

Issue: Group II Written Notice (failure to comply with established written policy and procedures); Hearing Date: 09/21/04; Decision Issued: 09/23/04; Agency: ODU; AHO: David J. Latham, Esq.; Case No. 840



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 840

Hearing Date: September 21, 2004
Decision Issued: September 23, 2004

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Interim Chief of Police
Advocate for Agency
Three witnesses 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 II Written Notice issued for failure to comply with established written policy and 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 three years as a police officer.

The agency’s Police Department Directives Manual includes a policy on the use of force, which states, *inter alia*, “The Department expects that officers will employ the minimum force necessary to accomplish a legal purpose.”³ The Manual also has a policy on police vehicle operations, which provides that, “At no time will the operator leave the ignition keys unattended in the vehicle.”⁴ Another policy in the Manual addresses the filing of reports by officers and states that an officer shall make a report when citizen complaints are made, and when there are incidents involving arrests, citations, or summonses.⁵

On the evening of April 24, 2004 the University sponsored a “Campus Chaos” event inside the student center; four or five bands were performing at different locations inside the center. The event lasted until the early morning hours of April 25, 2004. Several hundred students and non-students were in attendance throughout the center. As the event was coming to a close and the crowd was leaving the center, two campus police officers (not including grievant) observed two females having a verbal confrontation in a parking lot southwest of the center. Each female was with a group of people who were attempting to keep them apart and get them to leave the area. One of the females got into a car with her friends to leave. The second, angrier female (Hereinafter referred to as female C) was screaming profanity and threatening to assault the other female. One of the two officers decided to arrest female C for disorderly conduct. But, as he started to approach her, a male companion picked up female C and physically placed her in a car which then headed for the exit of the parking lot.⁶

Approximately three minutes later at about 1:25 a.m., grievant was driving westbound on a street adjacent to and north of the student center. At this time, grievant had no knowledge of the incident described in the preceding paragraph. There were 30-40 people in the general area at the time of this incident. He heard a female (who turned out to be female C) loudly screaming profanity to his

¹ Agency Exhibit 1. Group II Written Notice, issued May 20, 2004.

² Agency Exhibit 1. Grievance Form A, filed June 17, 2004.

³ Agency Exhibit 4. Policy Number A-6.0, *Use of Force*, June 1, 1999.

⁴ Agency Exhibit 4. Section II.A.2.d, Policy Number D-1.2, *Police Vehicle Operations*, July 1, 1999.

⁵ Agency exhibit 4. Section IV.A.2 & 5, Policy Number E-3.0, *Records/Information Systems Administration*, May 22, 2000.

⁶ Grievant Exhibits 10 & 11. Written statements of the two police officers who witnessed the incident.

left and stopped his vehicle. As grievant exited his car, female C began running towards an eastbound car that had stopped momentarily to allow people to cross the street. Grievant loudly told her to “Stop!” and ran after her. Several of the female’s friends were also screaming at her to stop.⁷ Grievant did not identify himself as a police officer or give any other verbal commands as he ran after her from behind. Grievant grabbed female C and took her to the ground face-first, placed his knee on her back, and hand-cuffed her. Female C did not resist arrest and cooperated with grievant fully after he grabbed her. Grievant issued a summons to female C for disorderly conduct.⁸

When grievant exited his vehicle he left the ignition keys unattended in the vehicle. The following day, female C filed a formal complaint with the police department. Five other witnesses also filed written complaints with the police department. Grievant did not file a report on this incident during or following his shift.⁹ A lieutenant assigned to investigate the matter interviewed grievant. During that interview, grievant admitted that it was possible that female C was not aware of his presence until after he had already taken her to the ground.

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:

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.

⁷ Agency Exhibit 2. Civilian (K.H.) Complaint Report, May 2, 2004.

⁸ Grievant Exhibit 8. Virginia Uniform Summons, issued to female C, April 25, 2004.

⁹ See Grievant Exhibit 7. Grievant filed an Incident Report two weeks later on May 9, 2004.

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.¹⁰

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.¹¹ An example of a Group II offense is failure to comply with established written policy.

Use of excessive force

It is undisputed that female C engaged in disorderly conduct. She was yelling profanities at 1:30 a.m. in a public place and threatened to physically attack another person. Grievant avers, and the agency did not dispute, that female C was subsequently convicted of the charge of disorderly conduct and sentenced to community service. Accordingly, the agency agrees that the female should have been arrested. The issue is whether grievant used more than the minimum force necessary to effect the arrest.

It is undisputed that grievant ran up to female C from behind, grabbed her and took her down to the ground in the prone position. There is a difference of opinion about how grievant took female C to the ground. Female C asserts that grievant “tackled” her after she had already stopped running.¹² A witness who filed a written complaint states that grievant “threw her on the ground.”¹³ A second complaining witness states that grievant “forcefully tackled” female C from behind.¹⁴ A third complainant states that as female C “was slowing down”, grievant “grabbed her by the neck and pressed her toward the ground.”¹⁵ A fourth witness states that grievant “slammed her down on concrete hard;

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

¹¹ Agency Exhibit 6. Section V.B.2, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, September 16, 1993.

¹² Agency Exhibit 2. Female C’s written complaint, April 25, 2004.

¹³ Agency Exhibit 2. Witness T’s written complaint, April 29, 2004.

¹⁴ Agency Exhibit 2. Witness H’s written complaint, May 2, 2004.

¹⁵ Agency Exhibit 2. Witness L’s written complaint April 25, 2004.

slammed her like a dude.”¹⁶ A fifth witness, who did not know female C or her friends, wrote a letter of complaint stating that grievant never said a word to female C, grabbed her from behind, and “slammed her face-down to the ground.”¹⁷ Four of the five witnesses state that grievant did not say anything to female C before he ran up behind her and took her to the ground.¹⁸

Three inconsistencies in grievant’s version of events make his testimony less credible than the evidence contained in the citizen complaints. First, prior to the issuance of discipline, grievant never alleged that female C resisted arrest. Grievant then filed a grievance in which he asserted that female C had “resisted arrest and refused to be taken into custody.”¹⁹ There is no evidence from any other police officer or witness that female C resisted arrest or refused to be taken into custody. To the contrary, the overwhelming evidence establishes that female C did not resist arrest and was fully compliant when grievant took her into custody. Second, grievant testified that a lieutenant told him he did not have to write a report. The lieutenant credibly testified that she never told grievant that he did not have to write a report. Third, grievant changed his testimony during the hearing regarding the type of take-down procedure he used to take female C down to the ground.

The preponderance of evidence suggests that, if grievant told female C to stop, she might not have heard him or, she could have thought it was one of her companions yelling at her. Even if one assumes that female C heard grievant, the evidence does not establish that she knew a police officer was running up behind her. By the time grievant reached female C, the weight of the evidence is that she was slowing down or had almost stopped. At the same time, the car she was running after had resumed driving down the street;²⁰ therefore, female C did not present a danger to anyone in the vehicle. After grievant had seized the female, she immediately stopped and cooperated fully with him. Grievant has not shown that there was any exigent necessity to take her to the ground or to put his knee on her back or shoulder.

Of particular concern are the statements of citizen complainants that, taken in their entirety, clearly evince the use of unnecessary force. While three of the complainants were companions of female C, two were not associated with her. In the absence of any evidence to the contrary, it is presumed that these two witnesses offer the most credible and objective evidence of what occurred. Both witnesses stated, independently, that grievant “slammed” female C to the ground. Given the lack of any resistance from the female, grievant clearly used more force than necessary. Grievant has not shown that the female required hand-cuffing. However, assuming hand-cuffing was necessary, grievant could

¹⁶ Agency Exhibit 2. Witness J.R.S.’s written complaint, April 25, 2004

¹⁷ Agency Exhibit 2. Witness J.S.S.’s letter of complaint, April 27, 2004.

¹⁸ Witness L. did not address this question in her statement.

¹⁹ Agency Exhibit 1. Attachment to Grievance Form A.

²⁰ Agency Exhibit 2. Witness J.S.S.’s letter of complaint April 27, 2004.

have told her to get on the ground without resorting to force. Alternatively, grievant could have told her he was arresting her and asked her to place her hands behind her back. But, grievant never gave her any verbal commands after seizing her and before taking her down to the ground with force.

Tellingly, grievant admitted that he did not identify himself as a police officer but should have done so before apprehending the female. He also admitted that he could have given her more verbal commands so as to obtain her cooperation without resorting to the use of force. Given the totality of the above circumstances, the agency has shown that grievant used excessive force to effect the arrest of female C. This was a violation of established written policy – a Group II offense.

Failure to make a report

Agency policy requires that the involved police officer shall write a report following incidents involving either citizen complaints or arrests. In this case, there was both an arrest and several subsequent citizen complaints. Grievant contends that he did not write an incident report immediately after the incident because the policy has not been strictly enforced. He points out that strict enforcement would require the writing of a report after the issuance of every traffic summons – something that is not done by other officers. This was not the mere issuance of a parking ticket or minor traffic violation summons. It was a serious incident which angered not only the arrested person but several other citizens who witnessed the event. It should have been obvious to grievant that an incident that involved: 1) an arrest, 2) issuance of a summons for commission of a misdemeanor, and 3) several formal citizen complaints would, at the very least, result in an investigation by the department chief. Therefore, grievant should have made a report in order to document his version of events contemporaneous with the incident. Grievant knew, or reasonably should have known, that a report would be required in this case. His failure to make a report was a failure to comply with established written policy – a Group II offense.

Failure to remove keys from vehicle

Agency policy mandates that an operator will not leave ignition keys in an unattended vehicle. The reason for such a policy is obvious. It was especially important in this case because dozens of young people were in the area. Anyone could have taken the vehicle before grievant could prevent it. Grievant knew this policy and admitted that he violated it. The situation to which grievant responded was neither an emergency nor was anyone's life in immediate danger. There was no reason that grievant could not have grabbed his keys as he exited his vehicle – something that is practically an automatic motion when experienced drivers leave their vehicles. Grievant's failure to comply with the vehicle operation policy was a failure to follow established written policy – a Group II offense.

Grievant's defenses

Grievant objects to the fact that the agency did not offer female C as a witness. The agency is free to present those witnesses it chooses to; grievant had the opportunity to request issuance of an Order for this witness but did not do so.

Grievant focused on female C's conduct in the parking lot a few minutes before he arrested her on the other side of the student center. Her behavior in the parking lot is irrelevant because grievant was, by his own admission, totally unaware of her behavior in the parking lot. Grievant's actions were based solely on his observations of the female at the time he first saw her. He cannot justify his conduct by what he learned *after the fact* about her earlier behavior.

Summary

The agency has demonstrated, by a preponderance of evidence, that grievant committed three identifiable Group II offenses. Rather than issue separate Group II written notices for each offense, the agency issued only one Group II written notice for all three offenses. It also elected not to impose a suspension. Given these facts, the agency has imposed the least amount of discipline possible consistent with the Standards of Conduct.

DECISION

The agency's disciplinary action is affirmed.

The Group II Written Notice issued on March 1, 2004 for failure to comply with applicable established written policies 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.²¹ 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.²²

[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

²¹ 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).

²² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.