

Issues: Group II Written Notice (providing false information, failure to follow policy, negligence), Group III Written Notice (use of excessive force) and Termination; Hearing Date: 09/10/12; Decision Issued: 10/01/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9883, 9884; Outcome: Partial Relief;  
**Administrative Review: EDR Ruling Request received 10/12/12; EDR Ruling No. 2013-3456 issued 11/07/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 10/12/12; DHRM Ruling issued 11/14/12; Outcome: AHO's decision affirmed.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9883 / 9884**

Hearing Date: September 10, 2012

Decision Issued: October 1, 2012

#### **PROCEDURAL HISTORY**

On April 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for use of unnecessary force. Also on April 17, 2012, Grievant was issued a Group II Written Notice with removal for presenting false information, failure to follow policy, and negligence.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On July 25, 2012, the Office of Employment Dispute Resolution issued Ruling No. 2013-3384, 2013-3385 consolidating the two grievances for a single hearing. On August 6, 2012, the EDR 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 September 10, 2012, 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 employed Grievant as a Police Officer. The primary purpose of his position was to provide patrol operations and services within the VCU Police Department. He received an overall rating of "Achiever" on his 2011 annual performance evaluation.

Mr. M was disruptive in the hospital Emergency Room waiting area and hospital employees called the VCU Police Department for assistance. Grievant, Officer A, and Officer L responded. A hospital employee told Grievant that Mr. M had been there on several occasions and been disruptive. Mr. M was yelling and cursing at the VCU employees. Mr. M began walking out of the waiting area and towards the entry way for the Emergency Room. As he approached the entry door to the Emergency Room, Mr. M turned and yelled and cursed at the police officers. He raised one arm up in the air and lowered as he turned back in the direction of the door. His gesture was consistent with someone indicating he had had enough of the circumstances he was facing and intending to leave. The entry door was designed to open automatically by sliding from one side to the other. The entry door was also designed to fold and collapse if pushed abruptly. Mr. M moved quickly towards the door and pushed it with sufficient force to collapse the door. While Mr. M was moving in a direction away from Grievant, Grievant

dipped slightly and lunged forward to push Mr. M all the way past the door and into the entryway and then pushed him up against scaffolding. Grievant held Mr. M's face while pressing Mr. M against the scaffolding. Grievant told Mr. M to leave. Mr. M left the Agency's property. Grievant did not arrest Mr. M.

Based on Mr. M's interaction with Grievant, Mr. M later threatened to kill Grievant. The Agency began its investigation upon learning of the threat.

On March 2, 2012 at approximately 11:48 p.m., Grievant was driving his police vehicle when he made a sharp turn in pursuit of another vehicle. The side of his vehicle slid into a curb causing damage to a wheel. Grievant stopped the vehicle and notified the Dispatcher that "my wheel went out, rear back wheel at [location]." Grievant stated, "Back wheel, just like popped on [location]." The Sergeant asked Grievant if it was just a flat tire. Grievant said "Yes sir, I believe it is." A tow truck company employee went to Grievant's location and repaired the flat tire. At about 12:50 a.m. Grievant called the Sergeant to inform the Sergeant that the vehicle was "riding rough." Grievant told the Sergeant that he had crashed the vehicle into a curb. The Sergeant went to Grievant's location and observed the vehicle. The Sergeant noticed that the rear axle was damaged and out of place, the hubcap was scuffed and the wheel was bent. The cost to repair the vehicle was approximately \$1700.

## **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."

### Group III Written Notice

Agency Policy 0100-0112 addresses "Use of Force" for police officers. Section 0100 provides, "The degree of force used must be reasonable and necessary under the circumstances. \*\*\* The Department expects that officers will employ only the minimum force necessary to accomplish a legal purpose." Section 0101(C) states that Excessive Force includes:

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.<sup>2</sup>

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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> Agency Exhibit 6.

DHRM Policy 1.60 lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

In the Agency’s judgment, Grievant should receive a Group III Written Notice for use of excessive force against Mr. M. The Agency’s judgment is supported by the evidence. Mr. M was in the process of leaving the emergency room. When Mr. M pushed the sliding door causing it to buckle, Grievant reacted by pushing Mr. M through the door and into the entryway outside of the emergency room waiting area. If Grievant had not acted, Mr. M would have passed through the sliding door and into the emergency room entryway and, likely, away from the Agency’s property. It was unnecessary for Grievant to use force by pushing Mr. M through the door to the outside entryway and up against the scaffolding. Grievant’s unnecessary use of force created a risk of physical injury to Mr. M, legal liability to the Agency, and resulted in a threat to kill Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that after pushing the doors, Mr. M turned to his left which indicated to Grievant that Mr. M intended to reenter the building. Grievant argued that if Mr. M had turned to the right it would have indicated that Mr. M intended to walk away from the building. A video taken in the Emergency Room, however, shows that Grievant pushed Mr. M in the back and that Mr. M then turned to his right, not his left. After pushing the doors open, Mr. M did not take any action that would have indicated he intended to reenter the building.

### Group II Written Notice

The Agency argued that Grievant should receive a Group II Written Notice for presenting false information, failure to follow policy, and negligence while operating a state vehicle. The Agency has not established a basis to take disciplinary action against Grievant regarding the damage to his police vehicle. Simply because Grievant’s vehicle was damaged when it hit a curb, does not establish that Grievant was negligent in the operation of the vehicle. The Agency failed to present sufficient details regarding the accident to establish that Grievant operated his vehicle improperly.<sup>3</sup> Grievant contacted the Agency immediately after the tire on his vehicle flattened. He reported what he knew, namely that the tire was flat. He did not report that the vehicle was damaged because he did not observe the damage. The Agency argued that it was

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<sup>3</sup> Grievant began pursuing a vehicle whose driver failed to stop at a red light. It may have been necessary for him to suddenly and rapidly accelerate his police vehicle.

obvious that the axle was out of place and that Grievant knew that the axle was out of place but told the Sergeant only that the vehicle had a flat tire. Grievant presented the testimony of another Police Officer who viewed the vehicle at approximately the same time as the Sergeant viewed the vehicle. The Police Officer testified that the damage was not obvious. He testified that he did not notice any problems with the vehicle when he first observed it. The Group II Written Notice must be reversed.

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 the Group III Written Notice with removal.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

## 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:

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<sup>4</sup> Va. Code § 2.2-3005.

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

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

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 the Office of Employment Dispute Resolution 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:

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

Or, send by email to [EDR@dhrm.virginia.gov](mailto: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 give a copy of all of your appeals to the other party and to EDR. 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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



# COMMONWEALTH of VIRGINIA

SARA REDDING WILSON  
DIRECTOR

## *Department of Human Resource Management*

101 N. 14<sup>TH</sup> STREET  
JAMES MONROE BUILDING, 12<sup>TH</sup> FLOOR  
RICHMOND, VIRGINIA 23219  
(804) 225-2131  
(TTY) 711

### POLICY RULING OF THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

In the Matter of  
Virginia Commonwealth University

November 14, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9883/9884. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The relevant facts of this case as listed below:

On April 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for use of unnecessary force. Also on April 17, 2012, Grievant was issued a Group II Written Notice with removal for presenting false information, failure to follow policy, and negligence.

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Virginia Commonwealth University employed Grievant as a Police Officer. The primary purpose of his position was to provide patrol operations and services within the VCU Police Department. He received an overall rating of "Achiever" on his 2011 annual performance evaluation.

Mr. M was disruptive in the hospital Emergency Room waiting area and hospital employees called the VCU Police Department for assistance. Grievant, Officer A, and Officer L responded. A hospital employee told Grievant that Mr. M had been there on several occasions and been disruptive. Mr. M was yelling and cursing at the VCU employees. Mr. M began walking out of the waiting area and towards the entry way for the Emergency Room. As he approached the entry door to the Emergency Room, Mr. M turned and yelled and cursed at the police officers. He raised one arm up in the air and lowered as he turned back in the direction of the door. His gesture was consistent with someone indicating he had had enough of the circumstances he was facing and intending to leave. The entry door was designed to open automatically by sliding from one side to the other. The entry door was also designed to fold and collapse if pushed abruptly. Mr. M moved quickly



towards the door and pushed it with sufficient force to collapse the door. While Mr. M was moving in a direction away from Grievant, Grievant dipped slightly and lunged forward to push Mr. M all the way past the door and into the entryway and then pushed him up against scaffolding. Grievant held Mr. M's face while pressing Mr. M against the scaffolding. Grievant told Mr. M to leave. Mr. M left the Agency's property. Grievant did not arrest Mr. M.

Based on Mr. M's interaction with Grievant, Mr. M later threatened to kill Grievant. The Agency began its investigation upon learning of the threat.

On March 2, 2012 at approximately 11:48 p.m., Grievant was driving his police vehicle when he made a sharp turn in pursuit of another vehicle. The side of his vehicle slid into a curb causing damage to a wheel. Grievant stopped the vehicle and notified the Dispatcher that "my wheel went out, rear back wheel at [location]." Grievant stated, "Back wheel, just like popped on [location]." The Sergeant asked Grievant if it was just a flat tire. Grievant said, "Yes sir, I believe it is." A tow truck company employee went to Grievant's location and repaired the flat tire. At about 12:50 a.m. Grievant called the Sergeant to inform the Sergeant that the vehicle was "riding rough." Grievant told the Sergeant that he had crashed the vehicle into a curb. The Sergeant went to Grievant's location and observed the vehicle. The Sergeant noticed that the rear axle was damaged and out of place, the hubcap was scuffed and the wheel was bent. The cost to repair the vehicle was approximately \$1700.

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Grievant argued that after pushing the doors, Mr. M turned to his left which indicated to Grievant that Mr. M intended to reenter the building. Grievant argued that if Mr. M had turned to the right it would have indicated that Mr. M intended to walk away from the building. A video taken in the Emergency Room, however, shows that Grievant pushed Mr. M in the back and that Mr. M then turned to his right, not his left. After pushing the doors open, Mr. M did not take any action that would have indicated he intended to reenter the building.

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## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is upheld. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is rescinded.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, as related to policy, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority regarding policy issues, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his appeal to the DHRM, the grievant has requested that this Agency review the decision as related to the application of VCU's policy on the use of force. While the grievant was issued two disciplinary actions, the grievant requested a review of only the application of VCU's policy that resulted in Group III Written Notice with termination.

In his decision, the hearing officer wrote, in part, the following:

In the Agency's judgment, Grievant should receive a Group III Written Notice for use of excessive force against Mr. M. The Agency's judgment is supported by the evidence. Mr. M was in the process of leaving the emergency room. When Mr. M pushed the sliding door causing it to buckle, Grievant reacted by pushing Mr. M through the door and into the entryway outside of the emergency room waiting area. If Grievant had not acted, Mr. M would have passed through the sliding door and into the emergency room entryway and, likely, away from the Agency's property. It was unnecessary for Grievant to use force by pushing Mr. M through the door to the outside entryway and up against the scaffolding. Grievant's unnecessary use of force created a risk of physical injury to Mr. M, legal liability to the Agency, and resulted in a threat to kill Grievant. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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Based on his assessment of the evidence, the hearing officer concluded that VCU officials were proper in issuing to the grievant a Group III Written Notice with termination. In his appeal to DHRM, the grievant did not identify any human resource

policy, either state or agency, that the hearing officer violated or misinterpreted in making his decision. Rather, it appears that the grievant is disagreeing with how the hearing officer assessed the evidence and the resulting decision. Therefore, this Agency has no basis to disturb this decision.

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Ernest G. Spratley  
Assistant Director,  
Office of Equal Employment Services