

AHO: Carl Wilson Schmidt, Esq.; Case No. 8304; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8304

Hearing Date: April 20, 2006
Decision Issued: May 8, 2006

PROCEDURAL HISTORY

On October 12, 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 applicable established written policy. On November 10, 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 March 2, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 20, 2006, a hearing was held at the Agency's regional office. The hearing was delayed beyond the customary time frame because the Hearing Officer found just cause to grant Grievant's motion to delay.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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. He has been working for the Agency for approximately seven years. He is well-respected for his bravery and commitment to the Virginia State Police and to the citizens of the Commonwealth of Virginia.

On April 21, 2005, Grievant received a radio dispatch notifying him of an emergency. While operating his police vehicle, Grievant activated the emergency lights and siren. He drove a short distance until he reached an intersection. Another State Trooper was at the intersection and had stopped. Grievant positioned his vehicle along side of the other police vehicle. Grievant turned off the siren but left the emergency lights flashing. Grievant and the other Trooper rolled down their vehicle windows and talked briefly. Although the other Trooper had finished his shift and was heading home, he asked if Grievant needed assistance. Grievant knew that several Troopers had responded to the call. Grievant told the other Trooper that Grievant did not need back up. Grievant rolled up his window and re-activated his vehicle siren.

Grievant was driving on BrM Drive. BrM Drive intersected a larger road, E Road. Traffic passing through the intersection was controlled by a traffic light. While sitting in

his vehicle looking toward the intersection, Grievant could see three lanes of traffic immediately in front of him. Traffic in the first two lanes was moving from Grievant's left to his right. The third lane was a left turn lane. Traffic in the third lane, moved from Grievant's left towards the right, but would turn to the driver's left. Past the three lanes were medians on the left and the right of the entrance to the intersection on E Road. The median to Grievant's left was a raised curb with grass in the middle. The median to Grievant's right was a raised curb but filled with concrete and was approximately four feet in width. This median had a traffic sign that was not large enough to block Grievant's view of the traffic coming from his right into the intersection. Past the medians were two lanes with traffic moving from Grievant's right to his left.

Traffic moving from Grievant's left to his right on E Road was traveling slightly downhill. Traffic moving from Grievant's right to his left on E Road was traveling on level pavement but would begin an upward slope after passing the traffic light.

Grievant's objective was to enter the intersection from BrM Drive and make a left-hand turn onto E Road. He had to pass through the three lanes of traffic on his left and onto one of the two lanes of traffic moving from right to his left.

After re-activating his siren, Grievant observed that two of the three lanes of traffic on his left had stopped. He did not observe any traffic in the third lane (the left turn lane) to his left. At a speed of at least five miles per hour, but more likely between eight and ten miles per hour, Grievant drove forward into the intersection. As Grievant began entering the intersection, traffic moving from his right to his left had not yet stopped. Grievant could not make his left hand turn until the traffic moving from his right to his left stopped. As Grievant moved into the intersection, he kept his head turned to his right in order to determine at what point all traffic on his right had stopped so that he could pass through the intersection. While Grievant had his head turned to the right, a 1981 yellow corvette approached from Grievant's left. The corvette was in the left turn lane that Grievant had previously viewed as empty. The corvette was traveling approximately 35 miles per hour in a 35 mile per hour zone. At the point when Grievant's vehicle was inside the intersection and passing in front of the left turn lane on E Road, the corvette continued down the left turn lane and into the intersection. Once the driver observed Grievant's vehicle, the corvette driver turned sharply to the left in order to avoid hitting Grievant's vehicle as Grievant's vehicle was moving forward. The front right bumper of the corvette hit the front left part of the bumper of Grievant's vehicle. The impact caused the front bumper of Grievant's vehicle to peel off of the vehicle and fall to the ground. The front right side of the corvette was damaged. Total damage for both vehicles was approximately \$17,000.

On August 8, 2005, Grievant received a memorandum from Sergeant B advising Grievant of the charges against Grievant that Sergeant B would be investigating. The memorandum stated the allegation as, "Your negligence contributed to a Department vehicle crash." Sergeant B also wrote, "[a] sustained allegation may result in disciplinary action."¹

¹ Agency Exhibit 1.

On August 11, 2005, Grievant wrote a memorandum stating:

This correspondence is being submitted in response to a complaint filed against this member on August 8, 2005. Specific allegation(s) that my negligence contributed to a Departmental vehicle crash on April 12, 2005. I do not deny this allegation, and accept full responsibility for my driving behavior.²

Grievant had been involved in seven prior accidents while operating his police vehicle for which he was deemed at fault. In December 2003 and in January 2005, Grievant attended Remedial Driver Training for Sworn Employees.³

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).

General Order 57 sets forth the Agency’s policy for Troopers to follow when they are operating a departmental vehicle in an emergency response. General Order 57(2)(b) authorizes State Troopers operating an “emergency vehicle” such as a police vehicle to:

[p]roceed past any steady or flashing red signal, traffic light, stop sign, or device indicating moving traffic shall stop if the speed of the vehicle is sufficiently reduced to enable it to pass a signal, traffic light, or device **with due regard** to the safety of persons and property. (Emphasis added).

General Order 57(4)(b) states:

Upon approaching an intersection controlled by a stop (red) light or stop sign, a sworn employee engaged in an emergency response will stop, and remain stopped, until all traffic has yielded the right-of-way.

² Agency Exhibit 1.

³ Agency Exhibit 7.

The question becomes what is the standard that applies to measure Grievant's actions. If the prudent person standard is applied, Grievant's actions would not be unexpected or illogical. In other words, if a typical driver were faced with the same situation, the typical driver may very well behave in the same manner as did Grievant.

In order to apply a higher standard than the standard of a prudent person, the Agency must notify Grievant that it is holding him to a higher standard. Grievant and other Troopers receive safety training beginning at the Academy and as needed thereafter. General Order 70 regarding the Interdepartmental Safety Program states:

It is recognized that sworn employees in carrying out their assigned duties of enforcing the laws must operate the Department motor vehicle in a manner different from the operation of the normal private vehicle. While the program is designed to make allowances in those cases, sworn employees should always be cognizant of the fact that they are held to a higher standard in the operation of a Department vehicle than a private citizen. This higher standard is based on the advanced experience and training sworn employees have received in vehicle operation in both non-emergency and emergency situations. The nature of the sworn employees' work creates an obligation to be attentive to the safe operation of the Department's motor vehicles and alert to any changes in road, weather or traffic conditions.

The Hearing Officer finds that the Agency has adequately informed him that he is to be held to a higher standard than would the average person with respect to operating his vehicle.

"Failure to ... comply with applicable established written policy" is a Group II offense.⁴ In this case, Grievant did not operate his police vehicle at a speed that would have enabled him to pass through the intersection with due regard to the safety of persons and property. When Grievant first stopped at the intersection, he observed that the left turn lane on E Road was empty. He should have considered the possibility that vehicles may later approach the intersection and fill the empty lane. Had Grievant anticipated this possibility, he would have known to look both to his right and then back to his left in order to verify that any approaching vehicles also stopped in the left turn lane.⁵ Because Grievant failed to do so, he did not act with due regard for the safety of

⁴ General Order 19(13).

⁵ In his August 11, 2005 memorandum, Grievant admitted to the charge against him. Grievant now contends he was merely taking responsibility because he is an honorable person. There is no doubt Grievant is an honorable person, but his August 11, 2005 response must be read in light of the August 8, 2005 charge presented to him. The August 8, 2005 memo to Grievant specifically informs Grievant that disciplinary action may result from the investigation. Grievant's response was an admission he made with the knowledge that he could be disciplined. From this perspective, the Hearing Officer must consider Grievant's statement to be an admission of fault with respect to the collision.

persons and property thereby justifying the Agency's issuance of a Group II Written Notice.

Grievant contends the disciplinary action should be mitigated because other Troopers engaged in similar behavior but were not disciplined. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."⁶ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "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." The accident on April 21, 2005 was Grievant's eighth accident where he was deemed at fault. Grievant did not show that the other Troopers who were involved in accidents but did not receive disciplinary action also had seven prior at fault accidents charged to them. There is not sufficient evidence for the Hearing Officer to conclude that Grievant was treated any differently from other State Troopers. The Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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

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:

⁶ *Va. Code § 2.2-3005.*

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 all of your appeals to the other party and to the EDR Director. 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.⁷

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.