



Issue: Group III Written Notice with suspension (failure to comply with written policy);
Hearing Date: July 20, 2001; Decision Date: July 21, 2001; Agency: Department of
State Police; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5233; **Judicial
Review: Appealed to the Circuit Court in the County of Fairfax on 08/17/01;
Outcome: HO's decision reversed and dismissed. Appellant awarded attorney's
fees (09/21/01) [Law No. 197743]; Judicial Review: Appealed to the Court of
Appeals (date unknown); Outcome: Circuit Court ruling reversed. HO's decision
reinstated (12/17/02) [Record No. 2853-01-4]**

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Department of State Police Case Number 5233

Hearing Date: July 20, 2001

Decision Issued: July 21, 2001

PROCEDURAL HISTORY

On May 1, 2001, Grievant was issued a Group III Written Notice of disciplinary action with three days suspension for:

On January 2, 2001, you failed to take proper action regarding an intoxicated driver that was transported to [hospital] and was involved in a vehicle crash you investigated. This is a violation of G.O. 19, para. 14.b.(20), G.O. 19, para 14.b.(24), and G.O. 25, para. One, (failed to comply with written policy. G.O. 19, para. 13.b.(1)).

On May 24, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 19, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 20, 2001, a hearing was held at the Agency's regional office. Upon motion of a party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate
Sergeant
Trooper
Facility Supervisor
Director of Security

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with three-day suspension.

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. 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 Department of State Police employs Grievant as a Master Trooper. He has been employed with the Agency for 30 years. Grievant’s 2000 evaluation shows his overall performance exceeded the Agency’s expectations. (Grievant’s Exhibit 1). No evidence of any prior disciplinary action was presented.

On January 2, 2001, during the late afternoon rush hour, Grievant was responding to a vehicle accident on a major interstate. An individual approached him and informed him that a serious motor vehicle collision occurred on the interstate a distance behind him. He immediately went to that collision site only to realize there was a third accident a distance behind the second collision. Grievant believed a woman was injured in the third accident and he called for a rescue squad.

The scene of the second collision was hectic. Grievant parked his cruiser behind the vehicle of the woman who he believed caused the collision. He feared the oncoming rush hour traffic might hit his vehicle so he placed flares behind his vehicle and began diverting traffic. Grievant escorted the woman from her vehicle into his vehicle.

Grievant questioned the woman while she was sitting in the passenger side of his vehicle. She said she did not have a driver’s license because it was suspended. Grievant made a Department of Motor Vehicle record check and was incorrectly informed by the dispatcher that the woman’s driver’s license was valid.

Grievant noticed the woman smelled of alcohol. She complained of head and neck injuries. Grievant suspected but did not know for certain that she may be feigning her injuries. He chose not to conduct field sobriety tests because he knew that if the matter was presented in court, defense attorneys would readily blame the woman’s failure to pass the field sobriety tests on her injuries. Grievant began the process of having the woman perform a preliminary breath test. This test involves having the subject blow into a machine and the machine’s calculation

reveals whether the individual is intoxicated. These tests are not admissible in court. Just as he was about to administer the test, the rescue squad Emergency Medical Technicians arrived and begin asking the woman questions and attempting to treat her. Grievant had many other tasks to attend to and decided to let the woman be transported to the hospital without first administering the preliminary breath test. He had her vehicle impounded. (Agency Exhibit 2D).

After assisting other motorists and returning the accident scene to normal, Grievant drove to the hospital. He observed the woman laying on a gurney in her patient room. She was calm and awaiting medical treatment. When the doctor came into the room, Grievant stopped his questioning briefly until the doctor finished asking questions. Grievant observed the woman for approximately 38 minutes and issued her two tickets. She showed signs of intoxication but no signs of aggressiveness while in Grievant's presence.

The first ticket was for driving on a suspended license. Grievant issued this ticket because the woman told him she was driving on a suspended license even though the dispatcher had informed him that the woman had a valid driver's license. Driving on a suspended license is a class two misdemeanor punishable by up to six months in jail and a \$1,000 fine. *Va. Code § 46.2-301*. The second ticket was for reckless driving which is a class one misdemeanor punishable by up to twelve months in jail and a fine of \$2,500. *Va. Code § 46.2-852*. Grievant did not arrest the woman for driving under the influence of alcohol. A Magistrate typically participates in the arrest of a person for driving under the influence of alcohol.

After Grievant left the hospital, medical staff began performing X-rays and other medical tests. The woman became belligerent. She kicked a technician twice in the ribs.

Approximately two hours after Grievant left the hospital, a hospital nurse called the State Police and said the hospital was ready to release the woman unless Grievant needed her. The dispatcher called Grievant and asked if he was through with the woman and said that she was drunk. Grievant responded that "I didn't want to guard her all night. She was pretending to be injured and I figured I was going to have to be over there two or three days. Tell them to go ahead [and release the woman] – I've charged her with everything that I'm going to." (Agency Exhibit 5).

Shortly after her first call, the nurse called the State Police again. She spoke with a Sergeant who indicated he would send a Trooper to the hospital to arrest the woman for being drunk in public. Once he arrived at the hospital, the Trooper had the woman perform field sobriety tests which she failed. He arrested her for being drunk in public.

The hospital staff later informed the police that the woman's blood alcohol content was .21 percent. This is almost three times the legal limit in Virginia. Grievant did not know the woman's blood alcohol level when he was at the hospital.

CONCLUSIONS OF LAW

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 19(12)(a). Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” General Order 19(13)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order 19(14)(a).

General Order 25 sets forth the Agency’s expectations of Troopers when they conduct criminal investigations. This order states, in part:

All criminal cases coming to the attention of a sworn employee shall be given the necessary attention to be brought to a logical conclusion by the efforts of this Department or properly referred to the law enforcement agency having jurisdiction.

The Agency has established by a preponderance of the evidence that the logical conclusion Grievant should have chosen was to take all necessary actions to arrest the woman for driving while under the influence of alcohol.

Group II offenses include, “Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy.” General Order 19(13)(b)(1). Grievant failed to follow established written policy when he failed to arrest the woman for driving under the influence.

The Agency contends Grievant should receive a Group III Written Notice because he undermined the effectiveness and efficiency of the Department and impaired the Agency’s reputation. This contention is based largely on the fact that the Nurse complained that Grievant left the hospital.

The Agency has not established that had Grievant pursued the DUI, he would have been able to stop the woman from assaulting hospital staff. The Agency’s evidence showed that in order to pursue the DUI, Grievant would have had to contact a Magistrate to authorize issuance of the DUI warrant. The Magistrate could have released the woman after a short period of time thereby permitting Grievant to leave the hospital before the woman became hostile.

The Agency contends Grievant attempted to “shirk official duty” contrary to General Order 19(14)(b)(24). Grievant did not shirk his duty. He performed his duty, but failed to do so in accordance with the Agency’s written policies.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with three days suspension is **reduced** to a Group II Written Notice. The Agency is directed to provide the Grievant with **back pay** for the period of

suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3).

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer