

Issue: Group II Written Notice with 3-day Suspension (failure to follow established written policy); Hearing Date: March 11, 2002; Decision Date: March 13, 2002; Agency: Virginia Commonwealth University; AHO: David J. Latham, Esquire; Case Number: 5388



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5388

Hearing Date: March 11, 2002
Decision Issued: March 13, 2002

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Shift Commander
Legal Assistant Advocate for Agency

ISSUES

Was the grievant's conduct on September 27, 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 in a reasonably prompt manner?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on November 29, 2001 for failure to comply with established written policy.¹ As part of the discipline, grievant was suspended for three working days. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Virginia Commonwealth University (hereinafter referred to as “agency”) has employed the grievant as a police officer for four years. Grievant is considered a good employee and has no prior disciplinary action.

The agency Police Department has promulgated a detailed Directives Manual. When hired, grievant received extensive training on the manual. Copies of the manual are available to grievant in the shift commander’s office, the police officer’s dayroom and the entire manual is available online. Chapter Six provides guidance on vehicular pursuits and states, in pertinent part:

0601: *Vehicular pursuits are inherently dangerous*, and should be considered only when the escape of a law violator poses a greater threat to the safety of the community than the pursuit itself does. In making a decision to pursue a vehicle, an officer should critically evaluate the following: (1) Nature and seriousness of the offense; (2) Geographical location; (3) Volume of vehicular and pedestrian traffic; (6) Road conditions. (Italics added)

0603: An officer who commences a vehicular pursuit does so at his/her own discretion, taking into consideration the guidelines and restrictions of this policy. *The principle responsibility of the officer is the safe operation of the police vehicle with due consideration for the safety of other drivers and pedestrians.*² (Italics added)

At about 1:30 a.m. on September 27, 2001, grievant was patrolling in a marked police vehicle on a six-lane boulevard within his jurisdictional boundaries. He noticed a vehicle coming from the opposite direction drive through a red traffic signal. As the vehicle passed by him, grievant continued to observe the vehicle in his rear-view mirror. The other vehicle then made a U-turn and drove up directly behind grievant’s patrol vehicle. Grievant then made three separate lane changes so that the subject would pass him. Each time he did so, the other vehicle changed lanes at the same time so as to stay directly behind the grievant. Grievant slowed to a stop and the other vehicle passed grievant. Grievant activated his flashing blue lights and followed the vehicle for about five blocks until the vehicle pulled into a gasoline station.

¹ Exhibit 8. Written Notice, issued November 29, 2001.

² Exhibits 1 & 19. Chapter Six, VCUPD Written Directives, *Vehicular Pursuits*, April 26, 2001.

The suspect immediately exited his vehicle and walked towards grievant's patrol car waving his arms and talking aggressively. Grievant exited his own vehicle and told the subject to get back in his own car and that grievant would explain why he stopped him. The subject appeared to be under the influence of either alcohol or controlled substances. Grievant started to return to his vehicle to check the subject vehicle's license plate number but then noticed the subject vehicle suddenly accelerate out of the parking lot. The subject drove down a side street that is a two-way street for only one block. At the first intersection, there are large "Do Not Enter" signs on each corner warning vehicles not to enter because the street becomes one-way.³

The subject continued straight ahead, driving down the one-way street. He drove the wrong way against the marked direction for three blocks. Grievant pursued the subject vehicle down the one-way street. After driving two blocks, grievant stopped briefly at a cross street that has two lanes of traffic in each direction to assure that he would be able to avoid any cross traffic. As he did so, the subject vehicle (which was one block ahead) turned right into another one-way street. Grievant accelerated down the next block reaching a speed of 45 mph. As he crossed the next intersection, a vehicle with the right-of-way entered the intersection from grievant's right. The two vehicles collided; the impact caused grievant's police vehicle to carom diagonally across the intersection into a railroad bridge support. Grievant's vehicle was totally destroyed and he sustained a concussion; the other driver received a shoulder injury.

A Virginia State Police officer investigated the accident and concluded that grievant was negligent because he failed to yield the right-of-way.⁴ The other driver was found not negligent. At the point where the street becomes one-way, there are large, red, reflective signs on each corner of the street marked, "Do Not Enter." In all but one block of the four blocks that are designated one-way, vehicles park on both sides of the street, facing in the direction of travel. At the intersection with the four-lane street, there are traffic lights only for the three directions from which vehicles may legally approach; there is no traffic light or stop sign facing the direction from which grievant pursued the suspect vehicle.

Grievant was on sick leave due to his concussion from September 27 through October 4, 2001. Grievant suffered residual effects from his injury well beyond that date. Therefore, his physician restricted his return to work on October 5, 2001 to light duty only. Grievant was not permitted to drive a vehicle or ride a bicycle until his physician released him for full duty on November 13, 2001. Grievant's shift commander did not want to unnecessarily stress grievant during his recuperation and light duty. When grievant's physician released him for full duty, the shift commander notified grievant on November 13, 2001 that disciplinary action was being considered and gave him five days to offer any

³ Exhibit 4. Diagram of streets in area of the pursuit.

⁴ Exhibit 3. The Virginia State Police are required to investigate all collisions involving state-owned vehicles.

mitigating circumstances.⁵ Grievant failed to respond within the time limit but did submit a written response on November 21, 2001.⁶ A Group II Written Notice was issued to grievant on November 29, 2001 citing him primarily for unsafe operation of his vehicle, and secondarily for insufficient communication with the dispatcher. Grievant filed a grievance on December 26, 2001.⁷

A tape recording of the dispatcher's communications during the incident includes grievant's reporting of the subject vehicle's license number. The recording does not reflect that grievant advised he was initiating a pursuit and, does not include a description of the vehicle, a direction of travel or the reason for the pursuit. It does include a transmission during the pursuit in which grievant stated that the suspect was going towards another street (this transmission was made after the subject turned right off the first street involved in the pursuit). The tape has gaps where no communication occurs. The recording is of poor quality, has much noise and is not clear at times.⁸

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.

⁵ Exhibit 6. Memorandum from shift commander to grievant, November 13, 2001.

⁶ Exhibit 7. Memorandum from grievant to shift commander, November 21, 2001.

⁷ Exhibit 9. Grievance Form A and attachments, filed December 26, 2001.

⁸ The dispatcher's tape recording was played twice during the hearing and is therefore part of the record made by the hearing officer during the hearing.

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 Training¹⁰ 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.¹¹

The law addresses the approach of law-enforcement vehicles that are using sirens and flashing lights, requiring other vehicles to yield the right-of-way by pulling to the side of the road. However, the same law states:

This provision shall not relieve the driver of any such [emergency] vehicle to which the right-of-way is to be yielded of the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of such vehicle from the consequences of an arbitrary exercise of such right-of-way.¹²

Another statute details specific exemptions for emergency vehicles in certain situations and states:

The driver of any emergency vehicle, when such vehicle is being used in the performance of public services, and when such vehicle is operated under emergency conditions, may, without subjecting himself to criminal prosecution: 4. Disregard regulations governing

⁹ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

¹⁰ Now known as the Department of Human Resource Management (DHRM).

¹¹ Exhibit 21. Section V.B.2.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Exhibit 2. Code of Virginia § 46.2-829. Approach of law-enforcement or fire fighting vehicles, rescue vehicles or ambulances.

a direction of movement of vehicles turning in specified directions so long as the operator does not endanger life or property.¹³

The agency's training material regarding the above statute cites the same language and includes the following:

NOTE: Does **not** permit traveling the wrong way on a one-way street or crossing double yellow line into oncoming traffic.¹⁴

Grievant reasonably believed that the suspect he stopped was under the influence of either alcohol or some other controlled substance. Under such circumstances, grievant had justification to make the traffic stop. When the subject then fled, grievant was also justified in starting to pursue him. The issue to be resolved herein, however, is whether grievant's inadequate communication to the dispatcher and his continuation of the pursuit the wrong way down a one-way street constituted failures to comply with established written policy.

Grievant maintains that he did communicate with the dispatcher regarding his initiation of the pursuit. However, the grievant asserted, and the agency agreed, that its radio communications system is problematical at best. For a variety of reasons, the police department often experiences brief periods when communications are made but not received. The tape recording played during the hearing confirms the radio traffic is intermittent, of poor quality and contains unexplained gaps. Accordingly, it must be concluded that the agency has not demonstrated, by a preponderance of the evidence, that grievant failed to attempt communication with the dispatcher.

The agency has demonstrated that grievant's continuation of this pursuit the wrong way down a one-way street did not comply with the established written policy to operate his vehicle with due consideration for the safety of other drivers. First, grievant knew, or reasonably should have known, from the training material he received that traveling the wrong way on a one-way street is prohibited. Second, even though grievant contends he did not remember this directive, he did know that even in a pursuit, his principle responsibility is the safe operation of his vehicle with due consideration for the safety of other drivers. Driving the wrong way on a one-way street is clearly an inherently dangerous activity and ignores the safety of other drivers who may innocently and legally cross that street or turn into that street.

Third, grievant argues that his siren was activated and that other drivers should have been aware of his presence. If other automobiles were not so well sound proofed and did not have sophisticated sound systems that drown out almost all outside sound, other drivers might be able to hear sirens. However, the reality today is that one cannot assume other drivers will be able to hear a

¹³ Exhibit 2. Code of Virginia § 46.2-390, Emergency vehicles exempt from regulations in certain situations; exceptions and additional requirements.

¹⁴ Exhibit 2. Agency Training Handout, *Civil Liability for Negligent Vehicle Operations*.

siren. Grievant argues that his flashing lights should have been visible. Given the high rate of speed at which grievant was driving (nearly twice the legal limit on that street) and the fact that there are multi-story brick buildings on both sides of the street, it is more likely than not that an unsuspecting driver would not have seen the lights until it was too late to avoid the collision. When driving the wrong way on a one-way street, grievant was obligated to use particular care as he approached every intersection. It is commendable that grievant slowed down at the previous intersection but his failure to use due consideration at the next intersection was the primary cause of the ensuing collision.

Fourth, grievant knew that when he continues a pursuit, he is required to critically evaluate the location, road conditions and vehicular and pedestrian traffic. Grievant knew that the street down which he pursued the vehicle is in the heart of the most popular downtown nightlife area in the city. A large number of bars are in the area and it is well known that many of the people walking and driving in this area late at night have been consuming significant amounts of alcohol. Thus, the vehicular and pedestrian traffic in this area adds a very significant element of danger to what was already a dangerous pursuit because grievant was driving at a high rate of speed in the wrong direction on a one-way street.

Grievant argues that others, including himself, have previously pursued suspects in the wrong direction on one-way streets. He contends that fire and emergency medical vehicles sometimes violate the same law. However, the issue is not whether other vehicles may have violated the law but whether they have done so with due consideration for the safety of other drivers and pedestrians. If an emergency vehicle, for necessary reasons, goes in the wrong direction on a one-way street but does so at a speed and in a manner that avoids accidents, the driver has used due consideration for the safety of others. It is clear from the totality of the circumstances in this case, as well as the outcome, that grievant was negligent in the operation of his vehicle.

Grievant contends, correctly, that many of the streets in this area can be confusing because the directions of travel change suddenly. However, knowing this, grievant had yet another reason to be cautious about continuing a pursuit through this area. The area in which this pursuit occurred is only four blocks from the boundary of his jurisdictional patrol area. Grievant acknowledged that he drives through this area periodically. Therefore, grievant was well aware of the nightlife activity in the area and the confusing streets.

Grievant also maintains that he did not see the prominent “Do Not Enter” signs when he entered the one-way street. The signs are large, reflective and not obscured; grievant should have had no problem seeing them. However, even if grievant did not see them, he should have become aware that the parked vehicles on both sides of the street were facing him – a second obvious clue that he was on a one-way street. Moreover, when he reached the intersection with the four-lane street, there is no traffic light or stop sign facing the direction from

which he was coming. This was a third indication that he was going the wrong way on this street.

It is worth noting that the agency's policy on vehicular pursuits states that, "Officers who terminate a pursuit based upon their sound professional judgement shall not suffer from corrective penalty."¹⁵ Thus, grievant would not have been subject to discipline had he ended this pursuit when it became dangerous, or if he had conducted the pursuit in a manner that avoided accidents.

Therefore, it is concluded that grievant did fail to comply with applicable established written policy – a Group II offense. There are no circumstances that would establish sufficient mitigation to reduce the discipline.

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. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.¹⁶ Management should issue a written notice as soon as possible after an employee's commission of an offense.¹⁷ 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 a detailed investigation is required, most disciplinary actions are issued within one or two weeks of an offense.

In this case, the disciplinary action was issued two months following the incident. The agency has provided a reasonable explanation for the delay. Grievant was on sick leave, and then on light duty for several weeks due to his concussion. The shift commander did not want to unduly burden grievant during his recuperation by asking him to respond to the proposed discipline. Therefore, he waited until grievant was given a final medical clearance before asking grievant to submit any mitigating circumstances. The disciplinary action was taken two weeks after grievant's release by the physician. Under these circumstances, the agency did act in a reasonably prompt manner.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and three-day suspension issued to the grievant on November 29, 2001 are AFFIRMED. The disciplinary action shall

¹⁵ Exhibit 19. Section 0610, VCUPD Written Directives, Vehicular Pursuits, April 26, 2001.

¹⁶ Exhibit 4. Section VI.A. *Ibid.*

¹⁷ Exhibit 4. Section VII.B.1. *Ibid.*

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.

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