applicable policy violations. The sergeant, the watch commander for each violation, also testified consistently with the Written Notices, stating that the Grievant offered no explanations for the violations. The Agency’s facility human resources officer also testified consistently with the Written Notices and stated that the Grievant never denied the offenses. A training captain testified that the Grievant received the applicable firearm training, which requires an officer to keep his weapon even when using a restroom.

Through his statements and testimony, the Grievant admitted to the offenses as written. The Grievant testified that he left his weapon unsecured because there was not a gun locker available and he was having a restroom emergency. The Grievant testified that he knew he made the mistakes as charged in the Written Notices, but he resolved not to repeat them. He testified that he is a diligent officer, the discipline is excessive, and he wants his job back.

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. 1998).

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 notice. 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, including the Grievant's admissions, I find that the Agency has reasonably proved the misconduct of the Written Notices.

The Grievant's admission establishes the essential facts of the offenses. I find that the Agency has met its burden of showing the Grievant's misconduct as charged in the Written Notices, and the level of discipline is supported by applicable policy—Policy 135.1, *Standards of Conduct*. Therefore, unless otherwise mitigated, I find that the Group II and Group III discipline, with termination, is consistent with policy.

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].” The Agency’s Policy 135.1, *Standards of Conduct*, is consistent with DHRM policy. 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 this case, the Grievant admitted the charges, but he is seeking mitigated relief in the form of returning to his job. The Grievant asserts, not unreasonably, that his taking responsibility for his mistakes, apology, good work record, and determination not to repeat the offenses should be considered for the level of discipline.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that the Grievant’s actions fall within the discipline prescribed by policy.

Given the nature of the Written Notices, as decided above, 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.

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, such as disparate treatment of similarly situated employees or improper motive.

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 extent of the disciplinary 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 Group II Written Notice and Group III Written Notice, with job 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.

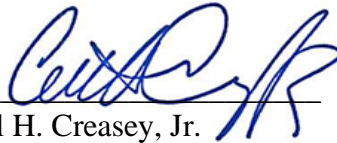
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.³

[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].

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

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