

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 11/26/07; Decision Issued: 12/02/07; Agency: VSP; AHO: Lorin A. Costanzo, Esq.; Case No. 8732; **Administrative Review: HO Reconsideration Request received 12/18/07; Reconsideration Decision issued 12/30/07; Outcome: Original decision affirmed; Judicial Review: Appealed to Henry County Circuit Court. Outcome: AHO's decision affirmed [CL08-001] issued 03/19/08.**

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF STATE POLICE**

DECISION OF HEARING OFFICER

In re: Case No: 8732

Hearing Date: November 26, 2007

Decision Issued: December 02, 2007

PROCEDURAL HISTORY

Grievant was issued a Group II Written Notice on April 30, 2007 for failure to respond and properly conduct an investigation.¹ On May 29, 2007, Grievant timely filed a grievance to challenge the disciplinary action. Grievant indicated his intent to advance his grievance to the second step and requested and received on 6/6/07 a timeframe extension.² The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head qualified the grievance for a hearing.³ On October 29, 2007 the undersigned was appointed hearing officer in this cause.

APPEARANCES

Agency Representative
Agency Party (Captain) who was a witness)
Counsel for grievant
Grievant (who was a witness)
First Sergeant

ISSUES

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

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. A preponderance of the evidence is evidence which shows that what is intended to be proved is

¹ Agency Exhibit Tab 5. Written Notice

² Agency Exhibit Tab 5. Grievance Form A and First Step Respondent.

³ Agency Exhibit Tab 5. Grievance Form A.

more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence presented in this cause and observing the demeanor of the witness, the Hearing Officer makes the following findings of fact:

Grievant filed a timely grievance of a Group II Written notice issued on April 30, 2007 (with a date of offense of January 5, 2007) for failure to respond and properly conduct an investigation when Grievant was notified that an individual was injured while that individual was in the custody of a Trooper.⁵

Grievant has 12 years service with the Virginia State Police (hereinafter referred to as "Agency") with 5 years as a supervisor. Grievant is a Sergeant and at the time this Group II Written Notice was issued Grievant had no active Written Notices.

On 1/5/07 an individual was cuffed by a Virginia State Police Trooper and escorted from the jail to a magistrate's office which was located in a nearby separate building about 200 yards distance from the jail. There were three flights of outside stairs between the two buildings. After returning to the jail the individual complained to jail staff that the Trooper had pushed him down the steps and he was injured. The individual's allegations were reported to the Virginia State Police by jail staff. The jail took statements and took photographs of the individual and of the site of the alleged injuries.

A State Police dispatcher telephoned Grievant at his home on 1/5/07 at approximately 10:27 P.M. and advised him that an individual complained that a Trooper pushed him down the steps and while he was in custody of the Trooper and the individual had "marks and stuff on his leg."⁶ Grievant then made a number of telephone calls from his home that night concerning these matters. He called Deputy, and left a call back number when informed the Deputy was not immediately available. He called the Trooper who was involved in the alleged incident and obtained information on the incident. Grievant's call was returned by the Deputy who told Grievant the individual had abrasions, medical attention had been rendered, photographs taken, and a statement obtained from the individual. Grievant indicated it sounded like their agency had already done most of the leg work for him, thanked him for their assistance, and said he would come to the jail the following day and pick up the statements and the photographs.

Grievant's investigation actions on 1/5/07 were limited to telephone calls. He did not go to the jail facility/site of the allegations until the next day nor did he interview or observe the individual complaining of injury. Grievant went to the jail on 1/6/07 at approximately 6:00 P.M. and received and reviewed the statements and photographs taken by jail staff/deputies. Grievant first tried to interview the individual making the allegations on 1/6/07. The individual

⁴ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

⁵ Agency Exhibit Tab 5. Written Notice.

⁶ Agency Exhibit Tab 2. Investigation report dated 2/15/07 (report page 18).

refused speak to Grievant on 1/6/07 and again refused on 1/10/07 when Grievant made a second attempt to speak with him. Grievant showed the jail photographs to the Trooper and interviewed the Trooper involved on 1/6/07 also.⁷

On 1/6/07 Grievant first obtained copies of photographs the Sheriff's Office/Jail had taken and copies of statements they had taken (including a written statement from the individual). Photographs were given to Grievant, which showed the injuries and individual from different perspectives

General Order No. 62 (revised January 1, 2006) provides, in pertinent part, as follows:

"2. Upon notification of a use of force incident, the supervisor shall respond and properly investigate the incident."

"8. Supervisors conducting the initial investigation shall take photographs of any alleged injuries. Likewise, photographs shall also be taken of the individual to verify that no visible injuries were sustained. . .".

Grievant attended "Leadership and Professional Development Training" in October of 2003 at the State Police Academy. During this training Grievant received instruction on Administrative Investigations, which included "Use of Force". General Order 62 was reviewed in this training and included in the outline were provisions for initial duties of the investigating supervisor which included *respond to the scene*.⁸

Grievant has investigated at least five "use of force" investigations, including one "Injury to Prisoner".⁹

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. 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 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 Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in 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

⁷ Agency Exhibit Tab 2. Investigation report dated 2/15/07(report page 7).

⁸ Agency Exhibit Tab 2.

⁹ Agency Exhibit Tab 2 3/19/07 report of First Sergeant (report page 8).

afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of State Police has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department.¹⁰ Unacceptable behavior is divided into three types of offenses according to their severity.¹¹ Group II Offenses include acts and behaviors which are more severe in nature and are such that an additional Group II offense should normally warrant removal. Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy is indicated in General Order No 19 as an example of a Group II offense.¹² The normal disciplinary action for a Group II offense is a Notice only or a Notice and up to 10 workdays maximum suspension without pay.¹³

After going to the jail the next day and reviewing the deputies' statements and seeing photographs of the individual did he realize the incident was more that a complaint.¹⁴ The approximate timeline of events occurring on 1/05/07 is as follows:

| | |
|------------|--|
| 7:40 P.M. | A handcuffed individual in custody of a Virginia State Trooper left the jail building to walk to a magistrate's office in a nearby building approximately 200 yards away |
| 8:00 P.M. | The individual was returned to the jail by the Trooper. |
| 8:10 P.M. | While processing the individual a deputy was asked by the individual to look at his hands which were observed by deputy to have abrasions on the right hand. The individual told jail staff he had been pushed down steps. |
| 9:05 P.M. | The individual was taken from his cell for medical attention. Abrasions were cleaned by a medic with peroxide. Neosporin and ice were applied. |
| 9:30 P.M. | The individual was returned to his cell |
| 10:15 P.M. | A deputy requested the State Police be notified of matters and requested the Trooper and a supervisor contact the deputy. |
| 10:27 P.M. | Grievant was contacted at home via telephone by a State Police dispatcher. |
| 10:42 P.M. | Grievant called the jail to speak with Deputy. Deputy was not available, Grievant left his number. |
| 11:15 P.M. | Deputy returned Grievant's call. ¹⁵ |

Grievant indicated he did not conduct an investigation at the scene on 1/5/07 because he did not consider this matter to be a "use of force" incident but to be a "complaint" that did not

¹⁰ Agency Exhibit Tab 3. General Order No. 19, Separation from the Service and Disciplinary Measures, Revised October 1, 2006.

¹¹ Agency Exhibit Tab 3. General Order No. 19. Section 9. a.

¹² Agency Exhibit Tab 3. General Order No. 19. Section 13. b. (1).

¹³ Agency Exhibit Tab 3. General Order No. 19. Section 13. c. (1).

¹⁴ Agency Exhibit Tab 2. Investigation report dated 2/15/07, report page 7. Written Statement of Grievant.

¹⁵ Agency Exhibit Tab 2. Investigation report dated 2/15/07.

require him to immediate respond.¹⁶

A number of individuals provided information as to injury being sustained by the individual. In the initial 10:27 p.m. call from the dispatcher Grievant was told that an individual complained that a Trooper pushed him down the steps and that the individual had “marks and stuff on his leg”. Grievant, in his telephone call to Trooper, was informed by Trooper that the individual had minor scrapes or bruising marks consistent with hand cuffing and it was related that the individual had scrapes on his knuckles. Grievant was told, in his 11:15 p.m. telephone conversation with Deputy, about abrasions on both hands and that a jail medic had examined and treated the abrasions to individual’s wrists.¹⁷

On 1/5/07 Grievant stated that the Deputy did almost all the leg work, took photographs, and that he would conduct follow-up investigation. He also said all he had to do was to formally interview the individual. The individual doesn’t require medical treatment. A dispatcher was told, “It looks like ___ ___as usual, but you’ve got to go through the motions.” (*expletive deleted*) Additionally, Grievant said that the individual was in jail and would not be going anywhere that night and he did not see why he could not wait and talk to him tomorrow evening.¹⁸

The Deputy who treated the individual on 1/5/07 observed the individual had a scrape on his right hand and ring finger which she cleaned and put a bandage on. While the individual told her he also hit his head she indicated there were no bruises or abrasions on his head.¹⁹

When Grievant did make a physical response to the allegations and did physically investigate on 1/6/07 he immediately became aware of the potential seriousness of the situation. Grievant saw the photographs on 1/6/07 and testified at that point he knew there was an “injury to prisoner”. Grievant acknowledged in his written statement that the individual had an injury which was more than a typical handcuff marks and that the initial information provided to him was watered down. He also indicated, “Saturday, I went by the jail and retrieved the statements and photos. Upon my review, I realized that there may be more involved in this situation than a mere “complaint”.²⁰

Grievant has investigated at least five “use of force” investigations, including one “Injury to Prisoner” and in each Grievant responded appropriately and in a timely manner.²¹

Grievant further contended that he understood one did not conduct a “use of force” investigation unless the prisoner complains of injury and he knows now but not on 1/5/07 that this should have been a “use of force” investigation. The individual did complain to the Jail staff of being injured and the jail staff did treat him for certain injuries. He was given information when initially contacted and during other telephone conversations on 1/5/07 as to injuries and the individual who was in custody complaining of being pushed down the stairs by a Trooper.

¹⁶ Agency Exhibit Tab 2. Investigation report dated 2/15/07, report pages 6 and 14; and testimony.

¹⁷ Agency Exhibit Tab 2. Written statement of Grievant.

¹⁸ Agency Exhibit Tab 2. Report dated 2/15/07 (report page 9 & 10) and Recording of conversation.

¹⁹ Agency Exhibit Tab 2. 2/15/07 report (report page 10).

²⁰ Agency Exhibit Tab 2. Written statement of Grievant.

²¹ Agency Exhibit Tab 2. 3/19/07 report of First Sergeant (report page 8).

Grievant presents that he was not required to respond and investigate that night (i.e. 1/5/07) even if it were a “use of force” investigation as this is not required by the General Order. Also he presents he would have gone out to the jail and investigated matters except he thought it was just a complaint and not a “use of force” incident.

General Order No. 62 mandates that a supervisor shall respond and properly investigate the incident upon the notification of a use of force incident and further provides for specific actions of the supervisor in the investigation. General Order No. 62 was reviewed in training attended by Grievant and Grievant was providing training materials indicating the initial duties of the investigating supervisor which specifically included responding to the scene.²²

Inconsistent Application

Grievant alleges the discipline he received is inconsistent with the discipline received by the Trooper. He contends this is indicated by the fact that he received a Group II Written Notice concerning his investigation and the Trooper’s discipline consisted of receipt of a “Sustained” Group II offense which was handled by “informal counseling”.²³

These cases involved different allegations being used as the basis for the violations and are differentiated by the different facts and consideration of each case. Both Grievant and Trooper were disciplined for failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy. However, the Trooper’s basis for this failure to comply with established written policy was his failure to immediately inform a supervisor that the individual was injured while being transported from the jail to the magistrate’s office. Captain testified he gave consideration to the Trooper’s approximate 18 years of service, his being a Senior Trooper, the fact he had never been involved in a failure to immediately inform a supervisor of a use of force in the past and he had been involved in numerous “use of force” incidents.

The basis for the failure to comply with established written policy for Grievant was his failure to respond and properly investigate an allegation of “use of force”.²⁴ Consideration was given to Grievant being a supervisor, his having previous experience with handling a number of “use of force” investigations, there were no prior sustained complaint/counseling received by Trooper and Grievant had received one prior sustained complaint/counseling involving sound decisions based on training. Capt further testified that in his experience as a supervisor with the Agency (since 1992) he never had a supervisor fail to respond and properly investigate a “use of force”. Additionally, consideration was given to the need to protect the Agency and to protect the Trooper in these matters and the need and benefit of a timely response with a proper investigation.

²² Agency Exhibit Tab 2.

²³ Agency Exhibit Tab 5 Written statement of Grievant.

²⁴ Agency Exhibit Tab 5.

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, 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. The Agency's discipline is not found to exceed the limits of reasonableness.

The Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the Agency's discipline was consistent with law and policy. The disciplinary action of issuing a Group II Written Notice was warranted and appropriate under the circumstances.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant on April 30, 2007 of a Group II Written Notice is hereby *upheld*.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

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: Director, Department of Employment Dispute Resolution, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219.

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 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 contradictory 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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo
Hearing Officer

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF STATE POLICE
DECISION OF HEARING OFFICER
ON GRIEVANT'S REQUEST TO REOPEN

In re: Case No: 8732

Decision on Request to Reopen Issued: December 30, 2007

APPLICABLE LAW

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, (effective August 30, 2004) provides, "A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, 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. Requests may be initiated by electronic means such as a facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director."

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 conclusion is the basis for such a request.²⁵

The Grievance Procedure Manual also provides, "The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request."²⁶

TIMELINE

The grievance hearing in this cause was held on November 26, 2007 and the "Decision of Hearing Officer" was issued on December 2, 2007. A fax was received from the Grievant himself on December 18, 2007 requesting the hearing be reopened. The request to reopen of Grievant was not received within the 15 calendar days of the date of the original hearing decision but was received on the 16th calendar day after the date of the original hearing decision being issued.

²⁵ § 7.2(a)(1) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

²⁶ § 7.2(c) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

CONCLUSION

Grievant's request to reopen hearing was received by the hearing officer on December 18, 2007 via fax. In order to submit a timely request to reopen, a request from Grievant would have had to be received by the hearing officer not later than December 17, 2007 (15 days from the date of the decision which was issued on December 2, 2007). As of December 17, 2007 the hearing officer had not received either a request for reconsideration or a request to reopen. Accordingly, while the need to respond to the Grievant's request is obviated, the hearing officer nevertheless elects to respond.

DECISION ON REQUEST TO REOPEN

The request to reopen was not made in a timely manner. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request during such period.

Additionally, Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The timeline of events was discussed in the initial decision as were concerns over timeliness and duties of responding. The hearing officer has carefully considered Grievant's arguments and concludes there is no basis to reopen the hearing.

APPEAL RIGHTS

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 HRM, 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 contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.

December 30, 2007

Lorin A. Costanzo, Esq.