

Issue: Group III Written Notice with suspension (failure to conduct a proper and thorough investigation); Hearing Date: 06/23/06; Decision Issued: 07/05/06; Agency: VSP; AHO: Lorin A. Costanzo, Esq.; Case No. 8379; Outcome: Agency upheld in full

COMMONWEALTH OF VIRGINIA

Department of State Police

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 8379

Hearing Date: June 23, 2006

Decision Issued: July 5, 2006

APPEARANCES

1. Grievant (who was a witness).
2. Grievant's counsel.
3. Agency designated party.
4. Agency presenter.
5. Witnesses.

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?

EXHIBITS

By agreement of the parties prior to hearing, exhibits were admitted in a group (ie: *en masse*). Grievant exhibits are contained in page 1 through 9, agency exhibits in page 10 through 57 and exhibits jointly agreed to and admitted in pages 58 through 106. Exhibit pages 107 through 110 (blank Police Accident Report form) were admitted by agreement at hearing.

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice for failure to conduct a proper and thorough on scene and follow up investigation after responding to a hit and run accident. As a part of the disciplinary action grievant was suspended without pay for two work days.¹

Grievant has been employed as a Trooper with the Department of State Police (hereinafter referred to as "agency") for approximately 3 years. Grievant has received training from the academy and his FTO on how to properly investigate an accident.²

On January 13, 2006 a driver called 911 on her cell telephone just after being hit in the rear of her vehicle by a pickup truck that left the scene of the accident. She reported the incident

¹ Exhibit page 67 to 69. Grievance Form A and Written Notice.

² Testimony of grievant.

and gave a vehicle description, tag number, and state of the license tag for the vehicle that left the scene of the accident.

Grievant was dispatched to the scene of the reported hit and run accident to investigate the matter. He met with the driver who had remained at the scene. She reported that her vehicle had a spare tire on the rear of the vehicle which was damaged, a back door that wouldn't open and wouldn't lock, and the bumper of her vehicle was damaged. Additionally she told grievant the vehicle leaving the scene, a pickup truck, was damaged extensively on the front grill.

A dispatcher had given grievant the owner's address belonging to the tag number of the vehicle reported leaving the scene. The dispatcher also provided the state in which the tag was issued, the tag number, and a description of the vehicle. The vehicle description matched the victim's description of the vehicle leaving the scene. Grievant heard this information before he left the scene of the accident.

Grievant testified that the driver at the scene did not provide him the state of the license number for the pickup truck. However, before leaving the scene he had heard from a dispatcher the tag number, the state in which the vehicle was licensed, a vehicle description, and the registered owner's address.³

Grievant did not give the information received from the dispatcher to the driver who reported the hit and run incident.

At the scene of the accident grievant saw the driver tried but couldn't open up her spare tire (located at the rear of the vehicle). He also saw damage to the rear bumper.

The only written documentation of the matter recorded by Grievant (until ordered to do a report 13 days later) was 10 lines of handwritten notes on an approximately 4½ inch wide note pad sheet. As to the vehicle hit, he listed the driver's name, address, telephone number, the vehicle's make, model, license number, and vehicle identification number. As to the pickup truck which left the scene, he made a handwritten note of the make, model, and tag number (without indicating the state in which the vehicle was licensed).⁴ No dispatched information received as to the licensing state, or owners address was recorded. No accident scene information was documented. Grievant did not fill out a SP 50 (accident field note) nor SP 239. He did fill out an SP-102 on January 26, 2006 when instructed to do so by his sergeant.⁵ No photographs, diagrams, or other documentation was made concerning this incident.

Grievant did not request a DMV check. He did not request a dispatcher transmit a "be on the lookout" for the vehicle leaving the scene to direct out of district assistance in locating the pickup. Nor did he contact the State Police in the State in which the pickup truck was licensed.

³ Exhibit pages 8 & 9; Exhibit page 96.

⁴ Exhibit page 3

⁵ Exhibit page 97.

The driver of the vehicle hit filed a complaint with agency concerning grievant's conduct of the investigation of the incident.⁶

The agency began an administrative investigation on January 14, 2006. Two allegations were investigated. The first allegation concerned shirking official duties and the second allegation involved failing to submit SP-102 in a timely manner. Grievant was afforded opportunity to respond to the allegations of complainant and did respond to those allegations in writing.⁷

During his investigations of the allegations the sergeant, after speaking with the complainant, ran the tag she provided and obtain the name and address of the person to whom the suspected pickup truck was registered. The vehicle was not licensed in Virginia. The sergeant had a dispatcher send a teletype to the State Police of the licensing state to have a unit go by the residence in an attempt to locate the owner and investigate the incident. Information was received from the contacted State Police and a contact name provided. This person was called and the sergeant obtained information concerning the registered owner of the pickup truck and his possible whereabouts.⁸

Ultimately, the first allegation was "sustained" and the second "not sustained".⁹

Grievant was provided notification on April 3, 2006 of being charged with conduct in violation of the Standards of Conduct, as specified in General Order 19 of the State Police Manual, namely General Order 19, paragraph 13 b (1) alleged violated 4 times, paragraph 14 b (20), and paragraph 14 b (24) and it was determined that grievant may be issued a Group III Written Notice and be suspended from duty for (2) workdays.¹⁰

On April 10, 2006 grievant met with captain and acting first sergeant concerning the allegations of the complainant. Prior to this meeting grievant was allowed to review the investigative reports. At this meeting grievant was informed allegation number one alleging grievant shirked his official duties when he failed to conduct a proper and thorough on scene and follow up investigation was sustained. He was notified this matter constituted a violation of General Orders 17 paragraph 11; General Order 17, paragraph 31; General Order 27, paragraph 1; and General Order 27, paragraph 3 c. These provisions are set forth as follows:¹¹

General Order 17 paragraph 11 ... "Employees will at all times be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of the official duties earnestly strive to win the approval of law-abiding citizens."

⁶ Exhibit page 83.

⁷ Exhibit page 96, 97.

⁸ Exhibit page 83,84.

⁹ Exhibit page 73.

¹⁰ Exhibit page 77&78.

¹¹ Gen. Ord. 17 begins Exhibit page 16; Gen. Order 27 begins Exhibit page 47.

General Order 17, paragraph 31 ... "Sworn employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on department policies and procedures, Departmental training, and supervisory recommendations."

General Order 27, paragraph 1 ... "The purpose of a motor vehicle crash investigation shall be to determine if there has been a violation of the law and, if so, to obtain the necessary evidence to prosecute the violator. The secondary purpose is to obtain the necessary information to file the required report."

The General Order 27, paragraph 2 ... "All motor vehicle crashes coming to the attention of sworn employees that meet any of the conditions stated below shall be investigated, provided they have not been investigated by an appropriate law enforcement agency." And General Order 27 paragraph 2 a. includes, "Crashed involving personal injury, death and/or hit and run."

General Order 27, paragraph 3 c provides that when an investigation of a motor vehicle crash is warranted the sworn employee shall "utilize Accident Investigation Field Note pad (SP-50) to record the details of their investigation.

Grievant was additionally informed his actions also violated the following Standards of Conduct in General Order 19:

- General Order 19 paragraph 13 b (1) ... *(Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established policy)*. Grievant was informed this was a Group II Offense which he had violated 4 times.
- General Order 19 paragraph 14 b (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. (Grievant informed this was a Group III Offense)*.
- General Order 19 paragraph 14 b (24) ... *(Manifesting cowardice, feigning illness, or otherwise attempting to shirk official duty)*. (Grievant was informed this was a Group III Offense.)

Captain took the four Group II offenses and two Group III offenses violating the Standards of Conduct referenced above and combined these to issue, on 4/10/06, one Group III offense under General Order 19, Paragraph 14 b (24) *(ie. "Manifesting cowardice, feigning illness, or otherwise attempting to shirk official duty")*. It was indicated that grievant, "Failed to conduct a proper and thorough on scene and follow up investigation after responding to a hit and run accident." In addition to the Group III Written Notice grievant was given a 2 day suspension.¹²

The second allegation was found "not sustained". As such is not a subject of this grievance and it is not further addressed.

Grievant was notified as per General Order 19, paragraph 21 of being charged with

¹² Exhibit page 73-75.

conduct which is in violation of General Order 19. A review for mitigation was conducted and no additional circumstances to support a modification of the intended action was determined.¹³

Grievant was issued one Group III Written Notice on 4/10/06 for violating General Order 19, paragraph 14 b (24) and indicating that grievant failed to conduct a proper and thorough on scene and follow up investigation after responding to a hit and run accident. Disciplinary action taken in addition to issuing the Group III Written Notice was a 2 day suspension.

Within the past 13 months grievant has received, as provided in General Order 19, paragraph 7 b (1), informal corrective action in the form of counseling for matters one of which dealt with improper actions at the scene of a crash investigation.¹⁴ Informal counseling was received by Grievant on prior separate occasions.¹⁵

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 *et seq.*, establishing procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures 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, 327 Va. 653, 656 (1989).

Code Section 2.2-3000(A) sets forth the Commonwealth of Virginia's grievance procedure and provides:

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 Section 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual, Section 5.8 Effective date: August 30, 2004.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code Section 2.2-1201, the Department of Human Resources Management (DHRM) promulgated Standards of Conduct Policy No. 1.60.

¹³ Exhibit page 79, 80.

¹⁴ Exhibit page 82.

¹⁵ Exhibit page 94.

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. The Department's General Order 19 sets forth Standards of Conduct. Paragraph 2 "Objective and Intent" of General Order 19 provides the Commonwealth of Virginia has a set of rules governing the performance and personal conduct and acceptable standards for work performance of employees. Furthermore, it is provided that these Standards of Conduct and Performance are designed and used to correct behavior.

General Order 19 paragraph 3 provides the Standards of Conduct are designed to protect the well-being and rights of all covered employees; to assure safe, efficient government operations and to assure compliance with public law. They serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance. The Standards of Conduct distinguish between lesser serious and more serious actions of misconduct and provide corrective actions accordingly. The Standards are intended to be illustrative but not all inclusive.

General Order 19 paragraph 14 a. provides that Group III offenses include acts and behavior which are of such a serious nature that a first occurrence should normally warrant removal.

General Order 19 paragraph 14 b (24) provides that Group III offenses include, "Manifesting cowardice, feigning illness, or otherwise attempting to shirk official duty."

The actions of grievant in his investigation of the hit and run of January 13, 2006 give rise to a number of concerns including:

1. This was a hit and run. Extensive damage was reported to the vehicle leaving the scene and this incident could have possibly been a felony. Damage was observed to the vehicle remaining at the scene.
2. No photographs were taken at the scene and the only information documented was 10 lines of handwritten notes.
3. The address of the owner of the vehicle leaving the scene was dispatched and heard by grievant but this information was not given to the driver reporting the accident.
4. Grievant did not request a "Be On the Lookout" outside the district be issued and this was Grievant's responsibility as officer on the scene.
5. There wasn't any follow-up investigation after leaving the scene. Dispatch had provided Grievant with the state and tag number, identity, and address of the driver of the suspect pickup truck and a description of the suspect vehicle. This was not given to the driver of the vehicle hit nor used to secure additional information from the State Police of the state where the vehicle was licensed.

6. On January 26, 2006 Grievant stated to the investigating sergeant that no state for the tag number was given him by the complainant and that the dispatcher did not provide a state with the tag number.¹⁶

Grievant testified that, at the scene, he heard from dispatch the vehicle and owner information for the pickup truck that left the scene. Before leaving the scene he had the tag number, the state in which the vehicle was licensed, vehicle description, and the registered owner's address. However, he did not give the information received to the driver reporting the accident.

The complainant testified that later the night of the accident she contacted grievant by telephone. She testified that grievant told her that the license plate she provided did not match the vehicle description provided and there was nothing else he could do. Grievant indicated he did not remember that he said this.

Grievant testified he concluded there was no hit and run based upon finding no debris at the scene after the driver said she saw extensive damage to the front grill of the pickup truck that left the scene. Grievant testified he saw the driver of the vehicle hit in the rear try to open up her spare tire holder but she couldn't. While he did not see debris on the road he acknowledged it could have been gone as the road was open to traffic. In his written response of 1/31/06 Grievant stated he saw damage to the middle of the bumper of the vehicle remaining at the scene.¹⁷

Preservation of information and documentation of the accident was raised as a concern by the agency. The only written documentation for the accident was 10 lines of handwritten notes which did not provide the state in which the suspect vehicle was licensed nor the owner's name and address.¹⁸

Grievant testified he did not fill out an SP 50, accident field notes, and indicated he did not do so because there was not enough information to do so. However, grievant acknowledged he had road and other information including time, weather, slope, pavement type, suspect tag, description, make, and owner's address of suspect vehicle together with information on the driver and vehicle hit. Grievant testified training, policy, and procedure requires him to fill out an SP 50 if it was an accident that actually occurred. He further testified he is not saying an accident did not occur. Also, grievant testified he did not do an SP 239.

Grievant did not take photographs but testified if he thought the accident was a criminal

¹⁶ Exhibit page 84.

¹⁷ Exhibit page 96.

¹⁸ Exhibit page 3.

offense would have. Agency raised concern that this was a hit and run accident that could possibly be a felony. For a number of reasons, there could be an inquiry made in the future concerning this incident. The lack of documentation to preserve matters found at the scene and lack of follow-up investigation is a valid concern.

In investigating matters grievant spend 10 minutes total at the scene and did not conduct any follow-up activity. At the time of the accident it was Grievant's responsibility to put out a "be on the lookout" for the vehicle that left the scene. This was not done.¹⁹

Grievant is a Sworn Employee. Training was provided grievant as it is provided to all troopers on how to conduct an accident investigation including investigating a hit and run. A part of that training is to take the suspect information from witnesses, to check that information with DMV, follow up that information with the victim, and follow up any leads that may lead to a suspect. Grievant did not do this and did not provide any information to the victim other than his name and number.²⁰

Grievant told the investigating Sergeant he could not remember saying to the driver of the vehicle hit that the tag number of the pickup truck came back to an SUV and therefore he couldn't do anything for her. Complainant testified she was told this. She testified that at the scene she not was not given the name or address of the driver of the pickup truck by grievant. The sergeant investigating allegations was able to obtain this information and give it to the complainant.

While the agency determined a total of 6 violations of the Standards of Conduct in General Order 19 (4 Group II and 2 Group III) it was determined that the violations would be merged into one Group III. It is also noted that that there has been informal counseling previously utilized by agency with grievant on more than one occasion.

In reviewing the agency imposed discipline, the hearing officer is to give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations. See LaChance v. M.S.P.B., 178 F.3d 1246; 1999 U.S. App. LEXIS 9711 (Fed. Cir. 1999)

The agency has borne the burden of proof (by a preponderance of the evidence) in this cause. The grievant engaged in the behavior described in the Written Notice. The behavior constituted misconduct and the agency's discipline was consistent with law and policy and does not exceed the limits of reasonableness.

¹⁹ Testimony at hearing.

²⁰ Testimony of sergeant.

DECISION

For the reasons stated herein, the disciplinary action of the agency is affirmed and the Group III Written Notice with 2 day suspension is UPHELD.

APPEAL RIGHTS

As set forth in the Grievance Procedure Manual in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative review: this decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with State or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The director's authority is limited to ordering the hearing officer to revise the decision to conform to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to 804-372-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 or faxed to 804-786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15 day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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.

B. **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.

Lorin A. Costanzo
Administrative Hearing Officer