

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. 12266

Hearing Date: May 20, 2025
Decision Issued: May 21, 2025

PROCEDURAL HISTORY

On February 26, 2025, the Agency issued Grievant two Group II Written Notices of disciplinary action, with job termination. The offenses were noted as failure to follow instructions and/or policy, identified as offense dates November 20, 2024, and January 25, 2025.

The Grievant timely filed a grievance to challenge the Agency's disciplinary actions, seeking removal of the Group II offenses and job reinstatement. The matter advanced to hearing. On April 14, 2025, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for May 20, 2025, the first available date available for the parties. On May 20, 2025, the hearing was held in-person at the Agency's facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant did not submit separate documents for exhibits. 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 Notices?
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 II offenses include acts and behavior of a more serious or repetitive nature. This level is appropriate for offenses that seriously impact business operations and/or constitute a neglect of duty involving major consequences, insubordinate behaviors, and abuse of State resources, etc. An accumulation of two Group II notices normally should warrant termination. Agency Exh. 31, p. 91. Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure are specific examples of a Group II offense.

Under Operating Procedure 040.1, *Litigation*, at I.A(2), employees must notify their Organizational Unit Head immediately upon receipt of a charge or conviction of a moving traffic violation. Notification must be documented using the Criminal Offense Moving Traffic Violation Notification 040_F1. Agency Exh. 30, p. 70.

The Offenses

The first Group II Written Notice, issued by the facility Warden on February 26, 2025, detailed the facts of the offense, and concluded:

On 11/20/2024 a telephone interview with [the Warden] and [HRO B.] was conducted with [the Grievant] The interview was about a four-way that may have been scheduled to take place at [the facility] on 11/13/24. [The Warden] asked [the Grievant] a couple of questions during the interview. [The Grievant] answered both questions and was instructed to put his statement in an email and the employee stated, “no. I will not. I am not doing that.” [The Warden] and [HRO B.] again asked during the Conversation to provide his statement in an email. As of December 13, 2024, [the Grievant] still did not write or send a statement after being asked to do so. This refusal to follow supervisor’s instructions is a violation of OP 135.1, Standards of Conduct.

Agency Exh.1, pp. 1-2. For circumstances considered, the Written Notice stated,

[Grievant] has an active Group I, Obscene or abusive language-expires 9/22/2025. Group II, Refusal to comply with Supervisor’s instructions (regarding search procedure/process)-issued January 2024.

The second Group II Written Notice, issued by the facility Warden on February 26, 2025, detailed the facts of the offense, and concluded:

On January 25, 2025, [the Grievant] was served three Virginia Uniform Summonses in Buckingham County: Failure to have a Vehicle Inspected, Fail to Display License Plates, and Operate an Unlicensed Motor Vehicle. [The Grievant] did not notify the Unit Head or anyone in the chain of command about these summonses. The facility discovered the issuance of these summonses while conducting a DMV check to ensure the employee had a valid driver's license. [The Grievant]'s failure to report or Notify supervision is a violation as outlined in Operating Procedure 135.1; In accordance with Operating Procedure 040.1, *Litigation*, employees charged with or convicted of a criminal offense or a moving traffic violation, including court-ordered and administrative driving restrictions must inform their Organizational Unit Head immediately if received during normal working hours, or the next workday if received during non-working hours. Notification must be documented on a *Criminal Offense/Moving Traffic Violation Notification* 040_Fl.

Agency Exh.8, pp. 21-22. For circumstances considered, the Written Notice stated,

[The Grievant] has two active Group Notices: Group I: Obscene or abusive language-expires 09/22/2025, Group II. Refusal to comply with Supervisor's instructions (regarding search procedure/process)-expires 1/24/2027. Due to an accumulation of active disciplines, termination 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, with prior, active formal disciplinary actions, as noted above.

The Agency witnesses testified consistently and credibly about the conduct charged in the Written Notices. The Warden testified to his interview of the Grievant regarding his knowledge of a four-way interdiction operation. The Warden testified to his multiple directions to the Grievant to provide his statement in writing and the Grievant's affirmative refusal to do so. The Warden would use such statement for his own reporting duty. The Warden also testified to the three moving traffic citations that were not reported as policy requires. The Warden also posited that each of the three citations could have supported separate written notices.

The human resources officer (HRO) testified to her presence during the Warden's interview of the Grievant, the Warden's direction to the Grievant to provide his written statement, and the Grievant's affirmative refusal to provide a written statement. The HRO also testified to her discovery of the moving traffic citations noted in the written notice, and the Grievant's failure to provide notice to his supervisor of the citations until after the agency's discovery of the citations some weeks later. The HRO also established the agency's notice to the Grievant of Operating Procedure 040.1, *Litigation*. Agency Exh. 33.

The Grievant's captain testified that the Grievant did not provide him with any notice of the moving vehicle citations.

The Grievant testified as an agency witness and on his own behalf. The Grievant admitted that he refused to provide the written statement of the four-way interdiction interview, stating that his oral statement was adequate and should suffice. The Grievant did not present any other justification, excuse, or need for some type of recognized accommodation, such as Americans with Disabilities Act. Similarly, the Grievant did not deny his failure to provide notice of his moving traffic citations as charged in the written notice, and the Grievant did not present any other justification, excuse, or need for some type of recognized accommodation. The Grievant testified that he believed he "had a target on his back" because of prior discipline and successful job reinstatement, suggesting a retaliatory motive for the current discipline. Accordingly, the Grievant maintained that the current discipline and job termination is excessive for the offenses.

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. 1998).

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 notices. 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 Notices, I find that the Agency has proved the charged conduct, which is sufficient to satisfy a Group II Written Notice for each disciplinary charge.

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 instances of conduct charged in the Written Notices constitute at least the level of more serious misconduct contemplated for a Group II level offense. The affirmative refusal to provide a written statement could be viewed as serious insubordination.

The Warden's directive for the Grievant to provide a written statement was not unreasonable, and the Grievant's refusal to comply was a refusal to follow supervisor's instructions. The policy requirement to report moving traffic citations is applicable to the circumstances. 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 misconduct. Accordingly, based on the definitional description of a Group II offense, I find the Agency has proved the conduct charged in each written notice and that each satisfies a Group II written notice. Two Group II written notices normally support job termination, unless mitigated to a lesser discipline. Here, with the record of prior Group I and Group II written notices, the accumulation of discipline supports termination. Accordingly, I find that the two Group II written notices and discipline of job termination 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. While the Grievant asserted some sort of retaliatory motive for the discipline, the Grievant’s belief, alone, is insufficient, especially given the lack of factual dispute over the two written notices.

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 two Group II Written Notices, with job termination, 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.

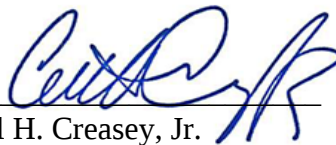
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.