



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12220

Hearing Date:	March 10, 2025
Closing Statements:	March 17, 2025
Decision Issued:	May 30, 2025

PROCEDURAL HISTORY

On October 9, 2024, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions or policy. The Agency subsequently reduced the disciplinary action to a Group I Written Notice.

On October 31, 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 he requested a hearing. On January 13, 2025, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A prehearing conference was held on January 21, 2025. On March 10, 2025, a hearing was held at a local courthouse. The record was left open to allow for submission of additional documents and closing statements. Grievant submitted a closing statement on March 17, 2025.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
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

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:

Virginia State Police employ Grievant as a Senior Trooper at one of its locations. He began working for the Agency in 2016. The purpose of his position was, "Responsible for patrolling the highways and enforcing the traffic and criminal laws of the Commonwealth." Grievant's duties included, "[r]espond to crashes. Conduct thorough investigations and initiate appropriate action consistent with law and Department rules and regulations."¹ Grievant reported to Sergeant.

Grievant received an overall rating of Major Contributor on his August 1, 2024 annual performance evaluation. Grievant did not have any prior active written notices. Grievant got along well with his co-workers and had a good reputation among his peers.

¹ Agency Exhibit pp. 70, 71.

Grievant received training regarding investigating felony hit and run motor vehicle crashes.

The Written Notice briefly described the offense as:

The employee while on duty failed to initially investigate a reportable motor vehicle accident and only did so after being instructed by a supervisor. The employee failed to notify dispatch when he stopped out with a vehicle that was occupied and stopped on the roadway after being involved in a motor vehicle accident. The employee failed to offer emergency medical assistance after an individual advised him that he struck his head during a motor vehicle accident. These actions are in violation of Department policy which states, "Employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department policies and procedures, Department training, and supervisory recommendations."

The Agency merged the three allegations into one written notice.

On August 6, 2024, the Governor entered Executive Order 34, Declaration of a State of Emergency Due to Hurricane / Tropical Storm Debby. The Order stated, "a tropical storm / hurricane is likely to cause significant rainfall and flooding across the entire Commonwealth that could cause transportation difficulties and power outages." The Order was effective for 30 days unless amended or rescinded by further Executive Order.

"Mark out" occurs when a Trooper notifies the Dispatcher over the radio or on MDT of the Trooper's status. MDT is a mobile data terminal located in a State Police Vehicle. Marking out ensures that the Dispatcher knows a trooper's location and what the trooper is doing.

Driver was 81 years old. On August 8, 2024, Driver was operating his pickup truck when it became disabled. He parked his vehicle on the side of a Route with the hood open. The Route was near the Interstate and had a steady flow of traffic.

Grievant decided to approach Driver and his pickup truck. Grievant forgot to "mark out." Grievant normally marked out using the MDT in the State Police vehicle, but he forgot to do so.

Grievant approached Driver and recognized Driver. Grievant had encountered Driver one or two times before. Grievant remembered Driver as someone who seemed confused and may have had some type of mental health or psychological issue. Grievant asked Driver for his license and registration.

During the conversation, Grievant pointed to his head and asked, "Did you hit your head?" Driver told Grievant that Driver bumped his head on the window due to a truck pulling out in front of him. Grievant did not observe any red spot or anything on Driver's

forehead. Grievant did not believe Driver's confusion resulted from bumping his head. Driver did not complain of pain. Driver had no injury apparent to Grievant.

Driver said his truck would not start. Grievant asked Driver if there was anything wrong with his truck. Driver said it was fine and needed a few minutes to get it started.

Grievant asked Driver if he wanted to try starting the vehicle. Grievant offered assistance to Driver. Grievant asked if Driver wanted a tow-truck, but Driver declined. Grievant said, "Ok, I'll leave you here to see if you can get it running. If you need assistance, you can always call us back. If you want us to make arrangements to get you a tow-truck, just let us know." Grievant added, "Maybe that will give you enough time to gather your wits a little bit better." Grievant told Driver to dial #77 if he needed further assistance.

Grievant drove his State Police vehicle away leaving Driver's truck still parked on the Route shoulder. Grievant had forgotten an earlier instruction for staff to not leave unattended vehicles abandoned on the roadways because of the pending storm. Grievant did not ask Driver if he wanted medical assistance and did not call for an ambulance. Grievant left the scene to go to lunch with his shift-partners.

Grievant was on-scene with Driver for six minutes and 37 seconds.

Sergeant passed by the pickup truck on the side of the road and stopped. Sergeant observed Driver standing outside of his pickup truck. Driver appeared confused, disoriented, and disheveled.² Driver was looking in the sky, walking in a circle, and looking into his vehicle. Sergeant asked Driver if he had broken down. Driver replied, "yes." Driver added he had been run off the road, struck a guardrail, and bumped his head. Driver said a commercial vehicle had run him off the road, forcing him into the guardrail.³ Sergeant requested Driver's license. Driver said he had already provided it to the previous Trooper. Driver said a Trooper had stopped to check on him and he had given his driver's license to the Trooper.

Sergeant took Driver's license and returned to his patrol vehicle to inquire with dispatch about which Trooper had stopped to check on Driver. The Dispatcher indicated no incident had been created and they were unaware of any Trooper who had stopped with Driver.

Sergeant's cell phone rang. Grievant was calling. Grievant told Sergeant that Grievant was the Trooper who had checked on Driver. Sergeant instructed Grievant to return to the vehicle's location.

² Sergeant later concluded Driver may have had a cognitive impairment related to his age.

³ Driver pointed to where his vehicle hit the guardrail. Sergeant noted that this did not make sense because the guardrail impact would have been lower on the vehicle than where Driver was pointing.

When Grievant returned to the vehicle's location, he met Sergeant and began to explain what had happened. Grievant said Driver told Grievant that a truck had pulled out in front of Driver causing Driver to swerve and bump his head on the window. Grievant said that when Driver brakes hard, the pickup truck shuts off, so Driver remained stationary for a moment to allow the vehicle to reset.

Sergeant asked Grievant if Grievant would consider this a "hit and run." Grievant replied, "with no damage?" Sergeant told Grievant a vehicle does not have to make physical contact for it to be classified as a hit and run. Grievant said he previously believed physical contact was required for a hit and run but agreed that if someone runs you off the road, causing a vehicle to crash, they are required to stop. Grievant said he did not observe any injury to Driver's head. Sergeant asked Grievant if Grievant had offered rescue assistance to Driver. Grievant said he had not done so. Sergeant told Grievant to investigate the accident.

Grievant walked to Driver and began asking for information to put in the investigative report. Grievant asked Driver for his license and vehicle registration. Driver described the vehicle that pulled out in front of Driver. Driver said he bumped his head, but he was not saying he needed rescue.

Grievant told Driver if he can get the truck started, to pull off the roadway to a parking lot. Grievant took pictures of Driver's truck.

Grievant explained the crash details to Driver.

Another vehicle pulled up and jump-started Driver's pickup truck. Driver drove his vehicle approximately 1000 feet to the Hotel parking lot. Driver resided at the Hotel.

Grievant remained at the scene for 57 minutes investigating the incident.

Grievant completed a Police Crash Report of the Virginia Department of Motor Vehicles. The Agency instructs Troopers to prepare Police Crash Reports in accordance with the Virginia Police Crash Report Reference Manual for DMV Form FR300P.

As part of a subsequent investigation, Sergeant interviewed Driver. Sergeant concluded Driver was difficult to keep focused on the topic at hand. Driver said he was a suspect in a double homicide from the 1960s and he was used to being interrogated by law enforcement. He said he worked for the FBI. Driver said Grievant did a fantastic job and that he had nothing bad to say about him. Driver said he was going to write a letter of appreciation for Grievant. The Agency attempted to locate Driver's letter of appreciation but was unable to find it.

CONCLUSIONS OF 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.” General Order ADM 12.02(6)(a). Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” General Order ADM 12.02(6)(b). Group III offenses “include acts of misconduct of such a serious nature that a first occurrence normally should warrant termination.” General Order ADM 12.02(6)(c).

Failure to Report and Investigable Accident

The Agency alleged Grievant failed to report an investigable accident. The question becomes what fact triggers a trooper’s duty to investigate.

Va. Code § 46.2-373(A) provides:

Every law-enforcement officer who in the course of duty investigates a **motor vehicle accident** resulting in injury to or death of any person or total property damage to an apparent extent of \$1,500 or more, either at the time of and at the scene of the accident or thereafter and elsewhere, by interviewing participants or witnesses shall, within twenty-four hours after completing the investigation, forward a written report of the accident to the Department. The report shall include the name or names of the insurance carrier or of the insurance agent of the automobile liability policy on each vehicle involved in the accident. A law-enforcement agency may utilize a contracted service provider to forward reports electronically to the Department in compliance with this section and to manage or disseminate copies of such reports to persons identified in, and in a manner consistent with, § 46.2-380, provided such contracted service provider complies with the requirements applicable to an agency in Chapter 38 (§ 2.2-3800 et seq.) of Title 2.2. (Emphasis added.)

Since there was no death or property damage of \$1,500, Grievant was obligated to investigate pursuant to statute only if there was a motor vehicle accident resulting in injury. The statute does not define motor vehicle accident.

General Order OPR 4.00 governs Motor Vehicle Crash Investigations. The purpose of his order is (1) to determine if there has been a violation of law and, if so, obtain the necessary evidence to prosecute the violator and (2) to obtain the necessary information to file the required report. Paragraph 2 (a) provides:

All motor vehicle **crashes** coming to the attention of sworn employees that meet any of the conditions stated below shall be investigated, provided they have not been investigated by an appropriate law enforcement agency.
a. Sworn employees shall investigate **crashes** involving personal injury, death and/or **hit** and run. (Emphasis added.)

State Police use the FR-300p form to report motor vehicle crashes to the Department of Motor Vehicles. The FR-300 Manual states, “[t]he primary purpose of crash investigation and reporting is to determine and properly document the causal factors associated with motor vehicle crashes.”

The Agency argued that Grievant had a duty to report his encounter with the Driver because it was a motor vehicle accident, crash, and/or hit and run. Grievant argued that there could be no motor vehicle accident, crash, or hit and run unless there was contact between Driver’s pickup truck and another vehicle or object.

Grievant’s obligation to investigate only arose if there was a crash or hit and run. General Order OPR 4.00 does not define crash or hit and run. Agency training addressed the difference between accident and crash and defined both.⁴

One of the definitions of accident was, “an unforeseen and unplanned event or circumstance.” This section is meaningless because there are many unplanned events or circumstances that are not motor vehicle accidents. Another definition of accident was, “an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought.” The training added, “[a]ccident is determined after an investigation.”

In this case, Driver claimed he hit his head, but there is no evidence showing he suffered any injury. Although it may have been possible that Driver suffered some injury, there is no evidence to show any actual injury. The investigation did not reveal any apparent injury. Driver was not involved in a motor vehicle accident.

Agency training defined crash as a verb which is not applicable to this case. It also defined crash as a noun including, “to fall, land, or hit with destructive force.” Nothing fell, landed, or hit Driver’s pickup truck. There was no destructive force because there was no destruction.

When Grievant first spoke with Driver, Driver did not indicate his vehicle came into contact with any other vehicle or object. Grievant did not observe any damage to Driver’s vehicle that would have suggested contact between Driver’s vehicle and any other vehicle or object. Grievant presented testimony from a Level III Certified Crash Investigator who testified if there is no contact with another vehicle, no monetary loss, and no injury, then there is no crash.

The Hearing Officer is persuaded by Grievant’s argument. The most common definition and usage of motor vehicle accidents and crashes includes contact between a vehicle and another vehicle or object. When General Order 4.00 is read as a whole, it presumes the definition of crash involves contact between two or more vehicles or objects. The Agency argued Driver was involved in a hit and run. This argument fails

⁴ Agency Exhibit p. 186.

because there was no “hit”. Since there was no contact between Driver’s pickup truck and the commercial vehicle(s), there could not have been a hit and run.

When Grievant encountered Driver, Grievant was not obligated to complete a motor vehicle investigation and report the information because there was no accident or crash.

Failure to Notify Dispatch - Mark Out

The Agency alleged Grievant should have marked out with the Dispatcher to show he had initiated an incident with Driver.

General Order OPR 3.00 governs Radio Operating Procedures. Paragraph 16 (h), provides:

Sworn employees shall notify the dispatcher by radio or MDT when providing police services in self-initiated incidents.

On August 8, 2024, Grievant observed a pickup truck on the side of a road. Grievant “self-initiated” the incident by deciding to approach the vehicle and Driver. He began providing Police services when he began interacting with Driver. Grievant did not notify the Dispatcher as required by General Order OPR 3.00 paragraph 16 (h). Accordingly, Grievant’s inaction was contrary to Agency policy thereby justifying the Agency’s decision to issue disciplinary action.

Failure to Offer Emergency Medical Assistance.

The Agency alleged Grievant failed to offer emergency medical assistance after an individual advised him that he struck his head.

General Order OPR 1.00 governs General Patrol. Paragraph 20, provides:

Employees will provide emergency assistance to motorists in accordance with the employees’ training and qualifications. This includes providing information and directions, assisting stranded or disabled motorists, and obtaining medical and other emergency assistance. Employees will ensure the requested service is provided in a timely fashion. Emergency assistance will normally be obtained by contracting the division dispatcher by radio and requesting the service needed. If the employee is unable to remain with the motorists until help arrives, he/she will take the necessary steps to provide safety to the motorists or arrange for transportation. However, this does not preclude transporting the motorists to a place of safety when a need arises.

Grievant did not inform Driver that Driver could receive medical assistance. Grievant did not inquire whether Driver needed medical assistance. Driver asserted he hit his head but Grievant did not observe any obvious signs of trauma, bruising, or redness

on the Driver's head. Grievant presumed that because he did not see injury to Driver's head, Driver did not suffer injury. His assumption may not have been correct. Grievant should have offered Driver medical assistance and allowed Driver to decide whether he wanted assistance.

Conclusion

Unsatisfactory job performance is a Group I offense.⁵ Satisfactory work performance includes:

Employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department policies and procedures, Department training, and supervisory recommendations.⁶

Grievant's work performance was unsatisfactory to the Agency because he (1) failed to mark out when he initiated Police services and (2) failed to ask Driver if he needed medical services. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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 rules established by the Department of Human Resource Management"⁷ 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 the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

⁵ See, General Order ADM 12.02, Attachment A.

⁶ Agency Exhibit p. 92.

⁷ *Va. Code § 2.2-3005*.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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

