

Issue: Group II Written Notice (failure to follow supervisor's instruction, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: February 7, 2002; Decision Date: February 8, 2002; Agency: Department of State Police; AHO: David J. Latham, Esquire; Case Number: 5363; **Judicial Review: Appealed to the Circuit Court in the County of Clarke on 03/08/02;**
Outcome: Decision of Hearing Officer was upheld on 05/29/02

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

DECISION OF HEARING OFFICER

In the matter of Department of State Police Case Number 5363

Hearing Date: February 7, 2002
Decision Issued: February 8, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 36th day following appointment of the hearing officer.¹

APPEARANCES

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

ISSUES

Was the grievant's conduct on September 3, 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?

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.

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on November 6, 2001 for failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.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 five years. Grievant is considered a good and knowledgeable trooper. He has no prior disciplinary action.

In the county where grievant is assigned, the trooper assigned to the 3:00 p.m. to 11:00 p.m. shift is designated to be "on-call" from 11:00 p.m. until 4:00 a.m. the following morning. Typically, the trooper will end his shift at 11:00 p.m. and go home to bed. On occasions when there is a traffic accident or some other event requiring a trooper, the agency dispatcher calls the trooper to respond. When the trooper responds, he is back on duty until the incident is resolved. Similarly, the trooper assigned to the day shift (7:00 a.m. to 3:00 p.m.) is on-call for the three-hour period immediately preceding his shift, i.e., from 4:00 a.m. to 7:00 a.m. The agency pays troopers a portion of their telephone expense to assure that they have telephone service.

In December 2000, the first sergeant had posted a memorandum regarding on-call status; grievant initialed a form indicating that he had read the memo. The memorandum states, in pertinent part:

Troopers working the county alone will normally be designated on-call for their respective shift ... It is the responsibility of the designated on-call trooper to be available for calls. Coverage responsibility will change at 4AM with *the evening trooper handling calls up to that time and the day shift trooper handling calls after that time.*³ (Italics added)

On Sunday, September 2, 2001, grievant had originally been scheduled to work the day shift. However, for unknown reasons, the schedule was changed and grievant switched shifts with the trooper who was initially scheduled for the evening shift. The schedule change was handwritten on the work schedule.⁴ Grievant received a copy of the amended schedule and posted it on the refrigerator in his residence. When the schedule is initially typed, one asterisk is placed after the 7:00 a.m. assignment to indicate that the trooper is on call for the three hours immediately preceding his shift. Similarly, two asterisks are placed after the 3:00 p.m. assignment to designate that the trooper will be on call for the five hours after his shift ends. When the schedule was amended to reflect the shift switch between grievant and another trooper, the times were changed but the asterisks were not handwritten after the times.

Pursuant to the revised schedule, grievant worked the evening shift on September 2, 2001. At 11:04 p.m. he arrived home and logged off duty. After going upstairs for a few

² Exhibit 2. Written Notice, issued November 6, 2001.

³ Exhibit 1, page 14. Memorandum from first sergeant to all troopers, *Call Outs/On-Call Status*, December 6, 2000.

⁴ Exhibit 7. Work Schedule, week of November 2-8, 2001.

minutes, he returned downstairs at about 11:15 p.m. to watch television. During the next 30 minutes, he drank two 12-ounce beers but did not eat any food; he went to bed at about 11:45 p.m.

Approximately one hour later at about 12:45 a.m., the agency dispatcher received a call regarding a motor vehicle crash. The dispatcher attempted to telephone grievant's home telephone but there was no answer after 20 rings; the dispatcher redialed and after 13 rings there was still no answer.⁵ The dispatcher then called grievant's supervisor (a sergeant) who directed that the dispatcher ask the county sheriff to send a deputy to grievant's residence. A sheriff's deputy arrived at grievant's residence at about 1:00 or 1:05 a.m. and was able to awaken grievant. Grievant opened the wooden door and spoke with the deputy through the closed glass storm door. After telling grievant that he should respond to the accident call, the deputy left.

At about 1:10-1:15 a.m., grievant called the dispatcher who then patched the call through to grievant's supervisor. Grievant advised his supervisor that he had drank two beers and asked whether he should respond to the incident call. Grievant averred that he was unaffected by the beer and was willing to respond to the call, if the supervisor approved. The supervisor could not assess grievant's physical condition himself and decided that it would be inappropriate to have grievant driving a state vehicle after consuming two beers. The supervisor advised grievant that he should not respond to the incident call. After this conversation ended, another trooper was assigned to respond to the incident call.

Grievant has one telephone in his residence – a cordless model. Grievant usually takes the telephone to his bedroom when going to sleep. On the night at issue herein, the telephone was left downstairs in a room sufficiently remote from grievant's bedroom that he could not have heard it ringing. Grievant also has a pager that he leaves next to his bed. The dispatcher was unaware of the pager number even though grievant maintains it had been used previously to page him. Grievant also has an answering machine in his den; it was not activated on the night at issue. Grievant has had repeated problems with telephone service; sometimes incoming calls aren't received and sometimes he is unable to make outgoing calls.

Subsequently, grievant's supervisor investigated this incident. Grievant did not state at any time that he believed he was not on call. Rather, when directly asked if knew he was on call, grievant contended that he did not understand the meaning of "on call."⁶ Grievant had never previously questioned the meaning of the term "on call" despite having been assigned to on-call status many times and having been called out to incidents while in an on-call status. Of the six other people who testified during the hearing, no one had heard any trooper ever ask the meaning of "on call."

Following investigation, the agency concluded that leaving a telephone outside of hearing range while in an on-call status constituted unsatisfactory job performance. The agency decided to take the corrective action of verbally counseling grievant and documenting the counseling in writing.⁷ The agency concluded that grievant's unavailability for duty due to consumption of alcohol was a Group II offense; a Written Notice was issued on November 6, 2001.

⁵ Exhibit 8. Partial Transcript of Dispatch tape recording, September 3, 2001.

⁶ Exhibit 1, page 2. Investigative memorandum to captain from sergeant, September 24, 2001.

⁷ Exhibit 3. Memorandum from captain to grievant, November 6, 2001.

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 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 Training⁹ 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 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 a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.¹⁰ The agency has promulgated its own version of this policy, which also specifies that this offense is a

⁸ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

⁹ Now known as the Department of Human Resource Management (DHRM).

¹⁰ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Group II offense.¹¹ Among the examples of a Group III offense is included, “Reporting to work when impaired by or under the influence of alcohol, or the unlawful use of controlled substances.”¹²

After careful consideration of the testimony and documentary evidence, it is concluded that the agency has demonstrated, by a preponderance of the evidence, that grievant failed to perform assigned work. Specifically, grievant was designated to be on call between the hours of 11:00 p.m. and 4:00 a.m. during the night of September 2-3, 2001. He was assigned to be on call in order to respond to traffic crashes. When called to respond, grievant contacted his supervisor and gave the supervisor cause to doubt whether it was appropriate for grievant to drive a state-owned vehicle. Given the circumstances, the supervisor had no choice but to assign someone else to perform the work assigned to grievant.

The grievant knew, or reasonably should have known, that being in an on-call status means that one can be called to active duty on short notice. When a trooper is called to duty while “on call,” he or she must be as alert and as presentable as during one’s regular shift. Employees of the Commonwealth are subject to the DHRM policy on alcohol. That policy provides that agencies may promulgate policies that more strictly regulate alcohol in the workplace provided such policies are consistent with the state policy.¹³ Agency policy provides that the odor of alcoholic beverage on the breath may constitute reasonable suspicion that an employee is under the influence of alcohol.¹⁴ There is no specific written agency order that states one shall not consume alcohol while on call. However, common sense dictates that a citizen might be dismayed, or even file a complaint, if a trooper responds to an accident call with alcohol on his breath.

Grievant emphasizes that he was ready, willing and able to respond to the dispatcher’s call and that it was his supervisor who made the decision that grievant should not respond. This attempt to shift responsibility to someone else is both inappropriate and suggestive of grievant’s recognition of his own culpability in this matter. By telling his supervisor that he had drunk two beers, grievant boxed the supervisor into a corner from which he had no alternative but to make the decision he did. The grievant’s admission of alcohol consumption and query as to whether he should respond to the call alerted the sergeant that grievant did not want to take sole responsibility for responding to the call. Grievant wanted the sergeant to assume ownership for the decision so that if anything went wrong, grievant would be able to say that his supervisor had told him to drive with full knowledge of the alcohol consumption.

The sergeant was unable to assess firsthand the grievant’s appearance and condition. The sergeant was also well aware that the most common response of those confronted about how much they have had to drink is “a couple of beers,” regardless of how much has actually been consumed. Although the sergeant had no reason to doubt grievant’s assertion that he had had only two beers, he could not be certain about that. Under these circumstances, the sergeant

¹¹ Exhibit 4, page 19-7. Section 12.b (1), Department of State Police General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised July 1, 1998.

¹² Exhibit 4, page 19-8. *Ibid.*

¹³ Exhibit 15. Section VII.A.1, DHRM Policy No. 1.05, *Alcohol and Other Drugs*, September 16, 1993.

¹⁴ Exhibit 14. Section 3.j.(2), Department of State Police General Order No. 52, *Employee Drug/Alcohol Testing*, revised July 1, 2000.

would have been foolhardy to direct grievant to respond to the call. He wisely and appropriately made the correct decision not to send grievant on this call.

Grievant argues that he assured the sergeant that he was physically capable of responding and that he was unaffected by the alcohol. The hearing officer believes that grievant genuinely felt he was unaffected. Moreover, it is more likely than not, given grievant's age and fit physical condition, that he probably had metabolized most of the alcohol by 1:15 a.m. Therefore, the hearing officer accepts grievant's assertion that he probably was physically capable of responding to the call. However, grievant's physical ability to handle the situation is not at issue. The issue is whether it is prudent to drive a state police vehicle, and confront citizens at the scene of a vehicle crash, after a trooper has consumed two beers.

Because the asterisks were not written in with the schedule change, grievant contends that he was not assigned to be on call. This argument is not persuasive for four reasons. First, the first sergeant's December 6, 2000 memorandum states unambiguously that the evening shift trooper will handle all calls up to 4:00 a.m. the following morning. Grievant was the evening shift trooper on this occasion and therefore was the on-call trooper. Second, the fact that the person changing the schedule failed to include asterisks does not alter the first sergeant's memorandum. Third, even if grievant had some doubt whether he was on-call, it was his responsibility to ask the appropriate supervisor to clarify the question. Finally, grievant never raised this issue until this grievance hearing. If he had truly believed he was not on call, he would have mentioned this to his supervisor on September 4, 2001 during the investigation.

Grievant argues that the dispatcher never called him because neither he nor his spouse heard the telephone ring, and his answering machine was not activated. He postulates that the dispatcher may have been calling the wrong number. The evidence established that grievant's telephone service had been problematical. However whether the dispatcher dialed the wrong number or whether the telephone malfunctioned are simply red herrings. The fact is that, when grievant was finally notified by the deputy, he effectively failed to perform his assigned work by advising his supervisor of his alcohol consumption, thereby resulting in his removal from on-call status at that time.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to the grievant on November 6, 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.

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.

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