

Issue: Group III Written Notice with suspension and transfer (insubordination and serious breach of discipline); Hearing Date: 09/19/06; Decision Issued: 10/03/06; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8415; Outcome: Employee granted partial relief; **Administrative Review: Hearing Officer Reconsideration Request received 10/11/06; Reconsideration Decision issued 11/09/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 11/13/06; EDR Ruling No. 2007-1490 issued 12/29/06; Outcome: HO's decision affirmed; Administrative Review: DHRM Ruling Request received 10/11/06 and/or 11/13/06; DHRM's ruling issued 01/16/07; Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8415**

Hearing Date: September 19, 2006  
Decision Issued: October 3, 2006

**PROCEDURAL HISTORY**

On July 6, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension transfer for insubordination or serious breach of discipline in violation of General Order 19, paragraph 14(B)(4). On July 6, 2006, 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 17, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency 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 Trooper. He graduated from the Academy in 1998. The purpose of his position is, "[r]esponsible for patrolling the highways and enforcing the traffic and criminal laws of the Commonwealth."<sup>1</sup> Grievant received favorable performance evaluations from the Agency.

In the fall of 2005, Grievant was issued a vehicle to use for his duties with a canine. He altered the vehicle without obtaining the Agency's permission. He altered the vehicle in a manner to improve the conditions for the dog and to enable Grievant to safely operate the vehicle, according to Grievant. When Grievant returned the vehicle after approximately one month to the State Police garage, an Agency employee observed the alteration and notified Agency managers who began an investigation.

In order to gather information regarding the charge against Grievant for altering his vehicle in the fall of 2005, Grievant's Supervisor<sup>2</sup> met with Grievant on February 3,

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<sup>1</sup> Grievant Exhibit 31.

<sup>2</sup> Grievant's Supervisor held the rank of Sergeant.

2006. During the interview, Grievant informed the Supervisor that he had altered the vehicle he was currently using by installing a steel cage divider which he had purchased with his own funds. Grievant made the alteration because he believed the “divider ... keeps the canine safely in the rear seat area and allows a safe view through the back window as well as enables proper seat position.”<sup>3</sup>

At the conclusion of the interview, the Supervisor told Grievant to remove the items he had installed in his vehicle and return the vehicle to its original configuration. The Supervisor used the phrase, “until this all blows over.” Grievant appeared confused to the Supervisor. Grievant repeated the Supervisor’s phrase, “until this all blows over.” Since the Supervisor was unsure whether Grievant understood him, the Supervisor restated his request. Grievant stated that he understood the Supervisor.

On March 16, 2006, the Supervisor made a routine vehicle inspection of Grievant’s vehicle. The Supervisor noticed that Grievant had not removed the divider as instructed. The Supervisor asked Grievant why Grievant had not removed the divider. Grievant responded that the Supervisor had previously told him to remove the divider “until this all blows over.” The Supervisor then ordered Grievant immediately to remove the divider. Grievant removed the divider. On March 18, 2006, the Supervisor inspected the vehicle again and the cage was removed as he had requested.

At the time the Lieutenant Colonel issued the Group III Written Notice with suspension and transfer, Grievant had a prior active Group III Written Notice under appeal. The local Circuit Court reversed the Hearing Officer’s decision and removed the Group III Written Notice against Grievant. As of the date of this hearing, Grievant had no prior active disciplinary action. The Lieutenant Colonel testified that one of the reasons he decided to transfer Grievant was because Grievant had a prior active Group III Written Notice. If Grievant had not had an active Group III Written Notice, the Lieutenant Colonel testified he would have issued the Group III Written Notice but would not have transferred Grievant.

Although the Lieutenant Colonel considered issuing Grievant a Group II Written Notice for altering his vehicle contrary to written policy and a Group III Written Notice for insubordination and a serious breach of discipline, the Lieutenant Colonel chose to issue only a Group III Written Notice for insubordination and a serious breach of discipline. The only issue before the Hearing Officer is whether Grievant’s behavior was insubordinate or committed a serious breach of discipline.

### **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

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<sup>3</sup> Agency Exhibit 2.

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).

“Failure to follow a supervisor’s instructions ...” is a Group II offense.<sup>4</sup> Grievant was instructed by his supervisor to remove the divider from his vehicle. Grievant knew or should have known he was to remove the divider immediately. Grievant failed to do so thereby justifying the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.<sup>5</sup> A suspension of up to ten workdays is permitted by General Order 19 upon the issuance of a Group II Written Notice. Accordingly, Grievant’s suspension must be upheld. Grievant’s transfer, however, must be reversed. A Group II Written Notice without the existence of prior active disciplinary action does not support the transfer of an employee.

The Agency contends<sup>6</sup> Grievant should receive a Group III Written Notice for “[i]nsubordination or serious breach of discipline.”<sup>7</sup> General Order 19 does not define “insubordination.” “Insubordination” is defined by Black’s Law Dictionary (6<sup>th</sup> ed.) as:

State of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer. (Citation omitted).

“Order” is defined by Black’s Law Dictionary as a “mandate; precept; command or direction authoritatively given; rule or regulation.”

In the context of this case, the Hearing Officer can find that Grievant was insubordinate only if the Supervisor gave Grievant an “order” as opposed to an instruction that did not rise to the level of an order. Whether Grievant received an order instead of a mere instruction depends, in part, on whether the words expressed by the Supervisor were a “*direction authoritatively given.*”

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<sup>4</sup> General Order 19 (13)(b)(1).

<sup>5</sup> The General Order 19 submitted as a hearing exhibit was revised on March 22, 2006, a date after the date of the incident in this case. The Hearing Officer has no reason to believe that the March 22, 2006 version of General Order 19 is materially different from the General Order 19 in effect in February 2006.

<sup>6</sup> The Agency did not allege in its Written Notice to Grievant that he acted contrary to General Order 19(14)(b)(21) which establishes a Group III violation for “[w]illful disobedience of a lawful command of a superior.”

<sup>7</sup> General Order 19 (14)(b)(4).

The Supervisor's direction to remove the divider was not authoritatively given to Grievant. The purpose of the meeting on February 3, 2006 was for the Agency to obtain information from Grievant about how he altered a vehicle in the fall of 2005. The purpose of the meeting was not to inform Grievant of his work obligations. During the discussion, the Supervisor told Grievant to remove the divider and stated to Grievant the phrase "until this all blows over."<sup>8</sup> Despite the Supervisor's explanation during the hearing, there is no logical context in which the phrase "until this all blows over" is compatible with a direction authoritatively given. By saying "until this all blows over", the Supervisor undermined the importance of the directive he was giving Grievant. The Supervisor conveyed a message that Grievant's compliance was somehow dependent on the Agency's investigation of his actions in 2005. Since Grievant did not believe he had done anything wrong in 2005 by altering his vehicle, it was reasonable for Grievant to believe the Supervisor's directive was not as important as would be an order from a superior officer.<sup>9</sup> Although the Supervisor re-stated the directive after it appeared Grievant was confused, repeating the directive did not somehow elevate it into an order because repeating the directive did not erase the uncertainty created by "until this all blows over." The Agency has not presented sufficient evidence to support its assertion that the Supervisor gave Grievant an order.

General Order 19 does not define, "serious breach of discipline." Presumably, every breach of discipline is serious, but not every breach of discipline is a serious breach of discipline. The question arises as to how does one distinguish between a breach of discipline that might be a Group I or Group II offense and a serious breach of discipline that would be a Group III offense. One factor to be considered would be whether the behavior alleged to be a serious breach of discipline had similarities to other listed examples of Group III offenses. Another factor would be whether the behavior alleged to be a serious breach of discipline had an unusual or extraordinary impact on the Agency or its operations. A third factor would be whether the alleged serious behavior was already listed as an example of a Group I or Group II offense.

In this case, Grievant's failure to follow the Supervisor's instruction is listed by General Order 19 as a Group II offense. Grievant's failure to comply with the Supervisor's instruction did not have any unusual or extraordinary impact on the Agency's operations or business. Grievant's behavior was not as severe as Group III offenses such as reporting to work impaired by alcohol, violating criminal drug laws, falsifying official State records, theft, physical violence, threatening or coercing others, criminal convictions, etc. Accordingly, Grievant's behavior was not a serious breach of discipline.

### Mitigation

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<sup>8</sup> The "this" in the phrase "until this all blows over" refers to the Agency's investigation regarding Grievant's alteration of the vehicle he had in the fall of 2005.

<sup>9</sup> Grievant testified he understood the Supervisor to say, "If I were you, I would take this divider out until this all blows over."

Grievant contends the disciplinary action should be mitigated. *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....”<sup>10</sup> 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.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).” To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>11</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant’s evidence raises a sufficient question as to whether the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.

Grievant contends the Agency retaliated against him because he achieved prominence as the President of a local union on January 1, 2006.<sup>12</sup> Grievant’s argument fails because he has presented no credible evidence to suggest that the Agency took disciplinary action against him or otherwise took action against him because of his membership in the local union. Grievant’s assertion that the Agency

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<sup>10</sup> *Va. Code § 2.2-3005.*

<sup>11</sup> See *Va. Code § 2.2-3004(A)(v)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>12</sup> Grievant points to comments made by co-workers. None of these comments are sufficient to counter the Lieutenant Colonel’s credible testimony stating that he did not consider Grievant’s union membership when taking disciplinary action.

retaliated against him remains speculation. The Agency presented credible evidence to show that it took disciplinary action against Grievant because it believed Grievant had engaged in behavior warranting disciplinary action. Grievant's request for relief from retaliation must be denied.<sup>13</sup>

### Discrimination and Workplace Harassment

Grievant contends he was subject to workplace harassment and discrimination. In order to show workplace harassment, Grievant must show the Agency took some action based on race, color, national origin, age, sex, religion, disability, marital status, pregnancy.<sup>14</sup> Grievant has not presented any credible evidence to show the Agency acted against him for any of these reasons. Grievant contends the Agency discriminated against him because of his political activity by participating in a union.<sup>15</sup> No credible evidence was presented showing the Agency acted against him because of any union or political activity on Grievant's part.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's suspension is **upheld**. The Agency is ordered to reverse its transfer of Grievant and **reinstate** Grievant to his former position or, if occupied, to an objectively similar position.

### **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

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<sup>13</sup> Grievant also contends the Agency failed to properly investigate his allegations against the Agency. The Supervisor testified he referred Grievant to the Professional Standards Unit because that Unit is the one that would otherwise handle Grievant's complaints. If the Hearing Officer assumes for the sake of argument that the Agency failed to properly investigate Grievant's allegations, the Agency's inaction was an error rather than intended as a form of discrimination or retaliation against Grievant.

<sup>14</sup> See, DHRM Policy 2.30, Workplace Harassment .

<sup>15</sup> See Governor's Executive Order 1 (2006).



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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>16</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>16</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8415-R**

Reconsideration Decision Issued: November 9, 2006

**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 seeks reconsideration in order to present testimony from an Explosives/Weapons Detection Canine Handler regarding alterations to a State vehicle. Grievant contends the Supervisor lied about whether he inspected Grievant’s vehicle when required to do so. Grievant contends the Supervisor lied about whether Grievant received an Interim Performance Evaluation. None of this testimony is relevant to the disciplinary action.<sup>17</sup> Grievant was not disciplined for altering his vehicle, he was disciplined for failing to comply with his Supervisor’s instruction.

Grievant contends the Virginia State Police Association has a “close involvement” with the Agency and therefore the Agency retaliated against him because of his political affiliation.<sup>18</sup> In addition, Grievant contends the Supervisor’s alleged

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<sup>17</sup> The Supervisor’s testimony was credible despite Grievant’s assertion to the contrary.

<sup>18</sup> An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: “Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. ‘whistleblowing’).” To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>18</sup> (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant’s evidence raises a sufficient question as to whether the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.

threats to him after the hearing show retaliation. Grievant also contends he was retaliated against because of actions taken against him upon his return to his former location as a result of the Hearing Decision.

The Lieutenant Colonel credibly testified that he did not consider Grievant's involvement in a union as part of the decision to discipline Grievant. Grievant's allegation of retaliation is untrue. The Agency disciplined Grievant because of his behavior and not because of his political affiliation.

Grievant contends the Agency improperly considered an investigative report in making its decision whether to discipline. Grievant could have further addressed this issue during the hearing and, thus, it is not new evidence.

Grievant objects to the Agency's failure to rescind his transfer on the day of the hearing. Grievant's argument fails because the Agency was not obligated to rescind his transfer until it received the Hearing Decision ordering it to do so.

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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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