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. 12230

Hearing Date: March 6, 2025
Decision Issued: March 7, 2025

PROCEDURAL HISTORY

On May 2, 2024, the Agency issued Grievant a Group I Written Notice of disciplinary action. The offense was failure to comply with applicable established written policy or procedures, on February 8, 2024.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking removal of the Group I offense. The matter advanced to hearing. On January 27, 2025, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for March 6, 2025, the first available date available for the parties. On March 6, 2025, the hearing was held in-person at the Agency's facility.

The Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits and Grievant's Exhibits, respectively. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and argument 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 likely than not; evidence that is more convincing than the opposing evidence. 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 DHRM Policy 1.60, *Standards of Conduct*, Group I offenses include acts of minor impact that require formal disciplinary action. This level is appropriate for offenses that have a relatively minor impact on business operations but still require formal intervention. Inadequate or unsatisfactory job performance is a definitive example of a Group I offense. Agency Exh. 27.

The Offense

The Group I Written Notice, issued by the maintenance supervisor on May 2, 2024, detailed the facts of the offense, and concluded:

> This Group I Written Notice is being issued for violating Department of Human Resource Management (DHRM) Policy 1.60 Standards of Conduct. Virginia Department of Transportation (VDOT) Safety Directive (SD) #01-006. Motor Vehicle Crashes, Incidents, and Convictions of Moving Traffic Violations and VDOT Safety Directive (SD) #01-003, Safely Rules.
>
> On February 8, 2024, you were operating, #R13369. Two co-workers were at the end field cleaning out hot boxes. As you went to leave the area, #R13369 went backwards, striking a tree on the left side of the bumper.
>
> The Richmond District Safety Review Committee reviewed the circumstances of this event on March 21, 2024, and determined that it was preventable collision. On July 21, 2023, you received a verbal memorandum for a preventable safety issue that occurred on July 19, 2023, for damaged equipment.
>
> Your negligent behaviors violated Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, Virginia Department of Transportation (VDOT) Safety Directive (SD) #01-006, Motor Vehicle Crashes, Incidents, and Convictions of Moving Traffic Violations and VDOT Safety Directive (SD) #01-003, Safely Rules.
>
> VDOT Safety Directive #01-006, Motor Vehicle Crashes, Incidents, and Convictions of Moving Traffic Violations explains that it is the core value

> of VDOT to provide a place of employment that is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees or the public. In accordance with that objective, VDOT reviews all incidents to determine if, and how, they could have been prevented.
>
> In addition. under the crash and incident directive, a crash or incident is preventable if the employee's negligent behavior contributed to the crash or incident. The Directive further provides that VDOT may take appropriate action under the Standards of Conduct to address crashes, incidents, and moving traffic violation convictions incurred by employees while they are operating VDOT vehicles, based upon the findings of that review.
>
> Your behaviors violated Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct which requires all employees to support efforts that ensure a safe and healthy workplace.

Agency Exh. 3. For circumstances considered, the Written Notice stated:

> You were issued due process on April 22, 2024, and you responded April 23,2024. In your response, to the incident that occurred on February 8, 2024, you stated "this incident doesn't demonstrate, I didn't obey or nor listen too, our verbal discussion about having a spotter for transferring items from a loader to a truck. This situation has mitigating factors, I was in the middle of having a medical issue, which was out of my control".
>
> After reviewing witness statements as well as both your due process response and your initial statement from the Incident report where you slated, “my response time was off.” I am unable to mitigate the written notice. You proceeded to drive back to the AHQ after the backing into the tree and you also have a valid DOT medical card.
>
> Due to the preventable incident on February 8, 2024 as well as the counseling memo you were issued July 23, 2023, for a backing incident which are both in violation Department of Human Resource Management (DHRM) Policy 1.60 Standards of Conduct, Virginia Department of Transportation (VDOT) Safety Directive (SD) #01-006, Motor Vehicle Crashes, Incidents. and Convictions of Moving Traffic Violations and VDOT Safety Directive (SD) #01-003, Safety Rule, I am issuing you a Group I written notice.

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 an operator maintenance, with a prior verbal counseling. The grievant was driving the identified motor vehicle and backed it into a tree, causing damage to the rear bumper. There was also a passenger in the vehicle. The Grievant asserted that he was suffering the effects of low blood sugar (hypoglycemia, *see* Grievant's Exh. 1[1]). The Grievant elected not to testify at the hearing, but his defense stance was that the accident was caused by the effects of his hypoglycemia, and the Agency failed to adequately investigate this assertion.

The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notice. Testimony provided by the Grievant's supervisor established that the Grievant did not follow policy when he left the scene of the accident and drove the vehicle, with the passenger, to the local headquarters. The supervisor testified that policy dictates the procedure of notifying one's supervisor from the scene of the accident, so that the proper investigation may be conducted. Agency Exh. 5, Safety Directive 01-003.[2] The area superintendent, occupational health supervisor, resident engineer, and human resources consultant senior all testified consistently regarding the Agency's policies and procedures regarding accidents. No one reported that the Grievant appeared to be exhibiting any signs or symptoms of a medical condition.

The Agency's Safety Directive 01-006 defines a preventable accident:

> An event in which the operator's actions while using a VDOT owned or leased vehicle/equipment is found to be guilty of contributory, simple, ordinary, or gross negligence.

Agency Exh. 6. The superintendent testified that another way to describe a preventable accident simply is one caused by operator error. The Agency's investigation into the accident did not include consultation with a medical doctor.

Because the Grievant did not testify, the established facts of the Grievant's operation of the vehicle and the accident are unrebutted. Also, because the Grievant did not testify, he did not establish any particular symptoms he believed caused the accident. The Grievant's grievance filings refer to having experienced a medical issue related to his blood sugar at the time. However, on the day of the accident, he did not assert he was having a medical issue, and witnesses to the events of the day reported observing no discernable indication of the Grievant having a medical issue.

[1] The exhibit is a printout of the online article from Mayo Clinic, describing hypoglycemia, and the symptoms, such as looking pale, shakiness, sweating, headache, hunger or nausea, irregular or fast heartbeat, fatigue, irritability or anxiety, difficulty concentrating, dizziness or lightheadedness, and tingling or numbness of the lips, tongue or cheek. More severe symptoms can include confusion, unusual behavior or both, such as the inability to complete routine tasks; loss of coordination; slurred speech; and, blurry vision or tunnel vision.

[2] The Agency's written notice does not specifically include the charge of leaving the scene of an accident or failing to immediately report the accident to a supervisor, but the Grievant's driving to the area headquarters is cited as an aggravating factor.

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. The Agency is justified in expecting its employees to handle equipment and vehicles in a safe manner. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has proved the misconduct charged in the Written Notice—a preventable accident caused by the Grievant's negligence (or fault).

In general, agencies are entitled to expect good judgment and performance from its employees. Failure to meet these expectations may constitute unsatisfactory performance, even in the absence of specific policy instruction. *See*, for example, EDR Ruling No. 2024-5710. I find that the conduct charged in the Written Notice constitutes unsatisfactory work performance and a preventable safety violation against policy, therefore, satisfying a Group I offense.

This judgment of work performance falls within the Agency's discretion, especially given the prior counseling for other equipment damage. 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. Accordingly, I find that the Group I discipline, the lowest formal disciplinary level, 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.

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 borne his burden of proving that his accident was entirely caused by an uncontrolled medical event. While the Grievant also believed some ulterior motive for the discipline, there is insufficient evidence of such improper motive. The mitigating factors offered by the Grievant do not rise to the level required to alter the Agency's election to exercise its discretionary discipline.

DECISION

For the reasons stated herein, the Agency's Group I Written Notice 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.

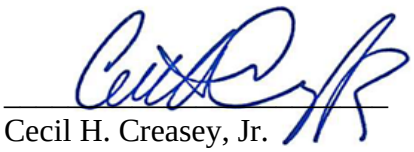
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.[3]

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

[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