

Issue: Group I Written Notice (failure to follow departmental procedures);
Hearing Date: 06/17/04; Decision Issued: 06/18/04; Agency: ODU; AHO:
David J. Latham, Esq.; Case No. 733



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 733

Hearing Date: June 17, 2004
Decision Issued: June 18, 2004

APPEARANCES

Grievant
Attorney for Grievant
Interim Chief of Police
Attorney for Agency
One witness for Agency

ISSUES

Did 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 I Written Notice issued for failure to follow departmental procedures.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² Old Dominion University (Hereinafter referred to as "agency") has employed grievant for four years as a police officer.

Departmental policy authorizes police officers to carry their agency-issued handgun while off duty. The agency also provides lockers for the storage of handguns while an officer is off duty. If an officer chooses to carry his handgun off duty, he is responsible for keeping his handgun safe and secure so as to prevent unauthorized use of the weapon.³ Grievant has a copy of the policy.

On Saturday, February 21, 2004, grievant ended his work shift at 7:00 a.m. and placed his handgun and identification in a small duffel bag. He put the duffel bag on the floor of the car behind the driver's seat. Grievant's personal car is a two-door, hatchback model. Grievant then drove to his girlfriend's residence, arriving there at about 7:30 a.m. He parked his vehicle in the driveway in front of the house, locked the car, and went inside for about one hour. When he returned to his car, the right passenger window had been broken and several items had been taken from the duffel bag, including his agency-issued handgun and police identification. Grievant called the police who investigated and prepared an incident report.⁴ Witnesses in the area advised police that three juveniles had smashed the car window with a brick and stolen the missing property. Other items in the duffel bag, including a camera and tape recorder, were not taken.

The handgun has not yet been recovered. The department did not require grievant to reimburse the \$500 cost of the weapon. This disciplinary action will not bar grievant from taking an examination for promotion should a promotional opportunity arise.

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

¹ Exhibit 1. Group I Written Notice, issued March 1, 2004.

² Exhibit 1. Grievance Form A, filed March 18, 2004.

³ Exhibit 1. Section II.F. Agency Police Department Directives Manual A-6.2, *Carrying of Weapons*, effective January 11, 2000, states, in pertinent part: "While off duty, officers are personally responsible for maintaining any Department-issued or authorized weapons in a safe and secure manner so as to **prevent** unauthorized use, accidental discharge or any misuse of the weapon(s)." (Emphasis added)

⁴ Exhibit 1. Police department Incident Report, February 21, 2004.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provides a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The policy serves 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. The Standards provide that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁶ An example of a Group II offense is failure to comply with established written policy. Group I offenses are the least severe and include inadequate or unsatisfactory work performance.

The facts in this case are undisputed. Grievant's agency-issued handgun was stolen from his vehicle during off-duty hours. Therefore, the agency has shown, by a preponderance of evidence, that grievant failed to secure his handgun in a manner that would prevent unauthorized use. Since the agency's

⁵ § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

⁶ Section V.B.2, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, September 16, 1993.

policy makes grievant personally responsible for keeping his weapon in a secure manner that will *prevent* unauthorized use, his failure to comply with the policy is a Group II offense.

Grievant observes that the written policy does not specifically state that handguns shall not be left in personal vehicles. It is true that the agency could amend its policy to include such a specific prohibition. In fact, the agency could reasonably require that all agency-issued weapons be placed in gun lockers at work during off-duty hours. However, the agency has allowed officers to carry their weapons during off-duty hours, presumably because some officers want this privilege. But, any privilege carries with it concomitant responsibilities. The policy mandates that the officer is responsible to secure the weapon in a manner that will prevent it from being stolen. Accordingly, while the policy could have been written more restrictively or with more detailed instructions, the fact that policy leaves some matters to an officer's judgment does not absolve grievant from his overarching duty to prevent the weapon from being stolen.

Grievant points out that the police chief has stated that it would be acceptable to put the handgun in a locked trunk, out of sight of passersby. Grievant's vehicle has a large window in the hatchback so that passersby can easily see what is in the cargo area. Because grievant has chosen to own this type of vehicle, it is incumbent on him to take steps to assure that his weapon is secured in an alternate but safe manner that prevents theft. Grievant's cargo area has a concealed compartment in which he could have secured his weapon. However, for reasons of personal convenience he chose not to use the compartment. Grievant also said he did not want to put the handgun in the cargo compartment because people in the area might have become suspicious that he was trying to conceal something of value. However, grievant could have placed the handgun in the concealed compartment before he left work and avoided this concern.

Grievant's failure to comply with the established written policy is a Group II offense. The agency gave consideration to grievant's otherwise good work record and decided to reduce the discipline to a Group I offense. Grievant contends that counseling would have been sufficient corrective action. In determining the appropriate level of corrective action, the hearing officer considered two factors. First, a handgun is a lethal weapon. It is entirely possible that the stolen handgun could be used in the commission of a crime, or cause injury or death. If an officer takes home other department-issued property (identification, utility belt), the theft of those items would not be as serious. However, the dangerous potential of a handgun required that the department issue a written policy emphasizing the officer's personal responsibility for preventing unauthorized use of the weapon. Therefore, it is especially important that a police officer who takes his weapon home take extra precautions to prevent it from being stolen. Grievant failed to take extra precautions. He could

have left his weapon in the agency-provided locker at work. He could have carried the handgun on his person. He could have placed the weapon in the concealed compartment of his cargo area. He could have taken the duffel bag into his girlfriend's house.

Second, the agency has demonstrated leniency by reducing the discipline from a Group II to a Group I. While the agency could have been even more lenient by just counseling grievant, it concluded that the seriousness of the situation warranted more than just counseling. The decision to issue discipline was carefully considered by the police chief and assistant chief in consultation with Human Resources professionals. Given all of the circumstances, the hearing officer concludes that the agency made a fair and balanced decision.

DECISION

The agency's disciplinary action is affirmed.

The Group I Written Notice issued on March 1, 2004 for failure to follow department procedure is hereby AFFIRMED.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.⁷ 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.⁸

[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]

David J. Latham, Esq.
Hearing Officer

⁷ 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).

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.