

Issues: Group III Written Notice (workplace violence), Group III Written Notice (insubordination), and Termination; Hearing Date: 01/23/07; Decision Issued: 04/09/07; Agency: Department of State Police; AHO: Carl Wilson Schmidt, Esq.; Case No. 8505; Outcome: Written Notice for insubordination – Employee granted Full Relief; Written Notice for workplace violence – Agency upheld in Full; Termination – Agency upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8505

Hearing Date: January 23, 2007
Decision Issued: April 9, 2007

PROCEDURAL HISTORY

On November 1, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence. Grievant also received a Group III Written Notice for insubordination or serious breach of discipline.

On November 15, 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 January 4, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 30, 2007, 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 Notices?
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 actions, 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 actions against the Grievant were 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 Department of State Policy employed Grievant as a Trooper II at one of its Areas. His position was, "[r]esponsible for patrolling the highways and enforcing the traffic and criminal laws of the Commonwealth."¹ He worked for the Agency from October 24, 1998 until his removal effective November 1, 2006.

Troopers may be promoted to Senior Trooper based on many factors including length of service. A Trooper's graduating class year determines his or her seniority. A trooper has a code number based on his or her seniority. When a Trooper is promoted to a Senior Trooper, the Agency makes an announcement during a staff meeting for all of the Troopers in a particular area of the State. Employees being promoted are not notified in advance. They learn of their promotions at the same time as their peers learn of the promotions.

On June 1, 2006, Grievant attended an area staff meeting conducted by First Sergeant W. Trooper G sat next to Grievant. As the meeting was coming to a close,

¹ Grievant Exhibit 1.

the First Sergeant W asked Trooper G to stand and be recognized for being promoted to Senior Trooper as of June 10, 2006. Grievant "sat up rigid" and his face reddened. Once Trooper G sat down, Grievant said to Trooper G "How did this happen?" Grievant said, "This isn't right; I was a trooper before you were. There is no way you made Senior Trooper before I did." Trooper G responded, "You have to ask the man up there; I don't know anything about it." Grievant said, "This is bullsh-t! This is fu-cked up and shouldn't have happened!" Grievant began asking other troopers in the audience what were their code numbers and the year they graduated from the State Police Academy.

Once the meeting ended, Grievant was agitated and was brushing aside others so he could make his way out the door to leave the room. Grievant was met at the door by Lieutenant E who asked Grievant what was his code number. Lieutenant E said he would confirm with personnel and then get back with Grievant regarding Grievant's status. Lieutenant E said Grievant should be happy for Trooper G.

Trooper G was in the parking lot. He had just gotten on his motorcycle and was talking to other troopers. Grievant was angry and upset and walked up to Trooper G. Grievant said to Trooper G, "I am tired of this sh-t. I am tired of you making me look like an idiot in front of my friends." Grievant leaned against Trooper G's motorcycle. Grievant pointed his finger directly into Trooper G's face and said, "You don't talk to me the way you did upstairs!" Trooper G and Grievant argued. Trooper G began leaving but Grievant continued to argue. Grievant said, "This is not right; no way you made Senior Trooper before me. This ain't f—king right." Trooper G said that the parking lot was not the place to discuss the matter and that they should go inside. Trooper G continued to say, "I had nothing to do with the announcement; I had nothing to do with the announcement."

As Trooper G began driving away, Grievant directed his middle finger towards Trooper G and said "he can go to hell!"

First Sergeant W observed Grievant in the parking lot and told Grievant he wanted to speak with Grievant about what happened. Grievant said he wanted to leave and did not want to talk about it. First Sergeant W restated that he wanted Grievant to come to his vehicle. Grievant had put on his utility belt and helmet and was ready to drive his motorcycle away. Grievant dismounted from the motorcycle and started walking towards First Sergeant W. First Sergeant W wanted Grievant to sit in First Sergeant W's vehicle so they could speak privately. First Sergeant W asked Grievant to get inside the vehicle. Grievant said he did not want to sit in the vehicle because he had on his gear belt and it would be uncomfortable to sit in the vehicle. First Sergeant W got out of his vehicle and talked to Grievant while standing outside of the vehicle.

First Sergeant W asked Grievant what was the problem. Grievant responded that he could not understand how Trooper G was promoted to Senior Trooper ahead of Grievant. While Grievant and First Sergeant W were speaking, Trooper G returned to the parking lot. He walked to where Grievant and the First Sergeant W were speaking. After some discussion, First Sergeant W asked Grievant and Trooper G to shake hands

and put the dispute behind them. They did so and the discussion ended. Several hours later, Grievant called First Sergeant W and apologized for his behavior. On the following day, Grievant apologized to Trooper G.

The Agency began an investigation. After a detailed investigation and review, the Agency decided to issue Grievant two Group III Written Notices with removal.

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).

Insubordination

The Agency contends² Grievant should receive a Group III Written Notice for “[i]nsubordination or serious breach of discipline.”³ General Order 19 does not define “insubordination.” “Insubordination” is defined by Black’s Law Dictionary (6th 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.*”

Under the facts of this case, First Sergeant W expressed a request that Grievant speak with him immediately. Grievant expressed a request to delay speaking with First

² 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.”

³ General Order 19 (14)(b)(4).

Sergeant W. First Sergeant W reiterated his request that Grievant come to speak with him and Grievant complied. First Sergeant W's statements to Grievant were not commands or directions authoritatively given. Grievant was not insubordinate to First Sergeant W. This Group III Written Notice issued for insubordination must be reversed.

Workplace Violence

“Workplace violence is a serious problem that can adversely affect the well-being and productivity of employees who are victims, as well as their co-workers. Therefore, the Department [of State Police] will not tolerate violence in the workplace committed by or against any employee or third party while in department facilities, work sites, vehicles or while conducting state business.”⁴

Workplace violence is defined as:

any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, attempted suicide, shooting, rape, threats, shouting, swearing, obscene telephone calls, threatening correspondence or e-mail, and stalking.

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

⁴ General Order 79.

Employees violating this policy will be subject to disciplinary action under General Order 19, *Standards of Conduct*, up to and including termination, depending on the circumstances.

“Threatening or coercing employees, supervision, or the public” is a Group III offense.⁵ During most of his interaction with Trooper G, Grievant was angry and was displaying anger towards Trooper G. Grievant’s cursing served to emphasize the level of anger he felt. Grievant threatened and coerced Trooper G by pointing his finger directly in Trooper G’s face and saying, “You don’t talk to me the way you did upstairs!” Grievant’s behavior could easily have provoked a physical response from Trooper G by invading Trooper G’s personal space. By displaying his middle finger to Trooper G and saying he can go to hell, Grievant also threatened Trooper G. Based on the evidence presented, the Agency’s issuance to Grievant of a Group III Written Notice for workplace violence must be upheld. An employee may be removed upon the issuance of a Group III Written Notice.

Grievant argues Trooper G did not feel threatened by Grievant’s behavior. Whether Trooper G felt threatened by Grievant’s behavior does not determine whether Grievant acted contrary to policy. More important considerations are whether Grievant intended to threaten Trooper G and whether a reasonable person could interpret Grievant’s behavior as threatening. In this case, Grievant intended to threaten Trooper G and his actions, by any objective standard, were threatening.

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...”⁶ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. He argues his behavior was exacerbated because he was under financial pressure resulting from several medical problems experienced by his family members. He has since received

⁵ General Order 19(14)(B)(14).

⁶ *Va. Code § 2.2-3005.*

counseling to help with anger management. Grievant also served the United States of America in Afghanistan from September 12, 2001 to March 20, 2003.

When these factors are considered as a whole, they are not sufficiently mitigating under the *Rules*, to support a reduction in the disciplinary action. Pressure and stress is a regular part of a State Trooper's duties while enforcing the criminal laws of Virginia. The Agency previously mitigated a Group III Written Notice because of Grievant's military service.

This case is unfortunate. Grievant had a remarkable career of public service, military service, and bravery. The Agency's conclusion that Grievant should be removed from employment, however, is supported by the evidence and the Hearing Officer must uphold that decision.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for insubordination or serious breach of discipline is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice with removal for workplace violence 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 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.