

Issues: Group II Written Notice (failure to follow instructions/policy), Group II Written Notice (leaving work without permission); Group III Written Notice (engaging in conduct that undermines agency's efficiency), and Termination; Hearing Date: 01/29/08; Decision Issued: 02/12/08; Agency: VSP; AHO: John V. Robinson, Esq.; Case No. 8775; Outcome: No Relief – Agency Upheld in Full.

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 8775

Hearing Officer Appointment: January 7, 2008

Hearing Date: January 29, 2008

Decision Issued: February 12, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge three (3) Written Notices each issued on November 9, 2007 by Management of the Virginia Department of State Police (the “Department” or “Agency”), as described in the Grievance Form A dated November 14, 2007 and signed by the Grievant on November 20, 2007. AE 11.<sup>1</sup>

The three (3) Written Notices consisted of (1) a Group II Written Notice: “Failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy” concerning the Grievant’s failure to properly investigate a motor vehicle accident; (2) a Group III Written Notice terminating the Grievant’s employment with the Agency effective November 9, 2007: “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” concerning the Grievant’s discussion of specified personal ongoing domestic issues with a County Deputy Sheriff in the presence of a citizen; and (3) a Group II Written Notice: “Leaving the work site or duty post without permission during working hours” concerning the Grievant’s leaving of his assigned duty station of an Interstate Highway for a minimum of two (2) hours and twelve (12) minutes during his 10-hour shift begun on May 26, 2007. AE 2 and 9.

The hearing officer was appointed on January 7, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 4:00 p.m. on January 7, 2008. The Grievant’s attorney (the “Attorney”), the legal advocate for the Agency (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. During the call and at the subsequent hearing, the Grievant, by counsel, confirmed that he is challenging the issuance of the above referenced Group II and Group III Written Notices for the reasons provided in his Grievance Form A and is seeking the relief requested in his Grievance Form A, including reinstatement and rescission of

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<sup>1</sup> References to the grievant’s exhibits will be designated GE followed by the exhibit number. References to the agency’s exhibits will be designated AE followed by the exhibit number.

the discipline. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on January 7, 2008, which is incorporated herein by this reference.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Agency was represented the Advocate. The Grievant was represented by his Attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's binder (1 through 12) and Grievant's Exhibit 1.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

#### APPEARANCES

Representative for Agency  
Grievant  
Witnesses

#### FINDINGS OF FACT

1. The Grievant was a Trooper with the Department until the termination of his employment effective November 9, 2007. AE 9 and 11.
2. The Grievant was dispatched to an accident on May 29, 2007 and the Grievant met with the persons involved in the accident about 0.8 miles north of the point of collision. AE 1. The location of the crash was a two lane roadway separated by a solid double line.
3. One of the persons involved in the accident initiated a complaint against the Grievant alleging, amongst other things, that the Grievant did not properly investigate the crash. In response, the Department began its administrative investigation. AE 1.
4. The investigating officer found the citizen complainant's first allegation that the Grievant failed to respond to the motor vehicle crash in a timely fashion to be unfounded. AE 1.

5. The Grievant did not stop at the point-of-impact but drove by it and the Grievant admits as much.
6. Although the Grievant received conflicting accounts of the accident from each driver, the Grievant admits that he did not go to the point of impact with both drivers. Instead, the Grievant told the respective drivers to have their insurance companies work it out.
7. Had the Grievant stopped at the point of impact he would have been able to view evidence of the impact discovered the day following the accident by the investigating officer from the Department. AE 1.
8. The Grievant did not go back to the point-of-impact to conduct a detailed examination of the crash site to determine if a violation of law had occurred.
9. The Grievant gave one of the drivers in the accident a piece of paper that contained the other driver's information and a phone number to call for a report, but no other information. AE 1. The Grievant admitted that he typically does not provide his badge number but did not remember giving his name or office number to the drivers involved in the accident. The Grievant also admitted that on this occasion he did not give out his business card.
10. Accordingly, the Department's investigating officer correctly sustained the allegation that the Grievant failed to adequately investigate a motor vehicle crash; to include but not limited to, failing to conduct an examination of the crash scene, failing to provide his name to involved parties, and failing to submit an accurate report.
11. The investigating officer also correctly sustained the third allegation that the Grievant improperly talked about his personal affairs with the County Deputy Sheriff at the scene in the presence of the citizen complainant. AE 1.
12. Based on information provided by each of the complainant, the County Deputy Sheriff and the Grievant, the Department's investigating officer reasonably concluded that the Grievant improperly revealed his on-going personal domestic issues in the presence of the complainant citizen, including information about the protective order concerning his children, custody concerning his children, etc. AE 1.
13. Because of what the complainant overheard concerning the Grievant's domestic issues, the complainant formed the opinion and told the investigating officer: "[The Grievant] was more interested in his personal problems than he was in working the crash." AE 1.

14. After receiving a complaint from the Grievant's spouse at that time, the Department initiated another administrative investigation. AE 2.
15. For his ten-hour shift from 3:00 p.m. to 1:00 a.m. begun on May 26, 2007, the Grievant was assigned by the Department to cover a particular Interstate Highway for his entire shift. In particular, troopers were supposed to maintain high visibility in their assigned locations because May 26, 2007 fell within the Memorial Day C.A.R.E. weekend, which began at 0001 hours May 25, 2007 and concluded at 2400 hours on May 28, 2007. AE 2.
16. Without permission and without notifying his dispatcher or a supervisor that he was away from the particular Interstate Highway to which he had been assigned, the Grievant went to a private community in the same county where his spouse was with a partner because of concern for his children.
17. The Grievant admitted during the hearing that he was not supposed to be up there (Tape 2, Side B) and the Grievant never reported to supervision his absence from his assigned work site.
18. The spouse's partner had filed a complaint with the private community's security and the Grievant was banned from entering the property. The Grievant admitted that he was aware of the ban and because of this the Grievant did not enter the property but stayed at the security house located at the main gate on May 26, 2007, while he was on duty assigned to the Interstate Highway.
19. At first the Grievant maintained he "may have been at the gate for approximately an hour or so, maybe less." AE 2. Later, the Grievant revised his estimate to at least a couple of hours. AE 2.
20. The Grievant did not claim any personal leave for the period he was at the private community during his shift and, as stated above, did not report his absence from his assigned work site to his supervisors.
21. After being stationed at the gate house for about two (2) hours and twelve (12) minutes, the Grievant requested a welfare check by the Sheriff's Department for the County. Subsequently, the Grievant himself was dispatched by the Department to assist the Sheriff's Office with the welfare check. However, when a Sheriff's Office supervisor familiar with the Grievant's marital problems learned that the Grievant was dispatched to the call, the Grievant was told to disregard the dispatch in order to avoid a conflict of interest. AE 2.
22. The administrative investigations undertaken by the Department were thorough, unbiased and the two investigators acted reasonably and diligently in reaching their respective findings and conclusions.

23. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
24. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
25. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.
26. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, positions taken by the Grievant are inconsistent and defy common sense. Furthermore, the Grievant, by his own admission, supported major assertions made by the Department in its case. Elements of this finding are discussed further below.
27. The Grievant currently has three (3) active Written Notices, a Group I, II and III, each issued in 2006. AE 2 and 10.

#### APPLICABLE LAW, ANALYSIS AND DECISION

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 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).

*Va. Code § 2.2-3000(A)* 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the

Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the General Order No. 19. AE 3. 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.

Pursuant to the SOC, the Grievant's infractions can clearly constitute Group II and Group III offenses, respectively, as asserted by the Department.

13. Second Group Offenses (Group II).

- a. These offenses include acts and behavior that are more severe in nature and are such that an Group II offense should normally warrant removal.
- b. Group II offenses include, but are not limited to:
  - (1) Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; . . .
  - (3) Leaving the work site or duty post without permission during working hours . . .

14. Third Group Offenses (Group III).

- a. These offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.
- b. Group III offenses include, but are not limited to: . . .
  - (20) 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.

Department General Order No. 19.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The Grievant, by counsel, argued at the hearing that he was relatively inexperienced and that the process of investigating a motor vehicle accident is largely subjective so that the Grievant should be excused judgment calls made with limited experience. However, while subjective judgment calls may well be a necessary component of the process, General Order No. 27 (AE 3) goes into great detail as to the specifics of a crash investigation:

1. The purpose of a motor vehicle crash investigation shall be to determine if there has been a violation of the law and, if so, to obtain the necessary evidence to prosecute the violator. A secondary purpose is to obtain the necessary information to file the required report . . .
  
3. When an investigation of a motor vehicle crash is warranted, sworn employees shall:
  - a. Conduct a detailed examination of the crash site in order to locate, mark for identification, and preserve all physical evidence. When needed to complete a crash investigation, available expert or technical assistance may be obtained from department sworn employees trained in advanced and reconstruction crash investigation and from sworn employees of the Motor Carrier Safety Team.
  
  - b. Locate and interview all persons who may have information relative to the crash under investigation, including the involved motor vehicle operators.
  
  - c. Utilize Accident Investigation Field Note pad (SP-50) to record the details of their investigation. . .
  
  - f. Sworn employees are required to provide their name, code/badge number, and area office telephone number, in writing, to traffic crash victims in the space provided in the Accident Investigation Field Note pad (SP-50).

Obviously, there is a basic floor of expectations associated with any motor vehicle crash investigation, involving certain specific minimum actions to be taken, such as "conduct a detailed examination of the crash site in order to locate, mark for identification, and preserve all physical evidence" etc. In this case the Grievant did not even stop at the point of impact so his argument that he should be excused a certain inexperience is logically flawed. If anything, his inexperience should have mandated at least a stop. Additionally, the Department's General



Orders and standards of conduct do not distinguish between more and less experienced personnel.

General Order No. 17 provides, in part, as follows:

1. The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of Departmental business and the maintenance of confidence by citizens of the Commonwealth. The purpose of this General Order is to prescribe some general standards of conduct for employees . . .
11. Employees will at all times be courteous, patient, and respectful in dealing with the public, and by an impartial discharge of their official duties earnestly strive to win the approval of all law-abiding citizens. . .
32. Sworn employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department policies and procedures, Departmental training, and supervisory recommendations.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Accordingly, the evidence supports the finding and decision of the investigating officer and the position of the Department that the Grievant undermined the effectiveness or efficiency of the Department's activities, etc. when the Grievant discussed with the Deputy Sheriff, in the presence of the complainant citizen, the Grievant's ongoing, personal domestic issues.

Similarly, the evidence clearly supports the finding and decision of the investigating officer and the position of the Department that the Grievant, without permission, left his assigned

duty station of an Interstate Highway for more than two (2) hours to check up on his wife and children at the gated community. The Grievant, by counsel, argued that the Grievant himself had the right to decide where to go and where his presence was most needed. However, this was clearly not Department policy and would obviously impair or even render meaningless any organizational and planning effort by Management if it were the case. Additionally, because of obvious conflict of interest concerns, the Grievant's usefulness at his self-chosen duty station was shown to be extremely limited when his dispatch was cancelled concerning the welfare check request the Grievant himself called in to the Sheriff's Office.

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant, by counsel, has also argued that the disciplinary action taken by Management was too harsh. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The seriousness of the Grievant's violations of Agency policy and procedures and his three (3) prior active Written Notices preclude a lesser sanction. The hearing officer agrees.

### DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the respective Group II and Group III Written Notices terminating the Grievant's employment, and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action and termination of employment concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

### 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. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 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, Suite 400, Richmond, Virginia 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 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 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.

ENTER:

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).