

Issue: Group II Written Notice (failure to follow established policy); Hearing Date: 12/12/02; Decision Date: 12/26/02; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5584



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5584**

Hearing Date: December 12, 2002  
Decision Issued: December 26, 2002

**PROCEDURAL HISTORY**

On August 23, 2002, Grievant was issued a Group II Written Notice of disciplinary action for "Failure to Follow Established Policy – Accepting/ Reporting Tips or Gratuities."<sup>1</sup>

On August 27, 2002, 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 November 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Advocate

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<sup>1</sup> The Written Notice shows Grievant was suspended from May 28 to August 23, 2002. This appears to be suspension pending the Agency's investigation and court proceedings rather than as a result of the Group II Written Notice. Suspension for a single Group II Written Notice cannot exceed ten workdays.

Assistant Operations Manager  
Senior Trooper

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action.

## **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 Transportation employed Grievant as a Senior Safety Service Patroller. Part of his responsibilities included assisting motorists stranded on highways because of their vehicles became disabled. He had been employed by the Agency for approximately 24 years.

Grievant assisted a distressed motorist on May 14, 2002. Unknown to Grievant, the motorist was a law-enforcement officer working undercover.<sup>2</sup> Grievant explains what happened as follows:

After specifically stating to the motorist three to four times that I could not accept the \$20.00 because the service provided was a free service, the motorist persisted and was insistent that I take the money. I accepted the \$20.00 with the explicit intention of turning it over to my Supervisor .... However, during the time that elapsed between the service and my getting back to the Yard, I simply and honestly forgot.<sup>3</sup>

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<sup>2</sup> The Agency had received reports that some of its employees were assisting stranded motorists and charging those motorist for otherwise free services. In order to catch those employees, the Agency used law-enforcement officers to pose as motorists. Grievant was not one of those employees charging for free services.

<sup>3</sup> Agency Exhibit 2.

## CONCLUSIONS OF POLICY

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.” DHRM § 1.60(V)(B).<sup>4</sup> 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.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Failure to ... comply with established written policy” is a Group II offense.<sup>5</sup> The Agency’s policy states:

The service provided by the Safety Service Patrol to motoring public is paid for by tax dollars. Therefore, Safety Service Patrol personnel ***shall not*** under ***any*** circumstances, accept any tips or gratuities from any citizens or companies. If, because of circumstances beyond your control you should receive a tip from a customer you must immediately notify your Shift Supervisor and turn the Tip in along with a written explanation of the circumstances. Safety Service Patrol personnel ***shall not*** recommend or direct business to any company (i.e. towing companies, salvage companies, etc.) which would give rise to an allegation of receiving kickbacks. Specifically, Section 11-75 of the Code of Virginia establishes that no public employee having official responsibilities for procurement transactions shall solicit, demand, accept, or agree to accept from a bidder a gift, gratuity, favor, or advantage. The law also establishes that it is illegal for any bidder, offeror or contractor to offer such item to a public employee. The code does offer flexibility in its guidance where items of nominal or minimal value are allowable. Appropriate items that are allowable include promotional calendars, pens, pencils, etc. Disciplinary action ***WILL*** be taken under the Standards of Conduct, against any personnel found accepting tips, gratuities or directing business to any companies or accepting kickbacks. (See § 11-75 Code of Virginia).

Grievant received a copy of the policy and was aware of its provisions.<sup>6</sup> Grievant failed to comply with the policy because he accepted a gratuity and after accepting it failed to immediately turn it over to his supervisor with a written explanation.

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>6</sup> Agency Exhibit 4.

Grievant argues he did not intend to keep the money, he simply forgot to return it when he changed out of his uniform after working his shift. The Hearing Officer agrees that Grievant did not intentionally refuse to turn in the money to the Agency. Grievant violated the policy, however, when he failed to turn in the money regardless of the reason he failed to do so. Thus, Grievant's actions were contrary to the policy.

## DECISION

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

## 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>7</sup>

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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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Carl Wilson Schmidt, Esq.  
Hearing Officer