

Issue: Group III Written Notice (behavior undermining the effectiveness and impairing the reputation of the Agency); Hearing Date: 05/07/18; Decision Issued: 05/29/18; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 11181; 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: 11181**

Hearing Date: May 7, 2018  
Decision Issued: May 29, 2018

#### **PROCEDURAL HISTORY**

On November 20, 2017, Grievant was issued a Group III Written Notice of disciplinary action for behavior undermining the effectiveness and impairing the reputation of the Department.

On December 15, 2017, 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 March 20, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 7, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Trooper at one of its locations. He began working for the Agency in June 2011. Grievant received performance ratings of "Extraordinary Contributor." No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work duties included testifying against defendants in criminal cases brought by the local Commonwealth's Attorney. His duties included providing assistance or support to local Deputy Sheriffs.

Grievant married the Wife in 2011. Grievant had known her since he was 12 years old. They had a Daughter.<sup>1</sup>

In August 2016, Grievant decided to divorce his Wife based on her behavior. The Wife also agreed. They decided to remain in the Residence for financial reasons but alternated weeks living in the Residence with their six year old Daughter. They began the process of selling their Residence and had a closing scheduled on February 9, 2017.

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<sup>1</sup> The Wife had a son from a prior relationship.

On October 22, 2016, the Sheriff's Office deputies respond to Grievant's residence to investigate a possible domestic dispute between Grievant and his Wife.

On October 24, 2016, the First Sergeant counseled Grievant not to put himself in situations where could hurt himself or do further harm to his current family situation. The First Sergeant told Grievant that as to his anger management, Grievant needed to be mindful of the situation he was in. The First Sergeant told Grievant because he was going through a divorce he had to be mindful of the situation he put himself into.

On February 5, 2017, Grievant, the Wife, and their Daughter were at their Residence. Grievant wanted the Daughter to leave the Residence with him. The Wife told Grievant that the Daughter did not want to leave with him. Grievant said she would go with him because he already had plans with his Daughter.<sup>2</sup> The Daughter threw a cup of water at Grievant and said she did not want to go with Grievant. Grievant got on his knees to clean up the water while he and the Wife argued. Grievant told the Wife she was a baby killer because she had an abortion.<sup>3</sup> Grievant said, "Why do you want to take her when you did what you did." The Wife grabbed one of the Daughter's boots and hit him in the head three or four times as Grievant remained on the floor. Grievant turned away but that did not stop the Wife from hitting him. The Wife grabbed Grievant's sunglasses and tried to break them. Grievant told her "Don't break glasses." After Grievant stood up, the Wife pointed at Grievant and stuck her fingers into his mouth. Grievant later told Sergeant H:

After she put her finger in my mouth I bit down on it. I am not sure how hard I bit down. [The Wife] then stated oh my god I can't believe you did this, your time had finally come, you are going to pay for this. [The Wife] then went outside and called 911. While waiting on the sheriff's office, [the Wife] came inside a couple of times and stated I can't believe you did this.<sup>4</sup>

At approximately 2:42 p.m. on February 5, 2017, the Wife called the local Sheriff's Office Dispatcher to report:

Me and my husband just got into an altercation and he just bit my finger and his teeth marks are all over it and I think it's broken. I have his teeth marks through my finger.

She informed the Dispatcher that Grievant was a State Trooper.

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<sup>2</sup> Grievant planned to take his Daughter to Grievant's father's house to watch the Super Bowl.

<sup>3</sup> Grievant testified the Wife told him he needed to stop telling everyone in town that she had had an abortion.

<sup>4</sup> Agency Exhibit 13.

Sergeant H, Deputy F and Deputy K of the Sheriff's Office responded to Grievant's residence. Upon arrival, they found the Wife in the driveway outside the residence. She was upset and crying while holding a bag of ice on her right index finger. The Wife told them she and Grievant got into a fight and Grievant bit her. Sergeant H looked at the Wife's finger and noticed teeth impressions along with broken skin and swelling. The Wife's finger was discolored on one side.

Sergeant H arrested Grievant for domestic assault and battery under Va. Code § 18.2-57.2. He was transported to the magistrate's office. Grievant was released on a \$2,500 unsecured bond. He was served with an Emergency Protective Order.

The Wife sought medical care on February 5, 2017 for the bite to her finger. On a scale of 1 to 10 with 10 being the worst imaginable, the Wife described the pain as a 5 out of 10.

On April 18, 2017, the Assistant Commonwealth's Attorney prosecuted Grievant in the General District Court. Grievant did not testify on the advice of his attorney and was found guilty. Grievant appealed the General District Court's decision.

On June 12, 2017, the Assistant Commonwealth's Attorney prosecuted Grievant in Circuit Court. Grievant testified and was found not guilty.

On August 13, 2017, the Wife sent Grievant a text message admitting she had been ugly towards him and mistreated him. She claimed to have "started seeing the light ...." She said she had "no excuses for the wrongs that I have done and the way I have treated you."<sup>5</sup>

## **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).

Group III offenses include:

Engaging in conduct whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes

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<sup>5</sup> Agency Exhibit 10.

actions which might impair the Department's reputation as well as the reputation or performance of its employees.<sup>6</sup>

On February 5, 2017, Grievant impaired his reputation and the Department's reputation by biting his Wife's finger with sufficient force as to leave teeth impressions and cause swelling and pain. The injury was sufficient that the Wife sought medical treatment. Because Grievant bit her finger, the Wife concluded she needed to notify the local Deputy Sheriff's office that Grievant injured her. Grievant encountered at least three Sheriff's Office employees with whom he might be in a position to receive or provide assistance with investigating crimes. Grievant was arrested for a crime by Sergeant H. He appeared as a defendant in the General District Court and the Circuit Court while holding a position that required him to sometimes testify in General District Courts and Circuit Courts on behalf of the Commonwealth against criminal defendants. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for engaging in conduct that undermines the effectiveness or efficiency of the Department's activities.

Grievant argued that the Wife shoved her fingers down his throat and that he bit her as a reaction. He asserted he was not at fault for the encounter because his action to bite was actually an unavoidable reaction. The evidence is clear that the Wife undermined their marriage, initiated and perpetuated the February 5, 2017 conflict, hit Grievant with a boot, and shoved her hand in Grievant's mouth after she felt insulted by Grievant's words. When Grievant bit the Wife's finger, it was more likely a deliberate act intended to inflict pain rather than merely an unavoidable physical reaction. In order to avoid disciplinary action, Grievant would have to show more than that he reacted to the Wife's behavior, but that his reaction was unavoidable or uncontrollable.<sup>7</sup> Grievant reacted to his Wife's action of shoving her fingers into his mouth. The bite, however, was with sufficient force to cause damage and pain and did not appear to be outside of Grievant's control.

Grievant argued the Agency's action was too severe. Although the Agency could have issued a lower level of disciplinary action to address Grievant's behavior, it has established that his behavior rose to the level of a Group III Written Notice under the high standards set for by the Agency for its Troopers.

*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>8</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any

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<sup>6</sup> General Order ADM 12.02 (14)(b)(20),

<sup>7</sup> When Sergeant H interviewed Grievant shortly after the incident, Grievant had an opportunity to state that the bite was unavoidable or unintentional. He did not make such a claim.

<sup>8</sup> Va. Code § 2.2-3005.

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 III Written Notice of disciplinary action 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>

[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

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.