

Issues: Group II Written Notice with suspension (failure to follow instructions) and Group III Written Notice (conduct undermining agency's mission); Hearing Date: 01/15/08; Decision Issued: 01/29/08; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8692, 8765; Outcome: Partial Relief



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8692 / 8765

Hearing Date: January 15, 2008
Decision Issued: January 29, 2008

PROCEDURAL HISTORY

On June 19, 2007, Grievant was issued a Group II Written Notice with a two workday suspension for failure to follow a supervisor's instructions. On July 23, 2007, Grievant was issued a Group III Written Notice of disciplinary action for engaging in conduct that undermined the effectiveness or efficiency of the Department's activities.

Grievant timely filed grievances 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 October 23, 2007, the EDR Director issued Ruling 2008-1826 and 2008-1827 consolidating the two grievances. On December 3, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 15, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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 Department of State Police has employed Grievant as a Special Agent since June 1999.¹ He was assigned to both drug enforcement and general investigations. Grievant had received training at trooper basic school, basic agent training, on-the-job training with a Field Training Agent and he attended 12 weeks of crime scene examination training at the Forensic Academy.

Grievant had prior active disciplinary action. On August 31, 2005, Grievant was issued a Group I Written Notice for inadequate or unsatisfactory job performance.²

On July 31, 2006, the First Sergeant issued Grievant a Letter of Instruction stating:

You have received verbal and written instructions on the importance of filing timely and accurate reports per established department policy. Late

¹ Grievant took a voluntary demotion and became a State Trooper. That demotion is not part of this grievance.

² Agency Exhibit 14.

reports will not be tolerated in the future and will be handled under the standards of conduct.³

On February 27, 2007, the First Sergeant received a request from a local County Sheriff for assistance with an investigation at a crime scene of a reported rape. The First Sergeant instructed Grievant to respond to the scene. Grievant reported to the scene and assisted a Deputy Sheriff in the collection of possible evidence of the crime. Twenty-four items of evidence were collected and Grievant took photographs of the scene. On March 15, 2007, Grievant drafted a report of his investigation on a form, entitled SP110, in order to document what he found at the crime scene. Grievant submitted the form to the Virginia State Police.

On April 16, 2007, a gunman committed multiple homicides. The Agency sent three agents to process the crime scene. The Agency concluded that three special agents were not enough to complete the work and decided to send two additional agents to the crime scene. Grievant was one of those agents. The Lieutenant ordered Grievant to report to the Building at 6 a.m. on April 17, 2007.

On April 17, 2007, Grievant reported to the Building at 6 a.m. Grievant and the other investigators met with the Case Agent on the first floor of the Building. The Case Agent worked from a command post on the first floor. Grievant and the other investigators were briefed on their assignments and they discussed their duties for the day. The Lead Agent, Special Agent C, Special Agent T, and Grievant were assigned to Room 207. The bodies of the victims had been removed from Room 207 the day before Grievant began working in the room.

At the direction of the Lead Agent, the group took breaks as a group. At approximately 11:30 a.m., the group left Room 207 and went to lunch in another area. They ate lunch together. They finished lunch and began walking back to Room 207. Sometime during the process of returning to Room 207, Grievant left the group. He went to the restroom without informing anyone where he was going or how long he would be a way. Grievant felt ill and remained in the restroom until he felt he could resume his work duties. The other members of the group noticed Grievant's absence. After approximately 30 minutes, Grievant returned to Room 207. He did not explain to the other members of the group why he was absent.

Later in the afternoon, the Lead Agent and Special Agent C took a moment to update their notes. Grievant left Room 207 and went to the restroom on the first floor. After that, he went to the break room where food and drinks were available to staff working in the Building. Grievant spoke with the Case Agent and another person in the room. Grievant began using the computer located in the room to search for information about the case. Grievant testified he did so at the request of the Case Agent after Grievant had asked the Case Agent if there was anything the Case Agent needed Grievant to do. The Lead Agent noticed that Grievant was absent from the room and

³ Agency Exhibit 7. Grievant acknowledged receipt of the document by signing it on August 2, 2006.

left the room to find Grievant. The Lead Agent found Grievant on the first floor in front of a computer. The Lead Agent asked Grievant what he was doing. Grievant said he had found an address of the sister of the gunman. Grievant used the Internet to search for the address. The Lead Agent felt disgusted that Grievant had abandoned a group and was performing tasks of little significance.⁴ The Lead Agent returned to Room 207. Grievant did not return to the room. Special Agent C walked down to the first floor to find Grievant. He found Grievant in a room across from the command post. Special Agent C began talking to Grievant. He told Grievant, "If you have not been reassigned we could really use your help." Special Agent C returned to Room 207.⁵ Grievant did not follow him. Approximately five or 10 minutes later, Grievant returned to Room 207. Grievant was absent from Room 207 for a total of approximately 30 minutes.

At one point during the afternoon, the Lead Agent asked Grievant to obtain a ladder that the Lead Agent believed was on the second floor of the Building. Grievant attempted to find the ladder but could not find one on the second floor. Grievant and another agent concluded they would go to their van and obtain a ladder.

The Lead Agent asked Grievant to draw a sketch of the room outlining the room's dimensions. Grievant did so and the sketch was acceptable to the Lead Agent. Grievant was also asked to count the number of desks in the room. Because he is a "visual person" he made a sketch of the desks as if they were in order in the room. The actual appearance of the desks was not in order. Grievant's sketch correctly showed the number of desks in the room although they were not correctly placed.

Grievant brought a water bottle into Room 207. He placed it on a desk and drank from the water bottle while he worked. At the end of the day, Grievant left the water bottle in the room and another one of the team members had to dispose of it.

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).

Group II Written Notice

⁴ The Lead Agent explained that the information Grievant obtained was likely already obtained on the prior day by a team of Federal and State experts with information resources more precise than a public Internet.

⁵ Grievant's absence frustrated Special Agent C.

"Failure to follow a supervisor's instructions" is a Group II offense. On July 31, 2006, Grievant was instructed by a Supervisor, the First Sergeant, that "[l]ate reports will not be tolerated in the future and will be handled under the standards of conduct."⁶ Grievant was instructed to provide assistance to a local County Sheriff with respect to an outdoor crime scene involving a possible rape. Grievant conducted his investigation on February 27, 2007. He transcribed an SP110 form on March 15, 2007 and submitted it to the Agency. Grievant was obligated by Agency policy to submit the report within five days of February 27, 2007.⁷ The report was due in the first week of March 2007 but Grievant submitted it late on March 15, 2007. Grievant failed to comply with a supervisor's instruction because he submitted a late report. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.⁸ A suspension of up to 10 workdays is permitted upon the issuance of a Group II Written Notice. Accordingly, Grievant's two work day suspension must be upheld.

Grievant argues that the SP110 report did not have to be reported within five days of the investigation, because the report was drafted in response to a request from a local law enforcement agency and not from the Virginia State Police. Grievant's argument fails. This is an assumption Grievant made at his own risk. Although Grievant may have been providing assistance to local law enforcement agency, the Virginia State Police expected Grievant to file a report on-time reflecting his investigation. Grievant failed to do so thereby justifying the issuance of disciplinary action.

Group III Written Notice

The Agency contends Grievant's behavior on April 17, 2007 was inappropriate for several reasons. First, Grievant brought a water bottle into the crime scene. Second, Grievant failed to obtain a ladder when asked to obtain one. Third, Grievant drew an inaccurate sketch of items in the Room 207. Fourth, Grievant took two unscheduled breaks and was away from his duties.

Grievant knew or should have known that taking a water bottle into the room was not appropriate and that doing so might contaminate the crime scene.⁹ His action constitutes unsatisfactory work performance.

⁶ Grievant had been informed in writing on several occasions prior to July 31, 2006 that the Agency would not tolerate Grievant continuing to submit reports after they were due.

⁷ Grievant was familiar with the SP110 form and aware of his obligation to submit it within five days of an investigation.

⁸ The Agency also alleged that Grievant failed to properly complete the report thereby engaging in inadequate or unsatisfactory job performance. Because this would only be a Group I offense, it is unnecessary for the Hearing Officer to address the facts of that allegation. The Agency has otherwise met the burden of proof necessary to show a Group II offense.

⁹ The Agency did not identify a policy prohibiting investigators from bringing items into the crime scene. Grievant and the other investigators learned this concept through their training.

The Agency contends Grievant created frustration because he was asked to obtain a ladder but was unable to locate one after looking for approximately 20 minutes. Grievant's instruction, however, was to obtain the ladder that was believed to be located on the second floor of the Building. Grievant searched the second floor but could not find the ladder. Grievant complied with the instruction given to him and, thus, his behavior was appropriate.

The Agency contends Grievant drew a sketch of items in the room that was not accurate. The Agency contends Grievant should have drawn the sketch to reflect the way the items appeared in the room. This argument is without merit. Grievant drew two sketches. Grievant was asked by the Lead Agent to make a drawing reflecting the measurements of the room. Pictures had already been taken of the room on the prior day. Grievant drafted a sketch in accordance with the Lead Agent's instructions. In addition, Grievant drew a second sketch to reflect the number of items in the room. He did not intend for that second sketch to reflect how the items actually appeared in the room. Grievant had not been asked to produce the second sketch and, thus, his work performance was not inadequate merely because he provided a second sketch.

Grievant's post was Room 207. He abandoned that post on two occasions. The first occasion was due to personal illness and that absence should be considered excused. The second absence, however, was not due to illness or for any other appropriate reason. Grievant's second absence was because he lacked an immediate task to perform. He remained away from his post approximately 30 minutes without excuse. During his absence, numerous tasks arose for which his assistance was needed by the other team members.

The Agency contends Grievant engaged in behavior giving rise to a Group III Written Notice for:

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 evidence is not sufficient to support this contention. The Agency has not shown that Grievant's behavior damaged the quality of the investigation. Grievant's behavior did not prevent the three other Special Agents from performing their duties. The effect of Grievant's behavior was to undermine the cohesiveness of the team, frustrate the three other special agents, and result in some undefined delay in the overall team performance. These consequences are not sufficient to raise the level of Grievant's discipline to a Group III offense.

Although the Agency has not established a basis to issue a Group III Written Notice, it has presented sufficient evidence to support the issuance of a Group II Written

Notice. "Leaving the work site or duty post without permission during working hours" is a Group II offense. Grievant's duty post was Room 207. Grievant was assigned to work as a team under the direction of the Lead Agent. The team took breaks as a team in order to preserve the crime scene. Grievant abandoned his duty post thereby justifying the issuance of a Group II Written Notice.

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..."¹⁰ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. The Agency's issuance to Grievant of a Group III Written Notice is **reduced** to a Group II.

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

¹⁰ *Va. Code § 2.2-3005.*

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.