



# **COMMONWEALTH OF VIRGINIA**

*Department Of Human Resource Management*

*Office of Employment Dispute Resolution*

## **DECISION OF HEARING OFFICER**

In re:

**Case number: 12162**

**Hearing Date: October 3, 2024**

**Decision Issued: November 26, 2024**

### **PROCEDURAL HISTORY**

On June 25, 2024, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance, failure to follow state and agency policies, and failure to meet or exceed established job performance expectations.<sup>1</sup>

On July 3, 2024, 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 the matter advanced to hearing. On August 19, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On October 3, 2024, a hearing was held at Agency offices in Richmond, Virginia.

### **APPEARANCES**

Grievant  
Agency Advocate

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Group I Written Notice of disciplinary action?
2. Whether the behavior constituted misconduct?

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<sup>1</sup> Agency Ex. 4-6.

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:

At the times relevant for this case, Grievant was a Permit Inspector for a Department of Transportation District office. Grievant had been employed by the Agency for more than nine years. Grievant began working as a Permit Inspector in the District office in November of 2023. Grievant left the District office in July of 2024 to take a position in a different district office. No evidence of prior disciplinary action was introduced during the hearing.

As a Permit Inspector, Grievant's job duties included inspecting issues along roadways and taking photographs and videos to document those issues. Grievant had concerns with being able to safely document issues while working in the field. Specifically, Grievant was often instructed to inspect and take photographs of issues along roadways where it may be unsafe to do so. Grievant testified that he had requested that the Agency provide him with a camera that could be mounted or attached to a vehicle dashboard and that would allow him to document his observations as he drove along the roadway without having to use his hands to hold a camera or other device and without having to exit his vehicle when conditions were unsafe.<sup>2</sup>

The Agency did not provide Grievant with a vehicle mounted camera that would allow him to take photographs or videos from his vehicle in a hands-free manner. Grievant was provided no training or instructions regarding how to perform his job duties that required that he document road issues when due to road conditions there was no safe means to do so. Grievant was expected to perform his job duties alone.<sup>3</sup>

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<sup>2</sup> Hearing Recording at 18:12-18:15, 20:11-20:50.

<sup>3</sup> Hearing Recording at 32:00-33:40, 30:16-30:36.

On May 20, 2024, Grievant was instructed by a business coordinator in the District office to get photographs of a portion of roadway following a customer service report of mud on the road and potential damage to the road.<sup>4</sup>

The portion of roadway that Grievant was instructed to photograph was a narrow, unlined short stretch of road situated between two curves. There were no shoulders along the roadway and steep banks on either side.<sup>5</sup> Grievant did not feel safe exiting his state vehicle and walking along the road in order to take a photograph of the mud tracks and potential damage on the road.<sup>6</sup>

Grievant stopped his state vehicle in the road to take a photograph of the mud tracks and potential damage to the road. As Grievant was taking the photograph, he realized that a vehicle was rounding the curve behind him, so he quickly pushed the button on his cell phone to take the photograph as he stepped on the accelerator to move the vehicle forward.<sup>7</sup>

### **CONCLUSIONS OF POLICY**

The Agency has issued Safety Rules. The Safety Rules include the following:

6. The use of cell phones is prohibited when operating any vehicle/equipment owned or paid for by the state. The use of a cell phones may be used for making and receiving calls only if the vehicle is equipped with a hands-free system.<sup>8</sup>

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

The facts in this case were largely undisputed. Grievant admitted that he used his cell phone to take a photograph as he accelerated the state vehicle he was driving forward from a stopped position in order to avoid being rear-ended by an approaching vehicle.

Grievant also admitted that he knew that it was a violation of policy to use a cell phone to take photographs while driving a state vehicle. Grievant asserted that he did not intend to use the cell phone while driving, but that due to his concerns about safely photographing the road, he had stopped his vehicle in the road to take the photograph and had to accelerate as he was taking the photograph in order avoid being rear ended.

Grievant violated the Agency's Safety Rules when he used a cell phone while operating a state vehicle.

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<sup>4</sup> Hearing Recording at 26:40-28:30.

<sup>5</sup> Hearing Recording at 13:56-16:40, 17:30-18:12, 19:30-20:11.

<sup>6</sup> Hearing Recording at 19:00-19:11, 19:30-20:11.

<sup>7</sup> Hearing Recording at 17:05-17:30.

<sup>8</sup> Agency Ex. at 12.

Whether the Agency's discipline was consistent with law and 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."<sup>9</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Grievant argued that the Agency's discipline was too harsh because the Agency did not provide Grievant with a dashboard mounted camera that would allow him to take photographs or videos from the safety of his vehicle in a hands-free manner. Grievant was provided no training or instructions regarding how to perform his job duties that required that he document road issues when due to road conditions there was no safe means to do so. The evidence showed that the Agency put Grievant in a difficult position when it gave him a work assignment that he could not safely perform with the equipment provided to him and under the conditions he found in the field. The Agency, however, argued that it expected Grievant to call his supervisor or someone else in management for guidance as to how to address the situation rather than putting himself and the public at risk by violating a safety rule (or by walking along a roadway where he felt unsafe). The Agency's expectations under the circumstances were not unreasonable.

A violation of policy or a safety rule is normally considered a Group II offense.<sup>10</sup> In this case the Agency charged Grievant with a Group I offense of unsatisfactory performance. In order to prove unsatisfactory performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties in a manner that met with the Agency's expectations. This is not a difficult standard to meet. In this case, when Grievant violated a safety rule while performing his work duties, because he violated a safety rule, his performance did not meet the Agency's reasonable expectations for performance.

The Agency's discipline was consistent with law and policy.

Mitigation

Grievant argued that the issuance of a Group I Written Notice was too harsh in light of Grievant's years of good service with no prior disciplinary issues. Grievant also argued that the discipline was too harsh in this case because Grievant had requested that the Agency provide him with the tools he needed to safely perform his job duties and the Agency had failed to do so.

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a

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<sup>9</sup> DHRM Policy 1.60, Standards of Conduct.

<sup>10</sup> DHRM Policy 1.60, Standards of Conduct, Attachment A.

reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

In this case, the Agency argued that it considered mitigating factors in issuing discipline in this case, including Grievant's prior work performance, years of service without prior discipline, and honesty with respect to this offense. The Agency argued that it had initially considered issuing a Group III written notice to Grievant but had mitigated the discipline prior to issuing the written notice and following its receipt and consideration of mitigating factor and Grievant's response to the due process notice in this case.

That the Agency could have further mitigated the discipline based on the facts of this case, but determined that it was inappropriate to do so, is not a reason for the Hearing Officer to conclude that the Agency action exceeds the limits of reasonableness.

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 Management..."<sup>11</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 the disciplinary action.

## DECISION

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

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<sup>11</sup> Va. Code § 2.2-3005.

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>12</sup>

*Angela Jenkins*

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Angela L. Jenkins, Esq.  
Hearing Officer

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<sup>12</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.