

Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing  
Date: 11/05/03; Decision Issued: 11/20/03; Agency: State Police; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 5833



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5833**

Hearing Date: November 5, 2003  
Decision Issued: November 20, 2003

**PROCEDURAL HISTORY**

On July 23, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

*You failed to follow written policy (attached letter 11/14/01 from [Captain] and a letter from [Colonel] on the unusual event notification dated 10/22/01). You failed to immediately notify supervisor of a shooting on interstate 264 that occurred on May 19, 2003.*

On August 16, 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 October 6, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 5, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

## **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 has been employed by the Agency since June 15, 1998. No evidence of prior disciplinary action against Grievant was introduced.

On May 19 2003, a road rage incident occurred on the interstate resulting in a motorist being shot. The victim was hit by the bullet but only slightly injured. The parties to the incident drove to an intersection near the church located several miles from the interstate. Grievant received a radio call at 6:18 p.m. and began traveling to a church. Grievant arrived there at 6:29 p.m. He found local police and rescue police already working. Local police had already interviewed the victim and begun collecting evidence. A local police sergeant advised Grievant shortly after Grievant's arrival that the case was Grievant's responsibility since the incident occurred on the interstate. The Agency and local police have an agreement that if an incident occurs on the interstate the Agency is responsible for investigating that incident. Grievant immediately begin interviewing the victim and police officers. He gathered information about the suspect and his vehicle. He radioed for others to be on the lookout for the suspect's vehicle.

Grievant checked the victim's status and learned that he was driving on a suspended license. While Grievant waited for a wrecker to arrive, he continued to gather information as part of his investigation. After obtaining all the information necessary and after the wrecker loaded the vehicle, Grievant drove to the area office and called the Sergeant, his immediate supervisor, at 9:19 p.m. The Sergeant asked Grievant why he had waited so long to call. Grievant responded that prior to this instance, he had not been called to the scene of a shooting. At the Sergeant's direction, Grievant also called the Bureau of Criminal Investigations and the public information officer.

Local media did not arrive to the scene of the investigation while Grievant was there. Later in the evening, a local television station reported that the shooting occurred on the interstate and that the local police were investigating the shooting.

On November 26, 2001, Grievant received a copy of a memorandum from the Agency Head entitled "Unusual Event Notification." Grievant was advised that he should report to his immediate supervisor any incidents described as unusual events. The memorandum requires notification of: "Any incident or development involving the Department that might particularly draw media attention."

### **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).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was obligated to report to his immediate supervisor any incident or development involving the Department that might particularly draw media attention. A shooting is an incident that might draw media attention. In this case, the shooting actually drew the attention of the media even though the media did not appear on the scene while Grievant was there. Grievant should have notified his immediate supervisor sooner than he did. Grievant's failure to do so constitutes inadequate or unsatisfactory job performance.

Grievant contends he timely notified the Sergeant of the incident because he was delayed by his duty to fully investigate. Grievant took over two and a half hours from the time he arrived at the church to notify the Sergeant. The evidence is not sufficient for the Hearing Officer to conclude that Grievant could not have taken a minute or two away from the investigation to contact the Sergeant. It is clear that Grievant waited until the end of the investigation to notify the Sergeant rather than notifying the Sergeant at the first available moment.

Grievant contends the Written Notice does not pass due process scrutiny. After reviewing the Written Notice, the Hearing Officer finds that it adequately places Grievant

on notice of the Agency's allegations against him. The Written Notice satisfies due process considerations.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>1</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.