Issue: Group III Written Notice with 5-day suspension (conduct that undermines the effectiveness or efficiency of the agency); Hearing Date: February 1, 2002; Decision Date: February 4, 2002; Agency: Department of State Police; AHO: David J. Latham, Esquire; Case Number: 5360

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of State Police Case Number 5360

Hearing Date: February 1, 2002
Decision Issued: February 4, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 30th day following appointment of the hearing officer.[1]

APPEARANCES

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

ISSUES

Was the grievant's conduct on and about May 31, 2001 and June 1, 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 III Written Notice and five-day suspension issued on November 8, 2001 for conduct that undermines the effectiveness or

[1] § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

efficiency of the Department's activities.[2] 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 4 years. The grievant does not have any prior disciplinary actions. His supervisors have been complimentary of his work performance.[3]

The practice of the agency is to report all accidents that involve injury or damage to both vehicles totaling more than $1000. The agency's written policy on motor vehicle crash investigation provides that:

> The purpose of a motor vehicle crash investigation shall be to determine if there has been a violation of the law and, if so, to obtain the necessary evidence to prosecute the violator. A secondary purpose is to obtain the necessary information to file the required report.[4]

On May 31, 2001, the grievant investigated a traffic crash in which one vehicle rear-ended a vehicle that stopped suddenly. There were no injuries to either party. Visible damage to the first vehicle appeared to be limited to the rear bumper cover. Visible damage to the at-fault vehicle included the front bumper cover, the left headlight assembly, left signal lamp assembly, hood and left fender. Grievant initially estimated the damage to the at-fault vehicle at over $1,000 and to the first vehicle at about $400-$500.

After speaking separately with both drivers, he allowed the driver of the first vehicle to leave the scene. Grievant then revised the damage estimates for the two vehicles downward to $800 and $100. He then spoke again with the driver of the at-fault vehicle (hereinafter referred to as Ms X) and told her that he had decided not to issue a ticket or summons because there were no injuries and because he had estimated total damages of less than $1,000. The actual damage, as determined by repair bills, was $370 to the first vehicle and $3,064 to Ms X's vehicle.[5]

Before she left the accident scene, grievant raised the hood of Ms X's vehicle to ascertain whether her car was driveable. He concluded that she could drive the car. Ms X, who is 23 years old and a single parent, was crying when grievant arrived at the scene.[6] As in other similar situations, grievant decided to give her his pager number in case she later had other questions about the accident. After Ms X left the scene, the hood of her car flew up and damaged her windshield.

Sometime within the next 24 hours, Ms X paged grievant. Grievant called Ms X who told him about her windshield damage and asked him to come to her apartment. On the evening

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[2] Exhibit 5. Written Notice, issued November 8, 2001.
[3] Exhibit 9. Letter from Lieutenant Colonel to grievant, October 30, 2001.
[4] Exhibit 3. Department of State Police General Order No. 27, *Motor Vehicle Crash Investigation*, revised July 1, 2000.
[5] Exhibit 1, p. 29. Repair bill for Ms X's vehicle. It is more likely than not that a charge of $394 (listed as "total outside" in the subtotal section) is for windshield replacement. Thus, the damage to Ms X's vehicle from the initial crash was $2,670. Grievant acknowledges that he has a significant amount of experience in making damage estimates at crash scenes.
[6] Grievant is married, with children and is several years older than Ms X.

of June 1, 2001, during his off-duty time, grievant went to Ms X's apartment. He was not in uniform but did carry his pistol. Soon after arriving, grievant asked Ms X for a hug. She initially refused but then consented to a hug. When they hugged, grievant attempted to kiss Ms X but she turned her head away. They sat on a couch and talked for a while. At one point, Ms X put her hand on grievant's leg and noticed something in the cargo pocket of his pants. She asked what it was and grievant pulled condoms from his pocket. Grievant had brought condoms with him because he was "flattered" when Ms X asked him to come to her apartment and because he "didn't know what to expect" during his visit.[7] Grievant and Ms X then went for a ride in his truck in order to listen to a compact disc of music.

They returned to her apartment and went to the bedroom where Ms X wanted to show grievant something on her computer. Grievant sat on her bed and believed that he detected the odor of marijuana. At this point, grievant decided that he had been wrong to visit Ms X and he left her apartment. Grievant did not physically force himself on Ms X at any time and they did not have intimate relations. At some time during the hour-long visit, grievant twice asked Ms X whether she wanted to make love to him; she said, "No."

Following the encounter at Ms X's apartment, she paged him several times during the next two days. He returned her calls and advised her that he could not see her again. During these conversations, she asked him for money on more than one occasion. She then discussed the entire matter with one or more coworkers. When a coworker suggested she file a complaint, Ms X called the agency and filed a complaint on June 5, 2001 because grievant had given her his pager number. The case was assigned to an investigator who interviewed both Ms X and grievant and filed a written report on July 31, 2001. Various superior officers reviewed the report but disciplinary action was not taken until November 8, 2001. The agency has not provided an explanation for why it took over five months from the date of the complaint to the issuance of disciplinary action.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 § 2.2-3000 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

[7] Grievant's testimony during the hearing.

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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[8]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[9] 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 of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses includes acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment. The agency has promulgated its own version of this policy, which provides examples of Group III offenses. One example of a Group III offense is engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.[10]

The parties stipulated during the hearing that grievant's underestimation of crash damages and his failure to categorize the crash as "reportable" was not a cited element of the disciplinary action. However, evidence on this issue was deemed admissible because it corroborates grievant's motivation in going to Ms X's apartment.

The general outline of the encounter between grievant and Ms X at her apartment is as stated in the Findings of Fact above. However, each of the parties has a different view of certain specifics. For example, grievant maintains that Ms X had told him she did not have a boyfriend. She also told him on the phone that her child would be staying with Ms X's mother on the night grievant visited. In essence, grievant argues that Ms X was interested in him and was a more active participant than she is now willing to admit. Ms X, on the other hand, maintains that grievant told her at the crash scene that he was not issuing her a ticket because he wanted to date her. She claims that she did not want an intimate relationship but just wanted him to be a "friend." She also alleges that, while in her bedroom, grievant placed his pistol and several condoms on the dresser.

However, it is concluded that resolution of the above details is moot because the evidence is sufficient to conclude that there was a mutual attraction between grievant and Ms X. By

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[8] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[9] Now known as the Department of Human Resource Management (DHRM).
[10] Exhibit 2. Section 13.b (1), Dept. of State Police General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised April 1, 2001.

inviting grievant into her apartment and bedroom, and by soliciting money from him, Ms X was certainly leading grievant to believe that the relationship could become intimate. Grievant candidly admits that he asked if she wanted to have sex (thereby signaling his own willingness and desire). By bringing condoms to her apartment, it is evident that he was ready and willing to engage in sexual relations with her.

Grievant knew, or reasonably should have known, that his actions might impair the reputation of the agency. Ms X has discussed this matter with coworkers. As her coworkers have only her version of events, the grievant's reputation, and by extension the agency's reputation, has been tarnished. This type of offense is identified in the Standards of Conduct as a Group III offense. Grievant has forthrightly acknowledged his wrongdoing and agrees that the agency must take some form of corrective action. However, grievant believes that the discipline given him is too harsh.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
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> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[11]

In this case, although grievant has been a trooper for only four years, he has established a work performance record that evokes compliments from his supervisors. There is no evidence that grievant intended to utilize his position for personal gain. Throughout the investigation and during the hearing, grievant has been candid and forthright about admitting his actions. He appears to be genuinely contrite about his wrongdoing. Finally, even though grievant's initial motivation appears to have been testosterone-fueled, his better judgement belatedly came to the fore and he backed out of a situation that could have led to far more serious consequences. Grievant was tempted, began to yield to the temptation, and then wisely put the temptation behind him. It also appears that grievant has been a very positive asset during his four years with the agency. Grievant avers that the impact of this incident on his marriage has been sufficiently significant to prevent a recurrence in the future.

Grievant's lapse of judgement and actions were serious and certainly require more than just the written counseling memorandum that he suggests. On the other hand, it is difficult to conclude, given the totality of the circumstances, that this offense was so severe that a first occurrence should warrant removal from employment (definition of a Group III offense). Yet, this offense is sufficiently severe that should grievant ever repeat it, the termination of grievant's employment would be warranted (a Group II offense). Therefore, for all of the mitigating reasons cited in the preceding paragraph, it is held that the appropriate level of discipline in this particular case is a Group II offense with five-day suspension.

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[11] Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

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.[12] When issuing the employee a Written Notice Form for a Group I offense, management should issue notice as soon as practicable.[13] 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.

In this case, the investigation consisted primarily of two interviews. It is unclear why five months were required 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 may well be considered a mitigating factor in future cases with different circumstances.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on August 28, 2001 is VACATED. The agency shall issue in its place a Group II Written Notice with five-day suspension; the dates of issuance and suspension shall be the same dates that appear in the vacated notice. 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 HIGHLY 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.

[12] Section 7.b, DHRM Policy No. 1.60, Standards of Conduct, effective September 16, 1993.
[13] Section 12.c (1), *Ibid*.

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.

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.

David J. Latham, Esq., Hearing Officer