

Issues: Group III Written Notice with termination (falsifying records); Hearing Date: 03/20/07 & 03/30/07; Decision Issued: 04/03/07; Agency: VSP; AHO: David J. Latham, Esq.; Case No. 8540; Outcome: Agency upheld in full;
Administrative Review: EDR Ruling Request received 04/06/07; EDR Ruling #2007-1630 issued 05/09/07; Outcome: Remanded to HO;
Administrative Review: DHRM Ruling Request received 04/11/07; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:
Case No: 8540

Hearing Dates: March 20 & 30, 2007
Decision Issued: April 3, 2007

PROCEDURAL ISSUE

The first hearing was conducted on March 20, 2007. After four and one half hours, grievant's attorney was called away for a family medical emergency. The hearing officer agreed to postpone the remainder of the hearing until such time as both parties and their representatives could be available. The hearing was reconvened and completed on March 30, 2007.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Division Commander
Representative for Agency
Nine witnesses 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 knowingly making a false official statement.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 two years. During his eight-month academy training, grievant was schooled in and practiced high-speed pursuit driving.

On May 8, 2006, grievant was dispatched to work a minor collision involving property damage and no injuries. Grievant drove southbound at 65 mph on an Interstate highway located inside a large metropolitan area where the speed limit was posted at 55 mph. The weather was overcast, misting, and the road was wet.³ Grievant was in the leftmost lane of three southbound lanes. As he rounded a tight curve to the right, his vehicle went airborne as he went over a dip in the road surface. Grievant lost control of his vehicle, skidded to the right, and struck the jersey wall on the right side of the highway with the left front of his cruiser. The car then swung left and hit the wall with its left rear, flipped around 180 degrees, and came to rest facing south.

Two passengers in a civilian vehicle that grievant had passed on the curve saw grievant lose control, go airborne, spin to the right, and strike the jersey wall.⁴ The civilians immediately stopped their car, observed smoke, and, assuming it might have been from a fire, went to assist grievant. They observed that grievant was conscious and initially incoherent as they got to his vehicle but noted that he got his bearings after a few minutes. The smoke was caused by deployment of the air bags and quickly dissipated. The witness asked grievant for flares; grievant opened his trunk so that the witness could get flares. A city police officer arrived on the scene within minutes. He found grievant to be conscious, able to answer questions coherently and consistently while repeating his story. Grievant told the officer that his vehicle was struck by a silver SUV, driven by a black male in his twenties or thirties, who stopped his vehicle, looked at grievant, and then drove away. A second city police officer arrived and affirmed that grievant was conscious, coherent, and consistent in his assertion that an SUV struck his cruiser. Police broadcast the description given by grievant. The two civilians were interviewed and reported that no other vehicles

¹ Agency Exhibit J. Group III Written Notice, December 29, 2006.

² Agency Exhibit K. Grievance Form A, filed January 5, 2007.

³ Agency Exhibit D. Attachment 3, Police Crash Report.

⁴ The witnesses were subsequently interviewed. Both stated that there were no other vehicles or SUVs near grievant's cruiser when grievant lost control and spun out. See Agency Exhibit D, Vehicle Crash Report, p.2, statement of witness.

had been anywhere near grievant's vehicle at the time of the crash. In fact, they remarked that it was unusual to see so few cars on that stretch of highway.

Another first sergeant arrived at the accident scene and spoke with grievant as he was in the ambulance awaiting transport to the hospital. Grievant told him the same story, i.e., that an SUV had struck him causing him to spin out. Grievant was given first aid and taken to a hospital complaining of abdominal, neck, and back pain. At the hospital, grievant requested pain medication but medical personnel did not give him painkillers to avoid masking his pain symptoms and thereby inhibiting diagnosis of injuries. Grievant's first sergeant had come to the accident scene. While other officers and rescue personnel attended to grievant, the first sergeant examined grievant's car and the entire accident scene. He could find no evidence of any other vehicle having been involved in the crash.

He followed grievant to the hospital when an ambulance transported him. He spent about two hours with grievant at the hospital interviewing him about the crash. During most of this time, a lieutenant and a captain also arrived at the hospital and witnessed the interview with grievant. Grievant repeated his assertion that another vehicle had struck him, that the other vehicle stopped, looked at grievant, and then left. He also asserted that two SUVs had been racing and that one hit his vehicle. During this interview, grievant was conscious, lucid, and convincing as he described the incident.⁵ The first sergeant had grievant repeat his story three times. While in the emergency room, grievant laughed and joked with the nursing staff at times. The lieutenant questioned hospital personnel about grievant's condition; they told both the lieutenant and the captain that grievant had no apparent injuries but that he was complaining of pain.

The agency's chief accident investigator, who has investigated over one thousand accidents, and who has been qualified as an expert witness, closely examined grievant's cruiser on May 17, 2006. He found that the damage to the vehicle was consistent with a single vehicle crash. All of the damage and scratches on the car are consistent with hitting a jersey wall. There was no evidence of paint transfer from, or damage from contact with, another vehicle.⁶

After interviewing grievant, the witnesses to the crash, and reviewing all relevant reports, the first sergeant met with grievant several days after grievant was released from the hospital and advised him that the report concluded that grievant was not involved in a hit-and-run collision. He also advised grievant that if he disagreed with the report, grievant was entitled to submit his own report detailing his recollection of the crash; grievant did not submit his own report. Grievant signed a typewritten statement asserting that one of two racing SUVs hit his vehicle, and that the driver of the SUV had stopped and looked at him.

⁵ Agency Exhibit H. Statement of lieutenant, October 27, 2006.

⁶ Agency Exhibit C. Memorandum from sergeant to captain, May 19, 2006.

On May 30, 2006, a special agent from the criminal investigation bureau interviewed grievant. Grievant admitted during that interview that he had not told the truth about the accident because he was afraid of the consequences as a result of several previous crashes in which he had been involved. Grievant was also afraid to tell the truth because he had already acquired the nickname "Crash" as a result of previous accidents. Grievant did not like having fellow troopers calling him by this nickname. Grievant wrote a statement acknowledging that he had seen only one SUV, not two, that there was no contact with another vehicle, and that he had just lost control of his vehicle.⁷ After this interview, grievant went to the captain's office and apologized for being untruthful about the accident. He explained that he did not like being called "Crash" by his peers.

The agency reported the results of its investigation first to the county Commonwealth's Attorney who recommended charging grievant with giving a false report.⁸ Subsequently, the case was transferred to the city's Commonwealth Attorney who filed a criminal charge against grievant pursuant to Va. Code § 18.2-461 for giving a false report.⁹ The case went to trial where the judge stated that grievant's actions compromised his ability to be a law enforcement officer. The court tried grievant and found the evidence sufficient for guilt¹⁰ but dismissed the case in December 2006 on condition that grievant seek counseling.

Grievant remained out of work from May 9 through June 21, 2006 and received workers' compensation during that period. He states that he had a concussion, and sprained neck muscles. He returned to work on June 22nd but was suspended that day.

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 need for orderly administration of state employment and personnel practices with

⁷ Agency Exhibit D. Grievant's handwritten statement, May 30, 2006.

⁸ The accident occurred at the city-county line. It was initially uncertain as to which locality had jurisdiction over the case. It was eventually decided that the charge against grievant should be filed in the city court.

⁹ Agency Exhibit L. Va. Code § 18.2-461. Falsely summoning or giving false reports to law enforcement officials. It shall be unlawful for any person (i) to knowingly give a false report as to the commission of any crime to any law-enforcement official with intent to mislead, or (ii) without just cause and with intent to interfere with the operations of any law-enforcement official, to call or summon any law-enforcement official by telephone or other means, including engagement or activation of an automatic emergency alarm. Violation of the provisions of this section shall be punishable as a Class 1 misdemeanor.

¹⁰ Agency Exhibit I. Virginia Uniform Summons, December 12, 2006.

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.¹¹

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.¹² 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 knowingly making any false official statement.¹³

The agency has shown, by a preponderance of evidence, that grievant repeatedly and consistently stated after his accident that an SUV had struck his state cruiser causing him to spin out and collide with a concrete wall. Grievant repeated this story to two city police officers, two first sergeants, a lieutenant, and a captain on multiple occasions. The agency has also demonstrated, by a

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

¹² Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Agency Exhibit M. General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised October 1, 2006.

preponderance of evidence, that grievant's accident did not involve any other vehicle. Rather, it appears that grievant was driving at a rate of speed that not only exceeded the speed limit, but was too fast for weather and road conditions. Grievant was responding to a collision call that did not involve injury and, therefore, he did not have to drive at a high rate of speed. However, witnesses affirm that grievant had activated his flashing emergency lights and was going too fast for the conditions.

Because the evidence supports a conclusion that no other vehicle was involved, grievant's statement about the cause of his collision to city police officers, agency employees, and his own chain of command was false. Grievant now avers that he does not recall making such a statement to officers at the site of the collision, or at the hospital emergency room. Grievant contends that he was unconscious for part of the time and incoherent part of the time following the accident. However, all of the agency employees and both city police officers dispute grievant's contention; these six witnesses all attest that grievant was coherent and lucid each time he repeated the story at the scene and at the hospital.

Moreover, grievant acknowledges that he signed the Vehicle Crash Report in which he repeated the same story, laying blame for the crash on an unidentified SUV. Grievant does not allege that he was incoherent when he signed that document some weeks after his collision. Grievant's defense is that he signed the report without reading it. It is difficult to imagine that a state trooper who has been through rigorous academy training, has been trained to observe detail, and has to complete as much paperwork as his job entails would be so cavalier as to sign his own crash report without reading it. Assuming that grievant truly did sign this report without reading it, he did so at his own peril. By affixing his signature beneath this statement, grievant effectively certified that the statement was correct and true. In fact, however, grievant has been unable to produce any witnesses or evidence to support this statement and therefore, the statement is false.

Grievant avers that he did not apologize to the captain for making a false statement. Rather, grievant contends that he apologized *if* he made a false statement. In order to believe grievant in this case, the hearing officer would have to find that all of the people who testified under oath about grievant's statements provided false testimony. Some of the witnesses who testified (two city police officers and the passing motorist) are not employed by the agency; grievant has not provided any reason to disbelieve their testimony. Grievant has neither shown nor even alleged that the six agency witnesses who testified had any reason to alter their testimony. These witnesses all testified clearly, consistently, and calmly despite rigorous cross-examination by grievant's attorney. It is concluded that the preponderant weight of the witnesses' testimony outweighs grievant's testimony.

Moreover, grievant himself provided a reason that would explain why he made the false statement. Grievant had already been involved in enough other

collisions in state vehicles that his peers had given him the nickname of "Crash." Grievant did not like being called by this nickname when he encountered other troopers and knew that this most recent collision would only increase the likelihood that he would be stuck with this nickname. This provided grievant a motive to shift responsibility for the accident to someone other than himself.

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 (two years). Grievant's first sergeant stated that grievant has performed his job satisfactorily in the past. Another witness stated that grievant is goal-oriented and has a good work ethic. However, the agency places a high premium on its employees being truthful at all times. Based on the totality of the evidence, the hearing officer concludes that the agency's decision to terminate grievant's employment was within the tolerable limits of reasonableness.¹⁴

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.

¹⁴ 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.'"

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
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.¹⁵ 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.¹⁶ 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

¹⁵ 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).

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

David J. Latham, Esq.
Hearing Officer