

Issue: Group III Written Notice with termination (engaging in conduct which undermines the effectiveness and efficiency of agency's activities – Interference with Operations); Hearing Date: 03/14/07; Decision Issued: 03/19/07; Agency: VSP; AHO: David J. Latham, Esq.; Case No. 8534; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:
Case No: 8534

Hearing Date: March 14, 2007
Decision Issued: March 19, 2007

APPEARANCES

Grievant
Two representatives for Grievant
One witness for Grievant
Division Commander
Representative for Agency
Three witnesses for Agency
One Observer for Grievant
One Observer for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a grievance from a Group III Written Notice for engaging in conduct on the job that undermined the effectiveness or efficiency of the

Department's activities.¹ As part of the disciplinary action, grievant was removed from state employment effective October 4, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Department of State Police (Hereinafter referred to as "agency") has employed grievant as a trooper for one and a half years. During his eight months of training at the state police academy, the courses stressed the importance of following instructions at all times. Instructors also emphasized the importance of assuring that the state police cruisers were kept in public view as much as possible in order to maintain a high public profile. State troopers are expected to be courageous in the face of danger.

On May 8, 2006, two county police officers were shot and killed at a county police substation.³ At 4:16 p.m., the county police department requested that state police units stay on the Interstate highways and look for a specific pickup truck believed to be driven by the suspect.⁴ The Department of State Police issued a BOL (Be On the Lookout) broadcast to all state troopers in the county advising them to patrol Interstate highways in the area and look for a specific pickup truck. When grievant heard the broadcast, he reversed direction on the Interstate and drove approximately ten miles, exited the highway, and entered an entrance ramp to the Interstate highway express lanes. The entrance ramp was closed to traffic at that time of day. At between 4:26 and 4:31 p.m., grievant parked his cruiser where the entrance ramp goes underneath the northbound Interstate highway in a spot that troopers commonly refer as "the cave."⁵ From this spot, grievant was unable to see any traffic in the northbound lanes of the highway and could see only the tops of tractor-trailers in one southbound express lane.⁶ From this location he could not have seen the suspect vehicle if it had passed by in any direction.

At the "cave," grievant retrieved his rifle from the trunk of his vehicle. While driving toward the "cave", grievant contacted a fellow trooper by cell phone and told her where he was going. The fellow trooper said she would complete the traffic stop in which she was engaged. At one point, the fellow trooper said "I'm about to get off this Interstate; I ain't crazy," When grievant told her where he was headed, she also agreed to come to the "cave."⁷ The fellow trooper arrived at the "cave" at about 4:44 p.m. Grievant and the fellow trooper stayed in the "cave" until approximately 5:47 p.m. During that time, the fellow trooper sat in her cruiser and talked on her cell phone with a county police officer for 37 minutes from 4:43 to 5:20 p.m.⁸ A third trooper arrived; he had made a turnaround off the interstate and was heading northbound up the express ramp when he saw grievant and the second trooper parked in the "cave." He stopped

¹ Agency Exhibit 7. Group III Written Notice, October 2, 2006.

² Agency Exhibit 18. Grievance Form A, filed October 17, 2006.

³ Agency Exhibit 3. Incident report, May 23, 2006.

⁴ Agency Exhibit 9. Dispatcher's radio log, 1616 hours.

⁵ Grievant estimated it took him from 10-15 minutes to reach the cave after he heard the BOL.

⁶ Agency Exhibit 8. Photographs of "the cave."

⁷ Agency Exhibit 4. Audio recording of surveillance unit in fellow trooper's cruiser.

⁸ Grievant Exhibit 4. Second trooper's Nextel activity detail, May 8, 2006.

and conversed with the second trooper for about five minutes some time between 5:29 and 5:40 p.m.⁹ While they were conversing, grievant sat in his own car and read a Bible. By 5:40 p.m., the second and third troopers had acquired information from their contacts in the county police department that led them to believe that the suspect had been shot dead. The third trooper left and resumed his patrol. At 5:47 p.m., the second trooper received a call and left the “cave.” Grievant avers that he left shortly after the second trooper left.

The agency released troopers to resume their normal patrols at 6:36 p.m.¹⁰ During the investigation into this situation, a sergeant asked grievant if he had called the second trooper on May 8, 2006; grievant responded that he did not call her. However, in a subsequent interview, grievant said that he could not recall who had called whom. Eventually, grievant acknowledged that he had called the second trooper.¹¹ Grievant also acknowledged that he should have stayed on the Interstate to look for the suspect.¹² Grievant stated that he had gone to the “cave” in order to retrieve his rifle from the trunk of his cruiser because he did not want to retrieve it where the public could see him. There is no agency policy or practice regarding the retrieval of rifles. The agency has not received any complaints about troopers retrieving their rifles in public areas. In the area where grievant is assigned, area policy states that troopers are required to patrol Interstate highways between 3:00 and 6:00 p.m. (peak traffic hours).¹³

Following the investigation, the agency considered various offenses with which grievant should be charged. Included were: manifesting cowardice or otherwise attempting to shirk official duty and, knowingly making a false statement.¹⁴ Ultimately, however, the agency decided to combine the charges under the more general description of engaging in conduct that undermines the effectiveness or efficiency of the Department’s activities.¹⁵ Grievant was given a Group III Written Notice and removed from state employment. The second trooper who stayed in the “cave” with grievant was also removed from state employment.¹⁶

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the

⁹ Agency Exhibit 12. Third trooper’s unit radio log.

¹⁰ Agency Exhibit 9. Dispatcher’s radio log, 1836 hours.

¹¹ Agency Exhibit 4. p.18, Investigation report.

¹² Agency Exhibit 4. p. 17, *Id.*

¹³ Agency Exhibit 4. p. 16, *Id.*

¹⁴ Agency Exhibit 4. pp. 24-25, *Id.*

¹⁵ Agency Exhibit 4. p.29, *Id.*

¹⁶ The second trooper was a probationary employee.

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*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁷

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. 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. Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁸ The agency has promulgated its own Standards of Conduct policy which defines Group III offenses identically. The agency policy provides that one example of a Group III offense is engaging in conduct on the job that undermines the effectiveness or efficiency of the Department's activities.¹⁹

The agency has shown, by a preponderance of evidence that grievant's conduct on May 8, 2006 undermined the effectiveness or efficiency of agency activities. Viewing the evidence in the light most favorable to grievant, he was parked in the "cave" from *at least* 4:31 p.m. to 5:47 p.m. – a period of one hour

¹⁷ § 5.8, *EDR Grievance Procedure Manual*, effective August 30, 2004.

¹⁸ Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁹ Agency Exhibit 2. General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised October 1, 2006.

and 16 minutes.²⁰ During that period of time, grievant was not patrolling the Interstate highways, could not observe traffic passing on the highways above him, and was not performing the duties for which he was being paid. Even in the absence of the fatal shooting of two county police officers that day, grievant was charged with the responsibility to patrol the highways each day between 3:00 p.m. and 6:00 p.m. This period is when the afternoon traffic is at its peak and when traffic accidents and vehicle breakdowns are also at their peak. Grievant should have been on the highways on the lookout for such traffic problems during this time.

On May 8, 2006, however, in addition to the normal heavy afternoon traffic, there was a second reason that grievant should have been patrolling. The agency had specifically directed all troopers to be on the lookout for a vehicle that may have been used by a suspect who had just shot and killed two law enforcement officers in the county. In such a situation, grievant's clear duty was to follow instructions, patrol the highways, assure that his state police cruiser was as visible as possible to the public, and be on the lookout for the suspect.

Grievant maintains that he was not afraid but that he was "concerned." The agency agrees that troopers had a right to be concerned and, the agency does not fault grievant even if he may have been afraid. Fear in such situations can be beneficial if it is channeled properly because fear enhances one's senses and may increase the potential for survival. However, when concern becomes so paramount that the one shirks his responsibility and sworn duty, then one is not fulfilling his obligation to the agency.

Grievant avers that he left the Interstate to retrieve his rifle out of public view, but there is no agency policy requiring grievant to do so. The preponderance of evidence established that grievant could have stopped anywhere to retrieve his rifle. However, even assuming that this was a reasonable course of action, it would have taken no more than a minute or two to retrieve his rifle and place it in the front seat of his vehicle. During the remaining hour and 14 minutes, grievant failed to perform any useful duties, failed to patrol the highways, was unable to observe traffic, and, other than talk with the second trooper, he only read a Bible. This clearly undermined the effectiveness of the agency's ability to maintain adequate coverage of the highways and be on the lookout for the suspect.

Grievant argues that he is a new state trooper and that he acted reasonably in this situation. He claims that, during the hour and 16 minutes in the "cave," he was "collecting intelligence." By this he meant information given him by the second trooper who was talking on a mobile telephone with a county police officer for 47 minutes. However, grievant has not shown that anyone in the agency assigned him to collect intelligence. Instead grievant was assigned to patrol the highways – a responsibility he did not fulfill. He also asserts that there

²⁰ However, grievant's radio log shows no activity between 1610 and 2040 hours – a period of 4.5 hours.

was confusion about just where the suspect was. While that may have been so, that is probably not uncommon in such situations. Grievant's job was to patrol the highways and, hopefully, contribute to the agency's collective knowledge about where the suspect was (or was not). If grievant had felt the need to have more intelligence about what was happening, he could have called his sergeant or the dispatcher for more information. Grievant failed to initiate any calls to his superiors for more information.

Regarding grievant's alleged false statement, it has been demonstrated that grievant initially made an incorrect statement when he said he did not call the second trooper on his mobile telephone. In fact, grievant did initiate that call. However, the agency has not shown that grievant falsified his statement. Black's Law Dictionary defines "falsify" as, "To counterfeit or forge; to make something false; to give a false appearance to anything." The word "falsify" means being intentionally or knowingly untrue. The agency has not borne the burden of proof to show that grievant knowingly made a statement he knew to be untrue. Grievant asserts that he and the second trooper frequently spoke by mobile telephone and that he initially was unsure about who called whom. The element of intent may be inferred when a misrepresentation is made with reckless disregard for the truth.²¹ The agency has not shown, by a preponderance of evidence, that grievant's misstatement was made with deliberate intent. It is just as likely as not that grievant could not initially remember who initiated the call. In any case, this misstatement by grievant whether intentional or not, is of relatively small significance compared to the primary offense of shirking his duty.

Finally grievant argues that the agency has not shown that he had a "high level" of intent to shirk his duty. First, grievant has not demonstrated that the agency has the burden of demonstrating a "high level" of intent. Grievant has not produced any law, regulation, or case law citation that supports a supposed standard of a "high level" of intent. Second, the evidence in this case is preponderant that grievant did shirk his duty. Grievant knew that he was supposed to patrol the highways between 3:00 and 6:00 p.m. even under normal circumstances – this he failed to do for approximately one and one quarter hours. More importantly, grievant had been specifically instructed to patrol the highways and be on lookout for a specific pickup truck from 4:16 p.m. to 6:36 p.m. Grievant's reaction when he received this instruction was to promptly leave the highways, go to a "cave" out of sight from traffic, and wait there until he received information leading him to believe that the suspect had been shot and killed. Grievant's excuses for staying in the "cave" are insufficient to overcome the presumption that he simply did not want to expose himself to a suspect who might be targeting law enforcement officers. If a law enforcement officer such as grievant who is hired to apprehend a suspect does not comply with a direct order to look for a suspect, who does grievant think will perform that job? The agency and its troopers are charged to serve and protect the public – during the incident at issue, grievant failed to do either.

²¹ *Haebe v. Department of Justice*, 288 F.3d 1288, 1306 Fn. 35 (Fed. Cir. 2002).

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice, and removal from state employment. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant does not have long state service (less than two years). His performance has been rated barely satisfactory with 55% of his core responsibilities rated as marginal.²² Based on the totality of the evidence, the hearing officer concludes that the agency's decision to terminate employment was within the tolerable limits of reasonableness.²³

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for engaging in conduct on the job that undermined the effectiveness or efficiency of the Department's activities, and grievant's removal from state employment effective October 4, 2006 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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. Address your request to:

Director
Department of Human Resource Management

²² Agency Exhibit 4. p. 29, Investigation report.

²³ Cf. *Davis v. Dept. of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.²⁴ 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.²⁵ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

David J. Latham, Esq.
Hearing Officer

²⁴ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.