

Issue: Group III Written Notice with demotion and pay reduction (violation of safety rule); Hearing Date: 08/27/10; Decision Issued: 09/09/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9374; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9374**

Hearing Date: August 27, 2010  
Decision Issued: September 9, 2010

**PROCEDURAL HISTORY**

On April 22, 2010, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for safety violation with a threat of harm.

On May 11, 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 July 20, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision due to the unavailability of a party. On August 27, 2010, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
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:

The Department of Behavioral Health and Developmental Services employed Grievant as a Police Officer until his demotion to the position of Transportation Operator I with a disciplinary pay reduction. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on June 20, 2007 and a Group I Written Notice issued on April 26, 2009.

The Individual is 45 years old and has lived at the Facility since 1984. He has significant medical concerns for which he receives care and treatment at the Facility. The Individual had what appeared to be a seizure in the morning of March 20, 2010. This resulted in a worsening of his medical condition such that it was necessary to transport the Individual to the Facility's Medical Clinic several hours later. When the Individual arrived at the Clinic, the Doctor examined the Individual and concluded it would be necessary to transport the Individual to the local Hospital. At 2:15 p.m., the EMT telephoned the Dispatcher and requested a Police Officer to provide transportation for the Individual to the local Hospital. The Facility's practice was for its Police Officers to drive the Facility's emergency vehicles when residents needed transportation for medical reasons. The Dispatcher radioed Grievant to notify him he was needed to drive the emergency vehicle. Grievant was in a Police vehicle driving in a direction away from the Facility. Grievant asked the Dispatcher if the matter was an emergency. He asked, "Is this just a transport?" The Dispatcher replied that the matter had not been

reported as an emergency. The Dispatcher called the Doctor and asked if the matter was an emergency. The Doctor told the Dispatcher that as long as the Individual left the Medical Clinic within 15 minutes, it would be okay. The Dispatcher radioed Grievant but did not tell him that the Doctor said if the Individual left in 15 minute it would be okay. Instead, she asked Grievant for his estimated time of arrival. Grievant responded "two minutes." Grievant actually was more than two minutes away from the Facility.

If Grievant had been informed that an emergency existed, he would have been authorized to activate the lights and siren of his Police vehicle and then cross the median strip of the highway to return to the Facility as quickly as possible. Because Grievant was not notified that an emergency existed, he drove the Police vehicle farther down the road without crossing the median strip of the highway and then turned the vehicle in the direction of the Facility.

The EMT moved the emergency vehicle from the back of the building in which the Medical Clinic was located to the front of the building. This meant that the Individual could be moved from the Medical Clinic into the emergency vehicle quickly.

At 2:18 p.m., Grievant radioed the Dispatcher and informed her that he was parking the Police vehicle behind Building 1 and was walking towards the Medical Clinic.

At 2:25 p.m., the Dispatcher radioed Grievant and asked his location. Grievant replied that he was sitting in the emergency vehicle. Grievant was not actually sitting in the emergency vehicle even though he stated that to the Dispatcher. Grievant was walking towards the emergency vehicle and was approximately 50 feet away from the vehicle.

Grievant assisted other staff when they were moving the Individual from his stretcher provided by the Medical Clinic onto a stretcher located inside the emergency vehicle. When Grievant drove the emergency vehicle from the Facility he did not turn on the lights or siren of the emergency vehicle because he had not been notified by the medical professional in the back of the emergency vehicle assisting the Individual that the Individual was "coding".

At 2:29 p.m., Grievant radioed the Dispatcher and notified her that he was in route on the way to the Hospital. Once the emergency vehicle was within a short distance of the Hospital, the Individual started to "code". The medical professional in the back of the emergency vehicle notified Grievant that emergency existed and Grievant turned on the lights and siren of the emergency vehicle. Grievant drove the emergency vehicle quickly to the Hospital emergency room. The Individual was admitted into the Hospital after he was evaluated by staff at the Hospital emergency room.

A Registered Nurse in the Medical Clinic complained about Grievant's slow response. She believed the Individual's medical condition was an emergency. She was

not aware of the Doctor's statement that it would be okay if the Individual left in 15 minutes. The Agency investigated Grievant's behavior and concluded that it did not constitute client neglect under Departmental Instruction 201, but that it justified disciplinary action.

## 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>1</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."

"[U]nsatisfactory work performance" is a Group I offense.<sup>2</sup> The evidence is clear that Grievant took too long from the time he was first contacted by the Dispatcher to the time he reached the emergency vehicle. When Grievant returned to the Facility, he should have driven his Police vehicle and parked it next to the emergency vehicle. This was the practice of most other Police Officers at the Facility. Instead Grievant drove his vehicle to the Police Department parking lot and then walked to the emergency vehicle. Grievant informed the Dispatcher that he would be at the Facility in two minutes even though he could not have reached the Facility in two minutes. Grievant told the Dispatcher that he was seated in the emergency vehicle even though he was approximately 50 feet away from the emergency vehicle. Grievant's slow response and inaccurate communications are best described as unsatisfactory work performance.

The question is whether there exists a basis in policy to increase the level of discipline for Grievant's behavior from a Group I offense to a Group III offense. The Agency argues that Grievant violated a safety rule where there is a threat of bodily harm. "Safety rules" generally refer to written rules established by an agency regarding the operation of equipment or the provision of services. No evidence was presented that Grievant was notified of a specific rule regarding the amount of time he had to respond to requests for him to drive emergency vehicles. To the extent such a rule could have been defined in this case, it would have been set by the Doctor. The Doctor indicated that as long as Grievant arrived and the Individual was ready to leave in 15 minutes, Grievant's response time would not be of concern. Grievant responded within 14 minutes. No evidence was presented that Grievant failed to properly operate the emergency vehicle in accordance with laws governing the operation of emergency vehicles. If the Hearing Officer assumes for the sake of argument that Grievant violated a safety rule, there is insufficient evidence to support the conclusion that Grievant

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

created a threat of bodily harm. Grievant was not responsible for providing medical treatment to the Individual. Grievant's operation of the emergency vehicle did not cause the Individual to "code". When the Individual "coded," a medical professional immediately attended to the Individual. When the facts of this case are considered as a whole, there is insufficient evidence to raise the disciplinary action above a Group I Written Notice.<sup>3</sup>

*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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 is reduced to a Group I Written Notice. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

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<sup>3</sup> DHRM Policy 1.60 provides "in rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency." The Agency has established that Grievant's slow response created frustration for staff in the Clinic who were attempting to help the Individual. That frustration, however, is not sufficient to establish a truly materially adverse impact on the Agency. In addition, although some staff at the Medical Clinic considered the matter to be an emergency requiring immediate action by Grievant, that urgency was not communicated to Grievant. For example, when Grievant was driving his Police vehicle away from the Facility, he asked if the matter was an emergency but was not informed that he was expected to respond to an emergency. Had he been advised an emergency existed, he could have gotten to the Facility sooner because he would have been justified in turning on his emergency lights and siren and taking a quicker route back to the Facility.

<sup>4</sup> *Va. Code § 2.2-3005.*

## 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].

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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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer