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. 12052

Hearing Date: February 9, 2024
Decision Issued: February 12, 2024

PROCEDURAL HISTORY

On November 17, 2023, Grievant was issued a Group II Written Notice and four Group III Written Notices of disciplinary action, with job termination. The offenses were violations of applicable policies on December 3, 2022, May 7, 2023, and June 14, 2023.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 18, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On February 9, 2024, a hearing was held in person at the Agency's location, the first mutual date available for the parties.

Only the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Advocate for Grievant
Agency Representative
Advocate for Agency
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

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."

General Order ADM 11.00, *Standards of Conduct*, requires employees to:

- Employees shall comply with all local, state, and federal laws.

¶12.a. Agency Exh. 21.C. Violations of this standard include, but are not limited to:

> (2) Being convicted for acts of conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public or to other state employees.

¶12.c(2). Agency Exh. 21.C.

- Employees will at all times be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of their official duties strive to win the approval of all law-abiding citizens and other employees.

¶13.a. Agency Exh. 21.C. Violations of this standard include, but are not limited to:

> (1) Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.

¶13.u.(1). Agency Exh. 21.C.

General Order ADM 12.02, *Disciplinary Measures*, provides that employees maintain the qualifications, certification, licensure, and/or training requirements identified for their positions. ¶1.d. Agency Exh. 21.G.

General Order ADM 12.02, *Disciplinary Measures*, provides that Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures or laws. ¶6.b. Agency Exh. 21.G.

General Order ADM 12.02, *Disciplinary Measures*, provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace; constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. ¶6.c. Agency Exh. 21.G.

The Offenses

The Grievant stipulated to the underlying facts of the five Written Notices, based on criminal conviction and protective orders, and he did not challenge the facts of the charges. The Grievant maintained his criminal innocence, but the criminal court rulings are final because he could not afford the legal appellate process. The Grievant stipulated that with the Written Notices in place, he is not able to possess a firearm for a time and, therefore, may not fulfill the duties of a sworn trooper, the job he was hired for and from which he was terminated after 19 years tenure. Given the nature of the Written Notices, the Grievant is not able to possess the firearms required of a trooper. The Grievant's work record contained no other formal complaints or disciplinary actions. The Grievant's position at hearing was seeking mitigated disciplinary action less than termination and to job placement in a civilian position with the Agency (that does not require a firearm). The Written Notices comprise Agency's Exhibit 1.

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 trooper for 19 years, with no other disciplinary record. The Agency's witnesses testified consistently with the Group Written Notices and associated discipline of termination. Two of the Group III Written Notices concern assault and battery of minors; two of the Group III Written Notices concern 2-year protective orders that prevent the Grievant from carrying a firearm, and the Group II Written Notice concerns inappropriate conduct undermining the effectiveness or efficiency of the Agency.

Among the Agency's witnesses, the human resources director testified that the Agency consistently refrains from hiring civilian employees who have active protective orders. There is only one Agency employee under a protective order, and that employee is currently on suspension pending investigation. Regardless of the disciplinary termination from the sworn trooper position, the Agency would not entertain hiring the Grievant with the two active protective orders. The Agency witnesses also established that the Grievant's conduct was reported in local news media and social media, harming the Agency's reputation.

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. 1988).

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 stipulation by the Grievant, I find that the Agency has reasonably proved the misconduct of the Group II Written Notice and four Group III Written Notices.

The Grievant is seeking alternative discipline. For a single Group III Written Notice, the normal discipline is job termination. Here, we have multiple Written Notices for which the Agency elected job termination. Although stipulated, I find the group levels of the Written Notices are appropriate. Without legal authority to carry a firearm, the Grievant is prohibited from serving as a sworn trooper. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group III Written Notices and the Group II Written Notice. The Agency conceivably could have imposed lesser discipline, such as demotion or transfer to a civilian position, but its election for job termination is within its discretion to impose progressive discipline.

The *Rules,* at § VI(A), provides the following for hearing officers' scope of relief authority:

> Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government. In addition, challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective they believe it may be. However, the hearing officer may order relief to remedy the application of a policy when policy was misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy.

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules,* § VI(B)1.

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]." 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 maintained that he was innocent of the charges, but he did not have the financial resources to appeal the court's guilty finding. The Grievant asserts, not unreasonably, that his 19 years of experience could be well used in a civilian position with the Agency.

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 have harmed the reputation of the Agency. Further, the Agency has consistently not hired applicants with violent crime convictions and who are under protective orders.

Given the nature of the Written Notices, as decided above, the impact on the Agency, and the Agency's hiring policies, 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.

The Grievant had a long tenure with the agency and had a record of satisfactory work performance. The Grievant's argument is not unreasonable—that he has valuable skills for a civilian position. Regardless, under the *Rules*, however, 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 four Group III Written Notices 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.

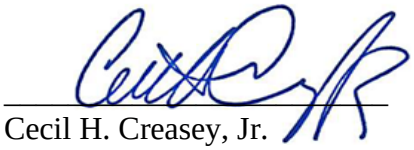
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[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].

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

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