

Issue: Group III Written Notice with 10 day suspension (misfeasance of duty);  
Hearing Date: 08/13/03; Decision Issued: 08/20/03; Agency: DGIF; AHO:  
David J. Latham, Esq.; Case No. 5780



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5780

Hearing Date: August 13, 2003  
Decision Issued: August 20, 2003

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks, reinstatement as an instructor for two educational programs. The initial disciplinary action was the issuance of a Group III Written Notice and ten-day suspension. Grievant's status as an instructor was not affected by the disciplinary action. The Second Step Respondent advised grievant that he was still an active instructor for the two education programs. Accordingly, because grievant's instructor status was not adversely affected, no relief is necessary.

APPEARANCES

Grievant  
Attorney for Grievant  
Major  
Representative for Agency

Three witnesses for Agency

### ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

### FINDINGS OF FACT

The grievant timely filed a grievance from a Group III Written Notice issued for misfeasance of duty.<sup>1</sup> Grievant was suspended for 10 days as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Game and Inland Fisheries (Hereinafter referred to as "agency") has employed the grievant for 21 years. He is an area sergeant. His past record has been excellent and he has never previously been disciplined.

On Saturday, April 12, 2003, the Virginia State Police (VSP) received a report that a hunter was missing. The hunter, his son, and the hunter's brother had been hunting turkey on the opening day of turkey season. State Troopers brought a tracking dog to the area on Saturday but were unable to locate the hunter by nightfall and the search was suspended until the following morning. On Sunday, April 13, 2003, the State Police located the body of the hunter. He had been shot once in the upper left back with a small caliber weapon.

The county sheriff's office called grievant at about 11:20 a.m. on Sunday and told him to contact the State Police. Grievant did so and was informed that a deceased hunter had been found. He then notified the agency's central dispatcher in Richmond and left for the site of the shooting, arriving there at about 12:10 p.m. While en route, he called a subordinate warden to alert him that he might be needed later. When grievant arrived, he found two State troopers, one VSP special agent, a friend of the deceased, and a Deputy Medical Examiner. The shooting scene was contaminated because of search party and state trooper footprints, and ATV tracks. The victim's body had been moved and examined, as had his gun. The state troopers had not cordoned off the area. Grievant assisted the troopers in their investigation, prepared his own written notes, took photographs of the scene including two turkey decoys, marked the location of the victim's body and shotgun, conducted a search for shell casings or other evidence, seized as evidence the victim's gun and ammunition, and

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<sup>1</sup> Exhibit 1. Written Notice, issued May 28, 2003.

<sup>2</sup> Exhibit 1. Grievance Form A, filed May 29, 2003.

interviewed the victim's son and brother. At about 3:00 p.m., one of the State troopers verbally requested that grievant take over the investigation.<sup>3</sup>

The victim's body was transported out of the hilly area on an all-terrain vehicle (ATV) with trailer to a waiting rescue squad ambulance, and from there to the medical examiner's office. At some point during the afternoon, grievant spoke with the regional captain and advised him of the investigation's status. Grievant left the area at about 3:45 p.m. and soon thereafter called the sergeant in charge of the agency's Special Law Assistance Program (SLAP). He gave the sergeant global positioning system (GPS) coordinates and requested that the six-person team conduct detailed mapping of the area. Grievant then returned to his office to photocopy his own hand-drawn maps of the area for the SLAP team sergeant and grievant's immediate supervisor (a lieutenant). At about 6:15 p.m., he met the SLAP team sergeant and lieutenant at the office and spent up to two hours briefing them on everything he had learned. He then directed one game warden to go the scene the following morning after a previously scheduled court appearance, and directed a second warden to attend the autopsy the following morning and collect the victim's clothing and the bullet.<sup>4</sup> Grievant assisted the SLAP team sergeant in preparing ATVs and metal detectors to be taken to the site the following morning. The sergeant said he would scan the area with the metal detectors the next day. Grievant turned over his undeveloped film to the sergeant who said he would get the pictures developed.

Grievant had previously scheduled a one-week vacation fishing trip beginning on Monday, April 14, 2003. Grievant's captain and three other agency employees were also scheduled to go on this same fishing trip and were all staying at the same motel. Neither the captain nor grievant's immediate supervisor (district lieutenant) told grievant to cancel his vacation. The SLAP team sergeant also knew grievant was going on the trip and told grievant to enjoy his fishing trip. He assured grievant that he would handle the situation at the shooting scene.<sup>5</sup> Grievant did not formally name anyone to take the lead in the investigation during his absence.

On Monday evening, the SLAP sergeant called grievant and told him what they accomplished at the site that day. He did not tell grievant that the site was a mess or say anything adverse about grievant's handling of the investigation to that point. On Tuesday, the SLAP team searched the area again but did not find

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<sup>3</sup> Exhibit 10. General Order 16.2.1.2 regarding Investigations states, "Under no circumstances shall a sworn employee commence an investigation into an incident already under investigation by another agency with that agency's formal request for assistance."

<sup>4</sup> As area sergeant, grievant does not have actual supervisory responsibility for game wardens, i.e., he does not have authority to hire and fire, or write performance evaluations. However, grievant does function as team leader and is authorized to direct them to assist him and perform tasks at his direction.

<sup>5</sup> The SLAP sergeant testified that he did not formally assume the lead until Monday morning when the first game warden assigned by grievant came to the site and was not prepared to take the lead.

anything of value. That evening, the division colonel called the SLAP sergeant; during the discussion, the sergeant mentioned that grievant was on vacation. Soon after that conversation ended, the colonel called the SLAP sergeant a second time and directed him to take the lead in the investigation.

Grievant voluntarily returned from his fishing trip on Wednesday night to rejoin the investigation. He learned on Thursday that the division colonel had directed the SLAP team sergeant to take over the investigation. On Friday, the regional captain advised grievant that the agency was displeased with grievant's handling of the investigation.

In the vast majority of accidental hunting deaths, another hunter will voluntarily come forward and acknowledge shooting in the area but mistaking the other hunter for game. No one ever came forward in this case. By the end of the week, it was learned that the victim was a successful out-of-state businessman who had recently taken out a very large life insurance policy. Friends and others have advertised monetary rewards for information leading to the person who shot the victim. These circumstances have increased the possibility that the shooting may not have been accidental. Thus, what appeared to have been a routine hunting accident quickly drew attention as a more high-profile case.

Aside from grievant's discipline, the only other corrective action taken was verbal counseling of the regional captain. The captain knew that grievant had previously conducted satisfactory hunting accident investigations and had complete faith that grievant could handle this investigation. Grievant has previously investigated about ten accidents involving fatalities and was not criticized for his handling of any of the cases. Grievant has received training in the proper methods of conducting investigations.<sup>6</sup>

#### 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:

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<sup>6</sup> Exhibit 3, pp. 92-97. *Hunting Accident Investigation* training guidelines.

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.<sup>7</sup>

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 Human Resource Management 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. 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.1 of the Standards of Conduct policy provides that Group I offenses include acts and behavior that are the least serious in nature. One example of a Group I offense is inadequate or unsatisfactory work performance.<sup>8</sup>

Grievant was charged with misfeasance of duty for seven alleged shortcomings. First, he was cited for failing to record the location and height of turkey decoys. However, grievant did take two photographs of the decoys showing their locational relationship to the victim.<sup>9</sup> Their height can be approximated from people in one of the photographs. The decoys were still inflated one day after the victim had been shot. If a bullet had deflated one of the decoys, it would have been critical evidence. Since neither decoy was deflated, their evidentiary value is less significant. Even though grievant's photographs provide a good approximation of height and location, a thorough investigation should have recorded these details.

Second, grievant was charged for not inventorying the victim's hunting vest. Grievant admittedly relied on the state trooper's verbal statement that he had inventoried the vest. It is understandable that grievant would want to rely on another law enforcement officer's word regarding the contents of the vest.

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<sup>7</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>8</sup> DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993. See also Exhibit 9, Chapter 13, *Employee Handbook*, October 2002.

<sup>9</sup> Exhibit 9. Photographs taken by grievant on April 13, 2003 at shooting site.

However, once grievant agreed to take over the investigation from the State Police, it would have been better procedure for him to conduct his own inventory.

Third, grievant failed to record the identity of firearms used by the victim's brother and son. He accepted their word that they had been using shotguns. Because the deputy medical examiner on the scene preliminarily determined that a small caliber rifle caused the fatal wound, grievant concluded that identity of the shotguns was not needed. Grievant's failure to obtain detailed information about the weapons used by other members of the hunting party appears significant. The medical examiner's preliminary determination could only be confirmed by an autopsy. As that had not yet been done, it would appear vital to identify with certainty all weapons that could possibly have caused the death.

Fourth, grievant failed to note the identity of certain persons at the scene. He did not immediately obtain the name of the Deputy Medical Examiner, but did obtain it at a later time. The SLAP sergeant acknowledged that he had no need for the Deputy Medical Examiner's name during the investigation. He was able to obtain it later in order to write a complete report. He did not obtain the names of the rescue squad personnel who transported the victim's body. However, these persons did not actually come to the shooting scene. They received the body only after it had been transported out of the woods. The agency has not shown that their names were important to the investigation. Grievant did not obtain the name of the VSP special agent; it certainly would have been prudent to do so in order to have a complete record of all people involved in the investigation. Nonetheless, the agency has not shown that this name could not easily have been obtained later from the other state troopers whose names were recorded.

Fifth, grievant was cited for failing to utilize department personnel, specifically the two game wardens in his team. Grievant felt that having three VSP officers at the scene on Sunday would be sufficient. He did direct both wardens to become involved in the investigation the following day. Moreover, grievant was not asked to take over the investigation until late Sunday afternoon, well after much of the initial investigation had been done. It is true that more people *might* have been helpful in spotting evidence, however, grievant made a judgement call that he and the VSP officers would be a sufficient number of people for what initially appeared to be a routine hunting accident.

Sixth, grievant was criticized for not taking metal detectors to the scene on Sunday. Grievant testified, and the agency did not dispute, that he had been trained that getting to the scene promptly is very important. Had grievant detoured to the office to pick up metal detectors, it would have delayed his arrival at the scene by 30-45 minutes. As it happens, a detailed search of the area with metal detectors on Monday failed to turn up any spent shell casings. One can only speculate whether the result would have been different on Sunday.

Finally, grievant was cited for not assigning this investigation to a game warden before he left on his vacation. However, neither grievant's supervisor nor his regional captain directed him to do so, even though both knew that grievant was leaving Monday morning for vacation. Moreover, grievant believed from his conversation with the SLAP sergeant that he was going to handle the situation in grievant's absence. The agency maintains that the SLAP team's sole function is to provide detailed mapping of the shooting site. Grievant's reliance on the SLAP sergeant's assurance is understandable, however, it would appear that grievant should have made sure that *formal* accountability for the ongoing investigation was passed either to a game warden or to the SLAP sergeant. This could have easily been accomplished by saying words to the effect of, "I want you to take over the lead on this investigation until I return from vacation." Grievant's failure to do so left others uncertain of just who was in charge.

The regional captain concluded that grievant did not adversely prejudice the investigation by either his actions or his inactions. However, the agency has established by a preponderance of evidence that grievant's investigation was inadequate. It is acknowledged that grievant took over an investigation that another agency had started, and that the scene was significantly contaminated by the time grievant took over. Further, the investigation assumed far more importance after grievant went on vacation. Until then, it appeared to have been a routine accident investigation. When it was subsequently learned that a motive for murder (large life insurance policy) existed, and no one came forward to admit an accidental shooting, the investigation garnered more publicity and came under much closer departmental scrutiny. Nonetheless, grievant did fail to obtain detailed information, verify the statements of other investigators, personally examine relevant items (guns and hunting vest), obtain the names of all relevant people, and affirmatively pass responsibility for leading the investigation to another person. With grievant's past experience, he knew or reasonably should have known, that these were elements of a thorough and detailed investigation.

The evidence and testimony touched on other alleged deficiencies in the investigation that were not made a part of the written disciplinary action.<sup>10</sup> However, addressing each of those deficiencies in this decision is neither warranted nor necessary. The evidence discussed above is sufficient to conclude that grievant's investigation was unsatisfactory.

Surprisingly, the agency stated that part of its rationale for administering a Group III Written Notice in this case was "to send a signal to other wardens that this matter is being taken seriously." The agency did not specify just how it intends to send this signal. However, a disciplinary action issued under the Standards of Conduct is considered a private personnel matter. As such, the disciplinary action is considered **confidential** and should not be disseminated to any other employees who do not have a need to know (e.g., supervisors in the direct chain of command or human resources manager). EDR does not identify

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<sup>10</sup> Exhibit 7. Memorandum to regional captain from district lieutenant, May 5, 2003.

employees by name in its hearing decisions in order to protect their confidentiality. Therefore, sending “signals” to other employees is not and should not be a part of the process of determining an appropriate level of discipline.

In this case, the agency characterized grievant’s offense as “misfeasance of duty.”<sup>11</sup> That term does not appear either in the Commonwealth’s Standards of Conduct, or in the agency’s general order supplementing DHRM Policy No. 1.60.<sup>12</sup> However, since the Standards of Conduct lists only examples of offenses, the determination of an appropriate level of discipline must be guided by the general definitions and examples found in Policy No. 1.60. Grievant’s failure to conduct an investigation that met agency expectations was not deliberate. Further, grievant did not fail to follow any supervisory instructions, perform assigned work, or otherwise comply with established written policy. Rather, he failed to conduct the investigation in a manner that was satisfactory to the agency. Thus, grievant’s offense was unsatisfactory or inadequate job performance.

### DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice for misfeasance of duty issued on May 28, 2003 is hereby REDUCED to a Group I Written Notice. The agency shall reimburse grievant for the time of his suspension.

The Written Notice shall remain in grievant’s personnel file for the length of time specified 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

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<sup>11</sup> “Misfeasance” is defined as “the improper performance of an act that a person may might lawfully do.” *Black’s Law Dictionary*, revised fourth edition.

<sup>12</sup> Exhibit 10. Section 12.3.1, *General Order 12*, revised December 1, 1990.

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.<sup>13</sup> 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>14</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>13</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.