

Issue: Group I Written Notice (inadequate or unsatisfactory job performance);  
Hearing Date: November 15, 2001; Decision Date: November 24, 2001; Agency:  
Department of State Police; AHO: Carl Wilson Schmidt, Esquire; Case Number:  
5324

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

**DECISION OF HEARING OFFICER**

In the matter of Department of State Police Case Number 5324

Hearing Date: November 15, 2001  
Decision Issued: November 24, 2001

**PROCEDURAL HISTORY**

On August 6, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

*Inadequate or Unsatisfactory Job Performance as set forth in General Order 19, paragraph 12.b(4) of the State Police Manual. On October 6, 2000 [Grievant] went to the residence of Mr. [DM] and confronted him while off duty and without arrest warrants under the pretext that his actions constituted an emergency.*

On September 4, 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 October 25, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 15, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Two Police Officers  
Deputy Sheriff  
Sergeant

**ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action.

## **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 State Police employs Grievant as a State Trooper. On October 6, 2000, Grievant was participating in a town fireman’s parade by driving a rescue squad vehicle in the procession. He was a member of the volunteer fire and rescue squad. He was neither on duty nor in State Police uniform.

Mr. DM observed the parade from the sidewalk. He had been drinking alcoholic beverages and was watching the parade along with several of his friends. Sometime between 7 p.m. and 8 p.m., Grievant passed in front of Mr. DM along the parade route. Grievant turned in Mr. DM’s direction and observed Mr. DM looking at and pointing to Grievant. Mr. DM said words to the effect of “That’s the motherf—ker who wrote me a ticket. I’m gonna get him and kick his ass.” After the parade, Grievant returned to the firehouse. He assisted in an awards presentation.

At approximately 9:30 p.m., Grievant went to the local police office and asked Police Officer JH to assist in obtaining information from Mr. DM so that Grievant could go to the magistrate’s office and obtain warrants against Mr. DM for curse and abuse and for threatening a law enforcement officer. Grievant also asked Police Officer JS, Police Officer RB, and a Deputy Sheriff to accompany him to obtain information from Mr. DM. They walked to where Mr. DM was staying.

Mr. DM was in his girlfriend’s second floor apartment of a two-story building. On the first floor was a business with access to a street sidewalk. A stairway with an external door permitted entry from the sidewalk to the upstairs apartment.

While Mr. DM was looking out the window, one of the police officers gestured for him to come downstairs. Another person inside the apartment came downstairs and informed them that Mr. DM refused to come downstairs because he did not want to be arrested for being drunk in public. Mr. DM requested that the Deputy Sheriff come up the stairs. Mr. DM had known the Deputy Sheriff in high school and trusted the Deputy Sheriff. The Deputy Sheriff was not in uniform, but went upstairs to speak with Mr. DM and was successful in persuading him to cooperate.

Mr. DM walked down the stairs and stood in the threshold of the open door to the sidewalk. Mr. DM recognized Grievant and knew Grievant was a State Trooper. Grievant had issued Mr. DM a traffic ticket approximately a year ago. Grievant asked Mr. DM for information about his address and social security number. Grievant also informed Mr. DM that the information was needed so that two warrants could be issued against him. Mr. DM was intoxicated and became belligerent. He said words to the effect of “You aren’t sh-t. I own you. I’m not giving you sh-t.” One of the police officers arrested Mr. DM based on his behavior. Grievant neither asked that Mr. DM be arrested nor did he physically participate in the arrest.

As a result of the arrest, Grievant obtained Mr. DM’s address. Grievant obtain two arrest warrants at 10:06 p.m. and the warrants were served on Mr. DM shortly thereafter.

### **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).

Group I offenses include, “[i]nadequate or unsatisfactory job performance.” State Troopers are highly trained and highly skilled professionals who hold significant power. When faced with several options, State Troopers are expected as part of their employment to be able to distinguish between good and bad options and choose the best option under the circumstances. Failure to exercise professional judgment constitutes inadequate or unsatisfactory job performance.

Grievant identified himself as a State Trooper thereby subjecting himself to the rules and responsibilities of a State Trooper. His actions on October 6, 2000 rise to the level of a Group I offense.

There are several reasons why Grievant’s actions were inadequate or unsatisfactory job performance. First, Grievant was the “victim” of the curse and abuse and threat and, thus, his actions personally to question Mr. DM could easily be perceived as an opportunity for Grievant to “get even” with Mr. DM.<sup>1</sup> Second, Grievant acted while off duty.<sup>2</sup> There was no reason

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<sup>1</sup> The Hearing Officer is not suggesting a State Trooper is prohibited from seeking to arrest someone who has committed a misdemeanor against him. The fact that Grievant was the victim emphasizes the importance of Grievant being able to separate his professional judgement from his personal feelings after having been insulted by Mr. DM.

<sup>2</sup> State Troopers are sworn law enforcement officers at all times even when not in uniform and on duty. Although soliciting personal identifying information is permitted by an off duty Trooper, the Agency prefers

Grievant had to act immediately. Although Mr. DM may have been intoxicated, he was inside a private residence without any indication he was harming or injuring anyone or that he intended to leave that residence. Grievant could have waited until the following day when he was on duty and in uniform to obtain the information. Third, Grievant asked for the assistance of three police officers and an off duty deputy sheriff. They assisted him because they knew he was a State Trooper. Assembling so many police officers for a straightforward task of asking for information resembled a “show of force” that heightened the appearance that Grievant intended to get back at Mr. DM. Fourth, Grievant already had access to information about Mr. DM’s address, social security number, and other personal identifying information. Grievant had sufficient information to request issuance of the warrants without having to obtain the information directly from Mr. D.M. When these factors are considered, Grievant should have refrained from taking the actions he took on October 6, 2000.

Grievant’s actions were not contrary to any specific section of the Virginia State Police Manual (other than the standards of conduct). His actions, however, were contrary to the professional judgment expected of State Troopers. The discipline selected by the Agency is measured and appropriate under the circumstances.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

## 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

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for its Troopers to wait until they are in uniform to do so unless unusual circumstances require immediate action. No such circumstances existed under the facts of this case.

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.

Carl Wilson Schmidt, Esq., Hearing Officer