Issue: Group III Written Notice with 5-day suspension (Willfully or negligently damaging or defacing state records, state property, or property of other persons); Hearing Date: September 25, 2001; Decision Date: October 12, 2001; Agency: Virginia Commonwealth University; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5283

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5283**

Hearing Date: September 25, 2001
Decision Issued: October 12, 2001

## PROCEDURAL HISTORY

On June 13, 2001, Grievant was issued a Group III Written Notice of disciplinary action with five workdays suspension for:

> Willfully or negligently damaging or defacing state records, state property, or property of other persons. On June 1, 2001, [Grievant], a VCU Police Officer negligently did strike a concrete pole base on the I-lot, causing damage to a police vehicle exceeding $15,000. The officer advised he was doing a report and forgot something. He stated he pulled off, noticed his window had condensation; while moving turned on his windshield wiper, after 1 cycle of the wiper blade he struck the concrete base.

On July 10, 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 August 29, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 25, 2001, a hearing was held at the Agency's regional office.

## APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate

## ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with 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 Commonwealth University employs Grievant as a police officer. He has worked for the University for approximately 16 months. No evidence of any prior disciplinary action against Grievant was presented.

On June 1, 2001, Grievant was in uniform operating his police vehicle. He was parked in a parking lot with several light posts affixed in concrete located throughout the parking area. Grievant had his vehicle in drive but had his foot on the brake. He was looking at some documents when he realized he had left some evidence at another location that was open to the public. He hurriedly took his foot off of the brake while putting his documents away. The vehicle rolled and hit a concrete post thereby causing the vehicle's airbags to deploy. A crash investigator used one test to estimate that Grievant was driving between 12 and 17 miles per hour and another test to estimate Grievant was driving at 22 miles per hour at the time of the collision.

After completing his investigation of the accident, the Lieutenant wrote a memorandum[1], dated June 5, 2001, to his superior, the Colonel, stating:

I recommend the following actions to be taken:

[1] Agency Exhibit 9.

> Enough negligence present to recommend the officer pay in accordance to the State Police procedure, the first $100.00 of repair.[2]
>
> The officer be issued a strong counseling letter instead of Group Offense process due to recommended payment as stated above.
>
> The officer will attend 8 hours of training during the EVCC section of the upcoming Academy.[3]

At the time the Lieutenant wrote his memorandum recommending a strong counseling letter, the Lieutenant believed Grievant caused $3,500 in damage to the vehicle.

On June 7, 2001, the Lieutenant learned from an auto repair shop that the repairs to the vehicle may exceed $15,000.[4] On the following day, the Lieutenant informed Grievant that "The severity of damage has caused me to re-evaluate the situation." The University issued Grievant a Group III Written Notice with suspension.

Grievant presented evidence of other automobile accidents caused by University police officers.

Grievant's Exhibit 2 shows that on October 21, 2000, a police officer was driving a police vehicle and attempted to enter a parking deck. He became distracted and as he drove his vehicle into the parking lot, the passenger side mirror struck a pole and the pole hit the passenger side window and shattered the glass. The cost to repair the mirror and window was $300. The police officer was a fifteen year veteran with no prior automobile accidents. He received a letter of counseling and was required to participate in a defensive driving course.

Grievant's Exhibit 3 shows that on March 23, 2000, a University police officer was driving a police vehicle in the same lot in which Grievant had his accident. The police officer was driving approximately 20 miles per hour when he struck a concrete light pole causing damage to his vehicle. The police officer received a letter of counseling and was required to complete a remedial defensive driving course. The letter of counseling states, "Further, this accident, which on the surface did not appear serious, resulted in extensive damage to the vehicle." The damage estimate was $1,500.

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[2] In accordance with State Police procedures, Grievant paid the first $100 of the cost to repair the vehicle.

[3] Grievant voluntarily took this defensive driving training even though the Agency did not require the training when it issued the Group III Written Notice.

[4] One estimate showed the vehicle may cost $13,493.47 to repair.

Grievant's Exhibit 4 shows that on March 16, 2000, a University police officer made a U-turn while driving a police vehicle in response to a police call. As the police officer made the turn, the officer collided with another oncoming vehicle forcing that vehicle into a parked vehicle. The cost to repair the police vehicle was approximately $2,000 and the cost to repair the oncoming vehicle was approximately $3,000. No disciplinary action was taken against the police officer.

Grievant's Exhibit 5 shows that on February 27, 2000, a University police officer was driving a police vehicle and attempting to enter a parking space in a parking deck when the vehicle hit a concrete pole causing approximately $150 to $300 damage to the police vehicle. The police officer received a verbal counseling with no other action taken against him. He was a 14 year veteran of the police force.

## CONCLUSIONS OF LAW

Negligently damaging State property is a Group III offense.[5] University policy requires police officers to be in control of operating their vehicles at all times.[6] When Grievant released his foot from the brake and the vehicle rolled into a pole, Grievant was negligent. His negligence damaged State property. In the absence of mitigating circumstances, Grievant's behavior would rise to the level of a Group III offense.

Mitigating circumstances exist justifying a reduction in the disciplinary action given to Grievant. "Management should apply corrective actions consistently, while taking into consideration the specifics of each individual case."[7] An inconsistent application of corrective action provides a basis to mitigate discipline.

The University's application of disciplinary action for automobile accidents has been forgiving. Each of the above examples of disciplinary action could have resulted in Group III Written Notices. Once the University has established a pattern of forgiving discipline, the discipline given to Grievant must be measured against that pattern.

In this instance, the University made the amount of damages the primary determining factor as to the level of discipline. On June 5, 2001, the University was prepared to issue Grievant a counseling letter with the assumption Grievant had caused damage of approximately $3,500. When the University learned that the damage amount had increased by approximately $11,500, it increased Grievant's discipline to a Group III Written Notice with suspension. The University's position changed from giving Grievant minimal discipline to giving him the maximum discipline short of termination

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5 P&PM § 1.60(V)(B)(3)(c).

6 Agency Exhibit 8.

7 P&PM § 1.60(VI)(C).

solely because of a change in the University's understanding of the amount of damage Grievant caused.

Grievant has established a *prima facie* defense that Grievant's disciplinary action was inconsistent with the disciplinary action given to other negligent police officers. The Agency has failed[8] to present sufficient evidence that the factual circumstances of the other police officer discipline was materially different from the factual circumstances surrounding Grievant's negligence. Accordingly, the disciplinary action must be rescinded.

By focusing on the amount of damages rather than the degree of employee negligence, the University arbitrarily applied corrective action. The *Standards of Conduct* are intended and designed to address employee behavior.[9] The primary focus of the *Standards of Conduct* is employee behavior. The amount of damage caused by an employee's action is one aspect to measure the seriousness of that behavior, but it is not the only or primary way to measure the severity of the behavior. For example, one can envision circumstances where one employee is slightly negligent but his negligence causes extreme financial loss whereas another employee is grossly negligent but because of happenstance the amount of financial loss is low. If the amount of damage is the primary consideration when disciplining employees, the employee who was slightly negligent would receive greater discipline than would the employee whose behavior was grossly negligent.[10] This approach would be inconsistent with the objective of addressing employee behavior.

The Hearing Officer recommends that the University issue Grievant a formal counseling memorandum. In addition, the Hearing Officer recommends that if the University wishes to use amount of damage as a basis to distinguish between levels of disciplinary action, that the University notify police officers of the change in its application of policy. The University may wish to avoid an "all or nothing" approach.

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[8] The University argued that the other police officers received lesser discipline because of their length of service. Based on the credibility of the witnesses and the evidence presented by the University, the Hearing Officer finds that the other police officers received lesser discipline because of the amount of damages they caused. Indeed, the University's argument is rebutted because the evidence showed that the University was prepared to issue the lowest discipline when it believed the damage was $3,500 even though Grievant had been employed only 16 months. If mitigation had been a primary consideration in the discipline issued to the other police officers, then surely the University would not have considered such limited discipline for Grievant when it believed damages were $3,500.

[9] The objective of Policy 1.60, *Standards of Conduct*, is to set "forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective action that agencies may impose to address behavior and employment problems." (Emphasis added.)

[10] One could argue that the police officer in Grievant's Exhibit 4 was significantly more negligent than was Grievant because that police officer may have endangered the lives of the passenger(s) in the oncoming vehicle. In addition, if those passenger(s) had filed civil suits for personal injury, the cost to the Commonwealth may have greatly exceeded the $5,000 known physical damages.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **rescinded**. GPM § 5.9(a). The University is directed to remove the Written Notice from the Grievant's personnel file in accordance with Policy 1.60 of the Department of Human Resource Management. The University 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). *Standards of Conduct*, Policy No. 1.60(IX)(B)(2).

## 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.

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.

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Carl Wilson Schmidt, Esq.
Hearing Officer