

Issue: Group III Written Notice (failure to follow policy), and Suspension; Hearing Date: 04/11/08; Decision Issued: 04/25/08; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8816; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8816

Hearing Date: April 11, 2008

Decision Issued: April 25, 2008

PROCEDURAL HISTORY

On December 3, 2007, Grievant was issued a Group III Written Notice of disciplinary action with a three workday suspension for violation of written policy.

On January 2, 2008, Grievant timely filed a grievance 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 March 12, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 11, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 employs Grievant as a Trooper. He has receiving training regarding pursuing a fleeing vehicle. This training included the Agency's expectations regarding a Trooper not shooting into a fleeing vehicle. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On January 22, 2007 at approximately noon, Grievant was working radar when he observed Mr. D¹ driving his vehicle in a reckless manner in a congested Interstate highway at a speed of 88 miles per hour in a 55 mile per hour zone.² Mr. D was driving a vehicle owned by Mr. P and containing one male and two female passengers. Grievant initiated a pursuit. He was driving his State Police vehicle with his emergency equipment activated. Grievant fell behind Mr. D's vehicle, but Mr. D sped away. Mr. D's vehicle attempted to change lanes but then Mr. D applied the vehicle's brakes to avoid hitting traffic. Grievant's vehicle hit the rear of Mr. D's vehicle. Both vehicles continued driving on the Interstate.

Mr. D's vehicle left the Interstate by driving down the exit ramp at R Road. Grievant followed Mr. D's vehicle down the exit ramp. At the bottom of the ramp, Mr. D's vehicle turned and struck Grievant's vehicle. Mr. D continued to drive his vehicle up

¹ Mr. D was a convicted felon.

² Speeds 20 miles above the posted speed limit constitute reckless driving.

the ramp in the wrong direction. Grievant drove his vehicle up the exit ramp in the wrong direction to follow Mr. D's vehicle.³

Grievant continued driving his vehicle to pursue the suspect's vehicle southbound on L Parkway.⁴ Both vehicles crossed the concrete median into the northbound lane. Grievant's vehicle struck a yield sign with the right side of his vehicle. Both vehicles then crossed the grass median into the parking lot of LP where Grievant's vehicle struck a light pole with the right front of his vehicle. Mr. D continued to drive his vehicle to the left and then began an "upside down" U-turn around a Hotel.⁵

Grievant exited his wrecked vehicle and ran from the left front side of the Hotel to the right front side of the Hotel. He ran into the driving lane of the parking lot on the right side of the Hotel. Instead of stopping his vehicle in the back of the Hotel, Mr. D had driven his vehicle around the back of the Hotel and was now driving from the back right side of the Hotel to the front right side of the Hotel and directly towards Grievant. The oncoming vehicle posed a threat to Grievant's life. Grievant used his weapon⁶ to shoot approximately four bullets at Mr. D as the vehicle accelerated towards Grievant. None of the bullets hit Mr. D. One of the bullets hit the driver's side "A frame" or "A pillar" which holds the windshield in place. Grievant began to move backwards and fell down. Mr. D's vehicle passed to Grievant's side and struck a curb as Mr. D was attempting to turn the vehicle to his left. Markings on the curb show that the wheels of Mr. D's vehicle were spinning and that the vehicle moved to the left down the curb for a few feet and then the vehicle turned completely to Mr. D's left and proceeded away from Grievant. Grievant stood up to kneeling position or to a standing position and pointed his weapon in the direction of the back window of Mr. D's vehicle. Grievant fired approximately four bullets towards Mr. D's vehicle.⁷ One of the bullets shattered the back window of the vehicle, passed through Mr. D's right arm and landed in the driver's side dash board.⁸ The angle of the bullet's path showed that Grievant had fired while the rear of Mr. D's vehicle was facing Grievant and the front of Mr. D's vehicle was pointed in a direction away from Grievant. Mr. D continued to drive away from Grievant and Grievant stopped shooting. As Mr. D's vehicle was attempting to re-enter the roadway, one of the passengers exited the moving vehicle. Grievant detained that person. Mr. D and the remaining two female passengers were later located and apprehended approximately a mile away from the Hotel.⁹

³ Grievant drove approximately 700 feet up the ramp in the wrong direction.

⁴ Both vehicles were traveling above the posted speed of 45 miles per hour.

⁵ Mr. D drove his vehicle from the front left of the Hotel to the back left of the Hotel and then behind the Hotel to the right rear of the Hotel. He then drove from the right rear of the Hotel towards the right front of the Hotel where Grievant was standing.

⁶ Grievant's firearm was a .357 semi-automatic pistol.

⁷ Grievant shot a total of eight bullets that day.

⁸ The bullet was recovered from the dashboard approximately one inch below the top of the dashboard.

⁹ Over a dozen people witnesses near the Hotel and in nearby restaurants witnessed various parts of the incident.

In accordance with Agency procedure, the matter was investigated criminally and referred to the local Commonwealth's Attorney for possible prosecution. The Commonwealth's Attorney completed his investigation of the use of deadly force and wrote a letter to an Agency manager outlining his conclusion. The Commonwealth's Attorney noted that "[i]t is not my position nor my role to determine whether proper policies or procedures were followed". He concluded that Grievant was within his legal authority and justified in the use of deadly force. The Commonwealth's Attorney declined to prosecute Grievant.

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).

General Order 57 governs use of Emergency Vehicle Operation. The purpose of General Order 57 is "to establish guidelines for sworn employees of the Department of State Police to follow when they are operating a departmental vehicle in an emergency response, overtaking, intercepting, or clocking a violator, or in a pursuit situation." Paragraph 6(d) governing vehicle pursuits states:

No pursuit will be conducted in a direction against the lawful flow of traffic on a one-way street or lane of a divided highway.

Grievant was pursuing Mr. D on a one-way lane of a divided highway. He followed Mr. D through the exit of that highway. The exit was a one-way roadway. Mr. D turned his vehicle and drove the wrong way up the exit ramp lane. Grievant followed Mr. D and drove on the paved portion of the exit ramp in the wrong direction. Grievant conducted a pursuit in a direction against the lawful flow of traffic on a one-way lane thereby justifying the Agency's conclusion that Grievant violated General Order 57. The Agency combined this offense with the disciplinary action issued for use of unnecessary force.

General Order 62, paragraph 13 provides that:

Sworn employees shall use only the force which is necessary and proper to take a person into custody and safely detain and deliver to confinement or to disperse persons participating in an unlawful assembly. ***

Paragraph 15 states:

The value of human life is immeasurable in our society. Police officers have been delegated the awesome responsibility to protect life and property and apprehend criminal offenders. The apprehension of criminal offenders and protection of property must at all times be subservient to the protection of life. The officer's responsibility for protecting life must include his/her own.

a. It is the policy of the Department that a sworn employee may only use deadly force to protect his/her life or the life of others from what the sworn employee reasonably believes to be an immediate threat of death or serious physical injury. ***

b. Shooting at a moving vehicle. Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force other than the vehicle. For purposes of this General Order, the moving vehicle itself shall not presumptively constitute a threat that justifies a sworn employee's use of deadly force. An officer threatened by an oncoming vehicle shall move out of its path instead of discharging a firearm at it or its occupants.

The Agency did not base its disciplinary action against Grievant regarding his use of deadly force when Mr. D's vehicle was approaching him and he fired at the front of the vehicle. Accordingly, the Hearing Officer will not consider that aspect of the case as a basis to discipline Grievant.

Grievant shot at the vehicle from the rear as Mr. D was attempting to drive the vehicle away from Grievant. Grievant's life was not in danger from the fleeing vehicle. Grievant was not authorized by policy to use deadly force to protect his life at that time. When Grievant fired at the fleeing vehicle, he placed the lives of Mr. D and the three occupants in jeopardy. There was no reason to believe that anyone other than Mr. D had violated any laws at that point. By shooting at the rear of the fleeing vehicle, Grievant acted contrary to General Order 62.

"The use of unnecessary force during an arrest/custody procedure" is a Group III offense.¹⁰ By shooting at Mr. D's vehicle as it was moving away from Grievant, Grievant used unnecessary force thereby justifying the issuance of a Group III Written Notice. A suspension of up to 30 workdays is authorized by the Agency's Standards of Conduct and, thus, Grievant's three workday suspension must be upheld.

Grievant contends that Mr. D's vehicle was backing up towards him to run him over and, thus, his life was in jeopardy when he shot through the back windshield of the vehicle. The evidence is insufficient to show that Mr. D was backing his vehicle at the time Grievant used his weapon. Grievant argues that the way the bullet entered Mr. D's right arm showed that his right arm was raised in a manner that would indicate that Mr.

¹⁰ General Order 62, paragraph 14(b)(27).

D was looking backward as if to back up.¹¹ Although this is possible, it is also possible that Mr. D's body was bouncing or reacting to the impact of the vehicle with the curb or that Mr. D was turning to drive the vehicle in a manner that would enable him to avoid gunshots from Grievant. In short, the evidence relating to Mr. D's gunshot wound is not sufficient to establish the direction of the movement of Mr. D's vehicle. The weight of the evidence suggests that Mr. D was attempting to flee away from Grievant and not run over him. This is based on the statements of the numerous witnesses who viewed Mr. D's vehicle, the markings on the curb, and the fact that Mr. D ultimately drove his vehicle out of the parking lot.

Grievant argues that the Commonwealth's Attorney's conclusion that use of deadly force was justified should be adopted for this disciplinary action. This argument fails. The Commonwealth's Attorney was examining the case from the perspective of whether criminal charges should be filed against Grievant. The Commonwealth's Attorney states in his letter that he is not expressing an opinion regarding whether Grievant violated Department policies and procedures. Facts that are sufficient to establish a violation of Agency policy may not necessarily be sufficient to show that a crime occurred. Showing that a crime did not occur does not establish that Agency policies were not violated.

Grievant contends the Agency did not timely issue disciplinary action. Although a timely issuance of discipline is always preferred, in this case the Agency's delays were justified by the necessity of the investigations. The initial investigation was conducted by the Bureau of Criminal Investigations whose purpose was to examine the criminal aspects of the incident and present its findings to the Commonwealth's Attorney. Following that criminal investigation, the Agency initiated an administrative investigation regarding whether Grievant's conduct was justified. Because the finding of that investigation was that Grievant's conduct was not justified, the Agency initiated an administrative investigation into whether disciplinary action should be taken. There is no reason to believe that the Agency's delays caused the evidence at the hearing to be less reliable. Each of the Agency's investigations was conducted within its authority and designed to enable the Agency to reach the most reliable conclusions possible. In short, the Agency's delays were justified and appropriate under the circumstances.

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...."¹² 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-

¹¹ According to medical personnel, the entrance wound came from the anterior and the exit wound was found on the posterior of the right arm of Mr. D.

¹² *Va. Code § 2.2-3005.*

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 employees¹³, 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.¹⁴

This case is very difficult. On the one hand, there is a risk of second-guessing the actions of an employee who engaged in a high-speed pursuit and was threatened by an oncoming vehicle. An employee under these circumstances may not be in the best position to make decisions affecting his career. On the other hand, the Agency has demonstrated that it has given Grievant proper training regarding how to address situations where decisions made in mere moments can affect the lives of many people including his career.

DECISION

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

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:

¹³ Grievant argued the Agency inconsistently disciplined its employees. The chart and evidence presented is insufficient for the Hearing Officer to determine the underlying facts of the cases for which Grievant contends lesser discipline was issued. Based on the evidence presented, the Hearing Officer cannot conclude that the Agency engaged in the inconsistent application of disciplinary action.

¹⁴ Grievant argued that the Agency had permitted its officers to drive the wrong way on interstate ramps as part of an operation to stop drag racing on a highway. Although an Agency sanctioned action of driving the wrong way on an exit ramp is materially different from an officer independently driving the wrong way on an exit ramp, Grievant's example has no bearing on the outcome of this case. If the Hearing Officer assumes for the sake of argument that Grievant's driving the wrong way on the exit ramp should not for a basis for disciplinary action, there remains sufficient evidence to support the issuance of a Group III Written Notice with respect to Grievant's use of force.

Director
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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.