

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 07/10/07; Decision Issued: 07/17/07; Agency: VSP; AHO: Frank G. Aschmann, Esq.; Case No. 8615; Outcome: No Relief – Agency Upheld In Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 8615

Hearing Date: July 10, 2007
Decision Issued: July 17, 2007

PROCEDURAL ISSUE

Grievant stipulated there were no procedural issues.

APPEARANCES

Grievant
Grievant's Attorney and Co-Counsel
Agency Presenter
Agency Representative
Six Agency Witnesses

ISSUES

Did the Grievant fail to follow a supervisor's instructions on November 9, 2006 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

The Virginia Department of State Police is a law enforcement agency which operates in a paramilitary structure. The Agency takes pride in its reputation for professionalism in the field of law enforcement. The Grievant is a trooper in this Agency and subordinate to the chain of command.

On August 14, 2006, an area meeting was called by the area Captain. The purpose of the meeting was to solicit the honest opinions of the area troopers in regard to a proposed plan to divide the area. The Captain notified the troopers that the meeting was "out in the grass", granting permission for them to speak freely their opinions on the issue. Numerous tangential issues were raised in the meeting including trooper "back up" support across area lines. A Sergeant at the meeting suggested there might be disciplinary action for crossing area lines which evoked an emotional response from the Grievant. The Grievant professed his loyalty and support for his fellow troopers. The tension in the room elevated and the Grievant was heard to ask the Sergeant to "step outside". The area Captain was alarmed at the rising tension and acted to intervene and calm the situation.

The Grievant's behavior in this incident was viewed with concern by his Superiors. The area Captain did not want the appearance that anyone would be punished for speaking freely at the meeting but felt the Grievant's behavior had been unprofessional, showed poor judgment and needed correction. Thus, the Captain deliberately waited three weeks and then sent one of his

lieutenants to speak with the Grievant about the incident.

On September 7, 2006, the Grievant, a Lieutenant and First Sergeant met to discuss the issue. The Grievant was advised that his Superiors viewed his behavior at the area meeting as unprofessional, rude and disrespectful to a superior. The Grievant was instructed to maintain professional behavior at all times and that similar behavior to a superior would not be tolerated.

On November 9, 2006, the Grievant was on duty performing a road patrol. He received a call to report to his local office to register a sex offender. Registration of a sex offender takes approximately five to ten minutes. Grievant left his location and traveled approximately thirty minutes to the office arriving close to 5pm. Upon arrival the Grievant encountered another Trooper in the office. This Trooper had been in Richmond at the Training Academy that day and stopped by the office to check his mail. A Sergeant in the office called the Trooper to his desk to conduct an evaluation review while the Trooper was there. The Grievant views this Trooper as a shirker and was upset that the Trooper had not registered the sex offender. The Trooper had been asked to register the sex offender by one of the Secretaries and had declined. The Secretary then had the call placed to the Grievant to come register the sex offender. The Grievant asked the Trooper if he could have registered the sex offender. The Trooper responded, "nope". The Grievant then called the Trooper a "lazy bastard". Present in the office at the time was the Sergeant, Trooper, Grievant, two Secretaries and the sex offender. The comment was heard by the Trooper, one of the Secretaries and the sex offender. The Grievant admits making the comment. The Secretaries left the office and the Grievant registered the sex offender who then left the office. The Sergeant continued the review with the Trooper. The Grievant approached and asked the Trooper if his fingers were broken, to which the Trooper responded, "no". The Grievant then made a comment about working together. The Sergeant interceded and told the Grievant they do work together and he appreciated his help. The Grievant responded sarcastically, "well, I hope you do". The Grievant left the office.

Subsequently, an investigation was conducted and the Grievant was ultimately issued a Group II Written Notice. This Group II disciplinary action is the subject of this hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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.

The Virginia Department of State Police have adopted these policies through General Order No. 19, Separation From The Service And Disciplinary Measures. Section 12 of General Order No. 19 defines abusive language and disruptive behavior as Group I type offenses. Section 13 of General Order No. 19 defines failure to follow a supervisor's instructions as a Group II type offense. Section 14 of General Order No. 19 defines Group III offenses which generally constitute an action which warrants immediate termination from service.

The Agency presented evidence to justify its action pursuant to General Order No. 19, Section 13, placing a Group II Written Notice in the Grievant's personnel folder. Actions on November 9, 2006 formed the basis for the Notice. The evidence given by the Secretaries in the office that day is compelling. Neither Secretary had any reason to support one trooper over the other nor any reason to fabricate a false story. Additionally, the Secretaries were not impeached in any way. The Sergeant on duty is likewise highly credible as he was a neutral party who was simply thrust into the situation and has not been impeached. As may be expected the two witnesses with the most to gain or lose are the most suspect in their testimony.

The Grievant's version of what happened initially appeared to contain false statements as to the location of those present in the office. This has subsequently been attributed to his highly emotional state of mind at the time and has become irrelevant because the Agency has stipulated that all issues concerning possible false statements by the Grievant have been resolved and it is not pursuing that issue as a basis for its action in this matter. Otherwise, the Grievant's testimony appears forthright and accurate about the November 9, 2006 incident as it is consistent with the other witness testimony.

The Trooper's testimony is also suspect. He claims never to have been asked to register the sex offender yet both Secretaries indicate he was and only after refusing was the Grievant called off the road to perform this duty. The Trooper claims to have provided the Grievant with a complete explanation of why he would not register the sex offender but this is inconsistent with the testimony of one of the Secretaries, the Grievant and the sequence of events as described by everyone including the Trooper. The witnesses heard the Trooper simply reply "nope" when asked if he could have registered the sex offender. Everyone indicates the Trooper was already engaged in the discussion with the Sergeant and never left that position while the Grievant made his comments which were made quickly and then he turned away and went to register the sex offender. The Trooper would not have had time or opportunity to make the full explanation as he claims. The Trooper's actions, testimony and complaint at being called lazy tend to give some credibility to the Grievant's opinion of him. As indicated by the immortal words of William Shakespeare, "Thou dost protest too much"; one who complains about a slight insult only acts to verify its truth. The Grievant's Counsel has done an admirable job of exposing the Trooper's shortcomings in this incident, however, his behavior is not the subject of this hearing and is thus irrelevant.

What is relevant is the Grievant's statement to the Trooper. Three witnesses heard the Grievant call the Trooper a "lazy bastard". The Grievant admits making the statement in his work place, while on duty, in the presence of others. This action alone is a violation of General Order No. 19, section 12 b, (3) as is proven by the evidence. Standing alone this act would be no

more than a Group I offense. However, this act can not be viewed in isolation.

Subsequent to making the comment, the Grievant reapproached the Sergeant's desk and continued to show his displeasure with the Trooper's actions with a question about the Trooper's fingers. This second confrontation ultimately resulted in the sergeant having to intervene and the Grievant speaking rudely and sarcastically to the Sergeant who was merely trying to calm the situation. This action forms a sufficient basis for a violation of General Order 19, section 12 b. (5), disruptive behavior.

If the actions of November 9, 2006, were the sole basis for the Group II Written Notice to the Grievant, this Hearing Officer would find that, with the mitigation of the Grievant's exemplary service since that time, a Group I Notice would be sufficient and the appropriate level of discipline for this matter. The Hearing Officer recognizes the Grievant's argument that the Group II Written Notice will prohibit promotion creating a harsh sanction but is not allowed to be moved by his personal sympathy and must decide the matter objectively on the basis of whether the Agency has met its burden of proof.

The Agency's basis for the Group II Written Notice lies in a failure to follow instructions violation under General Order No. 19, section 13 b. (1). The actions of November 9, 2006 are thus tied to prior events. It is the pattern of behavior which has created the level of concern among the Grievant's Superiors. The Grievant's unchecked emotions at the August 14, 2006 area meeting resulted in an appropriate response to instruct the Grievant to act professionally at all times and not to be insubordinate with superiors. This is established in the evidence through exhibit 3 and the testimony of an Agency witness, the Investigator, who was present as First Sergeant at the time, on September 7, 2006. While the Grievant testified he did not view the session as formal counseling his perspective of the type of meeting is irrelevant because a Direct Line Superior issued clear instructions as to how the Grievant was to conduct himself while on duty. This directive included acting professionally to maintain the reputation of the Agency and set an example for others in the service. Grievant admits his behavior on November 9, 2006 was unprofessional. This incident occurred just two months after being given the directive and less than three months after the prior incident. The concerns of the Grievant's Superiors thus appear to be well founded. In the field of law enforcement maintaining emotional control and a professional appearance are essential to job performance. These are points the Agency attempted to convey informally to the Grievant on September 7, 2006. It can be speculated with hindsight that the Captain, himself, should have made this directive to convey the seriousness of this conduct but he had clearly articulated reasons for sending a Lieutenant. The Grievant's position that he did not receive formal counseling and thus no progressive discipline is without merit. Progressive discipline is recommended but not required. General Order No. 19, section 7 b. The impact of the September 7, 2006 meeting with the Lieutenant on the Grievant furthers the concern of his Superiors in that even in this hearing the Grievant minimizes what he was instructed to do.

The Grievant's behavior is alarming in that he acted emotionally and unprofessionally before he was aware of all the facts, potentially devastating behavior in a law enforcement officer. Even if the Grievant's assessment of the Trooper is accurate there is another procedure for dealing with it. Resorting to verbal abuse was inappropriate. The Grievant's unchecked emotions also spilt over onto the Sergeant. The Sergeant was working to complete necessary office duties and testified he would have registered the sex offender himself if he had known the sex offender was there prior to the Grievant being called off the road. Despite his rank, hard work and having done nothing to the Grievant the Sergeant was subjected to rude and sarcastic

comments from the Grievant and forced to stop his work because of the disruption.

For the above stated reasons the Hearing Officer finds the Grievant failed to follow instructions of a Superior Officer given on September 7, 2006 when he was verbally abusive to a fellow Trooper on November 9, 2006. Additionally, the Grievant failed to follow instructions when he was disrespectful towards a Sergeant and Trooper disrupting the workplace on November 9, 2006, by failing to control his emotions and act professionally as directed on September 7, 2006. Mitigating circumstances of the Grievant's prior record of service and exemplary service since the November 9, 2006 incident are taken into consideration but found to be insufficient to justify reduction in the level of discipline. A Group II Written Notice is found to be appropriate and warranted.

DECISION

The disciplinary action of the Agency is affirmed.

It should be noted and it is suggested that should the Grievant continue exemplary service for a period of time satisfactory to his Superiors the disciplinary action of the Agency can be vacated pursuant to General Order No. 19, section 15 b. prior to the conclusion of the three year active period of the Notice allowing for promotion of the Grievant as merit may dictate.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

ADMINISTRATIVE REVIEW: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of

the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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 contrary 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.

Frank G. Aschmann
Hearing Officer