

Issue: Group II with suspension for failure to follow policy; Hearing Date: 06/12/18;  
Decision Issued: 07/02/18; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11186; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11186**

Hearing Date: June 12, 2018  
Decision Issued: July 2, 2018

**PROCEDURAL HISTORY**

On January 17, 2018, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow policy.

On February 6, 2018, 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 April 2, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2018, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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:

The Virginia State Police employs Grievant as a Senior Trooper in one of its divisions. He has been employed by the Agency for approximately 25 years. Grievant had prior active disciplinary action. On September 30, 2015, Grievant received a Group II Written Notice for failure to follow policy.

The Agency monitors the issuance and return of summonses. Fifteen summonses are in a pack. Each summons has a serial number. When a Sergeant or other supervisor receives the pack, the Sergeant records the serial number of each summons in a log book and distributes the summonses to Troopers.

A summons consists of five sheets of paper. Four of the sheets are carbonless copy paper so that when a Trooper writes information on the top page, the writing is copied on to the other four pages. After the Trooper completes a summons and it is signed by the violator, the first two copies are sent to the court. The third copy is given to the violator. The Trooper retains the fourth copy and takes that copy with him or her to court. The fifth copy is the "green copy" and it is held by the Trooper until the end of the week when the Trooper gives all of the green copies to the Trooper's supervisor.

Grievant developed a practice to follow every time he issued a summons. He took the green copy and placed in a stack with the green copies of other summons and

held them in a folder until the end of the week. Then he took the folder of green summons copies and gave them to his supervisor.

Troopers have discretion to warn, arrest, or summons. Sometimes a Trooper may begin the process of issuing a summons and write on the summons, but then decided not to issue the summons. This process is called voiding a summons.

When a Trooper voids a summons, he or she is supposed to give all five copies of the summons to a supervisor immediately. The Trooper is not supposed to count voided summonses as part of the Trooper's weekly activity.

On March 2, 2017, Grievant began to fill out Virginia Uniform Summons number 820 to be issued to Mr. B for operating a commercial motor vehicle with defective brakes on the steering axel. Upon reflection, Grievant decided not to issue Mr. B the summons. Grievant wrote "gave break" in the signature block and wrote "VOID" in large letters across the face of the summons. The word VOID did not copy on to the green copy of the summons.

On March 7, 2017, Grievant began to fill out Virginia Uniform Summons 822 to be issued to Mr. S for an expired State inspection. After speaking with Mr. S, Grievant decided not to issue the summons. Grievant wrote "gave break" in the signature block and wrote "VOID" in large letter across the face of the summons. The word "VOID" did not copy on to the green copy of the summons.

At the end of the week, Grievant gave his stack of green summons copies to his supervisor as was his practice. The voided green summonses were given to the supervisor. Grievant received credit on his Weekly Activity Report for issuing two summonses that were not issued.

Grievant put the first four copies of summons 820 and 822 in an envelope that he kept in his vehicle. He intended to turn in the envelope to his supervisor but forgot to do so. When he cleaned out his vehicle, he moved the envelopes to his office at his home where they remained until the Agency's investigation.

Grievant was truthful throughout the Agency's investigation. He admitted he made a mistake by following his routine and failing to turn in the voided summonses.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order ADM 12.02(12)(a). Group II offenses "include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal." General Order ADM 12.02(13)(a). Group III

offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order ADM 12.02(14)(a).

“Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy” is a Group II offense.

Agency Training Manual Insert Volume II Memo 2015 No. 03 dated June 3, 2015 governs Virginia Uniform Summons Accountability. This policy provides:

When necessary to void a summons, the word “VOIDED” will be written on page 1 and the entire form will be submitted to the sworn employee’s immediate supervisor within the same timeframe as a completed form. The date and reason for voidance should be noted on the Agency Copy of the form.<sup>1</sup>

Grievant voided two summonses but failed to submit them on a timely basis to his supervisor. Grievant acted contrary to Memo 2015 No. 3 thereby justifying the issuance of a Group II Written Notice.<sup>2</sup> Upon the issuance of a Group II Written Notice, an agency may suspend an employee. Accordingly, Grievant’s five workday suspension must be upheld.

*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 ....”<sup>3</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.

Grievant argued that the level of discipline is too high. The Hearing Officer agrees that the level of disciplinary action is too high<sup>4</sup> in this case but there is no basis

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<sup>1</sup> Agency Exhibit 17.

<sup>2</sup> Grievant also failed to follow the instructions to complete the SP 127 form to report issued summonses.

<sup>3</sup> *Va. Code § 2.2-3005.*

<sup>4</sup> Grievant was not attempting to “bump up” his numbers or otherwise mislead the Agency. His behavior was essentially a paperwork processing error. The impact on the Agency was not material. Contrary to the Agency’s assertion, Grievant behavior giving rise to this Group II Written Notice was not similar to the prior Group II Written Notice.

for the Hearing Officer to mitigate the disciplinary action. The Agency could have issued a Group I Written Notice for unsatisfactory work performance, but it chose to issue a Group II Written Notice instead. The Agency's level of disciplinary action is consistent with the Standards of Conduct and it does not exceed the limits of reasonableness. In light of the standard set forth in the Rules, 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 II Written Notice of disciplinary action with a five workday suspension is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resource Management  
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>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer