

Issue: Group III Written Notice with 2-day suspension (undermining effectiveness of agency and impairing agency's reputation); Hearing Date: February 18, 2002; Decision Date: April 8, 2002; Agency: Department of State Police; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5370



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5370

Hearing Date: February 18, 2002
Decision Issued: April 8, 2002

PROCEDURAL HISTORY

On November 1, 2001, Grievant was issued a Group III Written Notice of disciplinary action with two workdays suspension for:

In 7/17/01, after your police vehicle became stuck, you required another individual to pay a wrecker to remove your police vehicle and in return did not charge two individuals with a violation of the law. This is a violation of G.O. 19 para. 14.b(2) i.e. undermining the effectiveness or efficiency of the Department and impairing the Department's reputation. It is also a violation of G.O. 19, para. 14.b(23), i.e. accepting payment for a wrecker bill in lieu of not charging for a violation of the law.

On November 21, 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 January 15, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 18, 2002, a hearing was held at the Agency's regional office. Upon motion of a party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of the conflicting schedules of the parties.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Sergeant
Mr. L
Mr. M
Tow Truck Driver
Trooper II

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension.

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 Department of State Police employs Grievant as a State Trooper. He has been employed with the Agency for approximately four years and is a good employee with a good work record.

On July 17, 2001, in the darkness of early morning, Grievant was working stationary radar on a major roadway when he observed headlights in a private field in the distance. He drove to the field to investigate and observed a Jeep and two other vehicles driving in the field and attempting to elude him. Grievant pursued the vehicles through the field but his police cruiser became stuck in a muddy part of the field. He got out of his cruiser and pursued the vehicles on foot. The three vehicles stopped a short distance away because they had encountered a barbed wire fence blocking their escape.

Grievant approached the Jeep which was owned and driven by Mr. L. Mr. L stated that he knew he was trespassing and asked to be given a ticket so he could leave. Grievant obtained permission to search the vehicle but did not find any illegal substances.

Grievant approached a vehicle driven by Mr. Y. Mr. Y appeared to be under the influence of alcohol as evidenced by his blood shot eyes, strong odor of alcohol, and slurred speech. As Grievant was investigating the first and second vehicles, the third vehicle approached him. Grievant made an initial inquiry using his radio as to the identity of the driver of the third vehicle. Grievant was informed that the third driver did not have any outstanding warrants, etc. so he instructed the driver of the third vehicle to leave the area. The third vehicle promptly left the scene.

Grievant went back to Mr. Y's vehicle and instructed him not to leave. Grievant asked Mr. Y. to complete the Alco-sensor test to determine whether he had consumed alcohol. The test revealed that Mr. Y had exceeded the legal limit for alcohol consumption. Grievant arrested Mr. Y for driving under the influence of alcohol.

Grievant spoke with Mr. L and Mr. M. Mr. L owned the Jeep and Grievant told him words to the effect that if Mr. L could get the cruiser unstuck, Grievant would let Mr. L and Mr. M go free without being charged for trespassing. Mr. M overheard the conversation between Grievant and Mr. L. Mr. L. was attempting to remove the cruiser from the mud, but was unable to do so. Grievant had already called a tow truck in anticipation that Mr. L would not be successful in freeing the cruiser.

The tow truck driver arrived and pulled the cruiser out of the mud. The tow bill was \$125. Grievant spoke separately with Mr. L and said "Remember our deal; now the only thing different is that you have to pay the tow truck bill." A few minutes later, Grievant, the tow truck driver, Mr. L, Mr. M, and another Trooper discussed who would pay the tow bill. When the tow truck driver asked who would pay the bill, Grievant looked at the other trooper. The other trooper stated her understanding of how the bill should be paid. The tow truck driver said he thought Mr. L should pay the bill since his behavior caused Grievant to drive the cruiser into the field where it became stuck. Grievant agreed and Mr. L raised his hands and said he would pay the bill. Mr. L completed the paperwork to pay the bill but did not have sufficient money so Mr. M used his credit card to make the payment of \$125. Grievant felt that by having Mr. L and Mr. M pay the towing bill, they would suffer some punitive action for having trespassed on private property.

Grievant took Mr. Y to the magistrate. Grievant and the magistrate discussed whether Mr. Y could be charged with trespassing. The magistrate proposed issuing Mr. Y a summons and Grievant did so.

Grievant did not personally benefit from requiring Mr. L and Mr. M to pay the tow truck bill. The customary procedure for paying a towing bill would be to have the towing vendor send an invoice to the State Police for payment. If the towing vendor demanded

immediate payment, Grievant carried a credit card issued through the Agency. Grievant could have paid the towing bill with the credit card.

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).

The Agency contends Grievant’s behavior was contrary to two examples under its Standards of Conduct, General Order 19. The first example of a Group III offense is: “Acceptance of any ... moneys or other things of value ... intended as an inducement to ... refrain from performing any official act”¹ The Agency was obligated to pay the tow truck driver for the cost of towing the police cruiser. Grievant authorized the payment of that debt by Mr. L in return for refusing to charge Mr. L. and Mr. M with trespassing. Grievant received the satisfaction of a debt in return for refraining from performing an official duty. The Agency was justified in issuance of a Group III Written Notice with suspension.²

Grievant contends that he did not violate this provision of General Order 19 because he did not personally profit from the transaction. Although the provisions of the order mention bribes and would cover a situation where a Trooper personally profited, its language is broad enough to include an instance were a Trooper merely receives something of value regardless of whether that something benefits the Trooper or the Agency.

The second 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.

¹ General Order 19(14)(b)(23).

² If the Hearing Officer had been responsible for issuing disciplinary action in this matter, the Hearing Officer would have issued a Group II with two-day suspension. Grievant’s actions were intended to hold lawbreakers accountable; he simply exercised poor judgment in that objective. The question, however, is not how the Hearing Officer would have disciplined an employee, but rather whether the Agency has met its burden of proof under its policy. The Agency has met that burden and its discipline must be upheld. There are no mitigating circumstances that would justify a reduction of the discipline.

Mr. L and Mr. M appreciated not being charged with trespassing when they knew they were in fact trespassing. Each was grateful to Grievant and believed they had avoided trespassing charged by paying the towing bill for the cruiser. The Agency's reputation was adversely affected because Grievant led two citizens to believe that they could buy their freedom. Grievant's actions impaired the Agency's reputation thereby justifying issuance of a Group III Written Notice.

Grievant contends he did not require the two individuals to pay the tow truck bill and that the tow truck driver suggested they pay the bill. Although the tow truck driver testified that he suggested the two pay for the cost of towing, the Hearing Officer concludes that both Grievant and the tow truck driver separately came to the same conclusion, namely that Mr. L and Mr. M should pay the cost of the towing since they were ultimately responsible for Grievant being in a muddy field. Other factors showing Grievant made a deal include the credible testimony of Mr. L and Mr. M. They had no motive to misrepresent the events given that they were under the impression that Grievant had done them a favor. In addition, the investigation began after Grievant's supervisor overheard a conversation between Grievant and a former employee where Grievant said he had made two individuals pay the cost of towing his cruiser in order to avoid trespassing charges.

Grievant contends he did not instruct Mr. L and Mr. M to remain at the scene. He contends they were free to leave at any time, and thus were not subject to being charged with trespassing. The evidence does not support this conclusion. Grievant had taken numerous actions (e.g. searching Mr. L's Jeep)³ to suggest to Mr. L and Mr. M that they were not free to leave until Grievant said they were free to leave. While it is possible Grievant felt Mr. L and Mr. M were free to leave, he did not tell them they could leave.

Grievant contends he could not have charged Mr. L and Mr. M with trespassing based on his conversation with a supervising sergeant. Thus, he had not refrained from performing any official duty. This argument is untenable because Grievant ultimately charged Mr. Y with trespassing albeit it at the magistrate's office. Mr. L and Mr. M could have been charged with trespassing.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **upheld**.

³ Grievant told the driver of the third vehicle to leave after determining that the driver of the vehicle did not have any outstanding warrants. Having witnessed Grievant instruct the driver of the third vehicle to leave, it was reasonable for Mr. L and Mr. M to believe they could not leave until Grievant gave them permission to do so.

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 Resource 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 DHRM, 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