

Issues: Group III Written Notice (engaging in conduct that undermines agency's effectiveness) and Termination; Hearing Date: 08/04/09; Decision Issued: 08/11/09; Agency: Department of State Police; AHO: Lorin A. Costanzo, Esq.; Case No. 9123; Outcome: Partial Relief. Fee Addendum issued 09/10/09.

**COMMONWEALTH OF VIRGINIA
VIRGINIA STATE POLICE**

**DECISION OF HEARING OFFICER
In re: Case No: 9123**

Hearing Date: August 04, 2009
Decision Issued: August 11, 2009

PROCEDURAL HISTORY

Grievant was issued a Group III with termination on March 16, 2009 for:

"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."¹

The date of the offense was indicated in the Written Notice as October 27, 2007.²

On March 31, 2009, Grievant timely filed a grievance to challenge the disciplinary action. The grievance proceeded through the resolution steps and when the parties failed to resolve the grievance the agency head qualified the grievance for a hearing on May 14, 2009.³ On June 18, 2009 the undersigned was appointed hearing officer in this cause.

Objection and extension:

Agency designated their choice of individual to be Agency's Representative at hearing. Grievant's counsel objected to that choice. Grievant indicated he was in contact with the State Bar and objected to a hearing being conducted with any non-attorney/non-state employee representing the Agency. Grievant's attorney also indicated objection to the July 9th, 2009 hearing date, moved to have the hearing set outside the month of July, and waived the thirty five day period from date of appointment of the hearing officer for a hearing to be conducted.

The hearing officer afforded the parties opportunity to respond to the issue of the Agency's representative at hearing and present their respective positions. The issue was addressed by both Grievant's attorney and Agency's Representative.

§2.2-3004 of the Code of Virginia provides, in pertinent part, "The employee and the agency may be represented by legal counsel or a lay advocate, the provisions of § 54.1-3904

¹ Agency Tab 10. General Order No. 19, Section 14. b. 20.

² Agency Exhibit Tab 1. Written Notice

³ Agency Exhibit Tab 1. Grievance Form A.

notwithstanding."

Upon consideration of the arguments of the Grievant's attorney and Agency's Representative and pursuant to §2.2-3004 of the Code of Virginia, the Hearing Officer determined that Agency Representative could represent Agency at the hearing.

Grievant's Attorney raised issue over the timeline, moved for a hearing date not in July, 2009, and further waived the 35 day period for the decision to be rendered. On Grievant's motion and waiver, upon consideration of the timeline of events in this cause and for just cause, the 35 day period was extended from July 21, 2009 to August 11, 2009, and a hearing was set, by agreement, for August 4, 2009. The hearing was held on 8/4/09 and the written decision is due on or before 8/11/09.

Res Judicata:

On 7/29/09 Grievant's attorney indicated Grievant's position that the grievance hearing is barred by the doctrine of res judicata. Grievant's attorney contended that because the issue of misconduct had been litigated before the Virginia Employment Commission and Grievant was awarded unemployment compensation, Agency was precluded from raising a collateral attack on this ruling by continuing to present evidence of misconduct.

Agency Representative raised the provisions of § 60.2-623 of the Code of Virginia in response to the above. Per § 60.2-623 of the Code of Virginia, no determination or decision rendered under the provisions of §§ 60.2-619, 60.2-620, or § 60.2-622 shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title.

The Hearing Officer indicated that either party may provide any motion, brief, memorandum, etc. that is desired on this matter however, the matter would proceed to hearing on August 4, 2009, as scheduled with the understanding either party may also request a pre-hearing conference call and/or address this matter also on August 4, 2009.

APPEARANCES

Grievant (who was a witness)
Grievant's Attorney

Agency's Representative
Agency Party (Captain) who was a witness)
Special Agent
Sergeant 1
Sergeant 2
Sheriff

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence presented in this cause and observing the demeanor of the witness, the Hearing Officer makes the following findings of fact:

Grievant has approximately 19 years with Agency. Grievant was a Senior Trooper with Agency.⁵ Grievant was issued a Group III Written Notice with termination on March 16, 2009. The Date of Offense was indicated as October 27, 2007.⁶

On 10/27/07, while on duty, Grievant followed two vehicles for around 5 miles that were weaving from side to side. Grievant requested dispatch contact another law enforcement agency to assist. With such assistance both vehicles were pulled over. One vehicle was driven by a male and the other by Female. Grievant approached the vehicle driven by Female and the assisting law enforcement agency approached the male driver. The male driver was determined to be a deputy. When approaching Female's vehicle Grievant asked her if she had anything to drink as he smelled something coming from the car.⁷

After being pulled over, and after Female indicating she had had two drinks, Grievant asked Female to drive her car from where it was to a gravel area across the road. She did so. Grievant had other officer drive Deputy's car there also. Both vehicles were left at the gravel area when Grievant transported Female and officer transported Deputy from the scene. Both Female and Deputy were charged with DUI.⁸

Female was given a preliminary breath test. Grievant did not advise Female of her rights to a preliminary breath test as required by §18.2-267 of the Code of Virginia. No field sobriety tests, other than the preliminary breath test, were given Female by Grievant. Female's

⁴ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

⁵ Agency Exhibit Tab 6.

⁶ Agency Exhibit Tab 1. Written Notice

⁷ Agency Exhibit Tab 3.

⁸ Agency Exhibit Tab 3 and Testimony.

Certificate of Blood Alcohol Analysis indicated .14 and Deputy's Certificate of Blood Alcohol Analysis indicated .19.⁹

At the site of the breathalyzer test room Deputy told Grievant and other officer that he had cocaine on his person and that the cocaine was evidence from a case he was working. Deputy asked Grievant if he could give the cocaine to an officer. Grievant allowed Deputy to give the substance, which Deputy identified as cocaine, to the officer. Subsequently, the officer returned the cocaine to Deputy.

On 9/2/07 Sergeant, Grievant's supervisor, conducted an informal counseling session with Grievant and gave Grievant instructions. Those instructions were also set forth in the document, dated September 5, 2007, signed November 12, 2007, "Subject: Informal Counseling Notice – DUI Arrest/Officer Safety". Grievant was told on 9/2/07, and it was confirmed in the document:

"You will attempt to conduct field sobriety test on all individuals that are subject to arrest for DUI except when to do so would pose a safety hazard to you or the subject, or the subject refuses to perform the tests."

and

"You will store all arrestee vehicles in accordance with Department policy. No arrestee vehicle will be left unattended on the roadside."

The document confirmed that Grievant was informed, in the future, he was to be guided by this instruction and any future deviation from the instruction could be dealt with under the Standards of Conduct.¹⁰

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. 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 pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in part:

"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 employee disputes

⁹ Agency Tab 3 Attachments 4 and 5.

¹⁰ Agency Tab 5, Attachment 19.

which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

The Department of State Police has promulgated General Order No. 17, *General Rules of Conduct* and has promulgated General Order No. 19, *Separation From the Service and Disciplinary Measures*¹¹ which defines Group III Offenses to include acts and behavior of such a serious nature that a first occurrence should normally warrant removal. Examples of Group III offenses are set forth under Section 14 of General Order 19 but Group III Offenses are not limited only to such enumerated acts and behaviors.

General Order No. 19 Section 3. c. provides:

"The standards in this policy are intended to be illustrative but not all inclusive. Accordingly, an offense which, in the judgment of the agency head, although not listed in the policy, undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of this policy."

Group III offenses include:

"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."¹²

Summary of offenses alleged:

Seven offenses were described in the Written Notice issued Grievant on 3/16/09:

1. On 10/27/07 Grievant, after stopping Female for suspicion of driving under the influence of alcohol, prior to arresting her, Grievant instructed her to drive the vehicle she operated across the intersection to a widened area off the highway.
2. On 10/27/07 Grievant failed to advise Female of her rights to a preliminary breath test as required by §18.2-267 of the Code of Virginia.
3. On 10/27/07, after arresting a deputy for driving under the influence of alcohol, Grievant discovered a substance believed to be cocaine and Grievant failed to take possession of the substance until he determined if the substance was legally possessed by the deputy.
4. On 11/14/07 or 11/15/07 Grievant discussed the arrest and cocaine possession of deputy with Sheriff after being instructed on 11/11/07 not to

¹¹ Agency Tab 7. General Order No. 17 (revised January 1, 2007) and Agency Tab 10. General Order No. 19 (revised July 1, 2007).

¹² Agency Tab 10. General Order No. 19, Section 14. b. 20.

discuss this matter with anyone who might have information regarding the investigation. *(The above 11/11/07 date was corrected at hearing to 11/12/07.)*

5. On 7/21/08, during interview in oral responses to Allegation No. 1 Grievant stated part of the reason he instructed Female to drive her vehicle across the highway was because she did not have an order of alcohol about her person. This response conflicted with the statement made on her criminal complaint which stated, "Strong odor of alcohol."

6. On 10/27/07, Grievant failed to follow instructions given him on 9/2/07 when during the two investigations of Female and Deputy for DUI, other than the preliminary breath test, Grievant did not attempt to give Female field sobriety tests.

7. On 10/27/07, Grievant failed to follow instructions given him on 9/2/07 when he did not store Female's and Deputy's vehicles after placing them under arrest.¹³

Agency indicated that Grievant's actions were in violation of one Group I offense, and multiple Group II and Group III offenses.¹⁴ Agency consolidated the offenses into one Group III offense. All offenses were stated in the Group III Written Notice to constitute a violation of General Order 19, paragraph 14.b.(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."¹⁵

Investigation:

An investigation by Agency originated on October 27, 2007, when Agency determined that Grievant had arrested Deputy and Female for driving under the influence of alcohol and during Deputy's arrest Grievant failed to secure cocaine Deputy had in his possession.

Grievant notified Sergeant of the two DUI arrests but did not mention Deputy had cocaine in his possession. That morning Sergeant was told by another Trooper that the Trooper had heard of the arrest, that Deputy had drugs from a work related drug buy in his wallet when arrested, and Grievant allowed Deputy to keep the drugs. Sergeant notified 1st Sergeant of the incident and discussed their concern Grievant did not verify if Deputy legally possessed the cocaine.

It was not until approximately 1:00 P.M. to 2:00 P.M. that Grievant contacted Sergeant by telephone and told him he forgot to tell him about the drugs Deputy had. Deputy told Grievant he had drugs in his wallet from a previous drug buy and he did not have time to secure

¹³ Agency Tab 1. Written Notice.

¹⁴ Agency Tab 3.

¹⁵ Agency Tab 10. General Order No. 19, Section 14. b. 20.

the drugs in the evidence locker in his office. Grievant told Sergeant he did not take possession of the drugs because he believed Deputy's explanation.

On November 9, 2007, 1st Sergeant met with Sheriff regarding the incident. Sheriff indicated he was aware of the arrest but did not know about the drugs. Sheriff indicated he would discuss matters with the Commonwealth Attorney.¹⁶

Offenses:

1. On 10/27/07 Grievant, after stopping a Female for suspicion of driving under the influence of alcohol, prior to arresting her, Grievant instructed her to drive the vehicle she operated across the intersection to a widened area off the highway.

Grievant does not contest that after stopping Female he told her to drive her vehicle across the intersection to an area off the highway. He indicated in writing that he asked her if she had anything to drink because he smelled something coming from the car and she said no. He further indicated he did not smell any alcohol coming from her mouth, her eyes were not bloodshot, and her speech was not slurred. He did not think the Female was impaired and had her remove her car from where it was stopped to a gravel area across the road.¹⁷

Grievant had an in car video camera. Agency review of the videotape recording of the incident from Grievant's car video camera indicated, in pertinent part, that:

at 2:53 A.M. Grievant asked Female if she had been drinking and she said no.

Grievant told her she was driving all over the road.

at 2:54 A.M. Grievant told Female he could smell alcohol.

at 3:00 A.M. Grievant approached Female and asked her if she had anything to drink and Female said she had two drinks.

at 3:01 A.M. Grievant instructed Female to move her vehicle across the road and she drove her vehicle through the intersection and off of the roadway.

at 3:03 A.M. Grievant smelled alcohol on Female.

at 3:09 A.M. Grievant gave Female a preliminary breath test. Female said she drank two beers at 1:15 A.M. Grievant told her she was over the legal limit.

at 3:13 A.M. Grievant indicated he was going to place Female under arrest.

at 3:15 A.M. Grievant told Female she was under arrest for driving under the influence.¹⁸

The Certificate of Blood Alcohol analysis for Female indicated breath test results of .14% grams per 210 liters of breath.¹⁹

Grievant contends that he did not believe Female was impaired when he asked Female to drive her vehicle across the road.²⁰ Agency expressed concern over Grievant's instructions occurring after his having followed her weaving vehicle, after indicating in writing, "I asked if

¹⁶ Agency Tab 3.

¹⁷ Agency Tab 2.

¹⁸ Agency Tab 3.

¹⁹ Agency Tab 3, Attachment 5, Certificate of Blood Alcohol Analysis. and Attachment 6.

²⁰ Agency Tab 3, Attachment 14.

she had anything to drink, because I smelled something coming from the car."²¹ Additionally, the review of the videotape recording of the incident indicated Female told Grievant she had two drinks just before she was instructed to drive her car.

Investigators interviewed officer who received a lookout from Grievant who was behind two vehicles and according to information officer received, the drivers of the two vehicles appeared to be intoxicated and Grievant needed assistance in stopping them.²²

In a November 14 or 15, 2007 conversation with Sheriff Grievant told Sheriff he wanted to tell him all about the events surrounding Grievant's arrest. Grievant said he had his video camera on and was following two vehicles and the drivers were operating the vehicles in such a manner Grievant suspected they were intoxicated.

Agency expressed concern over Grievant's instructing Female, under these circumstances, to get in her vehicle and drive her vehicle. Concern was expressed as to both safety issues and liability issues.

2. On 10/27/07 Grievant failed to advise the Female of her rights to a preliminary breath test as required by §18.2-267 of the Code of Virginia.

§18.2-267 of the Code of Virginia provides at subsection F. "Police officers or members of any sheriff's department shall, upon stopping any person suspected of having committed an offense listed in subsection A, advise the person of his rights under the provisions of this section."

Review of the videotape, which was conducted by Agency, indicated that at 3:03 A.M. Grievant told Female he was going to have her blow in the machine to make sure she was not over .08. He told her she could leave if she was not over .08.²³

Agency review of the videotape recording of the incident from Grievant's car video camera indicated that at 3:09 A.M. Grievant gave Female a preliminary breath test and the review of the videotape recording did not indicate Grievant advised the Female of her rights to a preliminary breath test as required by §18.2-267 of the Code of Virginia.

Grievant indicated in writing he took the preliminary breath test machine to Female and told her for her protection, his, and the department he wanted her to blow into the machine. She blew into the machine and had either a .10 or .11 and she was placed under arrest.²⁴ Grievant testified he did not read Female her rights as he got confused.

3. On 10/27/07, after arresting a deputy for driving under the influence of alcohol, Grievant discovered a substance believed to be cocaine and Grievant failed to take possession of the substance until he determined if the substance was legally possessed by the deputy.

²¹ Agency Tab 2.

²² Agency Tab 3.

²³ Agency Tab 3.

²⁴ Agency Tab 2.

While in the process of a breathalyzer testing procedure and in the breathalyzer room, Deputy told Grievant and other officer that he had some cocaine in his wallet. Deputy indicated it was evidence from a case which Deputy had not yet placed into evidence.

Grievant was asked by Deputy if he could take the cocaine to his desk and Grievant said no. Deputy asked if he could give the cocaine to another officer and Grievant agreed to this. The officer took the cocaine from Deputy and put it in his pocket. Deputy was taken before a magistrate and released. Officer asked Deputy if he wanted his evidence back and when Deputy said yes he returned the cocaine to Deputy and Deputy walked home.

Agency expressed concern that Grievant did not take possession of the cocaine/substance identified as cocaine by Deputy and verify the Deputy's lawful possession of the cocaine. Grievant's supervisor, Sergeant, testified that it was basic police work to take control of what you believe may be an illegal substance to determine if it is and if it is a violation of the law to have possession of it. He testified Grievant should have taken possession of the substance, secured it, tagged it, and placed it in an evidence locker. Grievant did not take possession of the substance and secure it, tag it, and place it in an evidence locker.

4. On 11/14/07 or 11/15/07 Grievant discussed the arrest and cocaine possession of deputy with Sheriff after being instructed on 11/11/07 not to discuss this matter with anyone who might have information regarding the investigation.

On November 12, 2007 Grievant, Sergeant, and Special Agent (at the time of the meeting Special Agent held the position of 1st Sergeant) met. At this meeting Special Agent/1st Sergeant informed Grievant an inquiry was going to be conducted into Grievant's handling of evidence found on the person of Deputy when Grievant arrested him. At this meeting Special Agent/1st Sergeant informed Grievant not to discuss the matter with anyone who might have information regarding the investigation due to his need to conduct interviews.²⁵ During testimony Special Agent/1st Sergeant corrected the date of the meeting from 11/11/07 to 11/12/07.

On November 14, 2007 Grievant went to Sheriff's office and had a discussion with Sheriff. Grievant said he wanted to tell Sheriff he didn't touch the drugs at all. Grievant asked Sheriff to tell Special Agent/1st Sergeant that he said he didn't handle the drugs that Deputy had. Sheriff said he had already told Special Agent/1st Sergeant that Grievant had handled the drugs because of the telephone conversation Grievant and Sheriff had previously had. Grievant then said to Sheriff he would like Sheriff to call Special Agent/1st Sergeant and tell him that he said he didn't handle the drugs. Sheriff did inform Special Agent/1st Sergeant that Grievant had told him that he did not handle the drugs and that Grievant wanted him to tell him this. Sheriff also said that this was different than what Grievant said to him before.

On November 10, 2007 Sheriff and Grievant had a telephone conversation. Sheriff testified that in that conversation he asked Grievant where the drugs were that Deputy had when arrested. Sheriff testified Grievant told him Deputy gave Grievant the drugs, Grievant gave the

²⁵ Agency Tab 3 Attachment 7 and Testimony.

drugs to officer, and officer gave it back to Deputy at sheriff office/magistrate's office.²⁶

Sheriff had information relevant to the investigation. Sheriff was Deputy's supervisor and Grievant had him contacted 10/27/07 concerning his Deputy who was pulled over. Sheriff when contacted and notified of the driving matter indicated he felt the Deputy should be arrested. Sheriff was involved in the 10/27/07 incident. Sheriff was also a link in the determination of whether Deputy was or was not in legal possession of the substance indicated by Deputy to be cocaine.

Grievant was aware of the instructions given him not to discuss this matter with anyone who might have information regarding the investigation and did discuss this matter with such a person.

5. On 7/21/08 during interview in oral responses to Allegation No. 1 Grievant stated part of the reason he instructed the individual to drive her vehicle across the highway was because she did not have an odor of alcohol about her person. This response conflicted with the statement made on her criminal complaint which stated, "Strong odor of alcohol."

Videotape review conducted by Sergeant indicated that:

at 2:54 A.M. Grievant told Female he could smell alcohol.

at 3:00 A.M. Grievant approached Female and asked her if she had anything to drink and Female said she had two drinks.

at 3:01 A.M. Grievant instructed Female to move her vehicle across the road and she drove her vehicle through the intersection and off of the roadway.²⁷

Criminal Complaint re Female by Grievant indicated, "2nd car in front of me. Weaved several times across center lane. Strong odor of alcohol. P.B.T .11".²⁸

Grievant indicated he got Female and Deputy's information confused and when video magistrate came on line the magistrate read the criminal complaint to him he said it was wrong and to the best of Grievant's knowledge it was corrected. No evidence was received that the written document (i.e. criminal complaint) was amended/corrected in writing.

6. On October 27, 2007, Grievant failed to follow instructions given him on 9/2/07 when during the two investigations of Female and deputy for DUI, other than the preliminary breath test, Grievant did not attempt to give Female field sobriety tests.

Sergeant, Grievant's supervisor, conducted an informal counseling session on 9/2/07, with Grievant concerning certain matters. Grievant was given instructions at that session. It is not contested that Grievant met with Sergeant on 9/2/09. Those instructions were set forth in the document, dated September 5, 2007, signed November 12, 2007, "Subject: Informal Counseling Notice – DUI arrest/Officer Safety". Grievant was told, and it was confirmed in the document,

²⁶ Testimony of Sheriff and Agency Tab 3. document dated 11/6/08.

²⁷ Agency Tab 3.

²⁸ Agency Tab 3. Attachment 11.

"You will attempt to conduct field sobriety test on all individuals that are subject to arrest for DUI except when to do so would pose a safety hazard to you or the subject, or the subject refuses to perform the tests." Additionally the document confirmed that Grievant was informed, in the future, he was to be guided by this instruction and any future deviation from the instruction could be dealt with under the Standards of Conduct.²⁹

Grievant was aware of the supervisor's instructions. Female was arrested for DUI and there was no indication of a safety hazard or subject's refusal to perform the tests. No field sobriety tests, other than the preliminary breath test, were given Female by Grievant. Grievant indicated he did not give Female any additional field sobriety tests (other than the preliminary breath test) because his concentration was focused on Deputy.³⁰

7. On October 27, 2007. Grievant failed to follow instructions given him on 9/2/07 when he did not store Female's and deputy's vehicles after placing them under arrest.³¹

Sergeant, Grievant's supervisor, conducted an informal counseling session on 9/2/07, with Grievant concerning certain matters and gave Grievant instructions. It is not contested that Grievant met with Sergeant on 9/2/07. Those instructions were set forth in the document, dated September 5, 2007, signed November 12, 2007, "Subject: Informal Counseling Notice – DUI arrest/Officer Safety". Grievant was told, and it was confirmed in the document, "You will store all arrestee vehicles in accordance with Department policy. No arrestee vehicle will be left unattended on the roadside." Additionally the document confirmed that Grievant was informed, in the future, he was to be guided by this instruction and any future deviation from the instruction could be dealt with under the Standards of Conduct.³²

Both vehicles were left at the gravel area across the road from where the stop occurred when Grievant left the scene and both individuals were transported under arrest. After arriving at the Sheriff's office, Grievant permitted Deputy to make arrangements with a friend of Deputy to remove both vehicles.³³

Grievant was aware of the supervisor's instructions to him. The vehicles were left unattended. He was instructed that vehicles can be picked up while the Trooper is at the scene but the vehicle should not be left after the Trooper leaves. This was necessary to protect the property and to protect the Agency from liability.

Allegations:

Grievant alleged in his Grievance Form A. matters including:

- Unfair/Inconsistent application of policies, procedures, rules and regulations, which were vague, and ambiguous in the manual.
- Departmental sanctioned harassment and retaliation.

²⁹ Agency Tab 5, Attachment 19.

³⁰ Agency Tab 5.

³¹ Agency Tab 1. Written Notice.

³² Agency Tab 5, Attachment 19.

³³ Tab 2.

The discipline was selectively applied.
Harassment and Retaliation complaints made to supervision and
management have not been appropriately handled.
He was terminated for other unlawful reason.

There is insufficient evidence to find any to the above contentions/allegations.

Garrity Warning:

Grievant contends that the Garrity Warning was required and not given Grievant in this matter.

In *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) the U.S. Supreme Court held that protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

The right to remain silent when questioned by a governmental authority and not to self-incriminate is guaranteed under the 5th Amendment. Public employees could not be forced to choose between losing their job or giving up their 5th Amendment rights. An employee may be compelled to give statements under threat of discipline or discharge but those statements may not be used in the criminal prosecution of the officer. Any statement made after invoking Garrity may be only used for department investigation purposes but not for criminal prosecution purposes.

Grievant may be compelled by Agency to give statements under threat of discipline or discharge but those statements may not be used in the criminal prosecution of the individual officer.

Hearing Barred:

Grievant contention that the grievance hearing was barred by the doctrine of res judicata was again raised at hearing. Grievant's attorney contended that because the issue of misconduct had been litigated before the VEC, and because Agency lost, Agency was precluded from raising a collateral attack

VEC decisions are not binding on a Hearing Officer and are not relevant to this grievance hearing since it is unclear upon what evidence the Deputy relied upon in making the determination. The VEC determination is not a due process evidentiary hearing and is not under oath.³⁴ Little or no evidentiary weight is accorded since a VEC determination represents only the results of an interview by the deputy with the employee and/or the employer. The interview is not a due process evidentiary hearing and information obtained is not under oath. The hearing is

³⁴ 16 VAC 5-80-10.

not barred by the doctrine of res judicata.

Prompt Issuance of disciplinary Actions:

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary actions when an offense is committed. General Order 19 provides that when issuing an employee a Written Notice Form for a Group III offense, management should issue such notice as soon as practicable.³⁵ One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. The hearing officer takes notice that unless an extensive, detailed investigation is required, most state agencies issue disciplinary actions within days or, at most, a few weeks after commission of an offense.

In this case there is over a 16 month period from the October 27, 2007 offense date and the March 16, 2009 date the Group III Written Notice was issued. The written Chronology of Investigation³⁶ indicated that:

November 19, 2007	SP-103 received and investigation activities occurred.
November 26, 2007	Investigator requested not to proceed with administrative investigation due to BCI investigation
January 9, 2008	Investigator told criminal investigation was completed but awaiting response from special prosecutor.
May 13, 2008	Voice mail received advising investigator the criminal investigation was completed.
May 29, 2008	Letter received stating the criminal investigation was completed.

While Agency indicated that it could not take disciplinary action until after criminal investigation could be concluded there is a nearly 9½ month period between May 29, 2008, when the criminal investigation was completed, and March 16, 2009, when the Written Notice was issued.

It is recognized that criminal charges must take priority and that it would be inappropriate to jeopardize prosecution of a criminal case by taking disciplinary action before the criminal investigation is concluded. However, even after the criminal investigation had been concluded on the agency failed to take disciplinary action approximately 9½ months. This extraordinary delay is contrary to both the Commonwealth's Standards of Conduct and the Agency's own written policies (General Order 19). The agency failed to explain why it took this extraordinary delay to issue a Written Notice after the investigation was concluded.

When an agency delays imposition of discipline for an extended time, it gives the appearance that the offense is not serious. In an appropriate case, a hearing officer may give consideration to reducing the level of discipline where the Agency's delay in the issuance of discipline is sufficiently egregious as to negate the alleged seriousness of the offense. A hearing officer may not direct an agency on how to conduct its business, however, when an agency

³⁵ Agency Tab 10. General Order No. 19, Section 14. c. 1.

³⁶ Agency Tab 3, Attachment 17.

delays the imposition of discipline for an extraordinarily long time, such delay will be considered an extenuating circumstance that can mitigate the level of discipline imposed. The facts in this case dictate that the extended delay in issuance of discipline constitutes such a mitigating circumstance.

Mitigation:

The normal disciplinary action for a Group III offense is removal from employment. General Order 19 provides for a reduction of discipline if there are mitigating circumstances such as (1) conditions related to a given offense that would otherwise serve to support a reduction of corrective action in the interest of fairness and objectivity and (2) consideration of an employee's long service and/or a history of otherwise satisfactory work performance.

The extraordinary delay in the issuance of discipline must be taken into consideration in this case. Even after the criminal investigation was concluded the agency took approximately 9 1/2 months to issue the discipline. General Order 19 Section 14 c. (1) states, "When issuing an employee a Written Notice Form for a Group III offense, management should issue such notice as soon as practicable. Thus, the agency failed to comply with its own policy requiring prompt issuance of discipline.

General Order 19, Section 9. b. (3) provides that, "Mitigating circumstances may also justify the use of demotion, transfer and/or suspension as an alternative to removal. Suspension in lieu of removal shall not exceed 30 workdays for a Group III offense."

DECISION

Agency has shown by a preponderance of evidence Grievant engaged 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. Agency has shown that this is a Group III Offense. However, the extraordinary delay in the issuance of discipline must be taken into consideration.

For the reasons stated herein, the Agency's issuance to the Grievant on March 16, 2009, of a Group III Notice with disciplinary action taken in addition to issuing written notice of Termination (Effective Date: March 16, 2009) is **MODIFIED**.

a. The Group III Written Notice is hereby UPHELD.

b. In lieu of removal Grievant is suspended for 30 workdays without pay and Grievant's removal from state employment effective March 16, 2009 is hereby RESCINDED. Grievant is reinstated to his former position or, if occupied, to an objectively similar position. Grievant is awarded back pay from the point at which his suspension ends (30 workdays from the date of termination). Benefits and seniority are restored from the date at which suspension ends. The award of back pay must be offset by any interim earnings, and by any unemployment

compensation received.

c. The grievance statute provides that for those issues qualified for a hearing, the hearing officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.³⁷ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.³⁸

Therefore, Grievant is entitled to recover a reasonable attorney's fee, which cost shall be borne by Agency.³⁹ Grievant's attorney is herewith informed of his obligation to timely submit a fee petition to the Hearing Officer.⁴⁰

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 are 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: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

³⁷ Va. Code §2.2-3005 1. A.

³⁸ § 7.2 (e) EDR Grievance Procedure Manual, effective August 30, 2004. Section VI(D) EDR Rules for Conducting Grievance Hearings, effective August 30, 2004.

³⁹ Va. Code §2.2-3005 1. B.

⁴⁰ Section VI.D, Rules for Conducting Grievance hearings, Effective August 30, 2004. Counsel for the grievant shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the hearing decision, counsel's petition for reasonable attorney's fees.

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: Director, Department of Employment Dispute Resolution, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219.

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 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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo
Hearing Officer

**COMMONWEALTH OF VIRGINIA
VIRGINIA STATE POLICE**

**ADDENDUM TO DECISION OF HEARING OFFICER
In re: Case No: 9123**

Addendum Issued: September 10, 2009

DISCUSSION

The grievance statute provides a Hearing Officer may order reasonable attorneys' in qualified grievances challenging discharge if the Hearing Officer finds that the grievant has "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust. For a grievant to "substantially prevail" in a grievance hearing, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his former (or an objectively similar) position.

Grievant was reinstated to his position (or an objectively similar position) with agency by the decision of the Hearing Officer issued on August 11, 2009. Grievant "substantially prevailed" on the merits of a grievance and, pursuant to the provisions of § 7.2(e) of the *Grievance Procedure Manual*, is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust.

Pursuant to § 7.2(e) of the *Grievance Procedure Manual* counsel for the grievant is required to ensure that the Hearing Officer receives, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees. Additionally, § 7.2(e) requires that the fees petition shall include an affidavit itemizing services rendered, the time billed for each service, and the attorney's hourly rate charged in accordance with the Rules for Conducting the Grievance Hearing.

If neither party requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition and should do so no later than 30 calendar days from the date of the initial decision.

Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with the Grievance Procedure Manual and Rules for Conducting Grievance Hearings.

Timeliness of petition:

The decision in this cause was rendered on August 11, 2009, and the 15 calendar day period for receipt of the fees petition ended on August 26, 2009. On August 31, 2009, the Hearing Officer received, via fax containing copies of:

- a. A letter (dated August 31, 2009) addressed to the Hearing Officer.

- b. A document entitled "Petition for Attorney's Fees" indicating "Dated this August 14, 2009".
- c. An "Invoice" bearing the date of August 31, 2009 which indicated it was addressed Grievant.

§ 7.2(e) of the *Grievance Procedure Manual* charges counsel for the grievant with ensuring that the hearing officer receives, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees. Grievant's attorney indicated in the letter of August 31, 2009, that he drafted and mailed the petition (with attachment) on August 14, 2009. However, the above three documents, faxed on 8/31/09, are the only documents received by the Hearing Officer concerning attorneys' fees.

Affidavit:

§ 7.2(e) of the *Grievance Procedure Manual* requires that the fees petition shall include an affidavit itemizing services rendered, the time billed for each service and the attorney's customary hourly rate. Additionally, VI. D. of the *Rules for Conducting Grievance Hearings* indicates, "the fees petition shall include an affidavit itemizing services rendered, the time billed for each service, and the attorney's customary hourly rate not to exceed".

Use of the term "affidavit" requires a written declaration or statement confirmed by oath or affirmation of the party making it, taken before an officer having authority to administer such oath.

No such affidavit has been received by the Hearing Officer. While this information is provided in the Invoice it was not provided under oath.

Invoice and Petition:

A copy of an Invoice addressed TO: GRIEVANT "FOR ADMINISTRATIVE HEARING AND REPRESENTATION" was received by fax on 8/31/09. The Invoice indicated a total of 92.6 hours of services at \$275.00 per hour. Item number 2 of the "Petition for Attorney's Fees" indicated, "[Grievant] retained counsel to represent him in this matter in October of 2008." The grievance was qualified for hearing on May 20, 2009.

The Petition and Invoice filed raise the issue whether certain items presented for payment are reasonable, necessary, and related to the grievance hearing. The party claiming the legal fees has the burden of proving prima facie that the fees are reasonable and were necessary. In determining reasonableness of attorneys' fees the Hearing Officer looks to certain criteria: "the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." (*Chawla v. Burgerbusters, Inc.*, 255 Va. 616, 623 (1998))

The "Invoice" indicated 8 line items:

<u>Description</u>	<u>Hours</u>
19 Telephone Conferences with Client	4.6

In Office Conferences	9.3
Records Review, 952 separate documents	27.6
Witness Interviews	27.9
Research Time	4.2
Preparation Time for Hearing	9.3
Travel Time to Hearing, Round Trip	6
Hearing time	<u>3.7</u>
	92.6 Hours

Attorneys' fees are only awardable to the extent they relate to the grievance hearing. If the fees relate primarily to the management steps, the award should not include those amounts. However, if the fees incurred prior to qualification of the grievance can be shown to have been related to or for the preparation of the Grievant's case for hearing those fees are to be awarded if reasonable. Attorney's fees related to non grievance hearing matters are not awardable.

Hearing Officer has concerns with the timeliness, lack of an affidavit, and reasonableness in light of the above discussed criteria. The Hearing Officer is charged with the determination of reasonable attorneys' fees to be awarded. However, further discussion and determination of reasonable attorneys' fees is not necessary at this time due to the findings concerning timeliness and the other requirements for an award of reasonable attorneys' fees.

Lack of Discretion/Authority:

Grievance Procedure Manual and the *Rules for Conducting Grievance Hearings* require specific actions within specific time lines for an award of attorneys' fees to be made by the Hearing Officer. It is the opinion of the Hearing Officer that there is no discretion/authority granted a Hearing Officer to permit a late filing of the attorneys' fees petition and/or required affidavit after the 15 day calendar period from the date of the decision is issued. Nor does the Hearing Officer have the discretion/authority to award attorneys' fees if the petition and/or affidavit is not timely filed.

Furthermore, the fees petition did not include an affidavit as required under the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings*. Without such affidavit an award of attorneys' fees is not permissible.

Decision:

For the reasons discussed above, upon determination that the Hearing Officer lacks the discretion or authority to award reasonable attorneys' fees when there is an untimely filing of the petition for reasonable attorneys' fees and/or no timely filed affidavit, award of attorneys' fees is ***denied***.

APPEAL RIGHTS:

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a

ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in Section VII(C) of the Rules and Section 7.3 (a) of the Grievance Procedure Manual. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

Lorin A. Costanzo
Hearing Officer