Issue: Group II Written Notice (violation of established written policy); Hearing Date: December 18, 2001; Decision Date: December 20, 2001; Agency: Department of State Police; AHO: David J. Latham, Esquire; Case Number: 5335; **Judicial Review: Appealed to the Circuit Court in Spotsylvania County (01/18/02); Outcome: Dismissed for lack of jurisdiction (04/19/02)**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of State Police Case Number 5335

Hearing Date: December 18, 2001
Decision Issued: December 20, 2001

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Captain of Division
Representative for Agency
Two witnesses for Agency

ISSUES

Was the grievant's conduct on April 21, 2001 such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the disciplinary action issued promptly?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on August 29, 2001 for violation of established written policy. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of State Police (hereinafter referred to as "agency") has employed the grievant as a trooper for 22 years. The grievant does not have any other active disciplinary actions.

Agency policy provides that:

> Employees operating Departmental vehicles shall comply with the motor vehicle laws of the Commonwealth and shall operate such vehicles with due regard for the safety of all persons and property.[1]
>
> Another Agency policy mandates that:
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> Sworn employees will employ the utmost care to protect themselves when stopping violators for infractions of laws. Consideration must also be given the stopping of vehicles from a safety standpoint, during inclement weather, on hills and curves, in dense traffic, or in any instance where life and property may be endangered.[2]

The State Police Academy trained the grievant in the proper techniques for conducting a traffic stop on an undivided highway. The approved method is to allow the oncoming vehicle to pass and then safely execute either a U-turn or a turn in a driveway. Then, the trooper should pull the offender over to the shoulder and park the cruiser behind the stopped vehicle. Each traffic stop may be different due to traffic, weather or road conditions.

At 7:55 a.m. on April 21, 2001, grievant was patrolling at 55 mph southbound on a four-lane undivided highway.[3] As he crested a rise just before a straight stretch of highway, his radar registered a speed of 80 mph from a northbound vehicle that was approximately .6 to .7 of a mile away. Grievant promptly activated his blue lights and flashing headlights and began to gradually slow his cruiser because there were cars behind him. Grievant ascertained from his radar that the oncoming vehicle also immediately began to slow. Grievant eased across the double yellow line into the inside northbound lane; the two vehicles were then about .3 to .4 of a mile apart. The oncoming vehicle was in the outside northbound lane (next to the shoulder of the road); it slowed, pulled onto the shoulder and stopped. Grievant pulled into the outside lane, then onto the shoulder and stopped in front of the speeder with his vehicle facing the front of the speeder's vehicle. Both vehicles were able to safely stop without any emergency braking. There were no other vehicles in the northbound lanes at the time of the traffic stop. After issuing a traffic citation to the speeder, grievant continued his patrol.

The speeder is employed as a driving instructor at a local school. She was upset about the citation and asked a sheriff's deputy to speak with grievant about the matter. The speeder subsequently contacted the division office of the Virginia State Police and filed a written complaint because she believed that the manner in which grievant stopped her was not normal and could have been dangerous. The speeder pleaded guilty to reckless driving (80 mph in a 55-mph zone) and paid a fine.

During 2000, grievant was involved in two incidents that resulted in damage to his cruiser. In one instance, at the conclusion of a high-speed pursuit, he brought his vehicle to a stop too close to the speeding vehicle resulting in damage to both vehicles. In another high-

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[1] Exhibit 2. Section 23, Dept. of State Police General Order No. 17, revised April 1, 1999.
[2] Exhibit 2. Section 8, Dept. of State Police General Order No. 23, revised October 1, 1998.
[3] The Written Notice (Exhibit 3) lists the date of offense as April 12, 2001. The correct date was April 21, 2001 but the numbers were inadvertently transposed during preparation of the Notice. A memorandum dated December 10, 2001 (Exhibit 9) has corrected this.

speed pursuit, he crossed a double solid yellow line to draw abreast of the speeding vehicle. The vehicles came together and he then forced the other vehicle off the road into a ditch; both vehicles were damaged. Both accidents were deemed preventable; grievant was counseled in each case and sent to remedial driver training in June 2001.

Issuance of Disciplinary Action

The incident described herein occurred on April 21, 2001. The reckless driver filed her written complaint on June 11, 2001. The matter was then assigned to an investigator. The investigation was completed on July 18, 2001. The Written Notice was issued on August 29, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[4]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[5] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.1 of the Commonwealth

[4] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[5] Now known as the Department of Human Resource Management (DHRM).

of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses includes acts and behavior which are more severe in nature than Group I and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is failure to follow applicable established written policy.[6] The agency has promulgated its own version of this policy, which also specifies that failure to follow applicable established written policy is a Group II offense.[7]

The Code of Virginia provides that emergency vehicles are exempt from regulations in certain situations. Among other things, the driver of a law enforcement vehicle, when in the performance of public services under emergency conditions and while displaying emergency lights, may:

> Pass or overtake with due regard to the safety of persons and property, while en route to an emergency, stopped or slow-moving vehicles, by going to the left of the stopped or slow-moving vehicle either in a no-passing zone or by crossing the highway centerline.[8]

The facts in this case are undisputed. What is in dispute is whether grievant's crossing over double solid yellow lines into oncoming traffic lanes and stopping a violator hood-to-hood comports with the Agency's General Orders (cited supra). The evidence establishes that grievant made a traffic stop that permitted both the reckless driver and the grievant to bring their vehicles to a controlled and safe stop. There was no danger to the reckless driver, the grievant or anyone else during the time both vehicles came to a stop on the shoulder.[9] The legislature requires the driver of an authorized emergency vehicle to drive with due regard for the safety of all persons.[10] The standard of care which would customarily be required of the ordinary motorist does not apply to a police officer operating his vehicle under certain conditions prescribed by law, in hot pursuit of a law violator.[11] The proper standard of care required of the driver of an emergency police vehicle is the standard of care of a prudent man in the discharge of official duties of a like nature under the circumstances.[12]

The agency correctly points out that stopping a vehicle hood-to-hood rather than behind the other vehicle exposes grievant to additional potential for harm. The other vehicle could run into grievant as he approached it. If the driver had a firearm, approaching from the front exposes the grievant far more than if he parked behind the vehicle. Parking in front of the other vehicle may prevent other motorists traveling on that side of the highway from seeing the emergency lights thus exposing both grievant and the other driver to careless drivers. Moreover, driving into the oncoming lane might panic an inexperienced driver into an erratic, evasive action that could result in injury or property damage.

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[6] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[7] Exhibit 2. Section 13.b (1), Dept. of State Police General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised July 1, 1998.
[8] Exhibit 1. Va. Code § 46.2-920.
[9] Exhibit 6. Memorandum to Division Captain from Investigating Sergeant, July 18, 2001.
[10] Exhibit 1. Smith v. Lamar, 212 Va. 820, 188 S.E.2d 72 (1972).
[11] Exhibit 1. *Ibid.*
[12] Exhibit 1. *Ibid.*

Grievant's primary argument is that Va. Code § 46.2-920 does not specifically prohibit the action he took in this case. Moreover, grievant suggests that § 46.2-920.3 gives him the authority to park his cruiser in the manner he did. Grievant's interpretation of this statute is far too narrow and fails to consider the totality of the circumstances in this case. While the statute permits grievant to park his cruiser in any manner, notwithstanding other provisions of the chapter, one cannot ignore the reality of the situation. As noted above, there are several safety-related reasons for parking behind a traffic violator's vehicle, rather than in front of it. For this reason, the agency specifically trained grievant in the approved techniques for conducting a traffic stop.

The statute cannot be viewed in isolation to excuse grievant's actions. One must consider not just the statute, but also agency General Orders 17 and 23. These two policies supplement the statute and provide additional guidance to troopers for the operation of agency vehicles. Troopers are required to obey General Orders, just as they are statutes. While troopers are expected to be assiduous in enforcing traffic laws, they must give careful consideration to their own actions so that their enforcement does not create additional potential for injury to themselves or others. For example, the Hearing Officer takes administrative notice that many law enforcement agencies are now in the process of reevaluating guidelines for high-speed pursuits because a significant number of such pursuits end in accidents involving serious injury or death. Thus, a trooper must assess whether the value of making a traffic stop outweighs the potential dangers that may be required to pursue and stop a violator.

It is also worth pointing out that Section 8 of General Order 23 requires troopers to employ the "utmost care to protect themselves," when stopping violators. Thus, the agency's rule is designed to help protect troopers from taking unnecessary risks in a job that is already a high-risk profession. In this case, it is commendable that grievant was motivated to stop a driver who obviously posed a significant hazard to the motoring public. However, by stopping her as he did, grievant unnecessarily exposed himself to an increased potential for injury or death. If the driver stopped by grievant had been an armed drug dealer instead of a schoolteacher, the outcome of the traffic stop could have been much different.

Grievant argues that the Written Notice should be removed because he received harsher punishment than the reckless driver did. Although the reckless driver was found guilty and fined, the effects of this moving violation on her insurance premium and on her employment as a driving instructor were not made part of the evidence. Accordingly, it is difficult to evaluate the impact of the infraction on the reckless driver. However, even if this information had been made part of the record, it is difficult to compare the disciplinary action given to grievant with the impact of a traffic violation on the reckless driver. Moreover, such a comparison is irrelevant; when a grievant's actions merit discipline, that discipline must be determined according to the Standards of Conduct applicable to state employees. The punishment given to the reckless driver is determined according to the traffic statutes of the Commonwealth.

Grievant contends that, given the specific circumstances he faced (highway configuration and traffic conditions), he made the stop in the safest manner possible. If he had allowed the oncoming vehicle to pass and then executed a U-turn, he would have been too close to the curve in the highway, thereby creating a potential hazard for other oncoming traffic. Assuming that grievant's assessment is correct, and that making a U-turn would have been unduly hazardous, grievant had the option either to take the action he did, or to not make the traffic stop.

Four supervisory and management employees who reviewed this matter agreed that grievant's decision to stop the speeding vehicle hood-to-hood was not in compliance with agency policy. The applicable policies cited by the agency require: a) compliance with motor vehicle laws, b) operation of vehicles with due regard for safety and, c) use of utmost care to protect oneself. The motor vehicle law regulating emergency vehicles (§ 46.2-920) does not provide a specific exemption for the action taken by grievant in this case. When the statute does not provide a specific exemption, troopers are required to comply with all motor vehicle laws. By default then, it would appear that grievant might have violated Va. Code § 46.2-804.6, which states:

> Wherever a highway is marked with double traffic lines consisting of two immediately adjacent solid lines, no vehicle shall be driven to the left of such lines, except when turning left.

It could be argued that grievant was turning left in order to get to the shoulder on the opposite side of the highway. From grievant's own testimony, however, it appears that he was driving to the left of the solid yellow lines for a significant distance and only then turned off onto the shoulder. Giving grievant the benefit of the doubt, the hearing officer will not conclude whether the grievant violated § 46.2-804.6. However, it can be concluded that grievant did not operate his vehicle with due regard for safety when he moved into the lane of an oncoming vehicle that had been speeding at 80 mph. He also did not use the utmost care to protect himself when he stopped the violator hood-to-hood, thereby exposing himself and others to the potential for injury. Accordingly, the agency has demonstrated, by a preponderance of the evidence, that grievant failed to follow applicable established written policy – a Group II offense.

Grievant points out that, pursuant to statute, the reckless driver forfeited her right-of-way.[13] While this is correct, it has no impact on whether grievant's actions were in compliance with applicable established written policy. Grievant also contends that the discipline he received was arbitrary and capricious but he has not provided any evidence to support this contention.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior immediately.[14] When issuing the employee a Written Notice Form for a Group I offense, management should issue notice as soon as practicable.[15] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most disciplinary actions are issued within a few weeks after an offense.

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[13] Exhibit 1. Va. Code § 46.2-823 provides that, "The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have under this article."
[14] Section 7.b, DHRM Policy No. 1.60, Standards of Conduct, effective September 16, 1993.
[15] Section 12.c (1), *Ibid*.

In this case, the investigation consisted primarily of two interviews, both of which were completed by June 18, 2001. It is unclear why it took another full month to submit the written report and then nearly seven more weeks to issue the Written Notice. While the delay in this case is not sufficiently egregious to overcome the clear need for disciplinary action, such a delay could well be considered a mitigating factor in a case with different circumstances.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to the grievant on August 28, 2001 is AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct and Section 15 of General Order No. 19.

It is STRONGLY RECOMMENDED that the agency take appropriate steps to assure that disciplinary actions are issued more promptly in the future.

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 three 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.

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.

David J. Latham, Esq., Hearing Officer