

Issue: Group III Written Notice (failure to allow media proper access, failure to follow supervisor's instructions, and insubordination or serious breach of discipline); Hearing Date: 06/16/05; Decision Issued: 07/01/05; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8086; **Administrative Review: HO Reconsideration Request received 07/12/05; HO Reconsideration Decision issued 07/22/05; Outcome: Original decision affirmed. Administrative Review: DHRM Ruling Request received 07/12/05; DHRM Ruling issued 08/31/05; Outcome: Hearing Decision affirmed. Judicial Appeal: Appealed to the Circuit Court in Chesapeake, VA; Outcome: Hearing Decision reversed; Judicial Appeal: Appealed to the Court of Appeals; Outcome: Circuit Court ruling reversed – Hearing Officer's decision reinstated (Record No. 0162-07-1 issued 12/27/07).**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8086

Hearing Date: June 17, 2005
Decision Issued: July 1, 2005

PROCEDURAL HISTORY

On March 8, 2005, Grievant was issued a Group III Written Notice of disciplinary action for:

Fail to allow media proper access to an accident scene – violation of GO 19, paragraph 13 b(1):

Fail to follow verbal instructions of a supervisor – violation of GO 17, paragraph 9 – GO 19, paragraph 14 b(4); GO 19 paragraph 14 b(20); GO 19, paragraph 14 b(21)

Corrective action – written notice violation GO 19, paragraph 14 b(4) – insubordination or serious breach of discipline.

On April 4, 2005, 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 May 17, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 17, 2005, 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 III Written Notice of disciplinary action for failure to allow media proper access, failure to follow supervisor's instructions, and insubordination or serious breach of discipline.

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 Department of State Police employs Grievant as a State Trooper Senior. He has been employed by the Agency since 1998. He is well-regarded and respected by his peers for his professionalism and in-depth knowledge of the *Code of Virginia* and case law. Grievant takes his job seriously and can remain calm in extraordinarily dangerous situations. No evidence of prior active disciplinary action was introduced at the hearing.

On January 21, 2005 at approximately midnight, a crash occurred on an interstate highway under the jurisdiction of the State Police. Snow had fallen and the ground was wet, cold, and slippery. A single vehicle had left the right side of the highway, hit a sign, and then spun around and hit another tree.¹ State Trooper J and State Trooper A responded to the crash scene. Grievant arrived approximately 20 minutes after the crash. Grievant was responsible for assisting Trooper J to secure the scene and for keeping it safe. Trooper J had finished his discussion with the driver and issued a summons to the driver.

¹ Agency Exhibit 1.

The Cameraman arrived at the crash site after Grievant. He parked away from the emergency vehicles. He got out of his vehicle and removed his TV camera. On the side of the camera was written the initials of the TV station. An employee of another TV station was also covering the crash site.

Grievant told the Cameraman and a media person from another television station to leave the crash scene. The Cameraman objected and told Grievant that he had media credentials and had the right to be at the crash site.² Grievant told the Cameraman that if he did not leave Grievant would put him in jail. Grievant also told the Cameraman he could contact the Public Information Officer (PIO) if he wished. The Cameraman left the crash site.

The Cameraman called the State Police Dispatcher and asked to speak with the Public Information Officer.³ The Dispatcher provided the PIO's pager to the Cameraman. The PIO called the Cameraman and the Cameraman explained his objection to Grievant's actions. Shortly thereafter, the PIO called the Dispatcher and told her to,

Tell the trooper that's working the accident ... that when [the Cameraman] pulls back up there in the position he was in while ago, to leave him alone. I don't know who the trooper is, threatened to arrest him if he didn't leave the interstate. That is not our policy, I don't know who the trooper is, who's the trooper?

The Dispatcher called Grievant:

Dispatcher: I don't know who talked to [the Cameraman].

Grievant: I did.

Dispatcher: They called [the PIO]. [The PIO] said to tell you guys to leave them alone. That they have been doing their job for 18 years and that they weren't in the way.

Grievant: Yea, he don't have any lights on his car, he's got an unmarked little SUV, he's not wearing any reflective gear. So, yeah.

Dispatcher: Well.

Grievant: He was in the way, he was in my way.

² The Cameraman had been going to crash sites over an 18 year period without interference from the State Police.

³ The Public Information Officer holds the rank of Sergeant. He is authorized to give orders to a Trooper and to expect the Trooper to carry out those orders even if the Trooper is not in the PIO's immediate chain of command.

Dispatcher: Well he said the next time to tell you to notify your supervisor, that you had trouble with the media.

Grievant: Yea, ok they'll appreciate that.

Dispatcher: Yea, well maybe it will stop it.

Grievant: Well I told [the Cameraman] to leave and [an employee of another TV station]

Dispatcher: [Other TV station] hasn't called yet. (Laugh).

Grievant: I don't think they will; I'll just write the [Cameraman] next time.

Grievant: If they come out again I'm going to tell them to leave too so I'll just talk to him directly next time he calls.

Dispatcher: Ok

Grievant: Tell him I told that if he calls.

The Cameraman drove back to the crash site and parked away from the other vehicles as he had done so earlier. Grievant approached the Cameraman's vehicle and told him "I thought I told you to get off the road. Let me see your driver's license and registration." The Cameraman responded that he did not have his license with him because he had left it at home. The Cameraman told Grievant that he had spoken with the PIO who said the Cameraman could come back to the crash site. The Cameraman used his cell phone to call the PIO. The Cameraman spoke with the PIO and then gave the phone to Grievant. The PIO asked Grievant if he had received the PIO's order from the Dispatcher. Grievant acknowledged receiving the order but said the Cameraman had gotten in his way. Grievant handed the phone back to the Cameraman and walked back to his police vehicle. The Cameraman told the PIO that Grievant intended to write him two tickets. The Cameraman then walked back to Grievant's vehicle and handed the phone to him again. Grievant told the PIO that he had started the process of writing tickets. Because that process had started, the PIO stopped trying to dissuade Grievant from interfering with the Cameraman's activities. Grievant had the choice to warn, summons, or arrest the Cameraman. Grievant chose to issue two summonses.

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).

Group III offenses include, “[w]illful disobedience of a lawful command of a supervisor.”⁴ The PIO held the rank of Sergeant. Grievant was obligated to “obey any lawful order of a supervisor, including any order relayed from a supervisor by an employee of the same or lesser rank.”⁵ The Dispatcher relayed the PIO’s order to Grievant for Grievant to leave the Cameraman alone. Grievant understood the PIO’s instruction and knew he should have followed that instruction. Grievant intentionally disobeyed the PIO as evidenced by his actions and by his comments to the Dispatcher such as “I’ll just write the [Cameraman] guy next time”⁶ and “If they come out again I’m going to tell them to leave too.” Grievant did not leave the Cameraman alone when the Cameraman returned to the crash scene for a second time. Grievant told the Cameraman to leave a second time. Grievant required the Cameraman to provide a driver’s license and vehicle registration even though the Cameraman had taken no action sufficient to justify that demand.⁷ Grievant unnecessarily caused the Cameraman to be distracted from his duties. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice.⁸

Grievant contends he was permitted to require the Cameraman to leave the crash site a second time because the Cameraman was obstructing the emergency vehicles and, in particular, operation of the tow truck. Virginia law and Agency policy permitted the Cameraman to be present at the crash site without interference from the State Police. *Va. Code § 46.2-890* states:

No vehicle shall be stopped at or in the vicinity of a fire, vehicle or airplane accident, or other area of emergency, in such a manner as to create a traffic hazard or interfere with law-enforcement officers, fire fighters, rescue workers, or others whose duty it is to deal with such emergencies.

Vehicles being used by accredited information services, such as press, radio, and television, when being used for the gathering of news, shall be exempt from the provisions of this section, except when actually obstructing the law-enforcement officers, fire fighters, and rescue workers dealing with such emergencies.

⁴ General Order 19, paragraph 14(b)(21).

⁵ General Order 17, paragraph 9.

⁶ Grievant testified that when he said “next time” he meant the next time there was a crash and the Cameraman responded to that crash. Grievant’s words as stated, however, are sufficient to support the Agency’s assertion that he was referring to the second time the Cameraman went to the crash site.

⁷ The Cameraman identified himself as an employee of a TV station. He showed Grievant a badge that he wore around his neck identifying himself as affiliated with a TV station. The Cameraman carried a large camera with the station’s logo on the side. Nothing should have raised Grievant’s suspicion about the Cameraman’s affiliation with the TV station.

⁸ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

This section has the effect of permitting members of the media to be closer to a crash site than the public would be permitted. General Order 31 addresses the Agency's Public Affairs Policy and states:

Employees of the Department shall extend every courtesy to news media representatives who are actively covering an incident at the scene. This will include permission to closer access to the scene than that which may be granted to the general public, if such permission can be granted without endangering public safety or causing harm to the scene. News media vehicles and equipment may be located at points nearer the scene than permitted by normal traffic control, but the location of news media vehicles and equipment shall not be allowed to interfere with police operations or the general flow of traffic.⁹

The evidence presented does not support Grievant's assertion that he was justified in instructing the Cameraman to leave a second time. Testimony from staff operating the fire truck and rescue vehicle showed that the Cameraman did not interfere with their activities. The Agency's Investigator interviewed the tow truck operator and asked if the Cameraman had interfered with his ability to do his job. The tow truck operator responded, "No." Grievant contends the Cameraman bumped into the tow truck cable and nearly injured himself. Assuming¹⁰ for the sake of argument that this occurred, Grievant's preferred response would have been to instruct the Cameraman to be more careful or to move away from the cable. If that instruction had been unsuccessful, Grievant could have called the PIO to seek permission to remove the Cameraman. Grievant was not justified in forcing the Cameraman to leave the crash site under threat of arrest.

Grievant argues his actions were justified because the Cameraman was not wearing reflective materials and had not turned on his vehicle's flashing lights. This argument is irrelevant because nothing in policy required the Cameraman to use good judgment regarding what he should wear. Moreover, Grievant could have asked the Cameraman to turn on his vehicle's flashing lights.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

⁹ Agency Exhibit 7.

¹⁰ It is unclear what happened with respect to the tow truck cable. The Cameraman testified that he did not bump into the cable. One trooper at the scene testified that the Cameraman nearly tripped on the cable. This suggests the Cameraman hit the cable with a lower part of his body. Another trooper testified that the Cameraman nearly cut his head off on the cable. This suggests the Cameraman hit the cable with the upper part of his body.

APPEAL RIGHTS

You may file an administrative review request within **15 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 14th St., 12th 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 15 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 15-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.¹¹

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8086-R

Reconsideration Decision Issued: July 22, 2005

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 re-states his version of the events. Some of the facts Grievant alleges were not supported by the evidence.¹² Some of the facts Grievant alleges amount to errata.¹³ The material facts, however, are not in dispute. Grievant was instructed by a superior officer to leave the Cameraman alone when the Cameraman returned, yet Grievant interfered with the Cameraman’s activities without justification. If the Cameraman had behaved as poorly as Grievant contends, Grievant should have called the PIO and explained the Cameraman’s behavior and sought guidance regarding what to do. By demanding to see the Cameraman’s driver’s license and vehicle registration and by issuing the Cameraman two summonses, Grievant unnecessarily interfered with the Cameraman’s activities permitted by State statute.

Grievant contends the Cameraman “operated a vehicle on the highways of Virginia and stopped improperly on the interstate.” No credible evidence supports Grievant’s assertion. The Cameraman parked his vehicle on the side of the road with two wheels on the grass and two wheels on the pavement. His vehicle was out of the way of vehicles involved in the emergency. By inference, *Va. Code § 46.2-890*

¹² The Cameraman’s testimony was credible even though Grievant’s testimony differed. It is clear from the Cameraman’s testimony and threats made by Grievant to the dispatcher about the Cameraman that Grievant treated the Cameraman harshly.

¹³ For example, Grievant is a Trooper but the Hearing Decision mistakenly refers to him as a State Trooper Senior.

authorized the Cameraman to be at the scene. He could remain there so long as he was not “actually obstructing the law-enforcement officers, fire fighters, and rescue workers dealing with such emergencies.” The Cameraman did not actually obstruct law-enforcement officers, fire fighters, or rescue workers. The Cameraman did not stop his vehicle in a manner which impeded or rendered dangerous the use of the highway by others. Grievant’s assertion that the Cameraman interfered with Grievant, is unfounded. Grievant had no legitimate reason to choose to instruct the Cameraman to present his driver’s license and vehicle registration.

Grievant argues, “[t]o draw a conclusion on testimony of witnesses who, by their own admission did not even see the cameraman or his vehicle, that they were not interfered with, when all rescue personnel at the scene were not interviewed is an error of interpretation and investigation.” Grievant’s argument is untenable. The Cameraman testified credibly that he did not interfere with emergency personnel at the scene. He had been to many crash scenes and had experience in how to avoid creating a problem for people working at the scene. Grievant could have presented testimony of emergency personnel who were not interviewed by the Agency, yet he did not call them as witnesses. There is no reason to believe other emergency personnel would have testified differently from those who did testify. Grievant objects to the Agency failing to call as a witness the tow truck driver. Grievant raised as a defense that the Cameraman interfered with the tow truck driver. To support that defense, Grievant could have asked the Hearing Officer to compel the attendance of the tow truck driver. Grievant failed to do so.

Grievant argues, “[d]iscounting the testimony of other sworn employees at the scene over a violator (the cameraman), rescue personnel without first-hand knowledge and sworn employees not at the scene of supervisory rank or not is irresponsible.” Trooper J testified that he did not see the Cameraman interfere with fire, rescue or emergency personnel. Trooper A testified that she did not see the Cameraman interfere with any fire or rescue personnel. The only Cameraman interference Trooper J and Trooper A observed was with the tow truck. The extent of that interference, however, is unclear because their accounts differ materially. Trooper J testified the Cameraman nearly “cut off his head” on the tow truck cable. Trooper A testified that the Cameraman stumbled over the tow truck cable. The testimony of Trooper J and Trooper A is consistent with the Agency’s position that the Cameraman did not interfere with police, fire, and rescue vehicles and personnel. To the extent the Cameraman interfered with the tow truck cable, his interference was not sufficient to justify Grievant to order the Cameraman to leave the crash scene.¹⁴

Grievant asserts that the Agency poorly investigated the allegations against him. How well the Agency investigated the allegations against Grievant has no bearing on

¹⁴ In addition, Grievant would not have been justified in forcing the Cameraman to leave pursuant to *Va. Code § 46.2-890* because that section refers to law-enforcement officers, fire fighters, and rescue workers dealing with such emergencies. The tow truck was not involved in any aspect of rescue, but rather was involved in moving a vehicle after the driver had exited and no longer presented a risk to anyone.

the outcome of the appeal. The Hearing Decision is based on the evidence presented during the hearing and not on how well the Agency investigated the allegations.

Grievant argues, "I believe that while the complainant wishes to keep the Department in good standing with the media, on this occasion he chose press relations over the police mission. This action undermines my lawful first-hand observations and authority and will continue to improperly and unlawfully affect all sworn employees of this Department." The evidence, however, was that the Department expected its sworn employees to comply with Agency policy and to comply with the orders of higher ranking employees. Grievant failed to comply with a clear and direct order from a superior officer and failed to comply with Agency policy.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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:

1. The 15 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
VIRGINIA DEPARTMENT OF STATE POLICE
August 31, 2005

The grievant has requested an administrative review of the hearing officer's July 1, 2005, decision in Case No. 8066. The grievant was issued a Group III Written Notice. He filed a grievance to have the disciplinary action reversed. The hearing officer upheld the Group III Written Notice. The employee objects to the hearing officer's decision on the basis that the hearing decision is inconsistent with State and Agency policy. The grievant requested a reconsideration by the hearing officer but the reconsideration was denied. The agency head of the Department of Human Resource Management (DHRM) has requested that I respond to this administrative review request.

FACTS

The Virginia Department of State Police employs the grievant as a State Trooper in one of its field offices. He has been working for the agency for approximately 15 years. On January 21, 2005, a single vehicle accident occurred to which he and two other State Troopers responded. His duties at the accident site were to assist another State Trooper in securing the accident site and keeping it safe. While performing his duties at the accident scene, a cameraman from one of the local television stations drove up and parked his vehicle in the vicinity of the accident. According to the grievant, the cameraman parked his vehicle and set up his camera in an area that was too close to the accident scene which in turn created a safety hazard and hindered the rescue workers in performing their duties. He asked the cameraman to leave the area. The cameraman left the area but contacted the public information officer, a State Police Sergeant, through a dispatcher regarding the grievant's actions in barring him from the accident scene. It appears that the public information officer instructed the grievant to permit the cameraman to have access to the area, but when the cameraman and media representative from another station returned, the grievant directed that he move again and issued him a summons. After the Agency investigated the incident, the grievant was issued a Group III Written Notice and charged with the following:

*Fail to allow media proper access to an accident scene – violation of GO 31,
GO 19, paragraph 13 b(1);*

*Fail to follow verbal instructions of a supervisor – violation of GO 17,
paragraph 9, GO 19 paragraph 14 b(4); GO 19, paragraph 14 b(20);
GO 19, paragraph 14 b(21);*

*Corrective action – written notice violation GO 19, paragraph 14(b)-
insubordination or serious breach of discipline.*

He filed a grievance and in a decision dated July 1, 2005, the hearing officer upheld the disciplinary action.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, 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. Department of State Police General Order No. 19, Separation From the Service and Disciplinary Measures, Section 2., Standards of Conduct, with additions, parallels DHRM 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, the Department of Human Resource Management has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by the Department of Human Resource Management 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.

Summarily, the hearing officer concluded that the evidence supported that the grievant disobeyed a lawful order given by a superior. The grievant's contention that the cameraman's truck was obstructing the emergency vehicles' access to the accident, especially the tow truck, was found not to be true. Therefore, the grievant's explanation for having the cameraman to move his vehicle and for issuing a summons were found to be not credible. Thus, the hearing officer found that the evidence supported that the grievant failed to carry out an order by a superior and denied access by news media personnel to an accident scene. Based on the evidence, he determined that he was justified in upholding the disciplinary action.

Therefore, we have no basis to interfere with the execution of the hearing officer's decision.

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

Ernest G. Spratley
Manager, Employment
Equity Services