

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 03/16/09; Decision Issued: 05/26/09; Agency: Capitol Police; AHO: Carl Wilson Schmidt, Esq.; Case No. 9033; 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: 9033

Hearing Date: March 16, 2009
Decision Issued: May 26, 2009

PROCEDURAL HISTORY

On October 9, 2008, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for violating safety rules where there is a threat of bodily harm and for violating written policy.

On November 7, 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 February 4, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2009, 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 Advocate
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 Division of Capitol Police employs Grievant as a Police Officer. He has been employed by the Agency for approximately twenty years without prior disciplinary action. Grievant's performance evaluations consistently rated Grievant's work performance as satisfactory to the Agency. The purpose of his position is:

Protection of Government officials, legislators, employees, and citizens through the enforcement of state laws and the compliance with policies

and procedures through patrols in the Division's statutory jurisdiction and the maintaining of stationary police posts in assigned properties.¹

On June 13, 2008, Grievant was assigned to work the Governor's Mansion as the Mansion Gate Officer. His post was inside the Guard Shack. An elderly male and female couple entered through the north pedestrian gate, walked past Grievant, stood on the Mansion grounds for approximately twenty seconds and then entered the Mansion through the front doors. The Mansion's Docent encountered the couple inside the Mansion. The elderly man told her that security was lax because there was no one at the gate. The Docent sent the elderly man back to see Grievant while the elderly woman remained on the front porch. The elderly woman was carrying a purse.

Grievant observed several other tourists pass through the gate but failed to inspect their backpacks.

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." 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."²

The Agency's Employee Code of Conduct Section III(B)(6) states, "Employees shall comply with general orders, directives, regulations, and procedures of the Division of Capitol Police." Section III(D)(1)(d) provides, "While on-duty, employees shall remain awake, alert, aware of their surroundings, and attentive to their duties at all times."

The Agency's policy governing the Mansion Gate Post provides that:

Officers should be particularly alert to vehicles or pedestrians approaching any of the security gates.

Officers must closely monitor any open gates to ensure only authorized vehicles and people enter.

All persons entering the Executive Mansion are to be announced to the appropriate Mansion staff member and/or [Executive Protection Unit] via telephone, with the exception of the following:

1. EPU Troopers

¹ Agency Exhibit 6.

² See, General Order 019-A, Disciplinary Procedures & Separation from Service.

2. Division of Capitol Police officers
3. Mansion staff

The Mansion Gate officer will be responsible for screening all members of the public who enter the Executive mansion as part of a tour. The screening will include at a minimum:

1. visual observation
2. Inspection of all purses, carrying cases, or other parcels.
 - Prohibited items:
Firearms. Knives, chemical agents, or any item that could reasonably be used as a weapon.

“Failure to ... comply with applicable established written policy” is a Group II offense.³ Grievant acted contrary to the Agency’s policy governing the position of Mansion Gate officer because he permitted the elderly couple to pass through the gate and enter the Mansion without screening them by visual observation. He failed to inspect the elderly woman’s purse. The Agency has presented sufficient evidence to support the issuance of Group II Written Notice. Upon the issuance of a Group II Written Notice, the Agency may suspend Grievant for up to ten days. In this case, Grievant was suspended for three workdays. That suspension must be upheld.

Grievant contends he did not see the elderly couple because he was distracted by his other duties requested by the Agency. On June 13, 2008, the Agency was setting up a camera system so that Capitol Police officers could watch and monitor a civil rights display. Grievant had to remain in the Guard Shack while the Installer adjusted the video camera so that it would be correctly positioned towards the display. Grievant was to observe the image shown on video monitor inside the Guard Shack and inform the Installer when the Installer had correctly aimed the camera. This required a lot of “trial and error” adjustments to the camera system which required much of Grievant’s time and attention.

Grievant was distracted and did not observe the elderly couple. Grievant’s assertion that had the Installer not been present that day, he would have complied with policy is not supported by the evidence. A video of the Guard Shack shows Grievant approaching a tourist as the tourist attempted to pass through the gate to visit the Mansion. The tourist was wearing a backpack. Grievant approached the tourist and asked if the tourist had a video camera inside the backpack and the tourist said no. Grievant let the tourist enter the Mansion without checking the backpack for weapons or other prohibited items. Had Grievant noticed the elderly man and woman, it is not likely that he would have searched the purse of the elderly woman because she looked like a friendly tourist. Failing to search the elderly woman’s purse would have been a violation of Agency policy. In short, even if Grievant had not been distracted, it is likely he would not have fully complied with Agency policy.

³ Section IV(K)(2)(b)(1), General Order 019-A.

Grievant contends he should have been given training to enable him to perform the post duties. This is not a mitigating circumstance. Had Grievant read the post policy he would have known the requirements of the post without the need for any training.

Grievant contends the post policy was located only at the Guard Shack and not elsewhere in the Agency. He contends he did not have time to read the policy and, thus, did not have adequate notice of its terms. This argument fails. Grievant had worked the Guard Shack post approximately 17 times before over a series of months. Tours were there only approximately four times Grievant was working. Surely Grievant would have had some free time in order to read the post requirements.

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...”⁴ 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 II Written Notice of disciplinary action with 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.

⁴ *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 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.