

Issues: Two Group III Written Notices with termination (violating safety rules when there is a threat of bodily harm and making a false official statement); Hearing Date: 10/01/03; Decision Issued: 10/09/03; Agency: State Police; AHO: Carl Wilson Schmidt, Esq.; Case No. 5797; **Administrative Review: HO Reconsideration Request** received 10/15/03; **Reconsideration Decision** issued 10/28/03; **Outcome:** No newly discovered evidence or incorrect legal conclusions. **Request to reconsider denied.** **Administrative Review: EDR Ruling Request** received 10/16/03; **EDR Ruling** issued 11/19/03; **Outcome:** No findings that HO violated the grievance procedure [Ruling No. 2003-435]; **Administrative Review: DHRM Ruling Request** received 10/16/04; **DHRM Ruling** issued 02/05/04; **Outcome:** HO's decision comports with provisions of DHRM Policy, State Police Manual, General Order 19. Will not interfere with decision. **Judicial Review:** **Appealed to the Circuit Court in Arlington County on 02/27/04; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5797

Hearing Date: October 1, 2003
Decision Issued: October 9, 2003

PROCEDURAL HISTORY

On July 9, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violating safety rules when there is a threat of bodily harm in violation of General Order 19, paragraph 14.b.(10) of the State Police Manual.

On July 9, 2003, Grievant was issued another Group III Written Notice of disciplinary action with removal for :

Making any false official statement, a violation of General Order 19, paragraph 14.b.(5) of the State Police Manual.

On July 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 August 18, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. This matter was originally scheduled to be heard on September 12, 2003. At the request of a party, the Hearing Officer found just cause to grant a continuance. On October 1, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Eleven witnesses

ISSUES

1. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for violating safety rules when there is a threat of bodily harm.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for making a false official statement.

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 employed Grievant as a Motorist Aide until his removal. Grievant's duties include travelling on the highways and assisting stranded motorists with disabled vehicles. Part of Grievant's duties required him to drive a motorist assistance vehicle. This vehicle is a white Crown Victoria with yellow bar lights on the roof. No evidence of prior disciplinary action against Grievant was introduced.

On January 30, 2003, Grievant and Trooper M. were located near a highway and were talking to one another when they heard the radio dispatcher describe a domestic dispute occurring on the highway approximately 10 miles away. Trooper M. responded to the call and began driving his marked police cruiser toward the location of the dispute. Grievant also responded to the call. Grievant was operating his motorist assistance vehicle. Shortly after he began driving towards the domestic dispute, Trooper M. heard the radio dispatcher announce that the domestic dispute had become violent. Trooper M. activated his blue bar lights on the roof of his vehicle, increased the

speed of his vehicle to 85 mph, and began pulling away from Grievant's vehicle. A short time later, Trooper M. passed a vehicle on the road. After passing that vehicle, Trooper M. looked in his rearview mirror and observed Grievant's motorist assistance vehicle quickly passing that same vehicle. Trooper M. was approximately 10 to 12 car lengths ahead of Grievant's vehicle. Trooper M. paced Grievant's vehicle for a sufficient period of time to determine that Grievant was driving approximately 85 mph, the same speed Trooper M. was driving. Several portions of the highway were lighted such that Trooper M. could see that the vehicle following him was a white motorist assistance vehicle with yellow bar lights. Trooper M. recognized that vehicle as being Grievant's motorist assistance vehicle. Trooper M. arrived at the scene of the domestic dispute on the highway. Grievant arrived at the scene less than a minute later.

On February 10, 2003, Grievant was informed that he was subject to an investigation and asked to provide a written statement. On February 11, 2003, Grievant wrote a memorandum to the Sergeant stating, "I deny the allegation that I was speeding. While responding to this incident my vehicle did not break the speed limit." During the hearing, Grievant testified that he denied speeding on January 30, 2003.

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).

"Violating safety rules where there is a threat of bodily harm" is a Group III offense.¹ "Engaging in criminal conduct on or off the job" is a Group III offense.² Driving in "excess of eighty miles per hour regardless of the applicable maximum speed limit" constitutes reckless driving in violation of *Va. Code § 46.2-862*. Reckless driving is a Class 1 misdemeanor punishable by confinement in jail for not more than 12 months and a fine of not more than \$2500, either or both.³ By driving 85 mph over a distance of several miles without authorization⁴ and without his emergency lights being

¹ General Order 19(14)(b)(10).

² General Order 19(14)(b)(19).

³ *Va. Code § 46.2-868; Va. Code § 18.2-11*.

⁴ Operators of emergency vehicles displaying emergency lights and responding under emergency conditions may be exempt from speed limits. See, *Va. Code § 46.2-920*. As a Motorist Aide, Grievant was not exempt from speed limits.

activated, Grievant engaged in reckless driving thereby unlawfully creating the risk of bodily harm to himself and other drivers. Accordingly, the Group III Written Notice with removal for violating safety rules where there is a threat of bodily harm must be upheld.

To support its claim that Grievant violated safety rules (under the first Group III Written Notice), the Agency offered evidence suggesting Grievant transported an unauthorized person in his state vehicle at speeds up to 80 miles per hour. Testimony presented by the passenger in the vehicle revealed that she is extraordinarily sensitive to Grievant's driving and unable to accurately assess whether Grievant was driving too fast under the circumstances. Moreover, no evidence was presented of the speed limit over the route Grievant traveled. The evidence also showed that the Agency permitted "unauthorized persons" to be transported in State vehicles and that transporting the passenger would not in itself form a basis for disciplinary action as measured by the Agency's standard. Based on these factors, Grievant did not engage in behavior justifying issuance of a Group III Written Notice for transporting an unauthorized passenger. The absence of this evidence, however, is not significant since the Agency has presented sufficient evidence of Grievant travelling at 85 miles per hour on January 30, 2003 thereby supporting the Agency's issuance of a Group III Written Notice with removal.

"[K]nowingly making any false official statement" is a Group III offense.⁵ The Agency's policy does not define "official statement."⁶ The Hearing Officer interprets this language to intend to draw a distinction between a statement made in the normal course of one's daily activities and a statement made in response to an official charge or a statement made in response to a procedure attaching significance to the statement (e.g. making a sworn statement, making statements as part of an official investigation.) In other words, Grievant's statements become "official statements" when the Agency places him on notice that there may be consequences for his failure to tell the truth.⁷ When Grievant wrote a memorandum dated February 11, 2003, Grievant knew he was subject of an investigation. In the memorandum, he denied that he was speeding and

⁵ General Order 19(14)(b)(5).

⁶ If the Agency wished to define a Group III offense to include any lie, then it could do so. Since the Agency has not defined any and all statements made by an employee to be official statements, the Hearing Officer cannot attached official status to any words expressed by Grievant. The Agency is not free to attach the label of "official statement" to any statement made by an employee. For example, if an employee were to tell a "harmless" lie, it would be inappropriate to issue disciplinary action at the level of a Group III offense unless the employee was somehow first informed that his statement would be an "official statement."

⁷ The Sergeant described his first encounter with Grievant regarding Grievant's point of origin as "I also remarked to [Grievant] that he arrived at the scene very quickly. He told me he responded from the Connector Road." Nothing in the Sergeant's method of questioning or choice of words should suggest to Grievant that the Sergeant as asking for an "official statement." When the Sergeant questioned Grievant at the site of the domestic incident, Grievant reasonably construed the Sergeant's question as one intended to elicit general information and not one for which Grievant was making an "official statement." Thus, Grievant's statement that he was coming from the Connector Road was not an official statement subjecting him to a Group III Written Notice.

denied breaking the speed limit. The statement was a false official statement. Accordingly, the Group III Written Notice for making a false official statement must be upheld.

Grievant contends the disciplinary action against him should be mitigated. Grievant was suffering from depression due to the death of a State Trooper and because he observed a traffic accident which killed the driver. Grievant has recovered from the depression. The evidence is insufficient to establish a direct connection between Grievant's depression and his reckless driving and false statement.

Grievant contends the Agency failed to comply with General Order 18 outlining procedures for administrative investigations. Grievant does not cite any specific provisions of General Order 18 that were allegedly violated. Upon review of General Order 18, the Hearing Officer cannot find any material violations of General Order 18 that would affect the outcome of this hearing. The evidence is insufficient for the Hearing Officer to conclude that the Agency acted contrary to General Order 18.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for Violating safety rules when there is a threat of bodily harm is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for making a false official statement 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 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. 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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5797-R

Reconsideration Decision Issued: October 28, 2003

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends the Agency has not complied with General Order 18 thereby justifying reversal of the disciplinary action against him. The question in grievance hearings is not how well the Agency investigated a case, but rather what are the underlying facts giving rise to disciplinary action. Grievant is not a sworn law enforcement employee protected by the Law-Enforcement Officers Procedural Guarantee Act, *Va. Code § 9.1-500 et seq.* If the Hearing Officer assumes for the sake of argument that the Agency failed to comply with General Order 18 as alleged by Grievant, the Agency’s noncompliance is harmless error. Grievant had every opportunity to present evidence at the hearing to correct any erroneous evidence arising because of any failure by the Agency to comply with General Order 18. Nothing in General Order 18 states that the Agency’s compliance with that order is a condition precedent to disciplining an employee who is not a sworn law-enforcement officer.

Grievant argues that the Sergeant was unduly biased against Grievant. The Hearing Officer did not base the hearing decision solely on the Sergeant’s testimony. The testimony of Mr. AH was impeccable. To the extent the Sergeant’s testimony was inconsistent with Mr. AH’s testimony regarding the investigation, the Hearing Officer relied on Mr. AH’s testimony. Very little of the hearing decision was based on the Sergeant’s testimony. For example, the hearing decision relies on Grievant’s written statement regarding whether Grievant knowingly made a false official statement.

Grievant contends mitigating circumstances exist to reduce the disciplinary action against him. He points to his ten years of service and numerous commendations. The Hearing Officer reviewed and considered this evidence but finds it insufficient to mitigate the disciplinary action against Grievant. Grievant certainly had many accomplishments in his career with the State Police, but these factors are insufficient to mitigate the disciplinary action against him.

The inconsistent application of discipline can be a mitigating factor. Grievant contends he is being treated inconsistently from how the Agency treated the Sergeant who drove in excess of 130 miles per hour with an unauthorized person. The Sergeant received a Group III Written Notice but was not removed from employment. Agencies are expected to consider each employee on an individual basis but also to be consistent in their application of discipline. Not all of the factors surrounding the Sergeant's disciplinary action were brought out during the hearing. One key distinction between Sergeant's and Grievant's case, however, is that the Sergeant readily admitted his misbehavior and expressed remorse. In contrast, Grievant consistently denied his actions. The Sergeant clearly "learned his lesson." It is not clear Grievant can say the same.

Grievant argues that if he had been charged with reckless driving for excessive speed, a Court could have reduced the charge to a traffic infraction (not a criminal misdemeanor) where the "degree of culpability is slight."⁹ The Agency is not obligated to establish the likely final outcome of a criminal prosecution, especially where no criminal proceedings were initiated. The Agency is only obligated to show the employee engaged in criminal conduct giving rise to a Group III Written Notice. The Agency has met its burden of proof.

Grievant again challenges the reliability of Trooper M's testimony. The Hearing Officer found Trooper M's testimony to be credible and his judgment supported by the record. Trooper M had the ability to determine Grievant's speed and was able to do so under portions of the highway that were well-lit.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

⁹ Va.. Code 46.1-869 grants a Court discretion to lower a reckless driving charge to a traffic infraction, but it does not require that action.

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
The Department of Virginia State Police
February 5, 2004

The grievant, through his representative, has requested an administrative review of the hearing officer's October 9, 2003, decision in Case No. 5797. The grievant objects to the hearing officer's decision on the basis that the Department of State Police did not follow the provisions of General Order 18 in investigating the allegations of misconduct against the grievant. The grievant also requested that the hearing officer reconsider his decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this administrative review request.

FACTS

The Department of Virginia State Police employed the grievant as a Motorist Aide until he was terminated. On July 9, 2003, the grievant was issued a Group III Written Notice of disciplinary action with removal for "Violating safety rules when there is a threat of bodily harm in violation of General Order 19, paragraph 14.b. (10) of the State Police Manual." On July 9, 2003, he was issued another Group III Written Notice of disciplinary action with removal for "Making any false official statement, a violation of General Order 19, paragraph 14.b.(5) of the State Police Manual."

In responding to a domestic violence call, the grievant was charged with violating safety rules and transporting an unauthorized passenger in the state vehicle. For that violation, the hearing officer determined that transporting the unauthorized passenger was not sufficient to support that Group III Written Notice with removal because the Agency permitted transporting other unauthorized passengers. However, the Agency did present sufficient evidence that he was driving at the speed of 85 miles per hour and thus the issuance of the Group III Written Notice with removal was upheld. The grievant, through his representative, requested that the hearing officer reconsider his decision based his concerns that the agency violated General Order 18 during its investigation of the allegations. The hearing officer did not change his decision upon reconsideration.

During the course of investigating the speeding incident, the grievant was not totally truthful in describing the incident. Based on the agency's determination that the grievant was not telling the truth, the agency issued a second Group III Written Notice with removal for "...Knowingly making any false official statement." The hearing officer concluded that the evidence was sufficient to support that the grievant had made a false official statement and upheld the Group III Written Notice with removal.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, Standards of Conduct, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. The Department of State Police Manual, General Order 19, in relevant part, parallels DHRM's Policy No. 1.60.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that there was sufficient evidence to support the allegations the agency made against the grievant. DHRM Policy No. 1.60, Standards of Conduct, and the State Police Manual, General Order 19, provide sufficient guidance to the Department of State Police for handling workplace misconduct and behavior and for taking corrective action. While you have raised

concerns that agency officials misapplied the provisions of General Order 18 during its investigation of charges against the grievant, the evidence supports that the hearing officer reviewed and considered those concerns during the hearing. This Agency has determined that the hearing officer's decision comports with the provisions of DHRM Policy No. 1.60 and the State Police Manual, General Order 19, and will not interfere with the decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services