

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 12/04/07;
Decision Issued: 12/06/07; Agency: VSP; AHO: Frank G. Aschmann, Esq.; Case
No. 8748; 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. 8748

Hearing Date: December 4, 2007
Decision Issued: December 6, 2007

PROCEDURAL ISSUE

There were no procedural issues raised.

APPEARANCES

Grievant
Three Grievant Witnesses
Agency Presenter
Five Agency Witnesses

ISSUES

Did the Grievant fail to follow a supervisor's instructions given to Grievant by superiors on January 20, 2007 and January 25, 2007 such as to warrant disciplinary action under the Standards of Conduct? Were the directives given to the Grievant improper or unlawful such that the Grievant was not obligated to obey them? 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 has troopers, investigators and special units which operate in the field, in part, coordinated by dispatchers operating from centralized locations. Safe and efficient operation of the force requires a high level of cooperation and discipline from all personnel. The Grievant is a dispatcher in this Agency and subordinate to the chain of command.

The Grievant communicates directly with troopers in the field who rely on him for trooper back-up and other emergency response needs.

In the Summer of 2006, the Grievant and a Trooper began a friendship. The Trooper was suffering emotional distress from the death of a fellow trooper who was shot and killed on duty. The Trooper was also distressed from marital difficulties. The Grievant conversed with and consoled the Trooper on these issues. Many telephone calls were made between the two, initiated by both parties. These calls were made on and off duty. The Grievant ultimately received disciplinary action for excessive use of the telephone while on duty arising out of the calls made in the relationship.

In September 2006, the Trooper separated from her spouse and for a short period of time stayed in the home of the Grievant. While there, the Trooper's spouse took the Trooper's

personal automobile. The Trooper acquired another vehicle with the assistance of the Grievant. The Grievant co-signed an automobile loan to facilitate the purchase because the Trooper had bad credit.

The Trooper developed a friendship with the Grievant's mother and they spoke about separation and divorce issues. The Grievant's mother called the Trooper on the telephone on many occasions.

In January 2007, the Trooper reconciled with her spouse. This created a change in the status of the relationship between the Trooper and the Grievant and increased tension between the Grievant and the Trooper's spouse.

The Trooper's spouse had previously filed a complaint of adultery and after reconciliation complained of threats towards him arising out of the relationship between the Grievant and the Trooper. Disputes over property were a constant feature of the relationships at issue.

The issues and relationships between the Grievant, the Trooper and the Trooper's spouse were volatile with great potential to erupt into violence and illegal conduct. Issues in the relationship were often played out at work and effected the principals and other employees. The Agency felt it was necessary to intervene in order to provide a safe working environment, protect its employees and maintain the efficient delivery of services.

On January 20, 2007, a Lieutenant ordered the Grievant to have no further contact with the Trooper's household except as necessary for the performance of their employment duties. Lines of communication through supervisors were set up to allow the Grievant and the Trooper to resolve their outstanding property issues. On January 25, 2007 another Lieutenant issued a written order to the Grievant confirming the no contact order given orally on January 20, 2007.

On March 24, 2007, the Grievant sent a text message to the Trooper which read, "I could get in trouble for this but i just wanted to check to see how u all are doing?" The message sender was identified by name and telephone number on the Trooper's telephone equipment.

On March 25, 2007, the Grievant sent a text message to the Trooper relating to keeping the Grievant's roommate's dog. Grievant states this was sent to the Trooper in error and was meant for his roommate.

On March 27, 2007, the Grievant telephoned the Trooper. The call lasted approximately 12 seconds and ended once the Trooper had identified the caller as the Grievant and disconnected the call. The caller stated, "this is the person who you are not suppose to talk to." The Grievant states his mother made this call and gave him the telephone.

On March 24, 2007, the Grievant attempted to telephone the Trooper. The Trooper recognized the telephone number on her caller identification system and did not answer the call.

On March 27, 2007, the Trooper contacted superiors and complained about the contacts from the Grievant. An investigation was conducted by the Agency. The Grievant was ultimately issued a Group II Written Notice and a two day suspension. The Grievant's employment record was considered along with other potential mitigating factors in arriving at the final sanction. 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 13 of General Order No. 19 defines failure to follow a supervisor's instructions as a Group II type offense. General Order number 17, Section 9 directs that all employees shall follow the lawful orders of their superiors. Section 9b of General Order 17 places the burden on the employee to justify any refusal to obey an order and to raise the issue of the order's unlawfulness at the time it is issued.

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 March 24 to 27, 2007 formed the basis for the Notice. The Grievant was presented with a clear directive to cease contact with the Trooper. The Grievant was notified of this directive both orally and in writing by two superiors. The Grievant did not question the meaning of the order or its legality with his superiors. The very nature of the Grievant's communication, in the communications of March 24 and 27, acknowledge he understands the order and knows he is not suppose to make contact with the Trooper. The Grievant's actions can only be viewed as willful violations of the order of his superiors. Even if the message about the dog was sent in error and the Grievant's mother made one call it is evident that the Grievant sought contact during this March time period. The attempt to renew contact, in itself, broke the directive of the Agency and ran the risk of restarting the conflicts the Agency sought to prevent.

Grievant's argument that the Lieutenant had no authority to prohibit contact outside of his employment is unpersuasive. The Grievant failed to use the prescribed procedure for such an objection and did not raise this issue until after the fact of the violation of the order. The Grievant cites no authority for this position. The Agency has noted legitimate and compelling reasons why it sought to limit the contact between two of its employees and acted to facilitate the communication the parties needed to conduct their common business. The relationship had effected the performance of employees and was distracting from the Agency's mission. The order was an appropriate remedy for the problem and the preservation of the integrity of the Agency.

The Agency considered the employment record of the Grievant and the circumstances of

the events in reaching the sanction issued. The Agency followed its established policy of progressive discipline in the level of its sanction. A Group II Written Notice with two days suspension is found to be appropriate and warranted.

DECISION

The disciplinary action of the Agency is affirmed.

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