

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. 12236

Hearing Date: April 1, 2025
Decision Issued: April 7, 2025

PROCEDURAL HISTORY

On December 13, 2024, the Agency issued Grievant a Group III Written Notice of disciplinary action, with job termination. The offenses were noted as failure to comply with applicable established written policy or instruction, identified as offense date November 2, 2024.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking removal of the Group III offense and job reinstatement. The matter advanced to hearing. On February 10, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for March 13, 2025, the first available date available for the parties. For good cause shown, the hearing was rescheduled for April 1, 2025. On April 1, 2025, the hearing was held in-person at the Agency's facility.

The Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and arguments presented.

APPEARANCES

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."

Under Operating Procedure 135.1, *Standards of Conduct*, Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that include, but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws. Agency Exh. 12, p. 92. 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 is a specific example of a Group III offense. Also, refusal to obey instructions that could result in a weakening of security is a specific example of a Group III offense. Agency Exh. 12 p. 93.

Under Operating Procedure 411.1, *Inmate Transportation*, at III(B)(5), transportation officers must wear a ballistic vest over their uniform shirt during the entire transportation assignment. Agency Exh. 11, p. 50.

The Offense

The Group I Written Notice, issued by the facility Warden on February 27, 2024, detailed the facts of the offense, and concluded:

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. Also, failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure. On November 2, 2024, at approximately 2:20 p.m. Warden [C.] was conducting hospital checks at Select Specialty Hospital in Richmond VA. While entering room 233, he states he witnessed [Grievant] covered up in a blanket facing away from the inmate she was supervising/watching. Warden [C.] immediately told her to get up, and take the blanket off her face and body. He then noticed she did not have on her ballistic vest, and her boots were untied. Warden [C.] immediately told her to put on her vest and tie her boots. At this time, she refused to put the vest on stating "it is too small". Warden

[C.] addressed the importance of hospital coverage with her. Further, he explained to [Grievant] the danger she is putting herself, partner, and the public in due to her negligence. [Grievant] admits to not wearing the ballistic vest because it was too small, but she denies having her shoes untied, being covered with a blanket and facing away from the inmate. Co-worker witness statement substantiated that she was covered in a blanket and had on earmuffs. This impairs her ability to be fully observant of the inmate under her supervision which endangers safety. [Grievant] also acknowledged that she did not inform her supervisor that there was not a ballistic vest in her size or request that they send someone on the transportation run who could fit the available vest. This further put her safety and the safety of others at risk. [Grievant] violated DOP's 135.1 Standards of Conduct; OP 105.1 Employee Uniforms and OP 411.1 Inmate Transportation.

Agency Exh.1, pp. 1-3. For circumstances considered, the Written Notice stated,

[Grievant] has two years of service with no active written notices. She also stated that she has a medical condition that causes her to be cold. But acknowledges that she did not inform anyone of this condition or request an accommodation. [Grievant] also stated that she was not wearing her state issued uniform sweater which could have assisted her in staying warm. Additionally, in recent history [Grievant] acted heroically in a vehicle incident saving lives. However, due to the serious nature and potential outcome to officer, co-worker, inmate and public safety when officers are not fully observant/attentive while watching inmates at the hospital, no further mitigation is warranted.

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, without other active formal disciplinary actions.

The Agency witnesses testified consistently and credibly about the conduct charged in the Written Notice. Warden C testified to making rounds at the hospital and observing the facts charged in the Written Notice, and his written communication to Warden D corroborates his testimony. Agency Exh. 7, p. 17. Warden C testified that the Grievant could have and should have declined the post if the required equipment (ballistic vest in correct size) was unavailable to her. The regional administrator testified that he considered the Grievant's conduct to be analogous to sleeping, given her reclining posture, being covered with a blanket, and wearing earmuffs. He further testified that the agency treats all such offenses the same, despite mitigating circumstances like the Grievant's record of heroic service.

The Grievant's co-worker testified that the Grievant was seated in the recliner with her feet up and covered with a blanket. He testified that the Grievant, however, could have assisted with resistance to a potential emergency. He did not notice the state of the Grievant's shoes.

Warden D issued the written notice. He testified that public safety is the number one concern of the agency. He testified that the Grievant's condition of being cold and pregnant cannot excuse the requirements of the post, namely attentively supervising the inmate and

wearing required equipment (ballistic vest). Warden D testified that he discussed with the Grievant the lack of readiness caused by her reclined posture and blanket, and the safety risk of not wearing the vest. He testified that her pregnancy does not excuse the requirement of wearing safety equipment. Warden D also testified that the Grievant had an otherwise exemplary work history, but such does not mitigate the offense and consistency of agency discipline.

The Grievant denied that her shoes were untied or that she was asleep, but she admitted she was seated in the recliner with her feet elevated, covered up to her chin with a blanket and wearing earmuffs. The Grievant also admitted she was not wearing the required ballistic vest. The Grievant testified that she suffers from anemia, making her sensitive to cold, and that her pregnancy caused her assigned ballistic vest to be too small to wear. Grievant's Exh. 1. The Grievant never raised or sought any type of accommodation related to her condition or this conduct.¹

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.

¹ The Grievant's testimony and exhibits establish that she was pregnant and anemic at the time of the charged offense. Grievant's Exh. 1.

The Americans with Disabilities Act ("ADA") prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. 42 U.S.C. § 12112. Under the ADA, the term "disability" means, "with respect to an individual— (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity. *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 196-97 (2002). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2 (i). Refusing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" is a prohibited form of discrimination under the ADA. 42 U.S.C. § 12112(b)(5)(A). However, the employer will not be required to offer the accommodation if it would "impose an undue hardship on the operation of the business" of the employer. *Id.* Assuming the Grievant's pregnancy and anemia rendered her a qualified individual, there is insufficient evidence that the inadequate performance at issue was the result of the Grievant's conditions. Further, the evidence is uncontradicted that the Grievant had not placed the Agency on any notice of a request for accommodation.

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 that mostly confirm the conduct cited in the Written Notice, I find that the Agency has proved the charged conduct, which is sufficient to satisfy a Group III Written Notice for negligent and unsafe conduct.

In general, agencies are entitled to expect good judgment and performance from its employees. Failure to meet these expectations may constitute unacceptable conduct, even in the absence of specific policy instruction. *See*, for example, EDR Ruling No. 2024-5710. I find that the instance of conduct charged in the Written Notice constitutes serious misconduct of unreadiness and safety violation and, therefore, satisfies a Group III offense. The misconduct 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. Also, the misconduct was a refusal to obey instructions that could result in a weakening of security.

Contrary to the Grievant's approach to the grievance, the Agency has the prerogative to issue discipline for conduct that does not meet the Agency's standards of conduct. This judgment of work performance falls within the Agency's discretion. The Agency could have elected lesser discipline along the continuum of progressive discipline, but it is not required to exercise informal discipline in lieu of formal or a lesser written notice for the most serious misconduct.

Accordingly, based on the definitional description of a Group III offense, I find the Agency has proved the conduct charged and that it satisfies a Group III written Notice. A Group III written notice normally includes job termination, unless mitigated to a lesser discipline. Accordingly, I find that the Group III discipline 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 matter, the Grievant presented no mitigating evidence to challenge the Agency’s action, such as disparate disciplinary treatment or ignored request for accommodation.

EDR has further explained:

When an agency’s decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer “will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency’s mitigation decision is fairly debatable. Because I am not a “super-personnel officer,” even though I may have elected lesser discipline, I lack the authority to reduce the discipline under these circumstances. The Grievant has not shown any recognized mitigation factor, such as some improper motive, disparate treatment, or an unsatisfied request for accommodation.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, with job termination, must be and 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.

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.

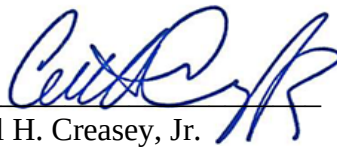
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.²

[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].

² 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