

Issue: Group II Written Notice (failure to follow supervisor's instructions, perform assigned work or otherwise comply with established written policy); Hearing Date: 07/23/03; Decision Issued: 07/25/03; Agency: State Police; AHO: Carl Wilson Schmidt, Esq; Case No. 5761



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5761

Hearing Date: July 23, 2003
Decision Issued: July 25, 2003

PROCEDURAL HISTORY

On April 28, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

You stopped [Mr. and Mrs. W.] for a tinted window violation on October 3, 2002 in Rockbridge County. During a traffic stop you were rude and discourteous in your tone, comments and non-verbal gestures. You also failed to videotape the stop as required by Memo 2000 – No. 5 (revised.).

Your actions were in violation of General Order 19, Paragraph 13 .b. (1) of the State Police Manual which states, "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy." The instructions and policy you failed to follow were as follows:

(1) General Orders 17, paragraph 11 of the State Police Manual which states, "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."

(2) General Order 23, paragraph 9(a) which states, "the sworn employee will merely informed the offender: The nature of the offense; why the charge was detrimental to the safety of the public; a specific charge if a charge is made; and a procedure the violator will follow in order to bring the matter to a conclusion."

(3) Instructions given to you by [Captain] on March 19, 2002 which were, "You are instructed to fully abide by the procedures set forth in the State Police Manual in relation to your dealings with the public in general and violators in particular."

(4) Memo 2000 - #5 (revised) which states, "The VCR recorder (both audio and video) shall be turned on when the sworn employee first suspects a driver/person(s) is committing a violation and turned off when the driver is arrested or released."

On May 21, 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 June 26, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 23, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Two Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for rude and discourteous behavior and failure to follow established written policy.

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 State Police employs Grievant as a Special Agent. He travels Virginia's highways to engage in drug interdiction. On occasion, Grievant will stop motorists whom he thinks may be violating laws other than drug laws. When he makes these stops, he typically warns the motorist rather than issuing a citation. No evidence of prior disciplinary action against Grievant was presented.

On October 3, 2002, Grievant was watching traffic moving on Interstate 81. He observed a vehicle with tinted windows that were darker than permitted by Virginia law. He turned on the flashing lights to his vehicle and caused the driver of the vehicle to pull to the shoulder of the interstate. Mr. W was driving the vehicle and Mrs. W was sitting in the front passenger seat.

When Grievant approached the stopped vehicle, Mr. W asked "What seems to be the problem, buddy?" Grievant formed Mr. W that the windows on his vehicle seemed to be darker than permitted by law and that he wanted to test them with his tint meter. Mr. W argued with Grievant that the tint was proper because he had had the tinting done in a professional shop in Waynesboro. Mr. W showed Grievant a "Formula One" sticker affixed to the vehicle inside the driver's door casing. Because of safety concerns, Grievant asked Mr. W to speak with him in a ten to twelve foot space between the rear of Mr. W's vehicle and the front of Grievant's vehicle. By standing between the vehicles, Grievant and Mr. W were a few feet further away from the side of the interstate, than if Grievant had spoken with Mr. W while Mr. W remained in the vehicle. Because of the heavy traffic on the interstate, Grievant and Mr. W spoke loudly to each other. At one point, Grievant used his tint meter to measure the tint to the glass of Mr. W's vehicle. The windows were darker than allowed under Virginia law. Grievant warned Mr. W and the husband and wife then departed.

Mr. W and Mrs. W went to their intended destination. Several hours later, they drove to a State Police office and filed a written complaint alleging Grievant behaved inappropriately towards them.

Grievant's vehicle is equipped with a video recorder and he wears a wireless microphone. Grievant failed to turn on the video recorded before he stopped Mr. W and Mrs. W.

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.” General Order 19(12)(a). 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.” General Order 19(13)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order 19(14)(a).

“Inadequate or unsatisfactory job performance” is a Group I offense.¹ Grievant’s behavior was unsatisfactory because he failed to turn on his video recording equipment. The Group II Written Notice issued to Grievant must be reduced to a Group I Written Notice.²

The Agency contends Grievant’s behavior was contrary to applicable established written policy. Although the Agency contends Grievant acted contrary to Memo 2000-No. 5 stating the VCR shall be used for “All traffic and criminal enforcement stops” and to Special Operations Division Operations Manual stating, “Each stop will be recorded on the Video Incident Capture System”, neither of these documents reflect an established written policy. The Agency maintains most of its policies in the form of General Orders within the State Police Manual. Sworn law-enforcement employees are trained regarding these policies and the Agency regularly emphasizes to employees the importance of complying with policy. In contrast, Memo 2000-No.5 and the Operations Manual are more in the nature of instruction manuals rather than policy. Simply because they are written does not convert them into established written policy. No evidence was presented suggesting that Grievant or other employees in his unit received any training regarding these documents. Consequently, Grievant’s failure to comply with Memo 2000-No.5 and the Special Operations Division Operations Manual reflects inadequate job performance (a Group I offense) and not violation of established written policy (a Group II offense).

The Agency contends Grievant was rude and discourteous to Mr. and Mrs. W. The Agency reaches this conclusion based on several factors. First, Sergeant M spoke by telephone with Mr. W and Mrs. W and Sergeant M felt their opinions about Grievant were credible. Second, Mr. W and Mrs. W quickly filed their complaint after their encounter with Grievant. Third, Mr. W and Mrs. W filed a complaint about Grievant even though Grievant let them off with a warning. It is uncommon for a citizen who receives only a warning to file a complaint against an Agency law-enforcement officer.

¹ General Order 19(12)(b)(4).

² There are several aspects of this case that the Agency has not raised as being of concern. For example, some evidence was presented suggesting Grievant accidentally or intentionally recorded over several portions of the video tape. The Agency did not contend Grievant had some custodial duty to ensure that the “evidence” was not altered. Because the Agency did not focus on that evidence, the Hearing Officer gave it little weight. That evidence also related to a third allegation against Grievant that was not sustained as part of the Agency’s investigation.

It may very well have been the case that Grievant was rude to Mr. W and Mrs. W in October 2002.³ What the Agency has failed to do, however, is to establish that conclusion based on the evidence presented.⁴ Mr. W and Mrs. W did not testify during the hearing. Grievant testified during the hearing and his testimony was credible. When faced with the question of what weight to give the testimony of a credible witness who testified at the hearing and the unsworn statements made by telephone to a Sergeant, the Hearing Officer must give greater weight to the witness appearing at the hearing. As a result, the Hearing Office finds that Grievant was not rude or disrespectful to Mr. W and Mrs. W.

DECISION

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

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

³ The Agency's assessment of the Mr. and Mrs. W's complaint is logical and reasonable. The role of the Hearing Officer, however, is not merely to confirm the logic and reasonableness of the Agency's opinion but rather is to independently form an opinion based on the evidence presented *de novo* to the Hearing Officer.

⁴ The Agency has overwhelmingly established that Mr. W and Mrs. W believed that Grievant had been rude to them. What the Agency has not established is that Grievant actually was rude to Mr. and Mrs. W. It is possible that the source of Mr. and Mrs. W's dispute with Grievant is that, in their eyes, Grievant incorrectly accused them of driving a vehicle with excessively tinted windows. In any event, it is difficult to determine the underlying concerns of Mr. W and Mrs. W since they did not testify and subject themselves to cross-examination by Grievant's counsel. Another matter of concern regarding the reliability of Mrs. W's statements is that she called Grievant a "prick" in her written statement. Such language is not consistent with an objective assessment of the facts and circumstances occurring on October 3, 2002.

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.