

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (making a false statement), Suspension, Demotion; Hearing Date: 09/24/08; Decision Issued: 02/17/09; Agency: Capitol Police; AHO: Carl Wilson Schmidt, Esq.; Case No. 8915, 8916; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 03/04/09; Reconsideration Decision issued 03/23/09; Outcome: Original decision affirmed; Administrative Review: EDR AR Request received 03/04/09; EDR Ruling #2009-2245 issued 05/04/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM AR Request received 03/09/09; DHRM response issued 03/31/09; Outcome: Request untimely; Judicial Review: Appealed to Circuit Court in City of Richmond on 06/04/09; Outcome pending.**



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

DIVISION OF HEARINGS

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8915 / 8916**

Hearing Date: September 24, 2008  
Decision Issued: February 17, 2009

**PROCEDURAL HISTORY**

On April 16, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to conduct an inventory as instructed by a supervisor. On April 16, 2008, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension and demotion to a Patrolman and 8.39% disciplinary pay reduction for making a false statement.

On May 13, 2008, Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and he requested a hearing. On August 12, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2008, a hearing was held at the Agency's regional office.

The Division of Capitol Police is an agency of the Legislative Branch of Virginia State Government. As such, the Division of Capitol Police is not subject by statute to the Virginia Personnel Act (VPA) and the Standards of Conduct promulgated by the Department of Human Resource Management (DHRM).

However, the Division of Capitol Police has, in effect, adopted both the DHRM Standards of Conduct for use by its employees. Moreover, for purposes of this hearing, the Division of Capitol Police made a policy decision to utilize the services of the Department of Employment Dispute Resolution (EDR). Because the Agency has opted to utilize the EDR grievance process, the hearing was conducted pursuant to the VPA and EDR policies and practice. Similarly, this decision reflects the principles that govern such grievance decisions and offers the same administrative appeal rights afforded to executive branch employees.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Division of Capitol Police employed Grievant as a Lieutenant until his demotion to a Patrolman effective April 17, 2008. Grievant began working for the Agency in August 1979. He became a Lieutenant in 1999 and had been assigned quartermaster duties since August 2001. Grievant's Employee Work Profile sets one of Grievant's expectations as:

Perform the quartermaster function of the agency by providing professional management of agency equipment, supplies and associated items. This will include inventory of existing property.

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On August 24, 2001, Captain J instructed Grievant to finish supply room inventory by September 15, 2001. Grievant completed a 2001 inventory.

Captain B had been Grievant's supervisor from August 2001 to January 7, 2008. Captain B had been putting pressure on Grievant to complete the inventory in July 2007. On August 2, 2007, Captain B wrote a memo to the Chief stating:

Attached is [Grievant's] proposed schedule for the Supply Room. I've spoken with him and he's prepared to implement this schedule by August. He's already started working on the inventory of what he currently has on hand in the facility. He assures me it will be ready for inspection by September 1, 2007, if he implements the schedule he's provided me.<sup>1</sup>

Captain B inspected the supply room for neatness and cleanliness on September 13, 2007. Grievant had not completed the inventory at that time. At the beginning of October 2007, Captain B asked Grievant how the inventory was coming along. On October 10, 2007, Grievant told Captain B that he should have the inventory completed within a week. In Grievant's October 30, 2007 evaluation, Captain B wrote, "[Grievant] needs to continue to work to complete the inventory of the agency's property."

During a staff meeting on November 14, 2007, Grievant asked the Chief whether his status as quartermaster would change during the General Assembly session. The Chief responded that the Agency needed to interview for a part-time position. She added that all of the inventory must be completed before Grievant's duties were turned over to the part-time quartermaster.

On Monday, January 7, 2008, Major H walked through the quartermaster section and noted things were orderly, neat, and clean. Major H returned to Grievant's office and asked about the status of the inventory. Grievant said the inventory was not complete. Major H asked Grievant when the inventory would be complete and Grievant responded "the first day of session." The first day of the General Assembly's session would be Wednesday, January 9, 2008.

On January 14, 2008, Colonel K instructed Lieutenant G to check with Grievant and obtain the documentation concerning the inventory. Lieutenant G went to Grievant and asked for documentation regarding the inventory. Grievant said he did not have any. Lieutenant G asked Grievant how much work Grievant had done on the inventory. Grievant responded, "none, I haven't even started it yet." Grievant told Lieutenant G he had not started the inventory because he was under the impression that he did not need

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<sup>1</sup> Agency Exhibit 4.

to do an inventory since he thought a new person would be taking over those duties. Grievant explained that he was aware of discussion of hiring a civilian to take over the quartermaster duties. Grievant also said he had been busy with other duties such as getting uniforms for officers and moving the Major's desk.

## 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."<sup>2</sup> 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. Grievant had been repeatedly instructed by his supervisors to complete an inventory. Grievant's supervisor, Captain B, instructed Grievant in 2007 to complete an inventory but he did not comply with that instruction. Major H instructed Grievant on January 7, 2008 to complete the inventory and even permitted Grievant to select the due date. Grievant selected the completion date of January 9, 2008 but failed to complete an inventory by that date. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with a supervisor's instructions.

Grievant argued he was not provided with sufficient training to complete an inventory. Conducting an inventory consists of identifying items, counting them, and recording the count. The evidence is insufficient for the Hearing Officer to conclude that Grievant's responsibility was so great that he could not conduct an inventory without training.<sup>3</sup> Grievant told the Agency's Investigator that the last inventory he remembered completing was in 2003.

Grievant argued that he was given other duties after January 7, 2008 that prohibited him from completing the inventory.<sup>4</sup> Although Grievant was given duties in addition to completing the inventory, the evidence is insufficient to show that those duties prohibited Grievant from completing the inventory. If Grievant could not have

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> If Grievant could not conduct an inventory, he should have informed his supervisor each time he was instructed to conduct an inventory. Grievant's response to his supervisors was that he would begin working on the inventory.

<sup>4</sup> Grievant's position was exempt from the overtime provisions of the Fair Labor Standards Act.

completed the inventory by the due date, he should have brought that matter to Major H's attention and sought guidance.<sup>5</sup>

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

It is the Agency's judgment that a sworn law enforcement officer who is untruthful should be subject to a Group III offense. The Agency's opinion is based on the value it places on honesty. Agency sworn law enforcement officers may be obligated to testify in court and have their truthfulness challenged. Agency sworn law enforcement officers are obligated to "display a high degree of integrity as explained by the *Law Enforcement Code of Ethics* and "adhere to the *Law Enforcement Oath of Honor*." The Agency's judgement is consistent with DHRM Policy 1.60 which specifies that falsifying a document is Group III offense.

On January 7, 2008, Grievant told Major H that he would complete the inventory by January 9, 2008. Grievant knew or should have known that he could not complete the inventory by that date and that he did not intend to timely complete the inventory. By telling Major H that he intended to complete the inventory by January 9, 2008 when in fact he did not intend to complete the inventory, Grievant knowingly made a false statement to Major H. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an Agency may remove an employee. In lieu of removal, an agency may suspend up to 30 workdays, transfer, demote and/or impose a disciplinary salary reduction on the employee. In this case, Grievant's ten workday suspension with demotion and disciplinary pay reduction must be upheld.

Grievant contends that at the time he told Major H that he intended to complete the inventory he actually intended to complete the inventory. Grievant had not completed an inventory since 2003. Grievant had repeatedly informed Captain B that he would complete the inventory but never did so. It is not likely that Grievant actually intended to complete the inventory when he said he would do so on January 7, 2008. It is more likely that he intended to appease Major H by saying he would complete the inventory but then would not complete the inventory as was his pattern in response to Captain B's requests. Grievant did not have a present intent to complete the inventory.

*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

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<sup>5</sup> Grievant asserted that he spoke with Major H about whether to move a desk or complete the inventory and Major H indicated Grievant should forgo the inventory and focus on moving the desk. The evidence is insufficient to support this assertion. It is not believable.

Resolution....”<sup>6</sup> 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-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 employees, 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.

Grievant argued that he is being charged with the same offense twice and, thus, the Agency can proceed under only one Written Notice. This argument fails. Although the one set of facts gave rise to the disciplinary actions, those facts give rise to two separate offenses. Grievant’s inaction gave rise to the Written Notice for failure to comply with a supervisor’s instruction. Grievant’s action of stating that he would complete the inventory by January 9, 2008 gave rise to the Written Notice for dishonesty. The Agency has presented sufficient facts to support the issuance of two written notices.

Grievant argues that the Agency should have offered him the opportunity to take a polygraph test to establish his truthfulness. Nothing in State policy requires an Agency to offer an employee the opportunity to take a polygraph test. The Agency’s failure to offer a polygraph test is not relevant to the outcome of this case.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor’s instruction is **upheld**. The Agency’s issuance to the Grievant of a Group III Written Notice with suspension and demotion and disciplinary pay reduction for making a false statement 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.

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<sup>6</sup> Va. Code § 2.2-3005.

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:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> 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  
600 East Main St. STE 301  
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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8915 / 8916-R**

Reconsideration Decision Issued: March 23, 3009

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends the original Hearing Decision contains errors of law. He does not cite the laws that were violated. He refers to a statement by a witness about the obligation of sworn law enforcement officers testifying in court. The Hearing Decision did not rely upon that testimony to issue the original Hearing Decision. The original Hearing Decision does not contain errors of law.

Grievant contends the original Hearing Decision was inconsistent with policy. Contrary to Grievant’s assertion, the Hearing Officer considered his years of employment and otherwise satisfactory job performance regarding whether the disciplinary action against him should be mitigated. Grievant’s objects to the lack of training he received. Grievant’s assertion that he lacked sufficient training to perform an

inventory is consistent with the Agency's contention that he did not actually intend to conduct an inventory even though he stated he would do so. In other words, Grievant knew he did not intend to conduct an inventory because in his mind he lacked the ability to do so. A Notice of Improvement Needed/Substandard Performance is not a prerequisite to the issuance of disciplinary action.

Grievant contends the original Hearing Decision is contrary to the grievance procedure. Any delay in issuing a hearing decision is not a basis to grant relief to a grievant. The hearing was scheduled following a prehearing conference on a date agreed to by all parties. The Agency met its burden of proof to show that disciplinary action was appropriate.

Grievant disputes some of the facts of the original Hearing Decision. Grievant has not presented any new evidence regarding the findings of fact. The Hearing Officer considered all of the written exhibits and testimony of witnesses to reach a conclusion. Grievant's version of several key facts was unsupported by the more credible evidence presented at the hearing by the Agency.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

## **APPEAL RIGHTS**

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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Carl Wilson Schmidt, Esq.  
Hearing Officer

March 31, 2009

RE: **Grievance v. Division of Capitol Police**  
**Case No. 8915/8916**

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised in the Grievance Procedure Manual, §7.2(a), either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request for an administrative review is made, the request must be received by the appropriate entity within 15 calendar days of the original hearing decision. Concerning your request for review, our records show that the original hearing decision was issued on February 17, 2009. Our records also show that your request for an administrative review was received at the Department of Human Resource Management on March 9, 2009, which is twenty days after the date the hearing officer issued his original decision. In accordance with the grievance procedure, that timeframe exceeded the permissible period for your request to have been received by this Agency. Therefore, we must respectfully decline to act on your request.

Sincerely,

Ernest G. Spratley