

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 10/12/04; Decision Issued: 10/22/04; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 7878



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7878

Hearing Date: October 12, 2004
Decision Issued: October 22, 2004

PROCEDURAL HISTORY

On July 1, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

You failed to store evidence in a timely manner and there were irregularities regarding the counting of currency and timely submission of the SP-102 and SP-158. You violated General Order 43, paragraph 8, relating to the storage of evidence.

On July 29, 2004, 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 September 15, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 12, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for 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 State Police employs Grievant as a State Trooper. He began working for the Agency in December 1997. His work performance has been satisfactory with the exception of a counseling memorandum he received in September 2003.¹ He has regularly been among the leaders in his Area in DUI and criminal enforcement.

On December 6, 2003, Grievant stopped a motorist operating a stolen vehicle. Grievant arrested the driver. As a result of a search incident to the arrest, Grievant obtained (1) a screwdriver and pieces of an automobile ignition, (2) a black backpack, (3) one ring of vending machine keys, and (4) an amount of U.S currency reported by Grievant as \$86.76 but actually amounted to \$105.76 (Grievant had miscounted the currency).

On December 17, 2003, Grievant presented the Supervisor with an SP-158, Notice of Vehicle Impoundment form which indicated that the vehicle had been stolen. Grievant did not submit at that time an SP-102 form which is a form that should have been submitted to account for the four items Grievant obtained by search. The Supervisor made a copy of the SP-158 and attached a note stating, "Is there an SP-102 coming with this" and then sent the note to Grievant.

On January 7, 2004, the Sergeant received an SP-102 relating to the items Grievant obtained by search. The SP-102 was returned to Grievant to correct minor

¹ Grievant was counseled regarding failing to secure evidence in a timely manner.

clerical errors. Grievant re-submitted the SP-102 to the Sergeant. On the second page of the SP-102, Grievant indicated the evidence he seized was submitted to the Area evidence locker.

Grievant suffered a broken leg and was on sick leave for approximately one month beginning March 7, 2004. On April 12, 2004, Grievant presented the four seized items to the Sergeant. Grievant explained to the Sergeant that he had obtained the items in December 2003 and kept them in the trunk of his State Police vehicle. The property was not stored in the State Police Area locker until April 12, 2004.

Grievant was experiencing a lot of emotional and psychological stress beginning three days before he obtained possession of the property. Grievant has been truthful throughout the Agency's investigation, grievance step process, and grievance hearing.

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).

General Order 43 governs "Property Management; Found, Recovered and Evidentiary Property; Evidence Security; Inventory; and Seized Assets." This policy governs "accountable property, including found, recovered and evidentiary property." Paragraph 8 of General order 43 states:

All property must be kept in department property storage facilities.

- a. All property obtained by a sworn employee shall be placed within a department property storage facility before the sworn employee ends his/her tour of duty.

A property storage facility refers to "any room, locker, safe, safety deposit box, file-safe cabinet, bunker, magazine, fenced lots, or other receptacle used to securely store property."² The trunk of a State Police vehicle is not a property storage facility.

General Order 43 applies to all property Grievant obtained, not just the property he considered to be evidence. To comply with General Order 43, Grievant should have placed the four items in a property storage facility and not kept them in the trunk of his

² General Order 43, Paragraph 2.

vehicle. By failing to do so, Grievant acted contrary to General Order 43. "Failure to follow ... established written policy" is a Group II offense.³ Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

Grievant contends the disciplinary action should be mitigated. He has presented evidence of personal difficulties affecting his work performance, his good work performance, and his honorable character throughout the investigation and grievance process. He points out that his actions did not have a negative impact on the criminal prosecution of the case.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."⁴ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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

³ General Order 19, Paragraph 13(b)(1).

⁴ *Va. Code § 2.2-3005*.

to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.