

Issue: Group III Written Notice with Transfer (conduct unbecoming); Hearing
Date: 06/25/10; Decision Issued: 08/05/10; Agency: VSP; AHO: Sondra K.
Alan, Esq.; Case No. 9345; Outcome: Full Relief.

DECISION OF HEARING OFFICER

IN RE: CASE NUMBER 9345

HEARING DATE: JUNE 25, 2010
DECISION ISSUED: AUGUST 5, 2010

PROCEDURAL HISTORY

On March 1, 2010, Grievant filed a grievance¹ with the Agency alleging that the Group III Disciplinary Action, which accused him of asking for special favors in his capacity as a police officer, is unproven and that the action and outcome should be rescinded. Grievance states, "The administrative investigation revealed that each of the four (4) persons interviewed and who were the only four (4) persons with direct knowledge of the events of October 09, 2009, each stated that no special favors were asked for nor received by the Grievant."

On February 17, 2010, Grievant was issued a Group III Written Notice of Disciplinary Action² for attempting to influence a criminal investigation while Grievant was off duty.

The outcome of the Third Resolution Step, initiated March 30, 2010, was not satisfactory to the Grievant, and on April 2, 2010 the Agency qualified the matter for a hearing³. In a letter dated May 13, 2010 the Hearing Officer received appointment from the Department of Employment Resolution (EDR), which appointment was effective May 19, 2010. On June 1, 2010 at 1:15pm during a pre-

¹ Agency Exhibit B

² Agency Exhibit B

³ Agency Exhibit B

hearing telephone conference, the case was set for June 25, 2010 at 10:00am at the Police Department's conference room.

APPEARANCES

AGENCY WITNESSES:

GRIEVANT WITNESSES:

ISSUE

1. Was the evidence sufficient to sustain a Group III offense against Grievant according to General Order ADM 12.2, paragraph 13(b)(20)?

BURDEN OF PROOF

The burden of proof is on the Agency to prove its claims against the Grievant by a preponderance of the evidence⁴. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not⁵.

FINDINGS OF FACT

Grievant, at the time of the incident, was an undercover officer for drug control for the Virginia State Police. On October 10, 2009, a friend of Grievant was stopped for DUI. Grievant was called by the town police to the scene to take custody of his friend's car. Grievant arrived and talked to both the officers and

⁴ Grievance Procedure Manual § 5.8

⁵ Grievance Procedure Manual § 9

his friend. Grievant aggressively questioned officers in a manner any anxious citizen related to an accused would do. Grievant made no overt request that officers do anything illegal to assist his friend⁶.

Grievant then proceeded to the jail and to the magistrate's office. Grievant's purpose was to have his friend released to his custody rather than spend the night in jail. Grievant identified himself to the magistrate as a police officer. It is in controversy whether he displayed a badge or only stated he was an officer. In any case, he offended the magistrate, who construed his identification would be an attempt to get special consideration. Grievant stated he had identified himself because, at the time, he had recently gone off duty and had the appearance of a drug dealer, not a responsible citizen. Nonetheless, he never exceeded the behavior of an anxious citizen with a relative in jail.

Grievant was on a friendly basis with an assistant Commonwealth's attorney in the jurisdiction where his friend would be tried. Grievant called this person and they met, drank several beers together and talked about various topics. One of the topics was the status of his friend's case. Among the questions he asked was whether or not his friend should hire an attorney. While this is not illegal for a citizen to ask, it is specifically unethical for an attorney to give any advice to the opposing side. Realizing this, the Assistant Commonwealth's Attorney became concerned about this conversation and meeting. The Assistant Commonwealth's

⁶ Agency Exhibit A, investigation by the Department of State Police; transcription states, “[the arresting officer] reiterated that [Grievant] never specifically asked for [friend] to be released.”

Attorney reported this conversation to the Commonwealth Attorney's Office and disengaged from association with Grievant. The Assistant Commonwealth's Attorney also reported the conversation to a DEA officer, who reported all of the above to Grievant's superiors.

The matter was investigated by an investigator for the state police and Grievant's behavior was determined to be a violation of General Order ADM 12.2, paragraph 13(b)(20), and a Group III Disciplinary Action was issued stating he was receiving a disciplinary action for "undermining the effectiveness and efficiency of the department's reputation and performance of its employees." This action was issued to Grievant on February 17, 2010. Grievant was not terminated nor was his salary significantly reduced. He did receive a disciplinary transfer, which negatively impacted Grievant as his residence was then located outside his work area requiring him to relocate while still being responsible for his home place.

The Agency considered Grievant's work history during which there had been no other disciplinary action in twenty-three (23) years. When questioned, his superior stated that he knew Grievant to be an honest person.

At the hearing, both town police officers who were at the scene on October 10, 2009, testified at the hearing that they had no problem working with Grievant in the future. The magistrate was not presented as a witness, however, it was

reported that Grievant did apologize to her and the apology was accepted⁷. The Assistant Commonwealth's Attorney stated it would feel "awkward" in a working relationship with Grievant in the future. The Commonwealth Attorney's Office for [the] County, Virginia, however, issued no negative statements regarding their relationship with Grievant. There was testimony that since the incident Grievant has worked with police, DEA agents and the Court system in an effective manner. It is the Agency's position they could have issued a Group III Notice for each of the three incidences, those being:

1. Discussion with police officers
2. Discussion with the magistrate
3. Discussion with Assistant Commonwealth's Attorney.

It is the Agency's opinion that, due to the excellent past record of Grievant, they mitigated the disciplinary action to consolidate to one Group III Action, they did not terminate Grievant and they did not significantly reduce his salary. However, they did issue a transfer of position from undercover agent and location to a new area outside of Grievant's residence area.

Grievant requests removal of his Group III Disciplinary Action from his personnel file and to be reinstated to duty in [the] County, Virginia and reinstated to his position as a DEA Officer.

OPINION

⁷ Agency Exhibit A, investigation by the Department of State Police; transcription states the magistrate whom [Grievant] allegedly offended said, "The officer was polite and never asked for any favors."

From the evidence presented, Grievant's behavior was nothing more than what an anxious parent of an arrested teenager would do for his child. None of Grievant's behavior was overtly illegal. However, the extent of his behavior over a period of time does raise suspicion of his motives. There is no doubt Grievant could have behaved in a more professional manner and not cause himself scrutiny by his superiors..

While it is not required that Grievant's behavior be actually illegal for violation of General Order ADM 12.2, paragraph 13(b)(20) to be relevant, it is, however, required that his behavior be proven to have "undermined the effectiveness or efficiency of the departments activities."⁸

The Agency failed to produce evidence that would, by a preponderance of the evidence⁹, prove that Grievant had caused any alleged harm to the Agency. While his behavior may have been professionally unbecoming, there was no evidence presented that would prove loss of status, reputation or efficiency of the Virginia State Police.

DECISION

For the above reasons, after reviewing the facts, exhibits, testimony of witnesses and observing the demeanor of witnesses, the Agency's issuance to the Grievant of

⁸ EDR Ruling, case number 7883, November 2004 states, "the Agency must not show merely that Grievant violated a State law, the Agency must show that Grievant's violation of State law caused some impairment to the Agency's reputation as well as the reputation or performance of its employees...Grievant's behavior has not impaired the Department's reputation or the performance of its employees. The Agency has not presented evidence that Grievant's behavior has materially altered the Agency's operations in any way. The evidence is clear that the Agency's reputation in the community has not been harmed by Grievant's behavior even though that behavior is known in the community."

⁹ Grievance Procedure Manual § 9

a Group III Written Notice of Disciplinary Action with transfer is **rescinded**. The Agency is ordered to reinstate Grievant to his former position or, if occupied, to an objectively similar position located in his prior locality.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹⁰ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) 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 policy 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:

¹⁰ 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.

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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
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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). 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 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 grievance arose.¹¹ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

¹¹ An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).