Issue: Alleged racial retaliation; Hearing Date: April 8, 2002; Decision Date: April 10, 2002; Agency: Department of State Police; AHO: David J. Latham, Esquire; Case Number: 5410; **Judicial Review: Appealed to the Circuit Court in the County of Hanover on 04/26/02; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5410

Hearing Date: April 8, 2002
Decision Issued: April 10, 2002

PROCEDURAL ISSUES

Prior to and during this hearing, some witnesses expressed concern that their testimony might precipitate retaliation by unnamed person(s) in the agency's supervision or management ranks. The Commonwealth's grievance procedure prohibits retaliation, stating, in pertinent part, "An employee may ask EDR to investigate allegations of **retaliation** as the result of the use of or participation in the grievance procedure…."[1] EDR will investigate such complaints and advise the agency head of its findings.

Subsequent to the filing of his grievance, the grievant requested a compliance ruling from the Director of the Department of Employment Dispute Resolution. The Director issued a ruling in February 2002 which upheld two of the agency's actions but directed the agency to conduct a second-step resolution meeting if the grievant made a request for same within five workdays of his

[1] § 1.5, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

receipt of the ruling. Grievant made such a request and the agency did conduct a second-step resolution meeting.

APPEARANCES

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

ISSUE

Did grievant's division commander retaliate against grievant on the basis of grievant's race?

FINDINGS OF FACT

The grievant alleged that his division commander retaliated against him on the basis of race because the division commander concluded that grievant should be counseled regarding his interaction with a motorist during a traffic stop on April 25, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of State Police (hereinafter referred to as "agency") has employed the grievant as a Trooper for 36 years. The grievant has consistently been an outstanding performer, receiving exceptional performance evaluations in past years and most recently was evaluated as an "extraordinary contributor." He has received numerous commendations, writes more traffic citations than any other trooper in his division and enjoys the reputation of being a hard worker.

The agency has promulgated General Rules of Conduct for all employees, which state, in pertinent part:

> Employees will at all times be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of their official duties earnestly strive to win the approval of all law-abiding citizens.[3]

[2] Exhibit 16. Grievance Form A, filed October 30, 2001.
[3] Exhibit 2. Section 11, General Order No. 17, *General Rules of Conduct*, revised October 1, 1988.

The agency's policy on Patrol Duty provides, with respect to a violation of the law observed by a trooper, that, "Any controversy incident to the warning, arrest, or summons will be avoided; the sworn employee will merely inform the offender: (1) The nature of the offense. (2) Why the offense was detrimental to the safety of the public if this is appropriate. (3) The specific charge if a charge is made. (4) The procedure the violator will follow in order to bring the matter to a conclusion."[4] (Underscoring added).

On April 25, 2001, grievant stopped a vehicle that had illegally tinted windows and a partially obscured license plate. Grievant used a tint meter to measure the degree of tinting and found the windows in violation of the statute. Grievant (who is white) carefully explained the violations to the motorist (who is black). He read the statute to the motorist three times because the motorist did not seem to understand the law. The motorist sat with grievant in the trooper's vehicle while grievant wrote the summons. After grievant gave the summons to the motorist, he was free to leave. As the motorist exited the trooper's vehicle, he said, "The only reason you stopped me was because I'm black."[5] Grievant immediately exited his vehicle, met the motorist in front of the car, and said, "The only reason you made that statement is because I'm a white police officer." The motorist said that his wife had told him he would get stopped in his new car because he was black. Thereafter, the motorist left and the traffic stop ended.

On April 26, 2001, the motorist called the State Police area office and complained about the traffic stop. However, the motorist did not ask to file a formal complaint at that time. The sergeant who received the motorist's call discussed the matter with grievant and advised him to not make racially-oriented comments in the future.

On April 28, 2001, the motorist decided to make a formal complaint. A different sergeant received the complaint and completed an agency complaint form (SP-103).[6] The complaint was routed to the Internal Affairs Section, which forwarded it to grievant's division commander for investigation.[7]

The investigating sergeant concluded that grievant was neither rude nor discourteous and did not make racial comments.[8] However, during the hearing, he testified that grievant "did not make a smart move" when he made the comment to the motorist. Subsequently, two lieutenants reviewed the investigation report and characterized grievant's comments as inadequate or

[4] Exhibit 3. Section 9.a., General Order No. 23, *Patrol Duty*, revised October 1, 1998.
[5] During the hearing, the motorist's recollection was that he said, "Maybe if I was a different hue, you wouldn't have stopped me."
[6] Exhibit 5. *Complaint/Request/Incident Report*, April 28, 2001.
[7] Exhibit 8. Memorandum to division commander from Internal Affairs, May 7, 2001.
[8] Exhibit 6. Memorandum to division commander from investigating sergeant, July 5, 2001. It is also instructive to note that the investigating sergeant added a gratuitous observation at the end of his report stating, "I see Trooper _____'s due process entitlement as being compromised; therefore, I recommend this complaint be unfounded." There is no evidence that the investigating sergeant is either a lawyer or otherwise qualified as an expert on due process entitlement.

unsatisfactory job performance, and a failure to follow Section 11 of the General Rules of Conduct, supra.[9] The lieutenants recommended that grievant be counseled about the meaning of Section 11. The division commander forwarded the investigation to his superior, indicating that he intended to sustain the matter.[10] The lieutenant colonel indicated in his memorandum to the agency head that the investigation did not support a finding of racial discrimination but that the remaining issues should be addressed by the division commander. The agency head approved this recommendation.[11] Counseling with grievant was conducted on October 1, 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. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[12]

Grievant contends that his due process entitlement was violated because the sergeant who completed the SP-103 form did not provide the motorist with a "Complaint Process" brochure or utilize the correct form (SP-163). In fact, the

[9] Exhibit 6. Lieutenants' endorsements, August 30, 2001.
[10] Exhibit 10. Memorandum from division commander to lieutenant colonel, August 30, 2001.
[11] Exhibit 11. Memorandum from lieutenant colonel to agency head, September 7, 2001.
[12] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

sergeant's uncontradicted testimony established that he did provide the brochure to the motorist. The grievant failed to demonstrate how failure to use the correct form either violated his due process entitlement or constituted racial retaliation.

Grievant further cites the Law-Enforcement Officer's Procedural Guarantees Act as support for his contention that his due process rights were violated.[13] The Act specifically provides for procedures involving investigations that could lead to "the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer."[14] The case at issue herein involved such a relatively minor issue that it could not have lead to any of the outcomes cited. Therefore, the cited statute has no applicability in this case.

Grievant correctly notes that his division commander failed to refer the motorist's allegation of racial comments to the Director of the Professional Standards Unit (PSU).[15] Even though the Director may refer the complaint to the field for investigation, he may also elect to investigate the matter directly. However, grievant has not demonstrated how failure to refer the complaint to PSU adversely affected him.

Grievant also correctly observes that the investigation initiated on May 7, 2001 was not completed within 30 days.[16] The investigation was assigned on May 7, 2001; the sergeant who conducted the investigation completed his report on July 5, 2001. However, testimony established that the investigator was unable to contact the complainant until June 13. Moreover, the investigator was absent for two weeks due to medical leave in June and absent due to military leave for 17 days in late June to early July 2001. These two extended absences and the inability to contact the complainant were beyond the control of either the investigator or the agency and, therefore, constitute extenuating circumstances that justified the investigation continuing beyond 30 days. Grievant's reliance on Code of Virginia § 2.1-116.05.G is misplaced because this statute refers to the grievance process, not to an administrative investigation conducted by the Virginia State Police.

The heart of grievant's complaint about this situation is that the division commander overruled the conclusion of the investigating sergeant. He contends that the division commander's decision was racial retaliation. This contention is unsupported and without merit for the following reasons. First, grievant ignores the fact that two lieutenants had recommended counseling before the division

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[13] Exhibit 20. Code of Virginia §§ 2.1-116.1ff (repealed October 1, 2001 and recodified under §§ 9.1-500ff).

[14] Exhibit 20. Code of Virginia § 2.1-116.2 (now § 9.1-501)

[15] Exhibit 4. Section 7.e, General Order No. 18*, Administrative Investigations,* revised July 1*,* 1998, provides, "The division commander of the effected employee shall contact the Director of the Professional Standards Unit in the following cases: Alleged civil rights violations, to include sexual or racial discrimination or harassment."

[16] Exhibit 4. Section 12, *Ibid*., states, "The investigation shall be completed within 30 days, unless the division commander or the Director of the Professional Standards Unit grants an extension due to extenuating circumstances."

commander received the investigation report. Second, he further ignores the fact that grievant's superiors, including the agency head, supported the division commander's recommendation to counsel grievant regarding the inappropriateness of his comment to the motorist.

Third, the undisputed evidence is that grievant's performance is highly regarded by all of his superiors, including the division commander. It would be totally inconsistent for the division commander to repeatedly endorse superior performance evaluations and numerous commendations of grievant, and then retaliate against him on the basis of race over such a relatively small incident as this traffic stop.

Fourth, the grievant has presented no evidence that the grievant wronged the division commander so as to engender a retaliatory response. "Retaliate" means, "to repay (as an injury) in kind; to get revenge."[17] In order for the division to commander to retaliate, there must have been a wrong committed by grievant against the commander. There is no evidence that grievant committed any such wrong, ergo, there is nothing against which the division commander could have retaliated. Viewed in a broader sense, the Grievance Procedure Manual defines retaliation as, "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g., whistleblowing).[18]

Grievant has not established a claim of retaliation because he was not engaged in a protected activity as defined in case law. Grievant contends that his conversation with the motorist is a protected activity because he has a right to freedom of speech under the First Amendment of the United States Constitution and Article I, Section 12 of the Virginia Constitution. However, it is well established that all employers, public and private, may restrict the speech of employees. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their office, without intrusive oversight by the judiciary in the name of the First Amendment."[19]

However, even if grievant could establish that he engaged in a protected activity, and even if he could establish the required nexus between that activity and management's action, the agency has rebutted grievant's allegation of retaliation by establishing that it had a nonretaliatory business reason for the counseling. The agency has credibly argued, pursuant to General Orders 17 and 23, that it has an overriding interest in fostering and maintaining a good public image. The agency pursues this interest by carefully regulating how troopers interact with the public, including what troopers say to citizens while performing

[17] Webster's Ninth New Collegiate Dictionary.
[18] Definitions, *Grievance Procedure Manual*, effective July 1, 2001.
[19] Connick v. Myers, 461 U.S. 138 (1983). See also Snepp v. United States, 444 U.S. 507, 509 (1980).

their duties. The grievant has presented no evidence that the agency's goal in regulating employee speech and conduct is pretextual.

Fifth, grievant has alleged only racial retaliation – not racial discrimination. However, even if grievant's allegation were to be interpreted as a claim of racial discrimination, he has failed to prove this charge. In a case involving allegations of racial discrimination, evidence of unlawful employment practices could be shown through disparate treatment, disparate impact, or a racially hostile work environment. Grievant has not shown, by a preponderance of the evidence, that any of these situations existed. Grievant alluded to situations where he believed that the division commander had treated blacks more favorably than whites. However, there is more to proving a case than merely expressing one's opinion.

Finally, grievant complained that management had no authority to overrule the investigating sergeant's recommendation. It is inherent in any organization, whether private industry or government, that a superior may overrule the decision or recommendation of a subordinate. This principle has been affirmed in a ruling by the Director of the Department of Employment Dispute Resolution (EDR) which established that upper management has the discretion to review the immediate supervisor's decision and to make a determination to award the requested relief or uphold the disciplinary action.[20]

Grievant has a very long career with the agency with superior ratings and no disciplinary or other blemishes on his record. He is upset that after 36 years, he should be counseled about what to say or not say during a traffic stop. He has been making traffic stops for nearly four decades and believes his experience serves him well. However, the fact is that agency management must direct the operations of the agency as it sees fit. The General Assembly has codified this in Section 2.2-3004.B of the Code of Virginia, which states, "Management reserves the exclusive right to manage the affairs and operations of state government." Neither the hearing officer nor the grievant can abridge the right granted to management by the General Assembly.

In this case, agency management determined that grievant should not have responded to the motorist in kind when the motorist played the race card. Agency management's guidance to troopers is that they should respond by stating the factual basis for the traffic stop, i.e., "I stopped your vehicle because I observed windows that appeared to be illegally tinted." (Or words to that effect). Grievant feels that his response may have avoided a confrontation. The agency believes that grievant's response had the potential to create, rather than avoid a confrontation. Grievant may disagree with the agency but, as an employee of the agency, he has no alternative but to abide by management's final decision on how to respond in this situation.

The complainant was upset enough about his interaction with grievant not only to call once, but to then come in and file a formal complaint, and ultimately

[20] Compliance Ruling of Director, In re: DMHMRSAS, March 23, 2001.

to testify at the grievance hearing. It is highly unlikely that the complainant would have pursued his complaint this far if there wasn't something in the interaction with grievant that could not be improved upon. As the agency head aptly observed during the hearing, it is probable that the complainant viewed grievant's response as sarcastic and unprofessional. The agency concluded that grievant's response should have been different and it simply counseled him to respond differently should that same situation recur in the future.

Two troopers who testified on grievant's behalf said they had responded to motorists in much the same way as grievant had when they encountered similar situations. This may give grievant some comfort. However, the fact that two other troopers are acting in the same fashion does not mean that grievant is right and the agency is wrong. It simply points up the need for more training and/or counseling on this issue.

Grievant also argues that there should not have been a need for a second counseling after the April 26, 2001 advice from the sergeant who took the initial telephone complaint. That may or may not be correct. However, it was not an unreasonable decision for management to conclude that perhaps a more detailed counseling session was necessary to emphasize management's concern about this issue. A second counseling about the same incident may seem demeaning to grievant but it has absolutely no cumulative effect on his performance record. Further, a second counseling for the same incident is not analogous to double jeopardy. It is simply reinforcement in the same way that annual training sessions on the same topic reinforce prior training.

Grievant makes the specious argument that Section 11 of the General Rules of Conduct didn't apply during the traffic stop because the motorist was driving a vehicle with illegally tinted windows and, therefore, is not a "law-abiding citizen." This argument must be rejected for two reasons. First, Section 11 states that, "Employees will at **all** times be courteous, patient and respectful…" (Underscoring and emphasis added). Second, the plain intent of Section 11 is to treat all citizens as though they are law-abiding. Virtually all citizens have been guilty of some minor infraction in their lifetimes but this doesn't give license to a police officer to treat them in other than a courteous and respectful manner.

Grievant was under the mistaken impression that written documentation of his verbal counseling had been made a part of his personnel file. The Standards of Conduct policy provides that formal disciplinary actions (Written Notices at the Group I, II or III level) are placed in an employee's personnel file in the Human Resources department. However, informal corrective action, such as verbal or written counseling, is not placed in the personnel file. The supervisor who counsels an employee retains documentation of the counseling session in his/her personal file that is maintained in the supervisor's desk. Such counseling documentation would be placed in the personnel file only as supporting evidence if future disciplinary action is required for the same or a similar offense.

Grievant makes much of the fact that the division commander amended his October 5, 2001 memorandum on November 13, 2001 when he stated that the language "racial comments" was expunged.[21] The decision to expunge this component had already been made by grievant's superiors and was affirmed by the counseling given to grievant on October 1, 2001. Thus, the division commander's November 13, 2001 letter only reaffirmed what was already decided and done. There is no evidence to support grievance's inference that this is probative of racial retaliation.

Grievant has requested five forms of relief:

1. *That the allegation be unfounded*. This case does not involve an "allegation" because grievant has admitted that he made the statement attributed to him by the complainant. Thus, it is not an allegation but an established and admitted fact.

2. *That the division commander refrain from retaliation in the future*. The grievant has not shown, by a preponderance of the evidence, that the division commander's actions constituted retaliation. Therefore, there has been no retaliation from which to refrain in the future.

3. *That the file relating to the motorist's complaint be purged from grievant's personnel file*. As stated above, counseling documentation is not placed in an employee's personnel file.

4. *That grievant be given a letter of apology by the agency head and the division commander*. A hearing officer has no authority to direct agency personnel to issue letters of apology.[22] Moreover, even if the hearing officer had such authority, there is no basis in this case for any apologies to be issued by management. The agency has not violated any of grievant's Federal or State rights.

5. *That grievant receive reimbursement for attorney's fees or, in the alternative, that the sergeant who initially received the telephone complaint declare the complaint unfounded*. Hearing officers have no authority to award attorney fees.[23] Even if such authority existed, it would not be warranted for reasons stated in this Decision. There is no basis to justify having the sergeant who received the complainant's initial telephone call change his report. Moreover, the sergeant testified that grievant's comment to the motorist was improper.

Because the corrective action taken in this case was merely counseling, it would not have qualified for a grievance hearing. By alleging racial retaliation, grievant has been able to obtain that hearing and have the merits of his case heard. It is clear, however, that the agency had the right to counsel grievant and

[21] Exhibits 12 & 13
[22] § 5.9, *Grievance Procedure Manual*, effective July 1, 2001.
[23] § 5.9(b)1. *Ibid.*

that the grievant has not proven that racial retaliation was the genesis of the decision to conduct counseling.

DECISION

The grievant has not demonstrated that the division commander's decision to counsel grievant was racial retaliation. Grievant's request for relief is DENIED.

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.

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David J. Latham, Esq.
Hearing Officer