

Issue: Group III Written Notice with suspension and demotion (conduct unbecoming an officer); Hearing Date: 03/14/03; Decision Issued: 03/21/03; Agency: College of William & Mary; AHO: Carl Wilson Schmidt, Esq.; Case No. 5664



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5664

Hearing Date: March 14, 2003
Decision Issued: March 21, 2003

PROCEDURAL HISTORY

On December 3, 2002, Grievant was issued a Group III Written Notice of disciplinary action for:

Violation of the Campus Police Department's General Orders (II. Rules and Regulations, Part 2A – Integrity, Page II.1) for conduct unbecoming an officer, as evidenced in the attached synopsis of your actions on October 26, 2002.

On January 6, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 20, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 14, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

Senior Police Officer
Police Officer
Two Lieutenants
Director
Patrol Officer
Two Area Directors
Baptist Student Minister
Three Head Residents
Commonwealth's Attorney
Office Manager
Resident Assistant

ISSUE

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

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 College of William and Mary employed Grievant as a Police Lieutenant until he was demoted to the position of Emergency Coordinator I as part of the disciplinary action taken against him. He received a ten percent pay reduction and was suspended from December 3, 2002 to December 14, 2002. No evidence of prior disciplinary action against Grievant was presented. For approximately 17 years, Grievant has had a successful and distinguished career as a law-enforcement officer at the College. His most recent evaluation rated his performance as an Extraordinary Contributor, the highest possible rating. Grievant graduated from the College of William and Mary.

Grievant was not scheduled to work on October 26, 2002. He attended the homecoming football game and began drinking beer at approximately 12:30 p.m. He consumed a significant amount of alcoholic beverages. At approximately 4:30 p.m., Grievant went to the Kappa Alpha fraternity house for an alumni reception. He

continued to drink alcoholic beverages. Grievant consumed between eight and ten alcoholic beverages. He was intoxicated.

Grievant's wife has a history of excessive alcohol consumption and erratic behavior resulting from excessive drinking. She went with Grievant to the alumni reception and was also drinking alcoholic beverages. She became intoxicated and began walking away from Grievant. Grievant feared his wife would leave the area and possibly endanger herself. He confronted her and a verbal altercation resulted. Grievant and his wife began yelling and arguing. Grievant made several vulgar remarks towards his wife. Several students witnessed the altercation and Grievant's intoxication.

A student called the Campus Police Department to report an altercation outside of the Kappa Alpha fraternity house. The Lieutenant and Police Officer S responded to the call. When the Lieutenant arrived at the fraternity house, he asked a student if the student knew the location of the disturbance. The student said it was at the end of the driveway and that the Lieutenant would probably know who was causing the disturbance. The Lieutenant and Police Officer S walked to the location of the disturbance and observed Grievant and his wife sitting in the "sand pit." Police Officer R arrived at the fraternity. He spoke with Grievant's wife and concluded she was intoxicated and uninjured. He waited with her until her father came to take her away from the campus. Grievant was taken home by another police officer. Neither Grievant nor his wife were arrested for any crime.¹

CONCLUSIONS OF POLICY

Rules and Regulations governing the Campus Police Department set forth three types of offenses.² Group I offenses "include those types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include more severe acts and behavior." Group III offenses "include acts and behavior of such a serious nature that a first occurrence may normally warrant termination."

The College Police Department has high expectations of its law-enforcement officers. College Police Department Rules and Regulations require:

All officers of the College Police Department shall conduct themselves at all times, both on and off duty, in such a manner as to reflect favorably on the department. Conduct unbecoming an officer shall include that which brings the department into disrepute or reflects discredit upon the officer

¹ Grievant and his wife were treated consistently with how other intoxicated alumni attending a fraternity reception on campus would have been treated.

² Campus Police Department Rules and Regulations are patterned after DHRM Policy 1.60.

as a member of the department or that which impairs the operation or efficiency of the department or the individual officer.

Although the Rules and Regulations list many offenses, the listed offenses are not intended to be all-inclusive. “Accordingly, conduct which, in the judgment of the Director, although not listed in these groups of offenses, that seriously undermine[s] the effectiveness of the agency’s activities or the employee’s performance should be treated consistent with the provisions of this policy.” In the Agency’s judgment, Grievant’s behavior is consistent with a Group III offense. The Hearing Officer agrees.³ Grievant held a law-enforcement position and became engaged in criminal behavior that was observed by students and his subordinates. He was responsible for enforcing against students the very laws he broke in their presence. He jeopardized his stature and leadership position within the Campus Police Department. He brought discredit to the Campus Police Department and undermined the Department’s ability to operate efficiently.⁴

Grievant admits that some disciplinary action against him is appropriate but believes that the degree of discipline imposed by the Agency is excessive.⁵ Grievant presented evidence of his distinguished career, exemplary job performance, and the hardship to the student community from his absence of a leadership position. The evidence is overwhelming that Grievant is a profoundly talented law-enforcement officer who has touched and improved the College community. He made one mistake on one day of his career; however, that mistake is one that would normally result in removal. The Agency has mitigated the disciplinary action against Grievant to suspension and demotion. Suspension and demotion is appropriate within the context of a Group III Written Notice and the facts of this case. It is logical for the Agency to remove Grievant from direct interaction with the College community as a police officer.

Grievant contends the Agency failed to comply with the Law-Enforcement Officers Procedural Guarantee Act, *Va. Code § 9.1-500 et seq.* Grievant is correct. The Agency failed to give Grievant proper notice and afford him the rights required by the Act. The question is what are the consequences arising because of the Agency’s noncompliance. The Hearing Officer finds that the Agency’s failure to comply with *Va.*

³ Group III offenses include, “Engaging in criminal conduct on or off the job.” See, Rules and Regulations, page II.5. Grievant engaged in criminal conduct by being intoxicated in a public place contrary to *Va. Code § 18.2-388* which makes public intoxication a misdemeanor.

⁴ Grievant argues that if his behavior is conduct unbecoming an officer, then the Rules and Regulations require that he be issued only a Group II Written Notice. Grievant’s argument fails, because although conduct unbecoming an officer may be a Group II offense, nothing in the Rules and Regulations limit it to a Group II offense. A police officer may engage in conduct unbecoming an officer that is so severe as to warrant issuance of a Group III Written Notice.

⁵ Grievant argues that public intoxication is a minor infraction. Grievant’s argument may have had merit, if his intoxication had not occurred at his workplace (the campus) and in front of his subordinates (police officers) and those he supervises (students and alumni). The fact that Grievant was not in uniform is irrelevant. He is a sworn law-enforcement officer at all times and is well-known in the College community.

Code § 9.1-500 et seq. is harmless error. Once the Agency realized it had not followed Act's requirements, it suspended the grievance procedure and allowed Grievant to chose a different grievance process consistent with the process afforded under *Va. Code § 9.1-500 et seq.* Grievant chose not to proceed under the Act. Grievant's decision is logical since the Law-Enforcement Officers Procedural Guarantee Act affords only "minimum rights" and a recommendation from a hearing panel. Even if the Hearing Officer were to exclude from consideration any facts obtained from Grievant, the Agency has presented ample facts from other witnesses to establish the events giving rise to Grievant's disciplinary action.

Grievant contends the disciplinary action taken against him was inconsistent with the disciplinary action taken against other College employees. He offered the example⁶ of a maintenance worker who used his master key to enter the room of female students without their permission and who attempted to spy on the female students. This employee remained employed by the College. Grievant's evidence is insufficient for the Hearing Officer to conclude that the Agency has inconsistently disciplined its employees. The details of the charges and action taken against the maintenance employee were not presented as evidence. Other than knowing that the maintenance employee remained employed by the College, no evidence was presented regarding what disciplinary action was taken against him. Grievant also remained employed by the College.

DECISION

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

⁶ Grievant offered other examples. None of the examples were sufficiently similar to Grievant's case to support the conclusion that the Agency disciplined Grievant inconsistently from other employees.

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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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