Issue: Group I Written Notice (failure to follow policy); Hearing Date: 02/08/11; Decision Issued: 02/09/11; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9495; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9495

Hearing Date: February 8, 2011
Decision Issued: February 9, 2011

PROCEDURAL HISTORY

On September 9, 2010, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy.

On October 8, 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 January 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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:

Virginia Commonwealth University employs Grievant as a Police Officer. The purpose of this position is:

> The Virginia Campus Police Act of 1976 authorized the establishment of campus police departments at the public institutions of higher learning. Officers assigned to such departments exercise the powers and duties conferred by law upon police officers of cities, towns, and counties. Officers patrol on foot, bicycle and in automobiles in and around the university to determine security of facility and detect intruders. Officers respond to complaints and request of the university community. Officers generate reports, arrest or administratively handle complaints. Officers generate field contacts, self initiated activities and respond to radio dispatch calls.[1]

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Convenience Store is located in an area adjacent to the Agency's campus. There are several nightclubs near the Convenience Store. When crowds exit the nightclubs, people sometimes go to the Convenience Store. It is not unusual for

[1] Agency Exhibit 6.

Agency police officers to respond to the area in front of the Convenience Store to deter disorderly conduct.

On June 18, 2010 at approximately 2 a.m., several Agency police officers including Grievant went to the parking lot in front of the Convenience Store. Mr. G was on break from his job and was with another individual in a white car in the parking lot in front of the Convenience Store. Grievant and another police officer confronted Mr. G while he was in the parking lot. Grievant instructed Mr. G to leave the parking lot. Grievant believed that Mr. G was loitering. Instead of leaving the parking lot, Mr. G began walking back and forth in the parking lot. He then walked towards the entrance of the Convenience Store. Officer F and Corporal C were standing on the concrete apron in front of the entrance to the Convenience Store with their backs to the store. Officer F was standing approximately one foot to the left of Corporal C. Mr. G was told either enter the store or leave the parking lot. Mr. G stepped onto the apron and was trying to "walk-through" Corporal C as if he didn't see her or know she was there. Mr. G made contact with Corporal C with his chest. Corporal C reached with her open hands to deflect Mr. G. sending him to her left and towards Officer F. Officer F planned to continue deflecting Mr. G to his left. Grievant ran towards Mr. G and approached Mr. G from Mr. G's back left side. Grievant made forceful contact with Mr. G, wrapped his arms around Mr. G, and shoved Mr. G. to the left of Officer F. Mr. G had a lit cigar in his possession. The fire portion of the cigar landed on Officer F's neck. Mr. G turned around and shoved Grievant. Grievant shoved Mr. G and ultimately forced Mr. G to the ground and several other police officers joined in to subdue and arrest Mr. G.

Either the owner or an employee of the Convenience Store complained to the Agency of a police officer's behavior. On June 18, 2010, the Agency began an internal investigation of the incident.

A copy of the Convenience Store's videotape of the incident was given to the Local Commonwealth Attorneys' Office. The Local Commonwealth Attorney decided not to prosecute Mr. G.

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."[2] 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."

[2] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Failure to follow policy is a Group II offense.[3] Section 0101(C)(1) of the Agency's Use of Force Policy states:

> Force is excessive when its application is inappropriate to the circumstances. No objective definition of excessive force can be offered; each situation must be evaluated according to specific circumstances.

The Agency's opinion is that Grievant used excessive force on Mr. G. The evidence supports this conclusion. Although Mr. G gestured towards Corporal C, Corporal C testified that he did not hit her. Corporal C was not under attack from Mr. G. When Mr. G moved towards her, she deflected him to her left with her open hand. Officer F planned to continue deflecting Mr. G to the left but Grievant grabbed Mr. G and shoved him. Officer F and Corporal C were moving forward towards Mr. G and not away from him in response to Mr. G's behavior. The evidence is clear that Mr. G had not harmed and was not presenting a threat of harm to Corporal C that required intervention from Grievant. Indeed, Corporal C wrote an incident report in which she stated "I feel like Officer [F] and I could have handled the situation without it escalating to a use of force issue." In addition, Officer B was with Grievant initially when Grievant first encountered Mr. G and observed Grievant run towards Mr. G. Officer B wrote:

> In my evaluation of this incident, the [individual] was asked several times to comply with police commands. In lieu of the heated discussion of the Officer and the individual, as well as the entire incident at hand that developed. The individual seemingly was being disrespectful. I will add that the approach that [Grievant] was not one that I would have proceeded with, yet given the events of the evening and the stress of the overall occurrence, I personally feel the individual was given due process to comply with the request of the officer. Yet the officer could have handled the situation in other ways to not appear so assertive towards the public.[4]

Based on the evidence presented, it appears that Officer F and Corporal C were in control of the altercation with Mr. G and were in the process of resolving the conflict in a manner consistent with having Mr. G stand down. If Grievant had not intervened, there is no reason to believe that Mr. G would have posed any serious threat to Officer F and Corporal C. Grievant's application of force was inappropriate under the circumstances of this case. Because his use of force was inappropriate, his force was excessive and contrary to the Agency's policy governing Use of Force. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency reduced the disciplinary action to a Group I Written Notice. That disciplinary action must be upheld.

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[3] See, Attachment A, DHRM Policy 1.60.

[4] Agency Exhibit 3.

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…."[5] 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 the disciplinary action.

Grievant argued that the disciplinary action against him should be reversed because the Agency failed to comply with the "Garrity Rule" under Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967). Grievant points out that the Agency obtained a statement from him without first informing him of his *Miranda* rights (e.g. right to remain silent and right to have counsel present) before questioning him. Because the investigator failed to inform Grievant of his rights, Grievant argues his written statement cannot be used to terminate him.

Assuming, for the sake of argument, that Grievant should have been given *Miranda* warnings, his written statement need not be rejected from consideration in this employment action. Garrity does not support Grievant's position. In Garrity, several police officers were questioned regarding fixing traffic tickets. Each police officer was told (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office. The police officers were faced with the choice "between self-incrimination or job forfeiture." Id. at 496. The Court concluded:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Id. at 500. (Emphasis added). Although the Court concluded that statements made under the threat of job removal may not be used in criminal proceedings, it did not address or prohibit use of those statements in employment disputes. In this case, the Agency did not initiate criminal proceedings against Grievant. Thus, Grievant's written statement may form the basis of disciplinary action against him.

[5] Va. Code § 2.2-3005.

Grievant argued that under the Agency's policies governing investigations of police officers, the Investigator had 30 days to complete the investigation or obtain an extension with the appropriate notification given to Grievant. Because the investigation took longer than 30 days, Grievant argues that the disciplinary action should be reversed. Although the Agency's investigation took approximately 45 days and the Agency failed to give Grievant notice of an extension of the investigation, Grievant has not presented any policy that would mandate a reversal of the disciplinary action. Although the Agency mitigated the disciplinary action from a Group II Written Notice to a Group I Written Notice, in part, because of the Agency's delay, no policy has been presented to show that a reversal of the disciplinary action was mandated.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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 14th St., 12th 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.[6]

[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

[6] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.