

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 11/27/12; Decision Issued: 12/14/12; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9968; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

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

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

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

In re:

**Case Number: 9968**

Hearing Date: November 27, 2012

Decision Issued: December 14, 2012

#### **PROCEDURAL HISTORY**

On September 24, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On October 2, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On October 31, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 27, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
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:

Old Dominion University employed Grievant as a Police Sergeant. He began working for the Agency in 1999. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised Officer P. On March 14, 2012, Officer P was operating his police vehicle on the Agency's campus when he observed a vehicle with its headlights off. He attempted to stop the vehicle but the vehicle attempted to elude Officer P at a high rate of speed. Officer P pursued the vehicle even though under Agency policy he was not authorized to do so. Following the incident, Officer P wrote a report stating:

At approximately 2357 hrs, 03/14/12, while awaiting the stoplight at Hampton Blvd and 38<sup>th</sup> street, I observed a [vehicle] with the headlights off, turned left on 35<sup>th</sup> street. I reobtained a visual of the same vehicle north bound at 40<sup>th</sup> street and Bowden Ferry Road. After attempting to initiate a traffic stop, subject disregarded my emergency equipment by speeding up, then making a right on 42<sup>nd</sup>, then a right on Hampton Blvd, then another right onto 39<sup>th</sup> street, disregarding (2) stop signs, accelerating to the speed of approximately 60 mph. Subject then turned left on Bluestone, then left on 38<sup>th</sup>, then right on Bowden Ferry. After disengaging due to safety, I advised NPD unit, [Local Police Officer] of the occurrence. \*\*\*

Following the incident, Grievant wrote a report to the Chief of Police.

At approximately 2357h, 03142012, while patrolling concurrent jurisdiction, [Officer P] was stopped westbound on 38<sup>th</sup> Street at the Hampton Boulevard traffic light when he observed a [vehicle] travelling northbound on Hampton Boulevard, then turning west onto 35<sup>th</sup> Street, without headlamps on after dusk. [Officer P] lost visual of vehicle when it turned, then he proceeded to Lambert's Point community. At approximately 0009h, while [Officer P] was travelling westbound on 40<sup>th</sup> Street, he observed the same vehicle travelling northbound, still without headlights, on Bowden Ferry, at which time he attempted to initiate a traffic stop, while notifying ODUPD dispatch. After activating his emergency equipment, the suspect vehicle sped up in an attempt to elude ODUPD. [Officer P] pursued the suspect vehicle northbound on Bowden Ferry, which turned right on 42<sup>nd</sup> street, then right turned on Hampton Boulevard, then another right turn on 39<sup>th</sup> Street, disregarding (2) stop signs, accelerating to excessive speed that [Officer P] believes to be approximately 50+ mph. Suspect vehicle continued left onto Bluestone Avenue, then left onto 38<sup>th</sup> Street, then finally right onto Bowdon Ferry, at which time ODUPD disengaged due to safety reasons. At approximately 0012h, [Officer P] then informed [local police officer], of occurrence, then notified dispatch that [local police department] assumed pursuit. At approximately 0012h, [local police department] apprehended same near the EVMS community at 1200 block of Spotswood Avenue.

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At 0016h, [local police department] unit requested [Officer P] at apprehension scene (Spotswood) for [number]. ODUPD report was written by [Officer P]. These are the chain of events for this incident. I did not find any conflict with ODUPD's Directive-1.3.

### **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."

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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.

"[F]alsification of records" is a Group III offense.<sup>2</sup> Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

The Agency has not established that Grievant falsified his report to the Chief of Police. Grievant's description of the incident was not materially different from the account given by Officer P. Grievant described how Officer P identified and followed the suspect vehicle. Grievant described Officer P's actions as pursuing the suspect vehicle. Grievant wrote that Officer P drove his vehicle in excess of 50 miles per hour. If Grievant wanted to protect Officer P from disciplinary action and hide from the Chief that Officer P had engaged in a pursuit, Grievant would not have written that Officer P pursued the suspect vehicle at speeds in excess of 50 miles per hour. The speed limits in the area of the pursuit typically were 35 miles per hour.

The Agency argued that Grievant falsified his report because he wrote that Officer P terminated the pursuit for safety reasons. Officer P wrote in his report that he disengaged due to safety.<sup>3</sup> Grievant did not falsely report that Officer P terminated the pursuit due to safety reasons. Grievant's report was consistent with Officer P's report regarding safety.

The Agency argued that Grievant falsified his report when he wrote, "I did not find any conflict with ODUPD's Directive -1.3." The Agency argued that Officer P was involved in a pursuit but his pursuit was not authorized by Directive 1.3 because a pursuit is permitted only if the officer believes the suspect committed a felony or attempted to commit a felony involving serious violence or injury and the failure to take pursuit and make an apprehension will potentially result in additional criminal activities involving serious injury or death. Grievant's statement is true. He did not believe that Officer P violated Directive 1.3 because he did not understand what constituted a pursuit under Directive 1.3. Grievant believed the policy only applied to "high speed

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

<sup>3</sup> When Grievant discussed the incident with Officer P before Grievant and Officer P wrote their reports, Officer P told Grievant that he disengaged from following the suspect vehicle for safety reasons.

pursuits” which he believed Officer P’s pursuit was not a “high speed pursuit”. Directive 1.3 does not require a “high speed pursuit” it merely requires a pursuit. Pursuit is defined in the policy as “an active attempt by a law enforcement officer in a motor vehicle to apprehend one or more occupants of another moving vehicle, where the driver of the fleeing vehicle is aware of the attempt and is resisting.” Officer P was involved in a pursuit but the conditions necessary to authorize that pursuit did not exist and, thus, Officer P was wrong to engage in the pursuit. Grievant should have recognized that Officer P was wrong to enter a pursuit.

The Written Notice provides:

While [Grievant] may not have intentionally concealed or misrepresented the facts of this incident, he failed to provide accurate critical information about the incident. He states that he reported what was reported to him; however, he had additional, firsthand information about the incident (including needing to provide corrective feedback to the responding officer) that should have been included in the report.

This language supports the conclusion that Grievant did not intentionally misrepresent facts. In other words, the Agency is conceding that Grievant did not know his statements were false. One of the elements of falsification includes intentionally making a false statement. Grievant’s failure to include firsthand information in the report does not rise to a level higher than a Group I offense.

The Agency has not established that Grievant falsified his report when he wrote that he did not find a conflict with Directive 1.3. What the Agency has established is that Grievant did not know the contents of Directive 1.3 and failed to properly interpret that policy. Grievant’s failure to properly interpret the policy is a Group I offense for unsatisfactory performance. Because the nature of the policy involved public safety (namely, preventing police officers and suspects from engaging in high speed chases that could injure nearby civilians), there is a basis to elevate the Group I to a Group II offense.<sup>4</sup> The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice with a ten work day suspension.

The Agency argued that Grievant’s report was not complete because he did not write that he was unable to assume command or take steps to terminate the pursuit. This allegation, if true, would not support the issuance of disciplinary action higher than a Group I Written Notice for unsatisfactory job performance.

*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

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<sup>4</sup> See, Attachment A, DHRM Policy 1.60 which 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. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.”

“in accordance with rules established by the Department of Human Resource Management ....”<sup>5</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.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys’ fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

## 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 **reduced** to a Group II Written Notice with a ten work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may reduce the amount of back pay by the ten workday suspension.

## 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 believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management

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<sup>5</sup> Va. Code § 2.2-3005.

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

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

2. 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail 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 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.<sup>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.