

Issues: Group III Written Notice (conduct undermining agency's effectiveness), Demotion and Transfer; Hearing Date: 04/17/08; Decision Issued: 04/21/08; Agency: VSP; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8858; Outcome: No Relief – Agency Upheld in Full; **Judicial Review: Appealed to Circuit Court (05/05/08); Outcome pending.**

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re: 8858  
Grievance Filed December 19, 2007

**Hearing Date: April 17, 2008**  
**Decision Issued: April 21, 2008**

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
5 Witnesses for Agency  
1 Witness for Grievant

**ISSUES**

The parties, by counsel and representative agreed in the pre-hearing conference on April 4, 2008, that the issues for this hearing are: "Did Grievant fail to follow a Circuit Court order by not executing documents necessary to vest title in a 2003 Ford Windstar to his ex-wife, and after borrowing said vehicle, fail to return it to her after repeated requests?"

**FINDINGS OF FACTS**

Grievant, a 15 year veteran trooper was divorced by order of the Wythe County Circuit Court dated April 13, 2006. A Separation Agreement between Grievant and his about to be ex-wife was approved in the divorce decree and the parties were directed to comply with its terms.

By the Agreement, the Grievant agreed to turn over to his about to be ex-wife a 2003 Ford Windstar Van and assume payments for it.

Grievant borrowed the van from his ex-wife to take his girlfriend to the beach. Grievant discovered that the van had a faulty right front wheel bearing and needed three tires. He had the bearing repaired and three new tires installed. Because of the condition of the van and mechanical problems with his own vehicle he did not return

the van to his ex-wife even after she requested him to do so. On September 10, 2007, a State Police First Sergeant met Grievant in the Headquarters parking lot and demanded the keys to the van. They were relinquished on the threat of Grievant being charged with unauthorized use.

Grievant's wife had not complied with Grievant's repeated attempts and requests to her to get the vehicle, which he had agreed to pay for, in her name.

An anonymous complaint was filed with the State Police that Grievant's second wife was bragging to the public that she was driving Grievant's first wife's van which she would not have to relinquish because troopers were involved, and no one would enforce the Court order.

The area Commonwealth's attorney testified that a court would probably dismiss any criminal charges on the matter as being a civil law question.

The failure to transfer the vehicle title to the first wife and failure to return the vehicle to her were combined for the purpose of punishment into one Group III offense with demotion to Trooper II and transfer within his Division to a different area, a different duty post in a different county.

### **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 Order 19, 14(b)(2-a).

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

Grievant, by refusing to return the van to his ex-wife in a timely fashion caused a complaint to the State Police, the appearance of which substantiated a violation of General Order 19, 14.b.(20), "(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."

The failure to get the title to the vehicle transferred to the ex-wife was testified to by a Commonwealth's Attorney to be a civil matter which might very well have been thrown out by a judge if it had been brought as a criminal matter.

### **DECISION**

The failure to return the borrowed van, which although it may have been titled to Grievant, was agreed to and ordered turned over to Grievant's first wife, constituted misconduct. This allegation is substantiated. On the "failure to obey a court order" allegation, the Grievant clearly was slow in getting this done and failure to obey a court order constitutes misconduct, so the allegation is less enthusiastically sustained since the evidence was that the ex-wife did not cooperate.

The combining of the two offenses into one Group III violation by the State Police was consistent with law and policy and was entirely reasonable since Grievant was not terminated.

From the evidence and for the reasons set out above, the two allegations against the Grievant are sustained and the combination of the two offenses into one Group III violation with demotion to Trooper II and transfer is proper and is sustained.

## 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**