

Issue: Group III Written Notice (engaging in conduct which undermines agency's effectiveness, and disclosing confidential information); Hearing Date: 11/10/03; Decision Issued: 11/12/03; Agency: State Police; AHO: David J. Latham, Esq.; Case No. 5841



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5841

Hearing Date: November 10, 2003  
Decision Issued: November 12, 2003

**PROCEDURAL ISSUE**

Prior to the hearing, the parties stipulated to the essential facts in this case. The grievant acknowledged that he had acquired and read administrative reports to which he was not a party and divulged the information contained in the reports to other troopers. At the beginning of the hearing, the parties agreed to the Findings of Fact, *infra*. The hearing then focused on arguments regarding the appropriate level of discipline for the offense.

**APPEARANCES**

Grievant  
Attorney for Grievant  
Representative 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 III Written Notice issued for engaging in conduct that undermines the effectiveness of the Department's activities and disclosing confidential information to unauthorized personnel.<sup>1</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of State Police (Hereinafter referred to as "agency") has employed grievant for 15 years; he is a senior trooper.

During the week of May 1-8, 2003, while working on the midnight shift, grievant entered a secretary's office to search for correspondence regarding troopers' shift starting and stopping times. He opened the unlocked top right drawer of the secretary's desk and found an administrative report involving a personnel complaint against another trooper. He read a portion of the report and replaced it in the desk. At the beginning of his shift a few nights later, he called two other troopers and asked them to meet him at a specified location. Grievant then disclosed to the two troopers what he had read in the report. Grievant acknowledges that he should not have opened the secretary's desk, and he should not have told anyone about what he read. It is common knowledge among troopers that the secretary keeps confidential personnel information in the top right drawer of her desk. The secretary never locks her desk drawers.

## 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).

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<sup>1</sup> Exhibit 2. Written Notice, issued August 14, 2003.

<sup>2</sup> Exhibit 1. Grievance Form A, filed September 11, 2003.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>3</sup>

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 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.<sup>4</sup> Section 14 of the policy provides that Group III offenses include engaging in conduct that undermines effectiveness of departmental activities and, disclosure of confidential information to unauthorized persons.<sup>5</sup>

The essential facts in this case are undisputed. Grievant stipulated to the Findings of Fact stated in the preceding section of this Decision. By agreement of the parties, the sole issue to be adjudicated is what corrective action is appropriate for the offense.

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<sup>3</sup> § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

<sup>4</sup> Exhibit 4. General Order No. 19, *Separation from the Service and Disciplinary Measures*, Revised October 1, 2002.

<sup>5</sup> Exhibit 4. Section 14.b. *Ibid.* Group III offenses include, but are not limited to: (20) Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees. (22) Disclosure of confidential information to any person except those who may be entitled to such information or, when directed by the Superintendent or a supervisor.

Troopers have serious and frequent contacts with the motoring public. Accordingly, the agency has a significantly higher public profile than most state agencies. The Department of State Police has therefore established higher behavioral standards for its employees. For example, the Standards of Conduct applicable to most state employees provides that engaging in conduct that undermines departmental effectiveness can be either a Group I, II or III offense, depending upon circumstances. However, The Department of State Police has determined that this offense is sufficiently serious that it is always a Group III offense.

The disclosure of confidential information can undermine the effectiveness or efficiency of departmental activities for a variety of reasons. In this case, disclosing information taken directly from an official report served only to fuel the rumor mill. The feeding of rumor mills is almost always counterproductive. When the agency designates information as confidential, grievant has no right to unilaterally rescind that designation by disclosing information to others. Based on grievant's admission, he committed a Group III offense because he disclosed confidential information to people who were not entitled to such information. This offense also violated the proscription against undermining departmental effectiveness – a second Group III offense.

The agency notes that the discipline for Group III offenses can include removal from employment, demotion, transfer, or suspension without pay for up to 30 days. The agency opted not to utilize any of these sanctions. Because of grievant's long service with the agency and his satisfactory performance record, the agency issued only a Written Notice, thereby meting out the minimum amount of discipline specified by the Standards of Conduct for the offense.

Grievant argues that his discipline should be further reduced because he has a good record and long service with the agency. However, the agency already took these factors into account when it issued only the written notice without attaching other sanctions. He also points out that some employees had already heard rumors about the other trooper's offense. Rumors and grapevines exist in every organization. However, grievant did not merely participate in office scuttlebutt; rather he disclosed information *directly* from a confidential report about the incident. This information might have adversely affected the agency's course of action with respect to the incident and the trooper involved.

The hearing officer must respect the agency's desire to maintain high standards for its employees. Further, in considering mitigating circumstances, the hearing officer must also 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.<sup>6</sup> The agency's discretion in determining

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<sup>6</sup> Section VI.B.1. *Rules for Conducting Grievance Hearings*, effective July 1, 2001.

the level of discipline should be upheld except when 1) the level of discipline issued was clearly erroneous based upon the examples listed in the Standards of Conduct or, 2) the agency failed to give appropriate consideration to mitigating circumstances. For the reasons stated above, neither exception is applicable in this case.

Grievant further argues that having an active disciplinary action on his record may prevent him from being considered for possible future promotion for up to four years.<sup>7</sup> Whether grievant will otherwise meet the requirements for promotion during that time is speculative. However, when he disclosed confidential information, grievant knew, or reasonably should have known, that doing so constitutes a Group III offense. Similarly, he knew or should have known that disciplinary actions have an “active” life. In the absence of the two exceptions cited above, there is no basis for a reduction in the level of discipline.

### DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on August 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. Address your request to:

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<sup>7</sup> Exhibit 4. Section 15.a. *Ibid.* Group III written notices shall have a four-year “active” period from the date the notice was issued to the employee. Group II written notices have a three-year “active” period; Group I written notices have a two-year “active” period.

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>8</sup> 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>9</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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David J. Latham, Esq.  
Hearing Officer

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<sup>8</sup> 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).

<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.