

Issue: Separation from State (unable to meet work conditions); Hearing Date: 01/24/18; Decision Issued: 04/20/18; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 11098; 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: 11098

Hearing Date: January 24, 2018
Decision Issued: April 20, 2018

PROCEDURAL HISTORY

On July 5, 2017, the Virginia Department of State Police removed Grievant from employment because he was found not fit for duty by the Department's psychiatrist. On July 25, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 11, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant was removed from employment in accordance with State policy?

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that his removal was contrary to State policy. 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 employed Grievant as a State Trooper in one of its Regions. The Essential Job Functions of Grievant’s position included:

- Operate a law enforcement vehicle during daylight and nighttime hours in emergency situations involving speeds in excess of posted limits. Such vehicle might be operated in a variety of unsafe road conditions caused by such factors as fog, smoke, rain, ice, and snow.
- Perform rescue or other life-saving functions at the scene of accidents, disasters, etc. Such function could require the lifting or dragging of heavy objects or persons; climbing or otherwise traversing terrain or obstacles; balancing on uneven or narrow surfaces; and using bodily force to gain entrance to barriers.
- Endure verbal abuse and mental stress when confronted with hostile personalities or dealing with traumatic events.¹

Dr. S is a Psychologist who is Board Certified in Neuropsychology. He has been licensed since 1991. He treats patients with Post Traumatic Stress Disorder (PTSD).

Dr. P is a Professor of Psychiatry at a major Virginia university. He has practiced as an attending psychiatrist since July 1984. He has experience treating PTSD. He has conducted between 50 and 70 fitness for duty evaluations for clients including the VSP in the past ten years. He has completed approximately five or six fitness for duty evaluations for the VSP.

¹ Agency Exhibit J.

Grievant and Trooper F met when they were children. Grievant was four years old. Grievant grew up with Trooper F. They went to high school together and were best friends. Grievant was the Best Man at Trooper F's wedding. Trooper F was a major reason why Grievant joined the Virginia State Police in 2010.

After graduating from the Agency's Academy, Grievant was assigned to County Suburban as a road trooper.

On October 5, 2012, Grievant and Trooper F were on assignment at a major Public Event. At approximately 10 p.m., Grievant received an emergency message on his radio indicating that a Trooper was in trouble and all units were summoned to the area. Grievant did not realize that Trooper F was stationed at that area. As Grievant approached the scene, Grievant did not realize Trooper F was in danger. When Grievant saw the black polish on the Trooper's shoes and his shirt stays, Grievant knew the downed Trooper was Trooper F. Grievant saw blood coming from Trooper F's nose. He saw the young woman driver of the vehicle that hit Trooper F sitting on the ground holding a small child and crying. Grievant sustained a hernia while assisting other Troopers in lifting the vehicle to rescue Trooper F.

Grievant spent time with Trooper F's body at the hospital. This was meaningful to Grievant. Grievant lost control at some point that evening and was kicking walls.

Grievant was unable to sleep for the first couple of nights. Grievant cried the two days before the funeral of Trooper F. Grievant held up well during the funeral because he wanted to be strong for Trooper F's wife and family. Grievant struggled with guilt over why he could not stop Trooper F's death and questioned why this happened. Grievant did not feel worthless or experience nightmares, perceptual disturbances and intrusive thoughts. He did not have thoughts of causing harm to himself or others. He began coping with his grief by taking care of others including Trooper F's widow, brother, parents, and other family and friends.

On October 12, 2012, Sergeant K requested a psychiatric evaluation of Grievant. The request was approved the Superintendent's designee.

On October 15, 2012, Grievant received his first psychiatric evaluation for duty from the Agency's mental health professional. Grievant met with Dr. W for approximately two hours. Dr. W concluded that Grievant was suffering from extreme grief and an acute stress reaction. She concluded Grievant was "not fit for full duty, from a psychiatric standpoint, due to the fact that he is unable to perform the essential duties of his job as a Virginia State Trooper" Dr. W recommended Grievant seek counseling through the Employee Assistance Program. She recommended that Grievant return to Dr. W for a re-evaluation in four to six weeks.

Grievant requested to be transferred due to hardship. On December 4, 2012, Grievant requested to rescind his hardship transfer from County Suburban to County Rural. He requested the transfer so that he could be closer Trooper F's wife and family.

Grievant wrote, "I feel it a duty incumbent upon me to ensure his wife and his family are taken care of."² On January 3, 2013, Grievant submitted a memorandum to the Agency Head asking to withdraw his hardship transfer request, but to remain on the regular transfer list for the counties he requested.

On December 11, 2012, Grievant received a second psychiatric evaluation for duty. Dr. W met with Grievant for approximately 35 minutes to re-evaluate his fitness for duty. She noted that Grievant had seen Dr. Si for three therapy sessions since she last met with Grievant. She recommended Grievant receive a fourth session and Grievant indicated he planned to do so. Grievant told Dr. W he was ready to get back to work. Grievant told Dr. W he was concerned regarding how he would respond when working his next traffic fatality. He wondered if he would see Trooper F in victims. Grievant said his role as protector would help him do his job and work fatalities in a way that honored Trooper F. Grievant felt confident he could handle these situations in the future.

Dr. W concluded:

Based on my psychiatric re-evaluation of [Grievant] on December 11, 2012, he has recovered from severe grief and an acute stress reaction that resulted from witnessing his lifelong friend and colleague dying underneath a vehicle that reportedly accidentally ran over him at [the Public Event] on October 5, 2012. At present, [Grievant] is able to perform the essential duties of his job as a Virginia State Trooper, and, as such, is currently fit for duty from a psychiatric standpoint.³

Grievant informed the Agency he intended to resign. On May 31, 2013, Grievant began taking annual leave prior to resigning which was scheduled for June 30, 2013.

On June 26, 2013, Grievant rescinded his resignation and requested leave without pay. The Agency agreed to the rescission of resignation although it was not obligated to do so.

On June 27, 2013, Grievant's request for leave without pay was approved by the Agency Head.

On February 25, 2014, Grievant was transferred to County Rural.

Dr. S began counseling Grievant in November 2014. Initially, Grievant met with Dr. S on a weekly basis. Grievant now meets with Dr. S once per month because Grievant's mental health has improved.

² Agency Exhibit O.

³ Agency Exhibit E.

Grievant had a son in 2015 and gave his son Trooper F's first name. Grievant attempted to have the Hospital deliver the baby by C-section on a date where the month and day numbers matched Trooper T's badge number.

Grievant and his Wife bought property on which to build cabins for overnight rental. On April 14, 2015, Captain C approved Grievant's request to engage in outside employment. The business opened in June 2016. The theme of the first cabin was to reflect Trooper F's life.

Grievant had been meeting with Dr. S. They discussed stressors at work. Grievant felt it was becoming increasingly difficult to work because of his PTSD symptoms. Grievant asked Dr. S to remove him from work. On November 10, 2016, Dr. S provided a note removing Grievant from employment. Dr. S wrote:

[Grievant] is a patient of mine associated with a work-related incident of 10/5/2012. As of today, 11/10/2016, he is released from work, until further notice, owing to an increase in his PTSD symptomology over the last couple of months or so.

On November 14, 2016, Captain C⁴ requested a fitness for duty evaluation of Grievant. Captain C was concerned that he had received a note from a doctor without a return to work date. The request was approved by the Superintendent's designee.

On November 17, 2016, Grievant began short-term disability. His STD was scheduled to expire May 11, 2017 at which time he would transition to long-term disability.

On December 14, 2016, Grievant sent Captain C an email asking for assistance. Grievant wrote, in part:

I'm sure you are aware by now that I have been out of work since November 10, 2016 due to worsening of my PTSD suffered from October 5, 2012. I am figuring out most of my triggers and anxiety have to deal directly with being a Trooper from the uniform to the car.⁵

Captain C considered Grievant's verbal request to be placed in another position that would allow him to remain employed by the Agency but without wearing a uniform or operating a State police vehicle. Captain C evaluated Grievant's request and concluded such a position was not available within the Agency.

⁴ Captain C was also at the Public Event when Trooper F died. He was familiar with the trauma Grievant experienced.

⁵ Agency Exhibit R.

On December 15, 2016, Grievant was notified he was approved for Family Medical Leave. He was informed, "You will be required to present a fitness-for-duty certificate to be restored to employment."⁶

On January 11, 2017, Grievant submitted a medical note authorizing his return to work but with "no traffic duty". The Agency granted the accommodation request.

On January 11, 2017, Captain C requested a second fitness for duty evaluation of Grievant. Captain C was renewing his prior request. The request was approved by the Superintendent's designee.

On February 7, 2017, Dr. S released Grievant to permanent restrictive duty. Dr. S wrote:

[Grievant] is a patient of mine associated with a work-related incident of 10/5/2012. He witnessed coworker, mentor, and best friend die in a pedestrian versus motor vehicle accident in the context of failed resuscitation efforts. He had returned from his previous duties with continued PTSD symptoms which became exacerbated over the summer and fall months, with diminution of symptoms upon being temporarily released from his law enforcement duties associated with his PTSD on 11/10/2016.

[Grievant] remains temporarily released from uniform patrol/street duty work. He is released to do investigative work and desk work. I will reevaluate on follow-up in two months' time (3/28/2007) although, at this juncture, I anticipate that these restrictions are likely to be permanent.⁷

On March 14, 2017, the HR Director notified Grievant that his short-term disability benefit would end on May 11, 2017 at which time he would be separate from employment and transition to long-term disability.

On March 29, 2017, Grievant was notified his request for additional Family Medical Leave was approved. He was informed, "you will have exhausted your FMLA leave entitlement in the applicable 12-month period on April 4, 2017." Grievant was informed, "You will be required to present a fitness-for-duty certificate to be restored to employment."⁸

On May 4, 2017, Grievant submitted to the Agency a medical note indicating he was "released back to full duty patrol work as of 5/8/2017."⁹ Dr. S observed that

⁶ Agency Exhibit X.

⁷ Agency Exhibit L.

⁸ Agency Exhibit X.

⁹ Agency Exhibit J.

Grievant's symptoms had decreased and he was able to return to work without restrictions. Dr. S had no concerns about Grievant's capacity to perform all of his job duties as a Trooper.

On May 4, 2017, Captain C requested a third fitness for duty evaluation of Grievant. The request was approved by the Superintendent's designee.

On May 15, 2017, Grievant received a third psychiatric evaluation for duty. Grievant met with Dr. P for approximately two hours. Dr. P reviewed: (1) the notes he received from the Agency indicating the reasons for the evaluation; (2) Grievant's job description including the Employee Work Profile, the VSP code of ethics, physical demands, and essential functions for sworn positions; (3) prior fitness for duty evaluations performed in 2012; and (4) information provided by Dr. S. Dr. P did not speak with Dr. S, but reviewed Dr. S's notes.

Dr. P met with Grievant and asked grievant to go over the chronological sequence of events. Dr. P asked Grievant about the immediate period after Trooper F's death and whether Grievant had experienced any acute stress. Dr. P asked Grievant exactly what happened that killed Trooper F. Dr. P asked Grievant if he received counseling and how often. Dr. P asked Grievant about his current status. Dr. P asked Grievant about depression symptoms, dissociation, intrusive thoughts, avoidance, dreams/nightmares, depersonalization or de-realization, negative effects, anxiety, and anger.

Dr. P concluded:

Psychiatric Assessment: Posttraumatic stress disorder with moderately active symptoms. Apparently, he had an acute stress disorder in 2012, then PTSD, got better in 2013 – 2015 and then relapsed in 2016. There may also be elements of Complicated Grief mixed with PTSD. While he reports that the symptoms have again moderated now with time-off and continued therapy (and medication), the symptoms/experiences are active in varying degrees and vulnerable to the exacerbation. There is also continued and significant preoccupation with his friend and work partner [Trooper F], his values and lifestyle and his death. There is also some identification with [Trooper F]. There is also anxiety and tension which may be part of the PTSD or a separate condition.

It appears that [Grievant's] psychological state is likely to interfere with performance of one or more tasks expected of a VSP Trooper. While it could be recommended that his earlier request not to be assigned to the [Public Event], and more recent request about not being assigned to traffic duty be accommodated for medical reasons, the more important thing to consider is that the underlying cognitive and emotional issues that form the persistent PTSD are likely to broadly affect him in performing his

various duties, even [if] it is not traffic duty. To some extent, it appears that he has incorporated part of [Trooper F's] identity and freely and honestly mentions how he dresses the way [Trooper F] liked to dress, how it might be [Trooper F's] hand that helps to make a tough arrest, etc., and he consciously is holding onto [Trooper F's] memory through a variety of mechanisms and experiences. These in and of themselves may not be unhealthy in personal life and may not [be] material in all jobs. Some of these may even be considered laudatory about the strong bond he has for his deceased friend and keeps his memory alive, BUT as a VSP Trooper these are likely to hinder his work performance, especially if the stress experience and symptoms were to worsen as happened in fall 2016 and there is a moderate to high risk of this happening.

Fitness For Duty: He is assessed as Not Fit for his usual duties at this time.¹⁰

On July 5, 2017, the Agency Head sent Grievant a letter notifying of his pending separation. On July 12, 2017, Grievant was separated from employment.

After leaving the Agency, Grievant began working at a local Sheriff's department as a Deputy Sheriff. He performed many of the duties he performed as a State Trooper. Grievant also began working as a police officer with a Hospital. He encountered injured, mutilated, and deceased people.

During the hearing, Dr. S testified that in his opinion as a Psychologist, Grievant is fit to perform the duties of his job as a State Trooper. Dr. P, however, testified that he believed Grievant's PTSD was chronic. Dr. P felt there was a moderate to high risk that Grievant's symptoms were likely to happen again.

Captain C considered placing Grievant in a dispatcher or trades tech position with the Agency. He considered the dispatcher position not suitable because it would involve a significant amount of stress and more than he believed Grievant could handle. Captain C did not place Grievant in the trade tech position because the Agency already had chosen another applicant for the position.

CONCLUSIONS OF POLICY

General Order ADM 14.10 governs Fitness's for Duty. The purpose of this policy is:

To describe mental and physical examinations which may be required to ensure an employee is competent to perform the assigned job, and to explain conditions under which these tests may be required.

¹⁰ Agency Exhibit D.

Section 1 provides:

The Superintendent may require mental and physical examinations of an employee by a designated psychiatrist, psychologist, or physician when, in the Superintendent's estimation, it is to the best interest of the employee or the Department. The purpose of these examinations is to assist the Department in making decisions to determine an employee's mental and physical fitness to perform his/her job. Beyond this assessment, however, it is the employee's responsibility to maintain fitness for duty.

Section 2 provides:

The necessity for the mental or physical fitness for duty examination may be based upon:

- a. Personal observation of general appearance or unusual actions or behavior.
- b. Recent illness or injury.
- c. Results of the physical survey, an examination by the Nurse Practitioner or recommendations of the Department physician.
- d. Involvement in a traumatic incident such as a shooting, assault, etc. ***
- e. Other information determined reasonable and sufficient by the Superintendent to justify the need for an examination.

Section 3 provides:

Request for fitness for duty examinations must be submitted through channels in writing to the Superintendent with endorsements by the appropriate supervisors. If the Superintendent authorizes a fitness for duty examination, the employee should be immediately placed on civil and work-related leave until the examination is conducted unless specific authorization permitting the employee to remain in a full-duty status is provided by the Superintendent based on the totality of the circumstances.

Section 5(g) provides:

If the designated psychiatrist, psychologist, or physician determines the employee is not fit for full duty, a recommendation will be provided regarding whether the employee is able to work in a light-duty status or is unable to work at that time.

The issue in this case is whether the Agency complied with its fitness for duty policy. The Agency has complied with its fitness for duty policy. DHRM Policy 1.60 provides:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include: ***

- inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered;

Accordingly, Grievant's removal must be upheld.

The issue is not whether Dr. S's or Dr. P's assessment of Grievant is more accurate. Nevertheless, the Hearing Officer first will address this matter.

Grievant submitted substantial persuasive evidence to show that he was fit for duty in May 2017 and that Dr. P's conclusion he was unfit was in error. The Hearing Officer does not agree with Dr. P's conclusion that Grievant was not fit for duty for several reasons. First, Dr. S met regularly with Grievant over a several year period. He had the capacity and experience necessary to determine whether Grievant was fit for duty and Dr. S concluded Grievant was fit for duty. Dr. S's conclusion was credible and well-reasoned and explained. Second, Dr. S had displayed the judgment necessary to remove Grievant from employment when Grievant was not fit for duty. If Grievant had not been fit for duty in July 2017, Dr. S would have so indicated. Dr. S's conclusion was trustworthy. Third, Grievant demonstrated the judgment necessary to determine whether he was fit for duty. Grievant believed he was fit for duty and was ready to return to work. Fourth, in September 2017, Grievant began working part-time for a local Sheriff's office as a law enforcement officer. He attended to vehicle crashes and observed injured people. He observed deceased people. When he worked on patrol, he operated a marked Sheriff's Office vehicle. He adequately performed his part-time duties with the Sheriff's Office. He did not experience any increase in his PTSD symptoms as a result of working in the Sheriff's office even though his duties were similar to his duties as a State Trooper. Fifth, in September 2017, Grievant began working full time as a private police officer with a local Hospital. He had full arrest authority on Hospital grounds. Grievant was involved in moving deceased people from ambulances to slabs in the morgue. He had keys to the morgue. He adequately performed his full-time duties with the Hospital. He did not experience any increase in his PTSD symptoms as the result of working at the Hospital. Thus, the Hearing Officer believes Grievant was fit for duty in May 2017.

The Agency complied with its fitness for duty policy for several reasons. First, the policy authorizes the Superintendent to require mental examinations of an employee by a psychiatrist when the Superintendent determined it was in the best interest of the employee or the Agency. It is clearly in the best interest of the Agency to have a fully functioning State Trooper who does not experience the side effects of PTSD. Grievant's PTSD sometimes affected his ability to perform his duties and the Agency's desire to determine how Grievant would perform with PTSD was appropriate. Second, each request for a fitness for duty evaluation resulted from observable behavior from Grievant. The Agency initially reacted to Grievant's displays of anger and frustration.

The Agency later reacted to Grievant's need for leave from work because of his ongoing mental health concern. None of the Agency's requests to evaluate Grievant were based on frivolous, arbitrary, or capricious reasons. Third, the Agency properly documented and explained its reasons for evaluating Grievant. Endorsements by supervisors were documented by the Agency. Fourth, the Agency relied on the opinion of Dr. P. Dr. P was a psychiatrist with substantial experience who was able to make an informed decision regarding Grievant's fitness for duty. The Agency was entitled to rely on his opinion. In other words, the Agency's concern for public safety and position of responsibility allowed it to exercise its discretion to adopt Dr. P's findings and disregard Dr. S's findings. Fifth, the Agency considered whether Grievant could be placed in another position with the Agency. The Agency made a good faith effort to find a suitable position for Grievant that would account for a lower level of stress. No such positions were available.

Grievant argued the Agency failed to comply with policy because the request for fitness for duty in 2016 did not result from a "recent illness or injury" because Trooper F's death occurred in 2012. Grievant's argument is not persuasive because the Policy authorizes the Superintendent to require a fitness for duty evaluation based on "[o]ther information determined reasonable and sufficient by the Superintendent to justify the need for an examination." In this case, there was ample evidence shown to justify the Superintendent's conclusion that an evaluation was needed.

Grievant argued that the policy did not require the Agency to follow Dr. P's conclusion. Although Grievant's assertion is true, it does not affect the outcome of this case. The Policy grants the Agency the discretion to follow Dr. P's conclusion and the Agency elected to do so in this case. The Agency's decision was not arbitrary or capricious or based on an improper reason or purpose. The Agency chose to rely on Dr. P's conclusion and its policy authorized it to do so.

Grievant argued that the Superintendent did not authorize the fitness for duty evaluations. The evidence showed that the Superintendent's designees authorized the evaluations. To the extent the Agency failed to comply with its Policy, that failure was harmless error. The Hearing Officer does not believe the Superintendent would have refused to authorize any of the evaluations given to Grievant.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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