

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 10/01/12;
Decision Issued: 10/02/12; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9882; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9882

Hearing Date: October 1, 2012

Decision Issued: October 2, 2012

PROCEDURAL HISTORY

On May 8, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On June 4, 2012, 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 August 22, 2012, the Office 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 October 1, 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 of State Police employs Grievant as a Senior Trooper. She has been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing. Grievant's performance evaluations showed that her prior work performance was satisfactory to the Agency.

Grievant turned off the video camera in her police vehicle in order to avoid draining the vehicle's battery. She had received training regarding how to activate the video camera.

On February 3, 2012, an alleged rapist was driving a vehicle while being pursued by local law enforcement officers. Grievant was working in her office when she was notified by the Agency Dispatcher to join the pursuit. Grievant took her computer and placed it into the docking station in her vehicle. She activated her emergency lights and siren but failed to push the necessary buttons to activate her mobile camcorder. She began pursuing the suspect and got behind the suspect's vehicle. Grievant followed the suspect at speeds of up to 100 miles per hour. At one point, the suspect slowed down and entered a four lane highway. The suspect entered the highway driving eastbound in the westbound direction. In other words, the suspect entered the highway in the direction facing oncoming traffic. Grievant was focused on the pursuit and also entered the highway driving eastbound in the westbound direction. She drove two tenths of a mile at a speed of approximately 45 miles per hour until she was able to begin driving consistent with the flow of traffic. She followed the suspect until he turned onto a

private drive. Grievant and several local law enforcement officers apprehended the suspect.

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.”¹ 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.”

Failure to follow policy is a Group II offense.² General Order OPR 2.01 provides guidelines to sworn employees for initiating, conducting, and terminating a pursuit. Section 3 of this policy provides:

No pursuit will be conducted in a direction against the lawful flow of traffic on a one-way street or lane of a divided highway.³

On October 17, 2008, the Agency Head sent employees MEMO – 2008 – No. 04 mobile camcorder recording equipment in patrol vehicles. Section II(F) provided:

Each camera system will be inspected daily by the operator and any discrepancies reported to supervision.⁴

General Order OPR 6.05 provides that the camcorder will be used for:

All police pursuits, upon initiation or when assistance is requested by another sworn employee of our agency or another agency.⁵

On February 3, 2012, Grievant responded to a radio call to join in a vehicle pursuit of a suspected rapist. She failed to activate her mobile camcorder. During part of the pursuit, she travelled two tenths of a mile against the flow of traffic on a divided highway. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60. See, VSP General Order ADM 12.02.

³ Agency Exhibit 7.

⁴ Agency Exhibit 10.

⁵ Agency Exhibit 8.

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...”⁶ 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.

Grievant argued that the disciplinary action should be reduced because a Group II Written Notice is too harsh under the circumstances. The Agency could have issued two Group II Written Notices for two violations of policy but mitigated the disciplinary action by issuing only one Group II Written Notice. The Hearing Officer is not a “super personnel officer” who can substitute his opinion regarding the level of discipline once the Agency has met its burden of proof. In this case, the Agency has met its burden of showing that Grievant engaged in behavior giving rise to a Group II Written Notice. The Agency’s discipline does not exceed the limits of reasonableness. In light of the standard set forth in the Rules, 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 II 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:

⁶ Va. Code § 2.2-3005.

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

3. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁷

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.