

Issue: Group III Written Notice with Termination (conduct unbecoming); Hearing Date: 06/11/10; Decision Issued: 06/14/10; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9340; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9340**

Hearing Date: June 11, 2010  
Decision Issued: June 14, 2010

**PROCEDURAL HISTORY**

On April 9, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for conduct unbecoming a police officer.<sup>1</sup>

On April 12, 2010, 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 May 18, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 11, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUES**

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<sup>1</sup> Neither party raised as an issue whether the Agency complied with Va. Code § 9.1-500 et seq. governing law enforcement officers' procedural guarantees. Accordingly, the Hearing Officer will not address that issue.

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 University of Virginia employed Grievant as a Detective in its Police Department. The purpose of this position was:

This position exists to carry out the core duties of the Police Department to protect lives, health, and property. The position does this by emergency responses, law enforcement, and crowd and traffic control.<sup>2</sup>

Grievant is required to have and maintain a valid driver's license. He began working for the Agency in June 2005. With the exception of the facts giving rise to this grievance, Grievant's work performance was outstanding. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

One of Grievant's activities was to leave his home in the late evening and drive to a local school in order to exercise at the school's track. Grievant often met a Friend who also exercised at the track.

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<sup>2</sup> Agency Exhibit 1.

In the fall of 2009, Grievant began driving his vehicle from his home to the track. On the way he was stopped by Virginia State Police Trooper T for speeding. Trooper T smelled alcohol and believed Grievant may have been under the influence of alcohol. Grievant completed field sobriety tests and a breath test. Trooper T believed Grievant was under the influence of alcohol. Grievant disclosed that he was armed and was a law enforcement officer with the Agency. Trooper T called Sergeant B of the Virginia State Police. Grievant knew Sergeant B from having work with him in the past. Following the telephone conversation between Trooper T and Sergeant B, Trooper T gave Grievant a warning not to drive under the influence of alcohol again. Trooper T instructed Grievant to drive his vehicle from the point of stop to the nearby school grounds and leave it there until the following day. Trooper T left and Grievant met his Friend to exercise. The Friend drove Grievant from the school to Grievant's house. Grievant's wife joined them and they drove back to Grievant's vehicle. Grievant's wife drove Grievant's vehicle back to their house. In the early morning, Trooper T discovered that Grievant's vehicle had been moved. He drove to Grievant's house and knocked on the door. Grievant answer the door. Trooper T was irate that Grievant had moved his vehicle contrary to Trooper T's instruction. Grievant tried to explain that he had his wife drive the vehicle and that he move the vehicle because he had items inside that he feared might be stolen. Trooper T remained upset and left Grievant's house. Trooper T suggested his treatment of Grievant might be different if Grievant repeated his behavior.

Grievant believed that Trooper T's behavior of coming to Grievant's house unannounced was inappropriate and was a mistake made by an inexperienced Trooper. On the following day, Grievant visited Sergeant B and expressed his concerns about Trooper T's behavior. Grievant did not report the incident to his supervisor or to any Agency managers.

On March 24, 2010 at approximately 9:30 p.m., Grievant left his home to drive to the school's track to exercise. Grievant failed to stop at a stop sign. Trooper T stopped Grievant and smelled alcohol coming from Grievant. At Trooper T's direction, Grievant completed field sobriety tests and a breath test. Trooper T arrested Grievant. Grievant was given a Certificate of Blood Alcohol Analysis showing that his breath sample's alcohol content was 0.12 grams per 210 liters of breath. Grievant's driver's license was suspended in accordance with *Va. Code § 46.2-391.2*.

On March 25, 2010 at approximately 2 a.m., the Captain received a call from the Lieutenant informing the Captain that the Agency had been notified by the Virginia State Police that Grievant had been arrested at approximately 9:30 p.m. on March 24, 2010. When the Captain arrived at work in the morning, he began an investigation after discussing the matter with the Chief. The Captain met with Grievant and discussed the arrest. Grievant was honest and forthcoming to the Captain. Grievant was placed on pre-disciplinary suspension while the Captain completed his investigation. The Captain subsequently spoke with Trooper T and Sergeant B of the Virginia State Police. Following the investigation, the Agency concluded that disciplinary action should be taken against Grievant.

## 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>3</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.”

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

Written Directive No. A-3.0 sets forth the Agency's Code of Conduct and Ethics for the Agency's Police Department. Section III states, in part:

Sworn personnel will adopt as their standard of behavior and abide by the Law Enforcement Code of Ethics:

As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all men to liberty, equality, and justice.

**I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or to my agency.** I will maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be consistently mindful of the welfare of others. Honest in thought and deed in both my personal and official life, **I will be exemplary in obeying the law and regulations of my department.** Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be ever secret unless revelation is necessary in the performance of my duty. \*\*\*

**I recognize the badge of my office as a symbol of public faith,** and I except it as public trust to be held as long as I am true to the ethics of the police service. I will never engage in acts of corruption or bribery, nor will I

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

condone such acts by other police officers. I will cooperate with any legally authorized agencies and their representatives in the pursuit of justice.

I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and confidence. (Emphasis added).

Section V states, “[t]hese regulations are applicable to each employee of the department and violation of these will result in disciplinary actions as prescribed by the department.” Section V(A)(1) states, “[e]mployees will obey the laws of the United States and the Commonwealth of Virginia and of any state or local jurisdiction in which they are present.” Section V(A)(2) addresses “Conduct Unbecoming” and states:

a. Employees of the University of Virginia Police Department will not conduct themselves at any time in a manner detrimental to the Department’s image as a law enforcement agency of the University. **Conduct unbecoming includes any act or conduct, whether specifically prohibited or not, which brings the Department into disrepute, reflects discredit upon the employee as a member of the department, or which impairs the operation or efficiency of the department or employee. \*\*\***

c. Employees will maintain a level of moral conduct in their personal and business affairs in keeping with the highest standards of the law enforcement profession. Employees will not participate in any incident involving moral turpitude which impairs their ability to perform their duties or causes the department to be brought into disrepute. Employees will not use the authority entrusted to them for any personal gain.

On March 24, 2010, Grievant engaged in conduct unbecoming a police officer of the Agency’s Police Department. As a Detective, Grievant had the authority to investigate and enforce the criminal laws of the Commonwealth of Virginia. Grievant was obligated to comply with all laws of the Commonwealth Virginia including those laws governing driving under the influence of alcohol. Grievant failed to stop at a stop sign and operated a motor vehicle contrary to the legal limit of 0.08 grams or more per 210 liter of breath as specified in *Va. Code § 18.2-266*. Grievant was expected to set an example of good behavior. His actions brought discredit on himself and on the Police Department. In light of this standard expected of Police Officers by the Agency, Grievant’s behavior rises to the level of a Group III offense. Upon the issuance of a Group III Written Notice of disciplinary action, an agency may remove an employee. Accordingly, the Agency’s removal Grievant must be upheld.

Grievant argues that the Agency failed to properly provide him with information regarding the Employee Assistance Program to enable him to address any issues he may have with respect to the consumption of alcohol. This argument fails. The Agency

is not required to notify an employee of the availability of this program as a condition precedent to taking a disciplinary action. In addition, Grievant initially denied he had a problem with alcohol consumption when the Agency initiated its investigation.

*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>4</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 contends the disciplinary action should be mitigated. This is not an easy case to resolve. The question is whether there are sufficient mitigating circumstances that would warrant a reduction in the disciplinary action. There are several factors worthy of consideration. First, Grievant has been honest and forthright throughout the investigation and disciplinary process. He recognized that his behavior was inappropriate and took full responsibility for his actions. Second, Grievant has sought the appropriate treatment to insure that he does not repeat his behavior of March 24, 2010. It is unlikely that Grievant would pose a risk to the Agency with respect to driving under the influence of alcohol in the event he were reinstated. Third, Grievant presented evidence regarding the treatment of another Police Officer who drove her personal vehicle while under the influence of alcohol. In September 2008, Police Officer S consumed alcohol and then drove her personal vehicle. She realized that she had consumed too much alcohol and stopped at a local store. She called a friend to come and get her. While she waited for her friend to arrive, someone in the store called the local sheriff’s office and asked for assistance. A Deputy Sheriff arrived at the store and confronted Police Officer S. The Deputy Sheriff observed Police Officer S in a vehicle with open containers of alcohol. The Deputy Sheriff arrested Police Officer S and charged her with appearing in public in an intoxicated condition. After Police Officer S was arrested, the Sheriff learned that Police Officer S was employed by the Agency as a police officer and decided not to prosecute the charge. Police Officer S timely informing the Agency of the charges against her. After an investigation, the Agency chose to issue Police Officer S a verbal counseling. No other disciplinary action was taken against Police Officer S.

When these factors are considered individually and as a whole, they are insufficient to reduce the disciplinary action given to Grievant. Given the severity of

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<sup>4</sup> *Va. Code § 2.2-3005.*

Grievant's behavior, his honesty, good work record, and desire to avoid repeating his inappropriate behavior are insufficient to mitigate the disciplinary action. The inconsistent application of disciplinary action is a basis to mitigate disciplinary action because it may reflect an agency's decision to single out a particular employee for disciplinary action. Upon first review, it may appear that the Agency inconsistently treated Police Officer S and Grievant. Both engaged in the behavior of driving a motor vehicle while in a state of intoxication. Police Officer S received no disciplinary action while Grievant received the highest level of disciplinary action. Although Police Officer S operated a motor vehicle after consuming too much alcohol, she realized she was not fit to continue driving and stopped her vehicle. When the Agency learned of her behavior, she was admonished that subsequent behavior would result in disciplinary action. Police Officer S did not repeat her behavior. In contrast, Grievant repeated his poor behavior. In the fall of 2009, Grievant was driving under the influence of alcohol and was stopped by Trooper T. Trooper T gave Grievant a warning and advised Grievant against repeating his behavior. Grievant disregarded Trooper T's warning and repeated the behavior on March 24, 2010. If Grievant felt his interaction with Trooper T in the fall of 2009 was sufficient to report to Sergeant B, surely it was significant enough to report to the Agency. It is unclear whether the Agency would have treated Grievant any differently than it treated Police Officer S had it learned of Grievant's first operation of a motor vehicle under the influence of alcohol. The evidence is insufficient to conclude that the Agency was inconsistent in the issuance of disciplinary action. In light of the standard set forth in the Rules, 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 III Written Notice of disciplinary action with removal 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>5</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>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.