

Issue: Group II Written Notice (failure to follow supervisor's instruction);  
Hearing Date: 12/09/02; Decision Date: 12/10/02; Agency: VMI; AHO:  
David J. Latham, Esq.; Case No. 5578



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5578

Hearing Date: December 9, 2002  
Decision Issued: December 10, 2002

APPEARANCES

Grievant  
Human Resource Director  
One witness for Agency  
Observer for Agency

ISSUES

Did the grievant's conduct 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 grievance from a Group II Written Notice issued for failing to follow his supervisor's written directive.<sup>1</sup> Following failure to resolve the matter during the grievance process, the agency head qualified the grievance for a hearing.<sup>2</sup> The Virginia Military Institute (VMI) (hereinafter referred to as agency) has employed grievant for over four years as a police officer. The agency's police department employs six people, including the Chief of Police.

The County of Rockbridge, City of Lexington, and VMI each have a law enforcement arm. The three law enforcement arms work cooperatively and utilize a Central Dispatcher to efficiently dispatch police officers where needed. Prior to December 1998, Central dispatchers had been routinely calling VMI police officers for complaints at locations within the City of Lexington. The police chiefs of VMI and the City of Lexington agreed that Central Dispatch should not summon VMI officers unless the Lexington Police Department specifically requested assistance. The VMI Chief of Police thereafter issued a written directive that agency police officers were not to be summoned for complaints in the city of Lexington unless requested by the Lexington Police Department. Copies of this directive were given to each VMI police officer. At various times, the Chief has subsequently verbally reminded officers about this policy. The directive also states, in pertinent part:

This letter also serves as notice to all VMI Post Police Officers. Answering complaints/calls outside Virginia Military Institute jurisdiction jeopardizes VMI property, students, faculty & staff, employees and visitors.<sup>3</sup>

At about 7:30 p.m. on September 19, 2002, grievant was at the agency Police post and was the only officer on duty. Over the police radio, he heard Central Dispatch tell a City of Lexington police officer to respond to a burglar alarm that had been activated at the Rockbridge Area Free Clinic. The Clinic is not connected with VMI and is not on agency property. Neither the Central dispatcher nor the City of Lexington police officer requested grievant to assist on the call.<sup>4</sup> Grievant did not call Central Dispatch to advise that he was going to the Clinic. Grievant left his post, drove to the Clinic, and arrived at the same time as the City police officer. Both officers exited their vehicles, walked around opposite sides of the Clinic building, and met in the rear of the building. Finding nothing unusual they walked back to their vehicles. Shortly thereafter a City police sergeant arrived; grievant then left to return to his post. Grievant estimates he was at the Clinic location for about three minutes.

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<sup>1</sup> Exhibit 5. Written Notice issued September 24, 2002.

<sup>2</sup> Exhibit 5. Grievance Form A, filed September 25, 2002.

<sup>3</sup> Exhibit 5. Letter to Central Dispatch Director from agency Chief of Police, December 18, 1998.

<sup>4</sup> Exhibit 4. Letter from City Police sergeant to -Human Resource Director, November 26, 2002.

There is no VMI property directly adjacent to the Free Clinic. The property is bounded by a private residence on one side, a road on one side and an approximately 45' high stone escarpment that runs behind the clinic and down to the road. The escarpment is fairly steep (about a 50-degree incline) and a wall has been constructed along the top of the escarpment. A road runs along the top of the escarpment; on the opposite side of that road is a private residence and a building (Turman House) that belongs to the VMI Foundation. The VMI Foundation is a non-profit organization; Turman House is not located on VMI property.

One other agency police officer has committed a similar offense by responding to a City police call without being requested. That officer has also been disciplined with a Group II Written Notice.

### 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.

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<sup>5</sup> 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.

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<sup>5</sup> Now known as the Department of Human Resource Management (DHRM).

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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group II offenses include acts and behavior of such a serious nature that an accumulation of two Group II offenses should normally warrant removal from employment.<sup>6</sup> Examples of Group II offenses include failure to follow a supervisor's instructions or otherwise comply with established written policy.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>7</sup>

Grievant pointed out that he had previously apprehended a subject on the road that runs between Turman House and the wall that overlooks the Free Clinic, and that nothing had been said about this incident. However, grievant had first observed the subject while he was on VMI property and pursued him off the property before apprehending him. Thus, that situation fell under the doctrine of close pursuit, which provides that an officer may pursue a subject outside of his jurisdiction so long as he has observed him commit an offense within his jurisdictional boundaries.<sup>8</sup> Therefore, this example is distinguished from the instant case and is not applicable herein.

Grievant interprets the law governing campus police departments to give him jurisdiction at the Free Clinic. That law provides that a campus police officer may exercise his powers and duties:

(i) upon any property owned or controlled by the relevant public or private institution of higher education, or, upon request, any property owned or controlled by another public or private institution of higher education and upon the streets, sidewalks, and highways, immediately adjacent thereto, (ii) pursuant to a mutual aid agreement provided for in § 15.2-1727 between the governing board of a public or private institution and such other institution of higher education, public or private, in the Commonwealth or adjacent political subdivisions.<sup>9</sup>

Grievant's reliance on this statute is misplaced for four reasons. First, it is undisputed that the incident occurred on the property of a clinic that is neither owned nor controlled by an institution of higher learning. Further, the incident did

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<sup>6</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>7</sup> § 5.8, *Grievance Procedure Manual, Rules for the Hearing*, Effective July 1, 2001.

<sup>8</sup> See *Code of Virginia* § 19.2-77.

<sup>9</sup> *Code of Virginia* § 23-234.

not occur on a street, sidewalk or highway immediately adjacent to property owned or controlled by an institution of higher learning. Grievant contends that the property on which the Clinic is situated is a “public lot” that falls within the ambit of this statute, however, this argument is not persuasive. Grievant offers no legal definition of a “public lot,” but presumably means that the general public has access to the Free Clinic. However, a “public lot” is not a street, sidewalk or highway. If the General Assembly had intended to include “public lots” in the law, it would have included that term or a functional equivalent.

Second, the lot on which the Free Clinic is situated is not immediately adjacent to VMI property. Even if grievant had believed that the Turman House is on VMI property, there is a public road between Turman House and the Clinic. Thus, pursuant to the statute, grievant’s jurisdiction would only include the public street – not a facility located on the opposite side of the street. Third, the Turman House is not located on VMI property. Therefore, the Free Clinic is not immediately adjacent to VMI property.

Finally, grievant alternatively argues that the arrangement to use a Central Dispatcher constitutes a “mutual aid agreement.” The agency maintains that there is no written mutual aid agreement among the three law enforcement agencies. If there is such an agreement, grievant has failed to produce a copy of it. Nonetheless, it is undisputed that VMI does have at least a verbal agreement to utilize the services of Central Dispatch and does respond, when requested, to aid City police officers. Thus, there is, at the least, a de facto aid agreement among the law enforcement agencies. However, the only documented evidence of this agreement is the VMI Chief’s letter of December 18, 1998.

This brings us to the crux of grievant’s argument. He maintains that because the Police Department’s policy manual does not address this entire subject, there is no “written directive.” This argument is spurious and self-serving. There is no requirement that all agency police department procedures must be in the policy manual. While it would be logical to have such a policy in the manual, grievant did not present any evidence that such is mandated. However, even if the manual had such a policy, the Chief has the authority to issue directives to clarify the policy. Here, the Chief issued, in writing, a letter that explained the conditions under which VMI officers may assist City police officers. Moreover, he gave a copy of his directive to all VMI police officers putting them “on notice.” That letter constitutes not only a “written directive,” but is also a clear warning to grievant that he may not respond to City police calls unless specifically requested to do so. Grievant violated that policy.

The agency has demonstrated, by a preponderance of the evidence, that grievant knowingly failed to follow the written instructions of his supervisor – a Group II offense. The grievant has not presented any circumstances sufficient to warrant mitigation of the offense.

## DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued to grievant on September 24, 2002 is UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>10</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.