

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 03/17/10;  
Decision Issued: 03/19/10; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9280; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9280**

Hearing Date: March 17, 2010  
Decision Issued: March 19, 2010

**PROCEDURAL HISTORY**

On October 16, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction.

On November 13, 2009, 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 March 2, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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:

Old Dominion University employs Grievant as a Police Officer. No evidence of prior active disciplinary action was introduced during the hearing.

On October 2, 2009, Grievant arrested two subjects and transported them to Central Booking in her Police vehicle. One or both of the subjects vomited in the rear seat of the vehicle. Grievant notified the Officer-In-Charge of what had happened. Sergeant G learned what had happened and he attempted to contact Grievant over the radio. He asked her to call him on a telephone line. It is not clear whether Grievant received the message. When Grievant did not call him on a telephone line, Sergeant G attempted to contact Grievant again by radio. He told Grievant to take the vehicle to the fire station and use a hose to wash out the vehicle.<sup>1</sup> Sergeant G had not seen the vehicle at that time and did not know its condition. It is not clear whether Grievant received Sergeant G's instruction to go to the Fire Department to clean her vehicle. Grievant returned to the Police Department and marked her vehicle out of service and asked that the Environmental Health Department be called. She left the Police Department and went home without having cleaned the vehicle.

On October 3, 2009, Sergeant L observed that Grievant had marked her vehicle out of service and that she had requested the Environmental Health Department be called. He had the Dispatcher call the Environmental Health Department to clean the vehicle. The Dispatcher told Sergeant L that the Environmental Health Department

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<sup>1</sup> The back seat of many of the Department's police vehicles are plastic and can be cleaned with a hose.

contact person said that the Environmental Health Department would respond to clean up blood, but would not respond to clean up vomit.

Sergeant L spoke with Grievant after she arrived for her shift on October 3, 2009. He instructed her to clean her Police vehicle. He did not tell Grievant how to clean the vehicle, he simply told her to clean the vehicle. Grievant refused to clean the vehicle. She told Sergeant L at least three times “I am not f—king doing it.” Grievant did not clean the vehicle. Another employee was instructed to clean the vehicle. That employee completed the task.

In February 2007, Grievant attended training at the Academy regarding bloodborne pathogens and received a training handbook entitled, “Bloodborne Pathogens for Law Enforcement. This handbook briefly mentioned how to clean contaminated surfaces. Grievant successfully completed a quiz asking her questions about her training. On October 2 and 3, 2009, a bloodborne pathogen kit was contained inside the truck of Grievant’s vehicle. The kit contained items necessary to clean up matter that may contain bloodborne pathogens.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>2</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow a supervisor’s instructions is a Group II offense.<sup>3</sup> Sergeant L held a supervisory relationship with Grievant. He instructed Grievant to clean her Police vehicle. His instruction was consistent with his authority and the Agency’s practice.<sup>4</sup> The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argues Sergeant L’s instruction was not enforceable because it was contrary to the Agency’s policy regarding the handling of bloodborne pathogens.<sup>5</sup> The

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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> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> Sergeant L testified that Officer M cleaned a police vehicle after experiencing two weeks earlier a similar situation to what Grievant experienced.

<sup>5</sup> The underlying assumption Grievant makes is that vomit constitutes bloodborne pathogens. It is not clear whether this is true. However, the Hearing Officer will make this assumption because the methods to clean up the vomit likely would be consistent with the methods needed to clean up bloodborne pathogens.

evidence showed that Sergeant L instructed Grievant to clean the vehicle but did not tell her how to clean the vehicle. It was up to Grievant to determine how she would clean the vehicle including whether they would utilize the kit contained in her vehicle. Sergeant L's instruction was appropriate and consistent with the Agency's operations and expectations of its employees.

*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..."<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.

Grievant presented evidence showing that she asked Sergeant L how to accomplish the task of cleaning the vehicle. According to Officer P, Grievant asked for "protective cloths, another uniform or gloves."<sup>7</sup> Grievant's request for assistance is a mitigating factor. It suggests the Agency may have been somewhat reluctant to assist Grievant in accomplishing her assigned task. Although there is a mitigating factor, there are also aggravating factors. First, Grievant was asking a question of Sergeant L for which she should have already known the answer. Grievant receiving training on how to clean her vehicle at the Academy in February 2007. She successfully passed a test asking her questions about bloodborne pathogens. In addition, she knew that her vehicle contained a bloodborne pathogen kit and latex gloves as evidence by a checklist she completed in September 2009. Second, the method by which Grievant expressed to Sergeant L of her rejection of his instruction was insubordinate. She told Sergeant L at least three times that "I'm not f—king doing it." Grievant argued that cursing was common among employees in the Department. One witness testified that cursing a superior officer was not done by employees holding lower rank. None of the witnesses suggested it would be appropriate for a Police Officer to curse to a Police Sergeant. When the aggravating factors are considered, they render the mitigating factor immaterial.

Grievant argued that the Agency was supposed to train her annually regarding bloodborne pathogens and its failure to do so justifies a reduction in disciplinary action.

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<sup>6</sup> *Va. Code § 2.2-3005.*

<sup>7</sup> Grievant Exhibit 2.

Grievant is correct that the Agency's policy requires annual training. Whether the Agency completed annual training, may be of significance if the Agency had attempted to discipline Grievant for how well she cleaned the vehicle. It is not of significance, however, with respect to whether Grievant refused to follow a supervisor's instruction. The Agency demonstrated that Grievant had sufficient training in 2007 and she knew a cleaning kit was available and knew that she was expected to clean the vehicle.

In light of the standard set forth in the Rules, the Hearing Officer finds no basis exists 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 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.
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>8</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>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.