

Issue: Group II Written Notice (failure to follow written procedure); Hearing
Date: 09/22/03; Decision Issued: 09/23/03; Agency: VSP; AHO: David J.
Latham, Esq.; Case No. 5809



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5809

Hearing Date: September 22, 2003
Decision Issued: September 23, 2003

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Two 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 appeal from a Group II Written Notice issued for failure to follow written procedure.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 The Department of State Police (Hereinafter referred to as “agency”) has employed grievant for five years as a trooper.

During basic training at the State Police Academy, grievant received and read an Officer Survival manual. The manual directs that traffic violators should normally be kept in their own vehicle when obtaining information, but that circumstances might justify interviewing the violator in the patrol vehicle.³ One such circumstance is “weather conditions that prohibit conducting interviews outside the vehicle.”⁴ The 2002 version of this manual contains the same instruction.

In February 2003, grievant received a patrol vehicle equipped with a video recorder (VCR).⁵ The training manual requires troopers to inspect the camera system daily and to report any discrepancies to supervision.⁶ It also directs that the camera system will be used for all traffic enforcement stops. The camera system is interconnected with the vehicle’s flashing lights, i.e., when the trooper turns on the vehicle’s flashing lights the camera system is also supposed to be activated.

At about 8:15 a.m. on April 9, 2003, grievant was in his patrol vehicle in the right lane of an interstate highway. Because of rush hour traffic and rain, traffic was bumper-to-bumper and had slowed to about 10 miles per hour (mph). A female driving a sport utility vehicle (SUV) drove past grievant on the shoulder at about 30-40 mph. Grievant turned on his flashing lights but the camera system did not activate. He pulled onto the shoulder and stopped the SUV within two or three seconds. Grievant exited his vehicle and approached the SUV. The rear windows of the SUV were heavily tinted and grievant did not closely check to see whether anyone was in the rear seats of the vehicle. Grievant observed that there was no one in the right front passenger seat.

¹ Exhibit 4. Written Notice, issued July 14, 2003.

² Exhibit 4. Grievance Form A, filed August 1, 2003.

³ Exhibit 1. *Officer Survival* manual, April 14, 1998. Section XIX.A.1, “Should normally keep the violator in his car to obtain information.” Section XIX.A.3, “Circumstances may justify interviewing the violator in your vehicle.”

⁴ Exhibit 1. *Ibid.* Section XIX.A.3.c(3)

⁵ Approximately 30-35% of the troopers in grievant’s district have vehicles equipped with VCR camera systems. See also Exhibit 1, *Endorsement # 3* from lieutenant to captain, June 11, 2003 regarding delivery date of patrol vehicle to grievant.

⁶ Exhibit 2. Training Manual Insert, Volume II, *Memo-2000-No. 5 (Revised)*, December 1, 2000. Section II.F. states: “Each camera system will be inspected daily by the operator and any discrepancies reported to supervision.” Section III.H. states: “Should the VCR malfunction, the Communications Division at SPHQ [State Police Headquarters] will be immediately contacted reference repairs.”

Grievant asked the driver for her operator's license. The driver stated that she did not have it with her and yelled at grievant asking why he had stopped her. Grievant told her that he stopped her for driving on the emergency shoulder at a high rate of speed. The driver impatiently and loudly said, "I am going to take the exit. I'm just trying to get my daughter to school."⁷ Grievant then asked her if she would come back to the patrol vehicle with him so that he could obtain the information needed to write her a citation. The driver agreed to do so and accompanied grievant to his vehicle. The violator's four-year-old daughter was left unattended in the SUV. Grievant cited the driver for reckless driving and gave her a verbal warning for not having her license on her person. The driver then returned to her SUV and left the scene.

On April 21, 2003, the agency received a letter from the SUV driver complaining that grievant had yelled at her, scared her four-year-old daughter, and ordered her to accompany him to his vehicle.⁸ As a result of this letter, a sergeant was assigned to investigate the matter. Investigation revealed that the videotape recorded a traffic stop on April 8, 2003; the next recorded stop occurred on April 15, 2003. Grievant made no other traffic stops on either April 9 or 10, 2003, and did not work from April 11-14, 2003. Grievant had experienced VCR malfunctions prior to April 9, 2003, but had not reported them to the SPHQ Communications Division.⁹ Following the investigation, a lieutenant issued a Group II Written Notice to grievant on July 14, 2003.

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:

⁷ Exhibit 3. Memorandum from grievant to captain, May 6, 2003.

⁸ Exhibit 3. Letter from complainant to agency, April 18, 2003.

⁹ A state police technician examined the VCR on June 12, 2003, found a problem, and replaced the unit's motherboard.

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.¹⁰

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.

The Standards of Conduct Policy provides that failure to comply with applicable established written policy is a Group II offense.¹¹ The Department of State Police has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department.¹² Section 13 of the policy provides that failure to comply with applicable established written policy is a Group II offense.¹³ Section 12 provides that inadequate or unsatisfactory job performance is a Group I offense.¹⁴

Bringing violator to patrol vehicle

The agency's general policy provides that a traffic violator should remain in her own vehicle unless she is being placed under arrest. However, the same policy recognizes that there are circumstances that justify placing a violator in the patrol vehicle, among them adverse weather conditions that prohibit conducting an interview outside the vehicle. The traffic stop in question occurred during rainy weather. After grievant learned that the violator did not have an operator's license with her, grievant had no option but to obtain information for the

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

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Exhibit 2. General Order No. 19, *Separation from the Service and Disciplinary Measures*, Revised October 1, 2002.

¹³ Exhibit 2. Section 13.b.(1). *Ibid.*

¹⁴ Exhibit 2. Section 12.b.(4). *Ibid.*

summons by asking the violator questions. The summons form must include the violator's name, address, race, gender, date of birth, height, weight, color of eyes, color of hair, in addition to vehicle identification information and license plate information. If grievant had attempted to obtain this information and write it on a summons form while standing in the rain next to the violator's vehicle, it is likely that the summons would have become water-soaked, smeared and unreadable. Under these circumstances, it was not unreasonable that grievant asked the violator to come to the patrol vehicle to provide required information. Therefore, it is concluded that asking the violator to get into the patrol vehicle was not, by itself, a violation of written procedure.

Grievant testified during the hearing that he was unaware that a small child was in the SUV when he asked the violator to accompany him to the patrol vehicle. However, it is concluded for three reasons that grievant's testimony about this issue is not credible. First, the violator stated in both her complaint letter and her written statement that she had told grievant that her daughter was in the SUV before grievant asked her to come to the patrol vehicle.¹⁵ This tribunal takes administrative notice that most, if not all, mothers have the welfare of their young children uppermost in their minds. Thus, it is highly credible that the violator did tell grievant about her daughter before leaving the SUV.

Second, grievant's written statement on May 6, 2003 corroborates the violator's written complaint, and contradicts his own testimony. Grievant wrote that the violator said she was taking her daughter to school *before* he asked her to come to the patrol vehicle. It is concluded that grievant's statement, which was written closer in time to the incident, and prior to the issuance of discipline, is likely to be a more accurate recollection of fact. Third, grievant testified that his note at the bottom of the summons "# -1" meant that there was only one person in the SUV. He offered this as proof that he did not know about the girl in the SUV. However, grievant testified that the violator told him while in his patrol vehicle that her daughter was in the SUV. Thus, by his own admission, grievant knew that there were two people in the SUV but he recorded only one.

The policy does not address what a trooper should do with regard to a small child in the violator's vehicle when it becomes necessary to place the violator in the patrol vehicle. However, common sense dictates that a small child left unattended in a vehicle on a busy highway could result in problems, especially when the vehicle was left running.¹⁶ Moreover, the child could have gotten out of the SUV and come back to the patrol vehicle. As this traffic stop occurred on a busy interstate highway, the child could have been injured. The

¹⁵ The agency did not ask the violator to testify. Therefore, her unsworn written statements must be accorded less evidentiary weight than grievant's sworn testimony. However, when grievant's own written statement corroborates the violator's complaint, it must be concluded that the issue about which they agree did occur as described.

¹⁶ Grievant did not know if the SUV was left running. The only available evidence is the violator's assertion in her complaint letter that she left the SUV running when she went to grievant's patrol vehicle.

agency did not offer evidence as to how grievant should have addressed this situation. However, at least one option was open to grievant; he could have asked the violator to bring the child with her to the patrol vehicle. Grievant's failure to address the small child issue constitutes unsatisfactory job performance.

Failure to record traffic stop

Grievant's undisputed testimony is that he turned on the cruiser's flashing lights at the time he initiated the traffic stop. The switch that activates the flashing lights is supposed to activate the VCR camera system. The camera system did not function during the April 9, 2003 traffic stop. There is no evidence that grievant deliberately failed to record the stop. However, the evidence indicates that grievant failed to follow Memo-2000-No. 5 because he had not immediately notified the Communications Division at SPHQ when the VCR malfunctioned on multiple occasions prior to this incident. Grievant did not dispute the lieutenant's testimony that grievant said he had not read the VCR camera system manual prior to this incident.

Grievant's failure to check the camera system daily, read the manual, and immediately notify the Communications Division of previous malfunctions all contributed to the failure to record the traffic stop at issue herein. Accordingly, the agency has borne the burden of proof necessary to show that grievant failed to comply with the written policy on the VCR camera system.

Summary

There was one additional difference between grievant's testimony and the violator's written complaint but it is not considered significant or determinative in this case. The violator said she was in grievant's patrol vehicle for 17 minutes; grievant said she was there for no more than four minutes. To the violator, who was admittedly in a hurry to get her daughter to school, the encounter probably seemed longer than it actually was. In any case, the exact length of time she was in the patrol vehicle was not a factor in the discipline and is therefore moot.

Grievant's credibility was somewhat tainted by another inconsistency. When first interviewed by the investigating sergeant, grievant said he could not locate a videotape for April 9, 2003 and that he must have been changing tapes on that date. Subsequently however, the tape was located and reflected that the stop was not recorded. Moreover, grievant never mentioned during this initial interview that he had been experiencing difficulty with the VCR system. Since grievant knew that the matter was being investigated, it would have been logical for him to immediately mention the malfunctioning equipment, if in fact, he had been experiencing such a malfunction.

In summary, grievant's failure to properly address the small child situation was unsatisfactory job performance - a Group I offense. As this specific offense

was not cited on the Written Notice, it alone would not sustain the disciplinary action in this case. However, the agency has shown, by a preponderance of evidence that grievant failed to follow applicable established written policy with regard to the recording of traffic stops – a Group II offense.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on July 14, 2003 is UPHeld. The disciplinary action shall remain active for the period specified in Section 15 of General Order No 19.

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.¹⁷ You must file a notice of appeal with the clerk of the circuit court in the

¹⁷ 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁸

[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

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.