

Issue: Group II Written Notice (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy) and Group III Written Notice with termination (use of unnecessary force); Hearing Date: 09/08/05; Decision Issued: 09/20/05; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8161



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8161

Hearing Date: September 8, 2005
Decision Issued: September 20, 2005

PROCEDURAL HISTORY

On July 28, 2005, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy, in violation of General Order 19, para. 13, b, (1) of the State Police Manual, to wit: 1.) on November 14, 2004, after you used force against [Mr. B] and [Mr. S], you released them and failed to place charges against them for the offense which necessitated your use of force. 2.) On November 14, 2004, prior to arresting [Mr. F] for driving under the influence, you failed to offer him a preliminary breath test as required by Virginia Code Section 18.2-267. 3.) You failed to store the license plate ... you seized as evidence and the video tape that captured the stop and subsequent arrest of [Mr. F] as required by policy. 4.) You falsely stated in your SP-102 that you returned the license plate... to the registered owner

Grievant also received a Group III Written Notice with removal for:

"The use of unnecessary force during an arrest/custody procedure," a violation of General Order 19, para.14, b. (28) of the State Police Manual

to wit: on November 14, 2004, after dragging [Mr. S] out of a van, you struck him on the back and left leg with your flashlight without justification because he would not lie down on the ground on his stomach. You had him under control at the time because you turned him over on his stomach and then walked away from him to get some handcuffs.

On July 28, 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 August 11, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 8, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 employed Grievant as a Trooper II until his removal on July 28, 2005. He began working for the Agency in 1999. The purpose of his position was:

Responsible for patrolling the highways and enforcing the traffic and criminal laws of the Commonwealth.¹

No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On November 14, 2005, Grievant was working the midnight shift. At approximately 1:15 a.m., Grievant was driving his vehicle in a remote part of the county where he worked. He passed by a van parked in front of a closed store. Grievant became suspicious so he drove past the van another time. Grievant's vehicle had a camera mounted on the dashboard.

The van began traveling on the road. Grievant followed behind the van and observed the van crossing the double yellow line down the middle of the road. Grievant radioed the dispatcher to determine the owner of the van. The dispatcher said the license plates were reported stolen. The license plates were compared to the DMV computer system, and Grievant was informed that the plates were confirmed stolen. Based on his experience, Grievant knew that people who put stolen license plates on their vehicles often do so to engage in crime. Grievant informed the dispatcher that he would stop the vehicle. Grievant turned on his police lights and siren so that the van driver would see and hear Grievant and pull over to the side of the road. The driver ignored Grievant and continued to drive. Grievant could see someone in the back of the van turning around and reaching for something and looking forward. Grievant was concerned that the driver was not pulling over to the side of the road because the people inside the van were attempting to conceal something or formulating a plan to fight or run.

Finally, the van drove into a parking lot and moved very slowly. This seemed strange to Grievant. Grievant pulled behind the van. The driver stopped but did not turn off the vehicle engine. Grievant concluded he was involved in a high-risk stop which posed significant danger to him.

Grievant positioned himself behind his opened door and drew his sidearm. He pointed it in the direction of the van. Grievant ordered the driver out of the vehicle. Grievant yelled "step out of the car and show me your hands; come here now!" The driver opened the door and stood next to the van. Grievant told the driver "walk back to me now!" When the driver failed to respond, Grievant repeated his instruction. Grievant added "get on the ground!" Grievant repeated "get on the ground!" The driver turned to Grievant and smiled and then put his hands in his pockets. He then re-entered the van. Grievant had never experienced such unusual behavior from a vehicle driver. Grievant's level of concern continued to escalate. Grievant did not know if the driver intended to reach for a weapon or to place the van in reverse and ram the police vehicle.

¹ Grievant's Exhibit 49.

Grievant called a 10-33 on the radio to request immediate backup. He knew the nearest trooper was approximately 20 to 30 minutes away. Grievant used the public address system on his vehicle to yell, "turn the vehicle off now!" He added "driver shut the vehicle off!" The driver ignored Grievant's instruction.

Fortunately, a local deputy sheriff heard Grievant's request for backup and went to Grievant's location. Grievant and the deputy agreed that the deputy would approach the van on the driver's side and Grievant would approach the van on the passenger's side.

Grievant approached the right side of the van with his weapon drawn and pointed it at the front passenger. He was also holding a flashlight. Grievant kicked the side of the van to gain the attention of the van occupants.² Grievant yelled, "open the window now!" When the passenger refused to do so, Grievant used his flashlight to break and shatter the passenger window. Grievant told the front passenger, Mr. B, in both English and Spanish, to get out of the vehicle. Mr. B slowly exited the vehicle and began to raise his hands and turned his back towards Grievant. Grievant told Mr. B to get on the ground. Mr. B was moving very slowly and Grievant grabbed Mr. B's left hand and then positioned himself behind Mr. B and forced Mr. B to the ground on his stomach. Grievant handcuffed Mr. B.

Grievant left Mr. B and went to the rear passenger's door and slid it open. Grievant spoke Spanish and told the passenger in the rear, Mr. S, to get out of the vehicle. Mr. S did not exit the vehicle. Grievant grabbed Mr. S and pulled him out of the van. Mr. S landed with his knees and hands on the ground. Grievant ordered Mr. S to "get down." Mr. S resisted. Mr. S then turned the left side of his body upwards as if to look at Grievant and to start to get up. Grievant used his flashlight to hit Mr. S on the left side of his shoulder. Mr. S fell backward and onto his back with Grievant over him. Grievant tried to pull Mr. S over onto his stomach but Mr. S refused. Grievant twice told Mr. S to roll over but Mr. S refused. Grievant then used his flashlight to hit Mr. S on the front of Mr. S's thigh. Mr. S raised his leg and Grievant was able to pull Mr. S over to his stomach. Grievant got on top of Mr. S and restrained him. Grievant says "f—king man" and "you want to f—k around."³ Mr. S was under control once Grievant was on top of him.

Although the driver was intoxicated, Grievant did not offer the driver a preliminary breath test as required by statute. The driver was later convicted of driving under the influence as well as other charges. Grievant did not place the stole vehicle tags in evidence storage. Grievant later wrote a report saying he had returned the tags to their owner but in fact had not done so.

² Grievant was not disciplined for kicking the van although numerous witnesses testified that his action was not appropriate.

³ Grievant was not disciplined for this behavior. He admits his language was not appropriate but reflected his heightened level of stress created by the conflict with the three men. Grievant was counseled regarding his comments.

Mr. S did not suffer any significant injuries from Grievant's strikes. Grievant's strikes were to non-lethal portions of the body. When the Investigator later spoke with Mr. S, Mr. S did not remember being struck by Grievant. Mr. S said if Grievant struck him it was because he would not lie down.

Grievant filed a use of force report which triggered Agency review. Grievant was placed on administrative duty on February 16, 2005 pending the Agency's investigation.⁴

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 II

"Failure to ... comply with applicable established written policy" is a Group II offense.⁵ Grievant used force against Mr. S but did not charge him with any crime. General Order 24(4)(f) provides that "[w]henver force is used by a sworn employee of this Department against any individual, a charge will be placed against that individual for the offense which necessitated the use of force" Grievant did not charge Mr. S with obstruction of justice which is a charge he could have brought.⁶ *Va. Code § 18.2-267* provides that the vehicle driver was entitled to be offered a preliminary breath test if one is available. Grievant had the test kit in his vehicle but did not offer it to the driver. The stolen license plate was evidence. Grievant failed to store the evidence as required by General Order 43(8)(a). Based on the foregoing, Grievant failed to comply with established written policy thereby justifying issuance of a Group II Written Notice.⁷

⁴ Agency Exhibit 19. The Hearing Officer finds that the Agency's decision to place Grievant on administrative duty was in accordance with General Order 62, paragraph 7 and General Order 18, paragraph 9. Although Mr. S did not suffer serious injury, the Agency should be given the benefit of the doubt to properly conduct its investigation.

⁵ General Order 19, paragraph 13(b)(1).

⁶ The local Commonwealth's Attorney testified he would have preferred for Grievant to have brought a charge of obstruction of justice against Mr. S.

⁷ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Grievant argues the Agency took 224 days from the day of the incident to the date a Written Notice was issued and that this length of time is so unreasonable as to justify a reduction in the disciplinary action. The Virginia State Police is unusual in that it requires numerous reviews of its Agency's supervisors and managers. Grievant's case was reviewed by numerous VSP employees and investigated by Internal Affairs. The Agency did not abandon its investigation such that any delays should serve to reduce the disciplinary action. The Hearing Officer will not penalize an Agency that makes an extraordinary effort to "get it right."

Group III

"The use of unnecessary force during an arrest/custody procedure" is a Group III offense.⁸ The Hearing Officer has closely reviewed the video of the incident on several occasions. Although portions of video are not pleasant to watch, Grievant's behavior is not so blatant or egregious that the Hearing Officer can conclude whether Grievant used unnecessary force based on the video alone. The Hearing Officer must rely on the expert opinions of State Troopers and trainers with numerous years of experience in order to determine whether Grievant's use of force was unreasonable. Upon consideration of expert witness testimony, the Hearing Officer finds that the Agency has not presented sufficient evidence to meet its burden of proof to show that Grievant used unnecessary force.

The Agency's experts consistently agreed that the totality of the circumstances determines how a Trooper is supposed to use force. They also agreed that a conflict between a Trooper and another person should not be an equal, 50%-50%, interaction. The Trooper should always use more force than his opponent is using. The Trooper is expected to gain quick control of any conflict for his own safety and for the safety of the person or persons with whom he is battling. A trooper need not be under attack before he or she may use physical force.

All of the sworn law enforcement officers who testified had watched the video prior to seeing it again during the hearing. Most had watched the video numerous times.

First Sergeant H supervised all sworn officers in the area where Grievant worked. He concluded Mr. S was non-compliant with and resistant to Grievant's instructions. Grievant's hit to Mr. S's shoulder and leg were not hard hits. First Sergeant H testified that Grievant's strikes were appropriate and designed to get Mr. S under control. First Sergeant H added that Grievant was a good trooper who was very capable and dedicated. He described Grievant as a model trooper and would have no concern if Grievant was reinstated.

⁸ General Order 19, paragraph 14(b)(27).

Sergeant EP had been a trooper for eight years. He teaches survival training to other troopers. He reviewed the video at the Agency's request. He concluded the traffic stop was a high risk stop, meaning there was a significant risk of danger to Grievant. He described Grievant's strikes as "a little excessive." He added troopers could disagree with what is reasonable under different circumstances.⁹

Captain RK reviewed the video and initially stated that Grievant's use of force was reasonable. He was also relying on First Sergeant H's report. After additional Agency's experts reviewed the tape and additional evidence about the circumstances were obtained, Captain RK changed his conclusion. He determined that Grievant's use of force was unnecessary, especially since Grievant's actions were not the type taught by instructors at the Virginia State Police Academy.

Sergeant B served as a coordinator for defensive tactics. He teaches troopers to use stunning techniques in order to distract a person who is involved in an altercation with a trooper. By distracting the person, the trooper can gain control over the person. Sergeant B testified that Grievant's actions were not appropriate as a distracting technique. He added that a trooper in Grievant's position is supposed to use whatever force was reasonable and necessary at the time. He stated that Mr. S's non-compliance was not an option once Grievant had determined Mr. S should be under custody. When asked if he could say what Grievant did was excessive use of force, Sergeant B responded that he was "not 100 percent sure." He could not say without a doubt that the force was unreasonable. He could not say the force was unreasonable. After further questioning, he was asked "was there a use of unnecessary force" and he responded, "No."¹⁰

First Sergeant B taught defensive tactics for five years. He viewed the video tape of the incident. When asked whether the force used by Grievant was unnecessary, First Sergeant B testified, "Cannot say that."

Deputy Superintendent N testified that Grievant used unnecessary force when subduing Mr. S. He felt Grievant's behavior was excessive and outside the Agency's use of force policy.

Lieutenant TE testified that he believed Grievant used minimal force on Mr. S. He added that Mr. S was not a small man.

The Agency's in-house legal counsel is a sworn Trooper who graduated from the VSP Academy in 1994 and worked as a local prosecutor. She has taught legal matters to State Troopers. She viewed the video. She testified she did not see a problem with

⁹ Sergeant EP was critical of several aspects of Grievant's actions on November 14, 2004 such as kicking the van, turning his back on an occupant of the van, etc. Grievant was not disciplined for the concerns expressed by Sergeant EP.

¹⁰ Sergeant B criticized Grievant's actions on November 14, 2004 such as when Grievant removed a suspect with a firearm in his hand, but Grievant was not disciplined for those criticisms.

the use of force from a legal perspective. She felt Grievant's actions were legally defensible. She testified that she did not believe Grievant's use of force was unnecessary. She felt that another Trooper could argue that Grievant should have used a lesser method but that reasonable people can disagree. When specifically asked under VSP policy did Grievant use unnecessary force, the Legal Counsel testified she was not qualified to answer that since she is not in a judgment position. She said the answer was not "black and white." She described it as a "very gray issue."

A local Commonwealth's Attorney reviewed the tape at the request of Internal Affairs. He testified he did not see anything constituting an assault by Grievant. He concluded Grievant's use of force was lawful. The Commonwealth's Attorney testified he would have hit Mr. S as did Grievant had he been in Grievant's position.

No credible evidence was presented to establish what Grievant should have done instead of striking Mr. S. One witness suggested Grievant could have used an arm-bar technique using his flashlight to roll over Mr. S. This evidence is unpersuasive because Grievant required his flashlight for illumination of a dark area. To perform an arm-bar technique without the flashlight would have jeopardized Grievant's ability to see his surroundings. Using the flashlight also would have jeopardized Grievant's ability to see his surroundings and placed him at risk of having his light damaged should the technique not go as planned. Moreover, no evidence was presented showing Grievant had been trained regarding arm-bar techniques. One witness testified Grievant could have used his O.C. spray to subdue Mr. S. O.C. spray is distilled cayenne pepper that must be sprayed into the face of the subject. This would have been difficult for Grievant to do while he was struggling with Mr. S. O.C. spray is a spray that could have bounded back into Grievant's eyes. Grievant was so close to Mr. S that using O.C. spray would not have been advisable.

The weight of the evidence is that Grievant did not use unnecessary force. All of the sworn law enforcement officers who testified had sufficient experience to be considered experts regarding the necessary use of force. There was no one expert whose experience or training was so great that the Hearing Officer had to give his or her testimony more weight than the other experts. The Agency offered Sergeant EP and Sergeant B as training experts. Sergeant EP's conclusion that Grievant's actions were "a little excessive" is too tentative to be relied upon. Sergeant B's conclusion was that Grievant did not use unnecessary force.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee

petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reversed**. The Agency is ordered to reinstate the Grievant to his former position, or if occupied, to an objectively similar position. He is to be awarded full **back pay** from which any interim earnings must be deducted. He is to be restored to full benefits and seniority. Grievant is further entitled to recover a reasonable **attorney's fee**, which cost shall be borne by the agency.¹¹

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

¹¹ Va. Code § 2.2-3005.1.A & B.

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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.