

Issue: Group II Written Notice (conduct that undermined the efficiency of the agency's activities); Hearing Date: 09/22/06; Decision Issued: 10/13/06; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8420; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8420**

Hearing Date: September 23, 2006  
Decision Issued: October 13, 2006

**PROCEDURAL HISTORY**

On May 10, 2006, Grievant was issued a Group II Written Notice of disciplinary action for engaging in conduct that undermined the effectiveness or efficiency of the Department's activities. On May 24, 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. The Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 23, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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 State Police employed Grievant as a Sergeant. As a Sergeant, Grievant had short hair and no facial hair. After the incident giving rise to this disciplinary action, Grievant transferred to another position. He grew his hair longer and grew facial hair as part of his new position. He is sometimes referred to in this decision as Sergeant Z.

Mr. F owned a dump truck. The truck was licensed for farm use only. Mr. F and Grievant were neighbors and friends. Grievant occasionally helped Mr. F operate his farm. Mr. F let Grievant keep some livestock on his farm. The dump truck was located at Grievant's house on December 28, 2005.

The Driver was a friend of Trooper W and of Grievant. Trooper W needed to move gravel to his driveway and the Driver agreed to help Trooper W. Mr. F let the Driver borrow the dump truck. Trooper W and the Driver were installing a floor at a local organization on December 28, 2005. During that time, the Driver drank two beers at approximately noon. At about 4:30 p.m., Trooper W drove the Driver to Grievant's house and then left. The Driver wanted to take the truck to his home and park it. On the next day, the Driver would get a load of gravel and take it to Trooper W's house. Grievant was not home when the Driver arrived.

Once Grievant returned home, Grievant and the Driver drove to the local gasoline station and purchased fuel. Grievant purchased a package of beer with at least 12 beers and possibly 18 beers. While he was with Grievant, the Driver drank approximately three beers. Grievant was teaching the Driver how to drive the dump truck.

Sometime around 7 p.m. on December 28, 2005, the Driver entered the truck in order to drive it to his house. Grievant gave the Driver an unopened beer and he drove off. Shortly thereafter, the Driver reached for his cell phone. When he did, he lost control of the truck and it moved to the side of the road. The truck went off the road and into a fence and landed on its side. There was damage to the fence. The Landowner's son and others went to the accident site. The Driver crawled out of the truck and appeared to be intoxicated to those around him.<sup>1</sup> The Driver borrowed the cell phone of a woman passing by and called Trooper W. Mr. W overheard the conversation. After speaking with Trooper W, the Driver said, "I have to get back in the truck, my buddy told me to get my beer out of the truck, sit on the bank, and start drinking." Mr. W did not observe whether the Driver followed the directive he received.

After receiving the Driver's call, Trooper W called Grievant. Grievant drove to the crash site and arrived shortly before Trooper W arrived. Neither Grievant, nor Trooper W were in uniform. The Driver recognized Grievant and mentioned to Grievant that he had consumed beer after the accident.

Mr. W went to the Landowner's residence and notified the Landowner of the accident. The Landowner drove to the accident site. The Landowner's son was already at the site talking to the Driver. The Driver appeared intoxicated to the Landowner.<sup>2</sup> The Landowner left the crash site and returned to his home. He called 911 Service and informed the operator of the crash and that the driver was drunk and there was a gas leak. He told the operator that he needed a Trooper to come to the scene because the Driver was trying to move his vehicle away. The Landowner returned to the crash site.

An Assistant Fire Chief arrived at the accident scene. He arrived in his personal vehicle and was not wearing a uniform. He identified himself to Trooper W as an Assistant Fire Chief. Trooper W told the Assistant Fire Chief he was not needed.

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<sup>1</sup> One of the first people to see the Driver was Mr. W. Mr. W told the Agency's investigator that:

[The Driver] seemed to be hurt, but the more I talked to him I realized he wasn't. He asked me if I had a cell phone and I told him I did not. He asked me if I had been drinking, I said no, but I think you have. **He said yeah I had way too many.** (Emphasis added.)

Mr. W added that the Driver "staggered pretty much." Agency Exhibit 2.

<sup>2</sup> The Landowner told the Agency's investigator the Driver was "stumbling around." He also said that the Driver's speech was slurred and loud when he talked. The Landowner said it was difficult for the Driver to walk. Agency Exhibit 2.

Trooper W did not identify himself as a Trooper. The Assistant Fire Chief knew that the truck was leaking gas and that his attention was needed despite Trooper W's assertion.

The Landowner knew there was an off duty Trooper at the site. He determined who he believed was the Trooper and approached him. The Landowner approached Trooper W who had arrived at the scene after being called by the Driver. The Landowner believed he was talking to Sergeant Z. The Landowner gave Trooper W a pen and paper and asked for the driver's name and address. Trooper W wrote on the paper, the Driver's name, the telephone number of Sergeant Z, the name of Sergeant Z and the badge number of Sergeant Z. Trooper W handed the paper to the Landowner and said the Landowner should call in five or six days to get a copy of a report. The Landowner later gave the paper to an Assistant Fire Chief who arrived at the scene. Based on this piece of paper, the Assistant Fire Chief incorrectly believed Trooper W was Sergeant Z.

The Landowner and the Landowner's son believed Trooper W was attempting to cover up a drunken driving accident. The Landowner's son told the Assistant Fire Chief that the Driver was drunk and that off duty Troopers were helping the Driver get beer cans out of the truck. During his conversations with the Landowner and the Landowner's son and others at the crash scene, the Assistant Fire Chief concluded Trooper W was attempting to protect the Driver from driving under the influence charges.

A Fire Truck arrived at the crash site along with several fire fighters. Grievant had observed the gas leak and approached the Assistant Fire Chief at the Fire Truck. Grievant asked the Assistant Fire Chief for absorbent.

Approximately one hour after the accident, Trooper B arrived to the accident and took control of the scene. He spoke with several people including the Landowner, the Landowner's son, the Driver, the Assistant Fire Chief, and Grievant. Grievant told Trooper B that the Driver had consumed a beer after the accident. The Driver also told Trooper B that he had consumed a beer after the accident. Trooper B charged the Driver with reckless driving but did not charge him with driving under the influence of alcohol.

Trooper W was out of work on December 28, 2005 due to short term disability.<sup>3</sup> Trooper W remained out of work on disability during the Agency's investigation and, consequently, the Agency's investigator did not interview Trooper W.

## **CONCLUSIONS OF POLICY**

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<sup>3</sup> This would explain why Trooper W wrote down Sergeant Z's information rather than his own information on the note he gave to the Landowner.

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 19(14)(b)(20) lists Group III offenses to include:

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.

The Driver was intoxicated at the time of the accident. He had not driven very far from Grievant’s house and, thus, he was likely intoxicated at the time he left Grievant’s house. By giving the Driver an unopened beer and taking no action to stop the intoxicated Driver from driving a truck, Grievant engaged in behavior that might impair the Department’s reputation and the reputation of its employees. Grievant should have recognized that the Driver had been drinking too much and should have taken some action or made some suggestion that the Driver wait until the alcohol’s effect wore off. By giving the Driver a beer, the Driver was able to drink a beer after he exited the truck following the crash. Although Grievant argues that the beer the Driver consumed was not the one he gave the Driver, there is no credible evidence to suggest the Driver had any unopened beers in the truck other than the one Grievant gave him. Accordingly, Grievant’s action enabled the Driver to consume a beer after the accident thereby preventing Trooper B from arresting the Driver for driving under the influence of alcohol.<sup>4</sup>

Grievant argues the Driver was not intoxicated when he left Grievant’s house. He relies on his observation of the Driver when the Driver left his house. He relies on the observation of Trooper B who indicated he did not see the Driver stagger or otherwise appear intoxicated. Trooper B observed the Driver approximately one hour after the accident. Immediately after the accident, however, Mr. W, the Landowner, the Landowner’s son, and the Assistant Fire Chief observed the Driver and each formed the opinion that the Driver was under the influence of alcohol. The Driver was staggering, slurring his speech, loud, and admitted he had consumed too many beers. The Agency has presented sufficient evidence to support its assertion that the Driver was under the influence at the time of the accident and at the time he left Grievant’s house.

*Va. Code § 46.2-665* provides that:

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<sup>4</sup> According to Trooper B, if an individual consumes alcohol after an accident, courts in the locality will not find that the employee was driving under the influence of alcohol.

No person shall be required to obtain the registration certificate, license plates and decals, or pay a registration fee for any motor vehicle, trailer, or semitrailer used exclusively for agricultural or horticultural purposes on lands owned or leased by the vehicle's owner.

The Driver was operating the truck illegally because he did not operate the vehicle exclusively for purposes of lands owned or leased by Mr. F. Grievant knew or should have known that the Driver would be operating the truck illegally. Grievant should have taken some action to advise the Driver that his intended operation was illegal. By failing to do so, Grievant might have impaired the Agency's reputation by giving the appearance that one of its employees either was unaware of the law or tolerated violations by his friends.

The Agency mitigated the disciplinary action to a Group II Written Notice. Based on the evidence presented, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.

#### Mitigation

*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>5</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.

#### Recommendation

As part of the Written Notice, the Agency asserted (1) Grievant's behavior was "highly irregular and protective of [the Driver]", (2) Trooper B was influenced by Grievant's statements regarding possible farm use and DUI violations to the point that Trooper B stated "the whole thing stunk." The Agency has not established these allegations. No evidence was presented regarding how the Agency would have disciplined Grievant if it had known these allegations could not be supported, and, thus, the Hearing Officer must make a recommendation to the Agency.

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<sup>5</sup> *Va. Code § 2.2-3005.*

The weight of the evidence showed that the Landowner and the Assistant Fire Chief confused Trooper W with Grievant.<sup>6</sup> Trooper W wrote out a note listing the Driver's name along with Sergeant Z's telephone number, name, and badge number. Trooper W handed the note to the Landowner.<sup>7</sup> The Landowner assumed that Trooper W was Sergeant Z. When the Landowner described the poor behavior of Trooper W to the Assistant Fire Chief, the Landowner said that Sergeant Z was the one involved in the cover up.

During the hearing, the Agency's Representative asked the Assistant Fire Chief if Sergeant Z was in the hearing room. The Assistant Fire Chief responded, "If I saw [Sergeant Z], I could identify him but he is not here." The Assistant Fire Chief testified for approximately 30 minutes. He was seated a few feet away from Grievant and Grievant cross examined the Assistant Fire Chief for several minutes. The Assistant Fire Chief described Sergeant Z as being six feet two inches tall, white, with sandy blond hair. Although Grievant had changed his appearance since the accident by growing his hair longer and growing limited facial hair, Grievant's appearance did not change so dramatically as to prevent the Assistant Fire Chief from identifying Grievant as Sergeant Z. Grievant is smaller than six feet two inches tall and his hair is darker than sandy blond. The Assistant Fire Chief was at the scene for several hours and had ample opportunity to distinguish the person he believed was Sergeant Z. Through numerous questions asked of him about whether the person sitting in the hearing room was Sergeant Z, the Assistant Fire Chief was given ample opportunity to name Grievant as Sergeant Z, but he continued to doubt any such assertion.<sup>8</sup> Based on the fact that the Landowner misrepresented the note's author as being Sergeant Z and the Assistant Fire Chief's testimony that Sergeant Z was not in the hearing room even though Grievant was seated a few feet from the Assistant Fire Chief, the Hearing Officer finds that the Assistant Fire Chief confused Trooper W with Grievant.

No one observed Grievant tell the Driver to drink a beer after the accident. If such a statement was made, it was made by Trooper W with whom the Driver spoke by telephone. Although Grievant admitting to being handed a beer can by someone who was crawling inside the truck trying to remove the beer can, Grievant dropped the can and told the person to get out of the truck. No one observed Grievant removing cans from the truck. Trooper W told the Assistant Fire Chief that he was not needed. Grievant on the other hand, told the Assistant Fire Chief to proceed with using

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<sup>6</sup> There is no reason to believe the Agency knew or should have known that the Landowner and the Assistant Fire Chief had confused Trooper W with Grievant. This fact was not clarified until the hearing.

<sup>7</sup> Grievant Exhibit 1 is the note presented by the Landowner to the Assistant Fire Chief. The Assistant Fire Chief had the note in his possession and presented it for the first time at the hearing. Grievant testified that the note was not in his handwriting. The Agency stipulated that the handwriting was not Grievant's and was in Trooper W's handwriting.

<sup>8</sup> The Hearing Officer's finding is not without some reservation. For example, the Assistant Fire Chief described Sergeant Z as smoking a pipe. Grievant was smoking a pipe at the scene. The Assistant Fire Chief's testimony during the hearing and the fact that the Landowner incorrectly identified Sergeant Z, overrides other conflicting evidence regarding Sergeant Z's identity.



absorbent to clean up the wreck site. In short, although Trooper W may have been involved in a “cover up” of a drunken driving crime, Grievant was not involved in that cover up.

When asked during the hearing whether Grievant’s conversation with Trooper B influenced the way he investigated the accident, Trooper B responded “I don’t think I would have done anything different.” Trooper B’s opinion that this “whole thing stunk” was based on his conversations with the Assistant Fire Chief. The Assistant Fire Chief spoke poorly of Grievant because he did not realize it was Trooper W who had engaged in the offensive behavior and not Grievant.

The Hearing Officer recommends that the Agency, at its sole discretion, re-evaluate the merits of this disciplinary action in light of the Hearing Officer’s finding that the Assistant Fire Chief confused Trooper W and Grievant when making his complaint to the Agency. In the event Agency managers conclude they would have reduced Grievant’s level of discipline had they known of the confused identities, the Agency should reduce or eliminate the disciplinary action at its discretion.

## **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:

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>9</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.