

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 11/24/08; Decision Issued: 11/25/08; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8956; 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: 8956

Hearing Date: November 24, 2008
Decision Issued: November 25, 2008

PROCEDURAL HISTORY

On June 12, 2008, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On July 10, 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 she requested a hearing. On October 2, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 24, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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. She has been employed as a Trooper by the Agency since February 2007. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On March 29, 2008, Trooper A was notified by the Dispatcher of a possible drunk driver driving on a highway. The highway had three lanes in one direction. Trooper A began driving behind the suspect. Grievant was also in the area and began driving her vehicle on the suspect's left side. They followed the suspect for approximately 1.5 miles. The suspect was weaving in between the broken lines of the center lane. Grievant did not see the suspect's vehicle cross the white line. Trooper A and Grievant spoke on the radio and Grievant said that the suspect's inspection and vehicle tags were okay. Trooper A said "yeah but he is all over the road". Grievant responded "he hasn't crossed the white line". Trooper A said "you have [probable cause] to pull them over, do you want him or not? If not, I'm going to take him". Grievant indicated she would pull the suspect over to the side of the road. The suspect stopped his vehicle.

Grievant approached the suspect's vehicle on its passenger side. She asked the suspect to roll down the window. He leaned over towards the passenger side and rolled down the window. Grievant spoke to the suspect briefly and then walked to the driver's side of the vehicle. When the suspect rolled down his window, Grievant could smell the odor of alcohol. She asked the suspect how much he had to drink. He responded one beer.¹ She asked him why he decided to drink and drive. The suspect replied because

¹ The suspect later admitted to drinking more than one beer.

his brother was sick. The suspect's eyes were bloodshot and glassy but his speech was not slurred. He spoke in "broken English" and advised Grievant that he was from another country.

Grievant asked the suspect to perform field sobriety tests and he agreed. The first test she administered was the horizontal glaze nystagmus cast. She advised him that he needed to follow her finger with his eyes as she moved her finger. When Grievant moved her finger to the left side, HGN was slightly present. When she moved her finger to the right side there was no HGN present. The suspect stopped following Grievant's finger several times and would say "ok". The next test was the nine step walk and turn. The suspect performed the test but raised his arms about 6 inches from his side and had several inches between his steps. The next test Grievant administered was the one legged stand. The suspect failed this test.

Grievant asked that the suspect if he wished to take a preliminary breath test. The test showed a result of .124. This level was higher than the .08 standard for intoxication.

The suspect told Grievant that his son was a police officer in another state. Grievant said that she would have to speak with his son. Grievant obtained the son's telephone number from the suspect and then called him, but he did not answer. The suspect provided Grievant with the telephone number for his other son who lived nearby. Grievant called that son and confirmed that his brother was a police officer in another state. Grievant gave that son directions to the location so that he could come and get the suspect.

Grievant walked back to talk to Trooper A and said, "I know you probably don't agree with me, but I'm not locking police officer's family members up." Trooper A said "It is your stop, so you do what you want." He asked Grievant if she "was good" and Grievant responded "Yes". Trooper A left the scene.

Grievant issued the suspect a summons for reckless driving. She released the suspect into the custody of the suspect's son who lived nearby. She permitted the suspect's vehicle to be towed to the suspect's house. Once the vehicle and the suspect were at his home, the suspect paid the tow truck driver's fee and regained control of the vehicle. Based on the testimony of the Agency's witnesses, it is likely that the suspect remained under the influence of alcohol at the time he regained control of his vehicle.

Trooper A watched much of Grievant's interaction with the suspect. He testified that Grievant had probable cause to arrest the suspect for driving under the influence of alcohol.

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).

"Inadequate or unsatisfactory job performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's work performance was inadequate or unsatisfactory because she failed to arrest a suspect for driving under the influence of alcohol. She released the suspect even though he was likely intoxicated. She instructed that his vehicle be towed to his residence where he was able to regain control of that vehicle from the tow truck driver. Had the suspect so desired, he could have reentered his vehicle and continued driving while intoxicated. Grievant failed to charge the suspect with driving under the influence of alcohol because his son was a police officer. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant argues that she did not have probable cause to arrest the suspect. She feared that if the matter was contested in court, the charges would not hold in the absence of probable cause. Grievant's argument fails. Grievant had probable cause to arrest the suspect based on many factors, but in particular, based on Va. Code § 18.2-267 (D) which addresses the preliminary analysis of breath to determine alcohol content of blood. This section states,

Whenever the breath sample analysis indicates that alcohol is present in the person's blood, the officer may charge the person with a violation of an offense listed in subsection A. The persons so charged shall then be subject to the provisions of § § 18.2-268.1 through 18.2-268.12, or of a similar ordinance.

The suspect's preliminary breath test showed a probable blood-alcohol content of .124, an amount above the .08 limitation. Thus, Grievant could have arrested a suspect for driving under the influence of alcohol. Even though the preliminary breath test is not admissible in court, it formed a basis to charge the suspect with driving under the influence so that he could be further tested to determine his blood alcohol content.

Grievant contends that the General Orders authorized her to exercise discretion to warn, summons, or arrest suspects. She exercised her discretion to issue a summons instead of making an arrest. Grievant's argument fails. Grievant's discretion is not without limitation. She must exercise her discretion consistent with the Agency's work expectations. Showing favoritism to a family member of a police officer is not consistent with the Agency's mission to protect the public.

Grievant argues that she did not give preference to the suspect because his son was a police officer in another state. This contention is not supported by the evidence. The testimony of Trooper A shows that Grievant expressed to him a desire not to arrest the suspect because his son was a police officer. Grievant felt it necessary to confirm the suspect's statement by attempting to call the police officer's son. There was sufficient evidence to conclude that Grievant issued a reckless driving summons to the suspect instead of arresting him because his son was a police officer.

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...."² 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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:

² *Va. Code § 2.2-3005.*

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:

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
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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.