

Issue: Group II Written Notice (failure to follow instructions and policy); Hearing Date: 04/17/08; Decision Issued: 04/21/08; Agency: VSP; AHO: Thomas J. McCarthy, Jr. Esq.; Case No. 8790; Outcome: Full Relief.

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re: Case Number 8790

**Hearing Date: April 17, 2008**

**Decision Issued: April 21, 2008**

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
3 Witnesses for Agency  
4 Witnesses for Grievant

**ISSUES**

The parties, by counsel and representative agreed in the pre-hearing conference on April 4, 2008, that the issue for this hearing is: "Did Grievant fail to follow his Supervisor's instructions [e.g. by leaving his assigned Duty Post] by using his issued department vehicle for unofficial businesses outside his assigned Duty Post?"

**FINDINGS OF FACTS**

On October 29, 2007, Grievant, a 15 year veteran trooper, was served a Group II written notice based on two allegations, to-wit:

Allegation No. 1: "You failed to follow supervisors' instructions in violation of General Order 17 of the State Police Manual. Specifically, you were instructed to be in your assigned Duty Post during working hours, except when conducting official Department business. These instructions were provided to you by your First Sergeant on May 23, 2007 and June 7, 2007, and by your Captain on September 17, 2007. It is alleged that you violated these instructions on September 12, 2007 and September 18, 2007."

Allegation No. 2: "You improperly utilized your issued Department vehicle while conducting personal business on September 12, 2007; September 13, 2007; and September 18, 2007, in violation of General Order 33 of the State Police Manual."

After considering the facts and mitigating circumstances both offenses were combined when considering disciplinary action and a Group II written notice was issued by Grievant's Captain.

Grievant lived in the County where his Headquarters was located.

Grievant was assigned as an undercover Special Agent to work with a drug enforcement team made up of representatives from a local police department, a county sheriff's office and Grievant.

Grievant had been divorced from his first wife since April 13, 2006. His first wife had moved from the former marital residence and only returned to it once or twice per month.

In refinancing a van which was turned over to his ex-wife, Grievant was due a refund check from the finance company which was to be mailed to the former marital address.

Grievant had been ordered by his Captain to have no contact with his ex-wife, except for matters pertaining to their children.

Grievant had been instructed to be "...in your assigned Duty Post during working hours except when conducting official Department business."

His Duty Post was the county adjacent to the county where his Headquarters was located.

Grievant, on two occasions six days apart, left the task force Headquarters in his Duty Post county and drove an unmarked vehicle to a community in the Duty Post county to do surveillance on a suspected drug manufacturer/dealer. Upon completion of his surveillance each day en-route home or to obtain court records, he drove by his former marital residence in his Headquarters county to check to see if the refund check was in the roadside mail box, knowing his ex-wife would not be there.

While at the mailbox he checked, as requested by his ex-wife, to see if dogs in a pen behind the house had water and on one occasion picked up some of his tools.

A neighbor lady reported his visits.

On one occasion, he drove on from the former marital residence to a County Courthouse to get CCRE numbers from the Circuit Court Clerk's Office. The numbers were not available, so he did not report this trip to his Headquarters.

On one occasion while in his issued vehicle, he stopped at a doctor's office.

Testimony was heard that minor stops for coffee, to pick up dry cleaning, etc., all personal matters, were routinely done in issued vehicles. The supervisor indicated that the stops in Allegation 2 “didn’t matter to him”.

Testimony was Grievant had been reported for not being at his Duty Post or available.

Testimony from a former Supervisor First Sergeant, the Sheriff’s Office Sergeant who led the task force, and a former Special Agent, all agreed that Grievant was always available when on duty in the Duty Post area.

A complaint from one task force member that she couldn’t reach Grievant, from the evidence appeared to be an attempt by her to cover the fact that she always called another Special Agent not assigned to her county or her task force rather than Grievant.

Grievant’s Captain consolidated the two allegations into one Group II after giving Grievant credit for mitigating circumstances.

From the testimony presented, Grievant did have permission from the task force leader to leave his post after a mass drug arrest when Grievant had arrested those assigned to him to arrest.

### **APPLICABLE LAW, POLICY AND PROCEDURES**

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 the workplace.” Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth’s grievance procedure and provides, in 2.2-3000A:

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 Section 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.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

The following policies were admitted and considered as an exhibit:

Commonwealth of Virginia, Department of State Police General Orders 17, 19, and 20.

### **CONCLUSIONS OF LAW AND POLICY**

After hearing the testimony presented, particularly the testimony by supervisors and former supervisors within the State Police and senior members of the drug task force in Grievant's Duty Post assignment, I concur the combining of the two alleged offenses into one offense when considering disciplinary actions. Based on the testimony presented by senior personnel, both now or formerly with the Department of State Police with regard to the accepted practice of using assigned vehicles for short stops for personal matters, I cannot find that a violation of General Order 19 - 13(b)(1) occurred.

Grievant's stops at his former mailbox in an attempt to retrieve mail on which he was one of the two addressees were not contacts with his ex-wife and were either on one of his possible routes home after duty or to the Courthouse on official business.

The complaint from a member of the drug task force was from a member of the task force who Grievant had complained to his First Sergeant was bypassing him and going to another special agent not assigned to the drug task force in his Duty Post county. The First Sergeant did not allow Grievant to take this complaint to his Captain.

### **DECISION**

The two allegations having been consolidated to one Group II, were not substantiated by the testimony or the exhibits. The Group II Notice was the only formal discipline on the properly consolidated charges. The Group II action of the Virginia State Police is reversed and recommended to be dismissed.

### **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 faxes 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 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.

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**Thomas J. McCarthy, Jr.**  
**Hearing Officer**