

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 09/24/18;
Decision Issued: 10/15/18; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11239; 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: 11239

Hearing Date: September 24, 2018
Decision Issued: October 15, 2018

PROCEDURAL HISTORY

On April 10, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On May 9, 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 July 23, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Trooper at one of its areas. He has been employed by the Agency for approximately six years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for investigating assigned vehicle crashes. While investigating a crash, Grievant was to use a SP50 note pad to write detailed "field notes" about the crash. The first four pages of the SP50 report were to be used to create an FR300 report. The FR300 report was to be submitted to the Department of Motor Vehicles.

On December 11, 2017, the First Sergeant notified Troopers in Grievant's area that he would be conducting an audit of FR300 reports. The First Sergeant reviewed the crash reports completed by troopers from January 1, 2017 to November 29, 2017. The audit revealed that Grievant completed approximately 50 crash investigations but failed to timely submit 17 "reportable" FR300 reports to the Department of Motor Vehicles. The audit also revealed that Grievant took Pad Field Notes for crashes he was handling but that his notes were sometimes incomplete.

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).

Va. Code § 46.2-373(A) provides:

Every law-enforcement officer who in the course of duty investigates a motor vehicle accident resulting in injury to or death of any person or total property damage to an apparent extent of \$1,500 or more, either at the time of and at the scene of the accident or thereafter and elsewhere, by interviewing participants or witnesses shall, within twenty-four hours after completing the investigation, forward a written report of the accident to the Department. The report shall include the name or names of the insurance carrier or of the insurance agent of the automobile liability policy on each vehicle involved in the accident.

General Order OPR 4.00 governs Motor Vehicle Crash Investigation. Section 7 of this Order provides:

When an investigation of a motor vehicle crash is warranted, sworn employee will: ***

c. Utilize the Crash Investigation Field Note Pad (SP-50) to record the details of their investigation.

Section 11 provides:

All motor vehicle crash investigations which by statute are required to be reported to the Department of Motor Vehicles will be submitted on the Police Crash Report (FR 300P).

When reporting crashes, ... the FR-300P shall be submitted through the Traffic Records Electronic Data System (TREDS) directly to the Department of Motor Vehicles from the area office within 72 hours after initiation of an investigation. When necessary, supplemental reports covering additional information will be submitted to the Department of Motor Vehicles through TREDS within 24 hours after the investigation is complete.

“Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy” is a Group II offense. From January 1, 2017 to November 29, 2017, Grievant prepared 17 “reportable” crash reports but

failed to submit them to the DMV within 72 hours after initiating the investigation and 24 hours after completion of the investigation. Grievant's behavior was contrary to Agency policy and the Code of Virginia. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.¹

Grievant argued the Agency failed to properly protect his privacy regarding dissemination of the Written Notice. Even if true, this allegation would not form a basis for reversing the disciplinary action.

Grievant argued that the Sergeant was supposed to review his crash documents on a monthly basis and should have caught the inadequate crash reports. This argument is not persuasive. The details relating to the nature and extent of the Sergeant's review were not established. It appears that the Sergeant's review involved many items including Grievant's documents. It is not clear, however, whether the Sergeant's review was supposed to be with sufficient scrutiny to determine whether Grievant's documents were in compliance with the Agency's reporting requirements.

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"² 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 disciplinary action should be no higher than a Group I offense. Grievant pointed out that he took full responsibility for his mistake. He argued that receiving a Group II Written Notice represents a significant detriment to his career advancement and imposes a potentially major financial loss of future earnings. Grievant was honest throughout the Agency's investigation. He has performed well for the Agency. He contends the impact on the Agency was limited because no citizens

¹ The Agency's allegation that Grievant failed to complete adequately Pad Field Notes does not rise above a Group I offense for unsatisfactory performance. The Agency's policy requires that he complete Pad Field Notes and Grievant did so for crashes he investigated. Thus, his behavior does not justify issuance of a Group II offense. Grievant, however, failed to completely document the crashes using the Pad Field Notes which showed his behavior was unsatisfactory to the Agency, a Group I offense. Since one of the two allegations can be classified as a Group II offense, the Agency's discipline must be affirmed.

² *Va. Code § 2.2-3005.*

complained about his work. Although it is clear that the Agency could have adequately addressed Grievant's behavior by issuing him a Group I Written Notice, the Agency's decision was consistent with its Standards of Conduct. Grievant's failure to comply with policy was a Group II offense. 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 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 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]

^[1] 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

Carl Wilson Schmidt, Esq.
Hearing Officer