

Issues: Group I Written Notice (failure to follow instructions), Transfer, and Retaliation; Hearing Date: 09/13/10; Decision Issued: 10/21/10; Agency: VSP; AHO: Sondra K. Alan, Esq.; Case No. 9369; Outcome: Partial Relief.

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 9369  
HEARING DATE: September 13, 2010  
DECISION ISSUED: October 21, 2010

PROCEDURAL HISTORY

The herein issue came about due to a citizen's complaint. The offense date was cited as occurring from October 27, 2009 to November 5, 2009. On November 10, 2009, Grievant received notice that he was relieved of his pilot duties and temporarily reassigned to a road vehicle duty in [County S] due to an administrative investigation.<sup>1</sup> On December 14, 2009, Grievant was given notice to confirm a complaint in keeping with general order ADM 12<sup>2</sup>. An investigation, case number I.A., Case #09-1124-0512 was initiated December 29, 2009.<sup>3</sup> On March 10, 2010, Grievant was issued a formal written notice and a Group I Disciplinary Action for "failure to follow Agency instructions, violation of department policy and FAA regulations and causing concern for the safety and undermining trust of the medical crew". The written notice did not note any mitigating circumstances. However, a letter from the Agency Lieutenant also dated March 10, 2010 did address mitigation and did recommend no discipline be administered other than the Group I report.<sup>4</sup> Grievant proceeded through first step resolution, second step resolution on April 13, 2010, third step resolution on May 4, 2010. The case was appointed to

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<sup>1</sup> Agency Exhibit G

<sup>2</sup> Agency Exhibit B

<sup>3</sup> Agency Exhibit B

<sup>4</sup> Agency Exhibit G

the Hearing Officer on July 13, 2010. A pre-hearing conference call commenced July 23, 2010 and the matter was set for hearing August 17, 2010 and continued at request of counsel to September 13, 2010 at which time the matter was heard.

### APPEARANCES

Agency Advocate  
Agency Representative  
4 Agency witnesses  
Grievant's counsel  
Grievant  
1 Grievant witness

### ISSUES

Did Grievant violate department policy and FAA regulations?  
Did Grievant cause medical staff to fear for their safety?  
Did Grievant fail to follow instructions?  
Is Grievant's discipline too harsh or retaliatory?

### BURDEN OF PROOF

The burden of proof is on the Agency as this is a disciplinary action involving a written notice level Group I Disciplinary Action.<sup>5</sup> The Agency must prove by a preponderance of the evidence that the action taken was warranted and appropriate under the circumstances.<sup>6</sup> A duty is applied to Grievant to show that the discipline applied to Grievant was retaliatory or unwarranted.

### APPLICABLE LAW

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<sup>5</sup> Grievant's Procedure Manual (GPM) 5.2(2)

<sup>6</sup> GMP §9

This matter is heard regarding the written notice of a Group I Discipline received by Grievant, which action is automatically qualified for hearing<sup>7</sup>. Grievant also relies on actions, which may qualify for hearing alleging there was an adverse employment action.<sup>8</sup> Grievant was disciplined in accordance with general order ADM 12.02.<sup>9</sup> No specific FAA rules or police force policies were entered as evidence other than Grievant's written statement, which describes certain safety standards of weather during which pilots were not permitted to fly.<sup>10</sup> Agency may issue performance evaluations and expect corrective behavior.<sup>11</sup> The action of Grievant being transferred from his position as a pilot may be reviewed, taking into account management rights<sup>12 13</sup> as well as Hearing Officer discretion.<sup>14 15</sup>

"Management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an Agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

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<sup>7</sup> GMP §4.1(A)

<sup>8</sup> §4.1(B)

<sup>9</sup> Agency Exhibit D General Order ADM 12.02 11(b)(4)

<sup>10</sup> Agency Exhibit B

<sup>11</sup> DHRM Policy 1.40

<sup>12</sup> DHRM Policy 1.60, Standards of conduct

<sup>13</sup> *Rules for Conducting Grievance Hearings*, §VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

<sup>14</sup> GPM 4.1c)(ii)(4)

<sup>15</sup> GPM 4.1(c)(ii)(5)

"The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management, which has been charged by the legislature with that critical task."

"The fact that a claim challenges an action under this section does not preclude it from qualifying if (i) the Grievant's claims and (ii) the facts, taken as a whole, raise a sufficient question as to whether the action constituted an adverse employment action that was improperly tainted by (4) retaliation or (5) unwarranted discipline."

### FINDING OF FACTS

Grievant had been a pilot for the Virginia State Police and as such was required to do medical evacuation missions. During the period October 27, 2009 through November 5, 2009, Grievant made statements to the medical crew assigned to his craft about his dissatisfaction with his Agency (see Hearing Officer Cases #9261 and #9262 for details of several disagreements). The statements came to Agency's attention by a citizen's complaint and meeting with the medical crew staff. The statements were originally construed as Grievant offering to ignore state police policy and FAA rules. The complaining witnesses, however, made it clear they were concerned about whether or not it was true that the Agency was pressuring pilots to take risky flights. It was not that they believed Grievant was breaking FAA rules. Grievant did admit he made statements (this not being direct quotes) such as "I don't care what the weather is, we're going" and "I've been written up for not accepting flights so we're going to take this one".<sup>16</sup> After hearing the complaints, Agency took Grievant temporarily off flight duty and

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<sup>16</sup> Agency Exhibit A

assigned him to a patrol car in an adjacent county while an investigation was commended. Grievant had previously been admonished in a performance evaluation<sup>17</sup> to stop making public comments about his job and state police business such as condition of equipment. After the investigation, the decision was made to issue a Group II Notice based on "failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable established written policy" but was mitigated to a Group I Notice "inadequate or unsatisfactory performance"<sup>18</sup> due to Grievant's record as a skilled pilot. This memo also stated Grievant was to receive no discipline other than the Group I write-up. Most, if not all parties to the hearing, commented on Grievant's exceptional skill as a pilot.

Sometime after he was placed on temporary duty as a patrol trooper, Grievant was told he would permanently be given that position and not return to pilot status. At hearing, the presiding officer for Agency, stated Grievant was put on ground duty because Grievant had requested that transfer two (2) years earlier and Agency was trying to accommodate him. To date, Grievant is still working for the Agency on patrol car duty in [County S] with no reduction in his pay rate except for allowances given to pilots.

#### OPINION

Grievant clearly did not violate any department policies or FAA regulations regarding safety of flight. There is no evidence to support he engaged in any such

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<sup>17</sup> Agency Exhibit C

<sup>18</sup> Agency Exhibit G

infractions. Grievant did admit to making statements, which caused enough concern for the medical crew to file a complaint with the Agency. The medical crew staff stated that Grievant's skill was not what caused them fear but that perhaps the Agency was pushing pilots to make unsafe decisions. Nevertheless, had Grievant not made the statements there would have been no concern for the medical crew to voice. Grievant clearly knew he was not to be making such statements. His notice via a performance evaluation was sufficiently clear to put him on notice. He failed to follow instructions.

The remaining issue is the transfer out of the Aviation Division. This Hearing Officer is quite aware it is not within her ability to second-guess management decisions. Further, this Hearing Officer is aware the Agency did not call the transfer part of its disciplinary action. However, given the long history of confrontations between Grievant and Agency, this Hearing Officer simply finds it incredible that Agency wanted to do Grievant a favor and grant his historic request for transfer. Minus any other logical reason, none of which were proffered, the Hearing Officer must conclude it was either actually a part of a disciplinary action or a retaliatory action. In either case, this gives the Hearing Officer authority to review the transfer. Transferring a highly skilled pilot out of the aviation unit for a Group I infraction is excessive discipline. Transferring a highly skilled pilot out of the aviation unit to rid themselves of a pilot with too many military leaves and too many grievances filed is also not permissible. Whether it be either or both of

those reasons (excessive discipline is substantiated by the facts of the case and retaliation is established by knowledge of previous cases along with the present case) Grievant is to be reinstated to his aviation position.

### DECISION

For the above reasons, Agency issuance of a Group I Disciplinary Notice action is **upheld**. Agency's transfer of Grievant from the Aviation Division is **reversed** and Grievant is to be reinstated. No back pay is ordered. Attorney fees are not appropriate to be ordered in this case.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.<sup>19</sup> 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

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<sup>19</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.



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, Department of Human Resources Management  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> 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.<sup>20</sup> 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.

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Sondra K. Alan, Hearing Officer

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<sup>20</sup> 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).