

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 05/11/12;  
Decision Issued: 05/15/12; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9729; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9729**

Hearing Date: May 11, 2012  
Decision Issued: May 15, 2012

**PROCEDURAL HISTORY**

On August 18, 2011, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On September 15, 2011, 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 she requested a hearing. On March 5, 2012, 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 in this grievance due to the unavailability of a party. On May 11, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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 Virginia Department State Police employs Grievant as a State Police Trooper II at one of its regional areas. She began working for the Agency in 2003. Grievant received numerous favorable performance evaluations. Grievant was highly regarded by Agency supervisors for the quality of her work. Grievant received numerous commendations for her work performance.

One of Grievant's responsibilities was to "take" or "handle" crash investigations for motor vehicle accidents involving injuries or property damage in the amount of \$1500 or more. In 2007, Grievant attended a staff meeting during which Captain C reminded sworn employees of their obligation to conduct crash investigations and not to "give away" those investigations to local law enforcement agencies unless there was an appropriate reason to do so.

In March 2011, the Agency received a complaint from the local Sheriff's Department that Grievant attempted to make the Sheriff's Department's staff handle a crash investigation that Grievant should have taken and the Grievant had an "attitude" towards several members of the Sheriff's Department's staff. The First Sergeant met with Grievant to counsel her. The First Sergeant instructed Grievant that she should not give away "calls for service" including crash investigations to local law enforcement

agencies unless there was a reason to do so. The First Sergeant also counseled Grievant regarding improving her interpersonal skills.

On June 5, 2011, an elderly man driving an expensive sports car crashed into a tree. The vehicle suffered extensive damage. The man was unable to exit the vehicle. A citizen observed that a vehicle had crashed and traveled approximately one mile to the Virginia State Police Area Office. Grievant was at the Area Office in order to refuel her vehicle. Before Grievant could exit her vehicle, the citizen pulled into the parking lot and told her that a car hit a tree and that he did not think the driver could get out of the vehicle. Grievant called the local Sheriff's Dispatch staff to advise them of the need for Fire and Emergency Medical Services regarding a possible entrapment and that she would respond to the crash scene from the Area Office as soon as she finished refueling her vehicle. The Sheriff's Dispatcher told Grievant that they already had a Deputy, Fire and EMS en route to the location and described the location. Grievant informed the Sheriff's Dispatcher that the accident was actually on the other side of the Area Office toward another street. Grievant told the Sheriff's Dispatcher that she had to get gas for her vehicle but would be responding to the crash scene from the Area Office.

After Grievant fueled her vehicle, Grievant began driving towards the crash scene. She used her radio to attempt to call the State Police Dispatcher to tell the Dispatch her that she was en route to the crash scene. Before she could reach the State Police Dispatcher, the State Police Dispatcher announced that Trooper R had been dispatched to the crash scene and was en route. Grievant told the State Police Dispatcher the correct location of the crash and told the Dispatcher that she was en route to assist Trooper R.

Grievant was the first responder to arrive at the scene of the accident.<sup>1</sup> Grievant secured the scene and began investigating. Grievant spoke to the driver of the car and asked him if he was all right. She observed that he appeared to be without significant injury except that he had blood on his fingers. She asked the driver if he had fallen asleep. Grievant attempted to take pictures of the crash scene but the battery in her camera was too low. Grievant attempted to determine the longitude and latitude of the crash site.

Approximately 8 to 10 minutes after Grievant arrived at the scene, the Deputy arrived. Grievant believed that the Deputy had been involved in the complaint the Agency received from the Sheriff's Department in March 2011. Grievant attempted to display a friendly demeanor and interacted with the Deputy in a manner to show that she was happy to work accidents and help out in any calls the Sheriff's Department may have had. She wanted to convey to the Deputy that she is typically a friendly upbeat person in order to counter the possibility that the Deputy may have perceived her as rude in March 2011.

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<sup>1</sup> Trooper R was approximately twenty minutes away from the crash site when he was dispatched by the State Police Dispatcher.

Grievant observed the Deputy beginning to work the crash. Grievant told the Deputy that a citizen had informed her about the crash. Grievant and the Deputy spoke regarding who would handle the crash investigation. Grievant concluded that the Deputy wanted to handle the investigation.<sup>2</sup> When Trooper R learned the Grievant would not be conducting the investigation, he sent her a text, "Why is [Sheriff's Department] working the crash if you were first on scene?" Before responding, Grievant went to the Deputy to clarify if she was supposed to be working the accident. The Deputy told Grievant that he did not know that the State Police were coming to the accident and that he considered it to be his accident. Grievant replied to Trooper R, "I don't think they were giving it to us, they were just telling us because the [State Police] office is right here by it." Trooper R questioned, "Was he on scene when [you] arrived?" Grievant answered, "no, but I'm not going to take calls out from under them. Same thing if the guy was drunk. I'm not gonna make them mad by overstepping."<sup>3</sup>

Because Grievant questioned the Deputy regarding who was to handle the crash investigation, the Deputy perceived Grievant as not wanting to work the crash. The Deputy worked the crash. Grievant remained at the crash scene. Grievant asked the Deputy how she could assist. The driver had informed the Deputy that he was diabetic. The Deputy asked Grievant to check the vehicle for any medications. Grievant did so and informed the Deputy that she did not find any medications in the vehicle. She made sure that the driver's walker and walking cane were removed from his car and loaded into the ambulance so that the driver would have them when he reached the hospital. Following his investigation, the Deputy completed and submitted the Department of Motor Vehicle report form.

## **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>4</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."

General Order OPR 4.00 governs Motor Vehicle Crash Investigation. Section 2 provides:

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<sup>2</sup> Grievant notified the State Police Dispatcher that the Firefighters were trying to get the driver out of the vehicle and that the driver was not "really hurt, they are having a hard time getting the door open and [Trooper R] can go back in service." See, Grievant Exhibit 2.

<sup>3</sup> Agency Exhibit 4.

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

All motor vehicle crashes coming to the attention of sworn employees that meet any of the conditions stated below shall be investigated, provided they have not been investigated by an appropriate law enforcement agency.

- a. Sworn employees shall investigate crashes involving personal injury, death, and/or hit and run.
- b. Sworn employees shall investigate crashes that involve an apparent extent and total property damage of the dollar value stated in § 46.2-373 of the Code of Virginia<sup>5</sup>, except those on private property, and which will allow investigation at the scene prior to the vehicles being removed.
- c. Sworn employees shall investigate crashes involving a state-owned or state-leased vehicle. (These crashes shall be investigated in keeping with General Order OPR 4.01.)
- d. Sworn employees will also investigate all other property damage crashes when directed to do so by a supervisor or when it is in the opinion of the sworn employee that the best interest of law enforcement will be served by investigating the crash. Crashes involving DUI suspects, habitual offenders, or other offenses that warn immediate enforcement action should be investigated.

Failure to follow a supervisor's instructions is a Group II offense. In March 2011, the First Sergeant instructed Grievant that she should not give away "calls for service" including crash investigations to local law enforcement agencies unless there was a reason to do so. On June 5, 2011, Grievant was the first law enforcement officer at the scene of the vehicle crash. The driver had suffered minor injuries. The vehicle damage exceeded approximately \$1,500. Under the Agency's policies and practice, Grievant was authorized and obligated to conduct a crash investigation. Grievant took several steps consistent with investigating the crash and considered herself to be conducting an investigation. When the Deputy arrived approximately 8 to 10 minutes later, she spoke with the Deputy regarding who was to conduct the investigation. Because the Deputy gave Grievant the impression that he wished to conduct the investigation and Grievant did not wish to "overstep" Grievant "gave away" the investigation to the Deputy. Grievant acted contrary to the First Sergeant's instructions by giving away the investigation to the Deputy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice because of Grievant's exemplary work performance.

Grievant argued that her behavior was consistent with the First Sergeant's instruction that she improve her interpersonal skills with respect to her interaction with

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<sup>5</sup> The amount established by the statute is \$1,500.

the local Sheriff's Department. She believed that the Deputy was involved in the complaint made against her in March 2011 and she wished to demonstrate a friendly demeanor.

The instructions given to Grievant by the First Sergeant in March 2011 are not inconsistent. The First Sergeant did not instruct Grievant to defer to employees of the Sheriff's Department. She instructed Grievant to display interpersonal skills so that Grievant would avoid being perceived as having an "attitude." Grievant was capable of complying with both instructions. She could have retained responsibility for conducting the crash investigation and communicated that decision to the Deputy in a polite and respectful manner. Instead, she deferred to the Deputy's preference and permitted him to complete the investigation.

Grievant argued that because someone had reported the crash to the Sheriff's Department before she called them, the crash investigation was within the Sheriff's Department's control. The evidence showed that the Agency's practice was for Troopers to investigate crashes if they were the first law enforcement officers to respond to the scene and the crash involved personal injuries or property damage exceeding \$1,500. The Deputy testified that it was his understanding that the first law enforcement officer on the scene was responsible for working the crash. Based on the evidence presented, Grievant was responsible for working the crash because she was the first law enforcement officer to reach the scene and the crash involved personal injury and property damage exceeding \$1,500.

Grievant presented evidence of several accidents investigated by the Sheriff's Department even though a Trooper had responded to the scene and the accident involved personal injury and damage exceeding \$1,500. This evidence is not sufficient to change the outcome of this case. The Supervisor testified that he was not familiar with the details of the accidents. He explained that if the Agency's Trooper had responded to the scene after the Sheriff's Department's Deputy had begun an investigation, it would have been appropriate for the Trooper not to duplicate the Deputy's investigation. The examples presented by Grievant did not provide a basis to compare the time a Deputy responded with the time a Trooper responded to the accident. If the Hearing Officer assumes for the sake of argument that in each case a Trooper arrived at the scene first, the outcome of this case would not change. The Supervisor testified that he was not familiar with the accidents. There is no reason for the Hearing Officer to believe that the Agency has singled out Grievant for disciplinary action. There is no reason for the Hearing Officer to believe that the First Sergeant had abandoned her instruction to Grievant given in March 2011.

Grievant argued that the Agency failed to take corrective action in a progressive manner. She asserts that the Agency could have issued a written counseling rather than a Written Notice. Grievant's argument fails. Although State agencies are encouraged to take progressive disciplinary action, they are not required to do so under the Standards of Conduct. The Agency is not obligated to issue a written counseling memorandum prior to issuing a Written Notice.

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>6</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 the disciplinary action.

## 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 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

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<sup>6</sup> Va. Code § 2.2-3005.



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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.