DECISION OF HEARING OFFICER
IN RE: CASE NO. 12054
HEARING DATE: 4-25-24
DECISION ISSUED: 5-10-24

PROCEDURAL HISTORY

Grievant was issued two Written Notices. One was for an incident on May 9, 2023, and a Written Notice was issued on January 2, 2024.[1] A second Written Notice was for an incident on August 13, 2023, that the Written Notice was dated September 8, 2023, but issued on December 13, 2023.[2] Grievant filed for a hearing and the cases were consolidated and qualified and assigned to the Hearing Office on January 2, 2024. Due to problems with Agency's Written Notices, they were resubmitted on the same day the matters were qualified to Appeal. A pre-hearing conference was held on January 23, 2024, and the matter was scheduled for hearing at Grievant's facility on April 25, 2024.

APPEARANCES

Agency Advocate
Agency Representative as Witness
Six (6) additional Agency Witnesses
Grievance Advocate
Grievant as Witness
Three (3) additional Grievant Witnesses

ISSUES

1) Whether Grievant violated Agency Policies 11,13,14,19 for matters related to the May 9, 2023, incident.[3]
2) Whether Grievant violated DHRM Policy 1.60 for matter related to May 9, 2023, incident.[4]
3) Whether Grievant violated VDOT Maintenance Best Practice Manual 5.7, Removal of Debris & Emergency Road Cleanup related to May 9, 2023, incident.[5]
4) Whether Grievant violated Agency Policies 11,13,56, 99 for matter related to the August 13, 2023, incident.[6]
5) Whether Grievant violated VDOT Safety & Health Manual SD #1.006.[7]

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[1] Agency Exhibit 8.
[2] Agency Exhibit 11.
[3] Agency Exhibit 8
[4] Agency Exhibit 8
[5] Agency Exhibit 8
[6] Agency Exhibit 11
[7] Agency Exhibit 4

6) Whether the employee's vehicle was considered a state leased vehicle.[8]
7) Whether a Group I discipline was an appropriate discipline.
8) Whether a Group II discipline was an appropriate discipline.
9) Whether there were mitigating circumstances.

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012, and the Grievance Procedure Manual (GPM) effective July 1, 2017

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "includes acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." More than one (1) active Group II offense may be combined to warrant termination. [9]

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of facts:

Grievant is a Superintendent at his area facility and has been an employee of the Agency for 29 years. Grievant is being charged with improperly sending an employee to do a task without proper safety measures. On the night of May 9, 2023, Grievant received a message from Traffic Operations Center (TOC) that a tree was down across a road. Grievant called his employee (E-1) who lived closest to the downed tree area asking E-1 to go to the location. Upon arrival E-1 exited his vehicle. A vehicle approached and struck E-1 then fled the scene. This encounter caused serious injury to E-1. E-1 was transported by helicopter to a hospital. Grievant reported the situation to his superior and went to the hospital. At the hospital Grievant was given E-1's work jacket which employee was

[8] Agency Exhibit 4 SD # 1.006
[9] Agency Exhibit 16 Operational Policy 1.60 Standards of Conduct

wearing at the time of the accident.[10] Employee's headlamp was found at the scene[11] and no work helmet was found. Grievant stated he had sent E-1 to assess the situation and report back. When E-1 had not called about the downed tree, Grievant attempted to call E-1 with no answer.[12] Shortly thereafter Grievant received a call about E-1's accident.

Grievant's supervisor, the Abingdon Residency Administrator (ARA), surmised Grievant had actually sent E-1 to remove the tree alone, on a dark, rainy night. The tree was still in place after the accident. A work order was planned for the next day at 8:00 a.m. and stated a chainsaw was needed.[13] No chainsaw was reported found at the scene of the accident, yet police reports and investigative report stated E-1 was cutting the tree. Due to his extensive injury E-1 has been unable to recall anything about the night of his injury.

Regarding the second incident on August 13, 2023, Grievant was charged with not reporting the incident. Again, Grievant had received an alert a tree was down at night on a road. Grievant had called employee (E-2) into headquarters where Grievant was to meet him. E-2 fell asleep at the wheel just before crossing over to headquarters. E-2's vehicle ran into the facility fence and also shifted a small shed slightly off its foundation. E-2 had no injuries, but his vehicle was totaled. The crash left part of the bottom of a chain link fence raised[14] and the facility shed[15] damaged. Grievant called his superior, the Maintenance Operations Manager (MOM), to report the down tree. Grievant stated he also told his MOM of the accident and asked if he needed to report further, to which MOM replied, "No." The MOM stated, when interviewed, that Grievant never told him about the accident and only discussed the tree issue. Grievant had a phone record of a 3-minute call to MOM.[16]

The ARA had spoken earlier to Grievant about not making accurate reports. A rearview mirror on an agency vehicle had been broken in the afternoon. Grievant did not report this accident until the next morning. Because of this error the ARA verbally told Grievant he now had to report to each person in Grievant's chain of command not just his next superior. However, ARA's written memo did not mention the reporting directive.[17]

Regarding the fence incident, ARA did not find out about the damage to the fence and building until he returned from his vacation. By that time all the damage had been fixed. ARA and those in his lower chain of command were unaware of the accident until everything was fixed. The ARA charged Grievant with not making a proper report. The Agency classified E-2's vehicle as one leased to the Agency as E-2 was considered on Agencies' time for his response to Grievant's requests to come to work. E-2's insurance, not VDOT, paid for all the damage.

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[10] Agency Exhibit 10 p. 299
[11] Agency Exhibit 10 p. 300
[12] Grievant Exhibit 7
[13] Agency Exhibit 9
[14] Agency Exhibit 12
[15] Agency Exhibit 12
[16] Grievant Exhibit 1
[17] Agency Exhibit 4

DISCUSSION

The incident that occurred on May 9, 2023, was tragic. If Grievant had purposefully put his employee (E-1) in danger it would certainly be a poor decision on the part of a Superintendent and against policy.

Factually, Grievant is the only person who has first-hand knowledge of his intention. Grievant stated, under oath, he had sent E-1 to access the situation. E-1 was standing outside his vehicle when the accident occurred. The tree had not been moved. A work order stated the tree was to be moved the next morning with a chainsaw[18] which it appears E-1 did not have a chainsaw with him. E-1 was not sent to headquarters to get equipment, he was sent to the scene. E-1 was wearing his Agency issued, rainproof jacket retrieved at the hospital. It also appears he had been wearing his headlamp[19] retrieved at the scene. Both items were appropriate to assess an incident in the rain. Despite this, the ARA surmised months later that E-1 had been sent to remove a tree from a road alone, in the dark, and in the rain without the proper number of people necessary to remove a tree. Grievant received a Group II Written Notice.

The second incident occurred on August 13, 2023, that cited best practice 5.7, and policies 11, 13, 56, and 99 which caused Grievant to receive a Group 1 Written Notice.

Prior to April 13, 2023, and after the incident of May 9, 2023, there was minor damage to a VDOT vehicle. Grievant did not report the damage until the next morning. ARA spoke with Grievant regarding this infraction. While no Written Notice was written, ARA stated he gave Grievant a directive to not only make reports to Grievant's superior but to every person in the chain of command. ARA's memo to Grievant does not reflect this directive.[20]

On August 13, 2023, E-2 was called out for a tree down. E-2 was to meet Grievant at headquarters. On E-2's way in, E-2 crashed into a VDOT fence and building due to his falling asleep at the wheel, Grievant was already at the headquarters. Grievant went to the scene, ascertained that E-2 was not injured and called the state police.[21] Grievant also stated that he called his superior, the MOM, to report the tree down issue and the accident at the headquarters. Grievant stated he inquired of the MOM if Grievant needed to alert anyone else and was told he did not need to make any further calls if E-2 was not injured.[22]

MOM, when interviewed, did not mention Grievant had called him.[23] At a second interview, after becoming aware of Grievant's phone record report, MOM remembered that Grievant had called but stated Grievant never mentioned anything about an accident.[24]

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[18] Agency Exhibit 13
[19] Agency Exhibit 10 p. 299, 300
[20] Agency Exhibit 4
[21] Grievant Exhibit 8
[22] Agency Exhibit 17
[23] Agency Exhibit 13
[24] Agency Exhibit 15

E-2 was traveling to work in his personal vehicle. The Agency described E-2's vehicle as a "Leased" Vehicle of VDOT on a VDOT mission.[25] This definition would require the crash to be reported. The Agency, however, permitted the damage to the vehicle to be covered by E-2's personal insurance.

The damage to both the fence and the building was repaired without the knowledge of upper management. The definition of "vehicle and equipment" could, or could not, be construed as a fence being" Equipment." It could, or could not, also be assumed the vehicle was about VDOT business and the damage to VDOT's fence and building was " equipment damage." Either way the incident was significant enough to alert the MOM and the state police.

OPINION

A Hearing Officer is a neutral person who is expected to listen in an unbiased manner to both parties' opinions. While the Hearing Officer may agree that a matter feels unfair to the Grievant, the Hearing Officer is bound by the rules created for the Hearing Officer's decision. The Agency is given deference to be able to manage its operations and employees.

Hearing Officers may order appropriate remedies but may not grant relief that is inconsistent with law, policy, or the grievance procedure.

In hearings contesting formal discipline, if the hearing officer finds that (1) 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 agency's discipline exceeds the limits of reasonableness.[26]

Further, 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.[27]

The Written Notice for the incident of May 9, 2023, contains no actual evidence that Grievant sent E-1 to do a dangerous task without proper equipment and without proper personnel. No directive at the time required two employees to do an assessment. A hearing officer must weigh the evidence. The testimony of the Grievant (although possibly self-serving) has more weight than an assumption based on a presumed circumstance. Also, the scene as described would lead one to believe that only an observation had occurred. No tree was removed, the employee had only a headlamp and a raincoat. No chainsaw was found at the scene. The hit/run driver damaged his oil pan running into the tree that was

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[25] Agency Exhibit 4 p. 40

[26] Grievance Procedure Manual, effective July 1, 2020. §5.9 pg 19

[27] Rules for Conducting Grievance Hearings effective July 2020, VI Scope of Relief pg 14. DeJarnette v. Corning, 133 F.3d 293, 299 (4th Cir. 1998)("Title VII is not a vehicle for substituting the judgement of a court for that of the employer").

still in the road. A work order indicated the work would be done the next morning with a chainsaw needed. By weight of evidence, none of the policies listed in the Written Notice apply to this situation.

The Written Notice for failure to report an accident also has conflicting evidence. Again, the hearing officer must decide based on the weight of the evidence, agency's deference to make decisions for the agency, and the demeanor of witnesses. Grievant stated he did report the full incident and called the state police. Grievant's superior, the MOM stated Grievant did not reveal anything about the accident. MOM's wife testified she remembered hearing the phone conversation nine months earlier and that Grievant never mentioned the crash. The MOM's testimony and that of his wife were inconsistent.[28] Wife being able to remember one phone call out of many that she could possibly have overheard 9 months earlier is certainly suspect. The Grievant's sworn testimony is more believable.

It also must be considered that if the agency believed E-2's vehicle to be in state use, the agency, not E-2's personal insurance, should have paid for the damage. VDOT did not file an insurance claim or pay for E-2's damaged vehicle.[29] Also, the duty of Grievant to make multiple reports to several persons is problematic. The imposed duty, if actually conveyed, seems onerous and retaliatory. However, Grievant did not make an issue of his requirement to make several notifications.

It is possible the damaged vehicle remained personal property, not considered VDOT business use. It was clear there was no personal injury. It is possible a fence and building could be excluded in the definition of "equipment." It is fortuitous that the damage was repaired so quickly. However, ARA had Grievant on notice he was to be more proactive about reporting matters. This incident, which involved significant expenses for damage, escaped notice. Considering all the facts, Agency has the right to be more informed and has the authority to use a Group I Notice to Grievant and any other person with knowledge of the event who did not make further report. Agency Policy #13 applies, which may be considered a Group I infraction.

MITIGATION

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 the rules established by the Department of Human Resource Management..." 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 recorded evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer

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[28] For instance, MOM stated he received about twenty-five calls a month. Wife said there were only two or three calls a month. MOM stated his wife "every night" says" who do I have to kill tonight" and "can they fart without you." Wife stated she said "can they fart without you" the night of E-2's accident is why she had such a sharp memory of that call nine months earlier.

[29] Witness testimony.

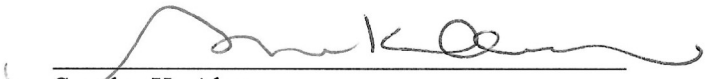
shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes:

(1) whether an employee had notice of the rule, how the Agency interprets the rule, and/or the possible consequences of not complying with the rule.
(2) whether the disciplinary is consistent with the Agency's treatment of other similarly situated employees or
(3) whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.

Grievant has 29 years of service with the Agency. He was described by several Witnesses as a very good employee. The Agency should not have assumed with no actual evidence that Grievant would have put E-1 in such a situation as to endanger E-1's very life. There is the possibility E-1 intended to put himself in danger but no actual evidence that Grievant instructed E-1 anything other than to make a report. The Group II discipline exceeds reasonableness.

DECISION

For the above reasons, the Group II discipline is RECINDED and the Group I discipline is UPHELD.



Sondra K. Alan
Hearing Officer

APPEAL RIGHTS

You may request an administrative review by EDR within **fifteen calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within fifteen 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].

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