Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing Date: February 4, 2002; Decision Date: February 5, 2002; Agency: Department of State Police; AHO: David J. Latham, Esq.; Case Number: 5366

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Department of State Police Case No. 5366

Hearing Date: February 4, 2002
Decision Issued: February 5, 2002

APPEARANCES

Grievant
One witness for Grievant
Captain of Division
Representative for Agency
One witness for Agency

ISSUES

Was the grievant's conduct on August 29, 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?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued on October 23, 2001 for inadequate or unsatisfactory job performance because he failed to properly conduct a hit-and-run crash investigation.[1] 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 2½ years. Grievant has one active disciplinary action – a Group I Written Notice for failure to comply with applicable established written policy.[2] Grievant attended the State Police Academy and has participated in training for accident investigation,[3]

[1] Exhibit 7. Written Notice, issued July 31, 2000.
[2] Exhibit 7. Written Notice, issued July 31, 2000.
[3] Exhibit 5. Transcript, January 24, 2000. See also Exhibit 9, *Resume of Subjects for the 99th Basic Session* conducted from June 10, 1999 through January 14, 2000.

and Selected Acts training,[4] which addressed changes to the law that became effective on July 1, 2001.

The agency's policy on the investigation of criminal matters states that, "It shall be the duty of every sworn employee to submit a Preliminary Investigative Report (SP-102) upon receipt of a complaint or upon aiding or engaging in the investigation of a felony…."[5] The agency's policy regarding the investigation of motor vehicle crashes states, in pertinent part:

> 2.a. All motor vehicle crashes coming to the attention of sworn employees that meet any of the conditions stated below shall be investigated, provided they have not been investigated by an appropriate law enforcement agency: Crashes involving personal injury, death and/or hit and run.
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> 3.c. When an investigation of a motor vehicle crash is warranted, sworn employees shall: Utilize Accident Investigation Field Note pad (SP-50) to record the details of their investigation.[6]

Grievant was counseled in May 2000, in writing, for issuing a summons for an improper driver's license when, in fact, the license had been properly issued. He received a Group I Written Notice on July 31, 2000 because he made an improper felony arrest. In conjunction with the Written Notice, grievant's captain advised him in writing that:

> I strongly emphasized to you the critical importance and vital necessity of fully complying with all provisions of the Laws of Arrest at all times. … *Should you have any questions in this regard or in any situation in the future, you are to contact your supervisor for advice and guidance.*[7] (Italics added)

On July 29, 2001, grievant investigated a hit-and-run incident. One vehicle had struck another vehicle at the merge point before a construction zone but left the scene without stopping. The driver of the vehicle who reported the crash followed the hit-and-run vehicle far enough to write down its license plate number, color and make. Grievant assessed damage to the complainant's vehicle at less than $1000. Because accidents that involve less than $1000 in property damage are non-reportable, grievant advised the complainant that this was not a reportable accident and that he "could not do any more." Grievant neither made any notes in his SP-50 Accident Note pad nor initiated an investigation utilizing form SP-102. He checked the license plate number given him by the complainant and gave the name of the owner to the complainant. He also advised the complainant that, since the matter was non-reportable, it would have to be settled between their insurance companies and/or by the court.

Approximately two hours later, grievant recalled a change in the law that had become effective on July 1, 2001. That change provides that the penalty for failure to stop at a motor

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[4] Exhibit 6. Training Records for grievant, June 4, 2000.

[5] Exhibit 2. Item 5, Department of State Police General Order No. 25, *Investigation Criminal/Non-Criminal,* revised August 16, 1994.

[6] Exhibit 3. Items 2.a & 3.c, Department of State Police General Order No. 27, *Motor Vehicle Crash Investigation*, revised July 1, 2000. See also Exhibit 4, Memo–1994–No. 7, *Non-Reportable Crashes*, July 25, 1994.

[7] Exhibit 12. Memorandum from captain to grievant, July 31, 2000.

vehicle accident with property damage is a Class 5 felony.[8] Grievant discussed the incident with another trooper who suggested that they pose a hypothetical question to their supervisor (a sergeant) using the facts of the incident grievant had responded to. The sergeant advised that an accident report was not necessary because damage was less than $1000, but that a criminal investigation report (SP-102) was necessary because all hit-and-run accidents involving any amount of property damage are felony offenses. Grievant did not disclose to the sergeant that his question was not hypothetical but was, in fact, based on the incident he had handled two hours earlier. He then began to fill out an SP-102 report. He subsequently investigated the matter in full, completed his investigation and submitted the SP-102 report within the required five-day limit. Ultimately, the offending driver was identified, charged and convicted for leaving the scene of the accident.

On August 30, 2001, the complainant called the State Police office and spoke with grievant's supervisor. He said that although grievant gave him the name of the hit-and-run vehicle's owner, grievant told him there was nothing more he could do, that it was an insurance matter and not a reportable accident. He also said the grievant did not take his (the complainant's) name but left him with the impression that grievant was not going to take any further action in the matter. The complainant said he called, not to get grievant in trouble, but to assure that the State Police would follow up and take appropriate action against the hit-and-run driver. After the complainant's call, the sergeant remembered the "hypothetical" question grievant had asked the prior evening.

After investigating grievant's actions, the agency concluded that grievant's failure to record information and his statements at the scene led the complainant to conclude that the State Police was unwilling to fully investigate the incident. After review by several superior officers, the agency issued a Group I Written Notice to grievant on October 23, 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

[8] Code of Virginia § 46.2-894. (Prior to July 1, 2001, the penalty for failure to stop was a Class 1 misdemeanor if there was property damage only.)

> 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.[9]

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[10] 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 I offenses are the least severe of three groups of offenses. One example of a Group I offense is inadequate or unsatisfactory job performance.[11] The agency has promulgated its own version of this policy, which also specifies that inadequate or unsatisfactory job performance is a Group I offense.

The agency points out that it could technically have issued a Group II Written Notice because grievant failed to comply with applicable established written policy. However, the agency decided that grievant's apparent confusion and lack of intent to violate Departmental policy constituted mitigating circumstances and, therefore, issued a Group I Written Notice for inadequate or unsatisfactory job performance.

After careful consideration of all the evidence, it is concluded that the agency has borne the burden of proof, by a preponderance of the evidence, to demonstrate that grievant's job performance in this case was inadequate or unsatisfactory. First, grievant failed to take notes at the scene on his SP-50 Accident Note pad. Grievant contends that there is no written instruction requiring that notes be written at the scene of the incident. However, common sense dictates that notes of an incident should always be made as soon as possible while they are fresh in the mind of the writer, and should be made at the scene where details can be seen, measured or discussed with the parties. More significantly, it is clear that grievant did not intend to make any notes on his SP-50 pad until after his supervisor told him that a criminal investigation report must be filed.

Second, by giving incorrect information at the scene (i.e., that there was nothing more he could do), grievant led the complainant to believe that the entire incident was going to be dropped and that complainant might have to pay for the repair of his vehicle. This reflected adversely on the agency, resulting in the filing of a verbal complaint to the agency.

Third, grievant could have been more forthright and direct when he spoke with his supervisor on the evening of August 29, 2001. Rather than pretending to pose a hypothetical

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[9] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[10] Now known as the Department of Human Resource Management (DHRM).
[11] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

question, grievant could have simply and directly asked his supervisor how to handle the situation. Had he done so, the supervisor would have been prepared to reassure the complainant the following morning that the incident was being investigated and would be handled appropriately.

Grievant points out that he ultimately did complete the investigation, resulting in a conviction of the hit-and-run driver. As the agency has observed, it is commendable that grievant successfully followed through with the investigation. However, completion of this investigation was the grievant's responsibility in the normal course of his duties. The fact that he did what was expected of him is not the issue. The issue that prompted disciplinary action was the unsatisfactory manner in which grievant initially handled the situation, as discussed in the preceding three paragraphs.

The hearing officer is reminded of a popular military saying, "There are three ways to do something – the right way, the wrong way and the Army way." The State Police have a large number of detailed written policies that address the "agency way" to handle various situations. Those policies have been carefully drafted after years of experience and contain specific procedural requirements for reasons the agency deems important to the successful completion of its mission. In some cases, procedures not found in writing are communicated verbally, or through on-the-job training. One of the underlying principles the agency stresses is the paramount need for honesty and forthrightness in all actions and communications. Here, the agency concluded that grievant was not forthright because, rather than acknowledge his mistake from the beginning, he attempted to backtrack and make it appear that he had performed the investigation properly from the outset.

Grievant's supervisor acknowledged that there is nothing inherently improper about asking a hypothetical question of one's supervisor. However, in this case grievant's question was an actual set of facts which he disguised as a hypothetical. Grievant did this because, by the time he talked to the supervisor, he knew that he had erred in not beginning an investigation at the time he talked with complainant. In addition, the sergeant had been grievant's supervisor for only one week and grievant was understandably concerned about making the best possible impression. Grievant was also influenced to a degree by his fellow trooper who suggested that the question be posed as a hypothetical to the sergeant. Nonetheless, it was grievant's decision to accept this suggestion and so he must take responsibility for that decision.

The purpose of the disciplinary action in this case was to assure that grievant understands: 1) that he should have handled this situation differently and, 2) that his failure to do so resulted in an unnecessary complaint from a citizen. One of the major purposes of all discipline is educational, i.e., to prevent a recurrence of the behavior in the future. Documenting the offense in writing helps to assure that the grievant is fully informed of both his error, and how to avoid that error in the future.

If this incident had been grievant's first such offense, it is possible that a written counseling might have been the appropriate corrective action. However, grievant has previously been counseled in writing and has also received a Group I Written Notice for similar offenses. Under these circumstances, it is held that a Group I Written Notice is the appropriate level of discipline in this case.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on October 23, 2001 is AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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