

Issue: Group III Written Notice with Termination (failure to follow policy and falsifying records); Hearing Date: 12/01/15; Decision Issued: 01/04/16; Agency: ODU; AHO: Ternon Galloway Lee, Esq.; Case No.10710; Outcome: Full Relief.
Attorney's Fee Addendum issued on 02/03/16 awarding \$3,602.50.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10710

Hearing Date: December 1, 2015

Decision Issued: January 4, 2016

SUMMARY OF DECISION

The Agency had found Grievant failed to follow policy and falsified records. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found the Agency's evidence insufficient to sustain the discipline. Thus, the Hearing Officer vacated the Group III Written Notice with termination and reinstated Grievant.

HISTORY

On September 30, 2015, the Agency issued Grievant a Group III Written Notice with termination. The Agency asserts in the notice that Grievant falsified records and failed to follow policy. Grievant timely filed his grievance to challenge the Agency's action. On October 28, 2015, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held November 4, 2015.¹ Subsequently, the Hearing Officer issued a scheduling order setting the hearing for December 1, 2015, as agreed to by the parties during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. None were expressed. Following opening statements by the parties' advocates, the Hearing Officer admitted Agency Exhibits 1 through 15 and Grievant's Exhibits 1 through 7. During the hearing, Grievant's Exhibit 8 was also admitted without objection.

At the hearing, the parties were also given the opportunity to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party. At the conclusion of the examination of all witnesses, the parties were granted leave to submit written closing arguments. Accordingly, the record was left open until December 15, 2015, for these written arguments.²

During the proceeding, the Agency was represented by its attorney. An attorney also represented Grievant.

APPEARANCES

Advocate for Agency

Witnesses for the Agency (1 Agency witness and 1 joint witness)

¹ This was the first date available for both parties for the PHC.

² The Agency's closing statement was due and submitted on December 8, 2015, and Grievant's was due and submitted on December 15, 2015.

Advocate for Grievant
Witnesses for Grievant (Grievant and 1 joint witness)
Grievant

ISSUE

Was the written notice with termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified the Hearing Officer makes the following findings of fact:

1. The Agency is a university and Grievant has been employed as one of the Agency’s police officers for 17 years. During this period Grievant has made numerous arrests. The Agency represented that Grievant had been a good police officer with the university during his tenure. (Stipulation by the Agency). Prior to the discipline Grievant received that is the subject of this grievance, Grievant had never been disciplined. (A Exh. 5, Tr. 2 of 2, p. 3; Testimony of Grievant).

2. On April 19, 2015, Grievant arrested Customer 1 for being drunk in public, resisting arrest, and underage possession of alcohol. Grievant then went before a magistrate where he provided sworn statements sufficient for the magistrate to issue formal charges. Specifically, regarding the drunk in public charge, Grievant informed the magistrate that Customer 1 was heckling him and calling the police officer names. Further he told the magistrate that when he approached Customer 1/when he was on him, he could smell alcohol and see Customer 1’s glassy eyes.

Grievant charged Customer 1 with resisting arrest because from Grievant’s perspective during the incident on April 19, 2015, when Grievant informed Customer 1 that he was under arrest, Customer 1 stepped back in an attempt to leave. Customer 1 also failed to comply with instructions of Grievant and his arms were flailing. In light of these actions by Customer 1, Grievant grabbed Customer 1’s arm and handcuffed him. This scenario occurred in a matter of only a few seconds. Once hand-cuffed, Customer 1 attempted to pull away from Grievant. The trial for Customer 1 on the charges was held on May 19, 2015, in the General District Court.

(A Exh. 5, Tr. 2 of 2, pp. 12-13, and 97; Testimony of Grievant; A Exh. 5, Tr. 1 of 2, pp. 11-12,

and 61).

Video

File 4 of the Video

3. On the date of the incident, April 19, 2015, surveillance cameras at the store video recorded Customer's 1 arrest, as well as the events leading up to it. As submitted as evidence, this video contains 10 files and is filmed from only one angle. That angle is from the left corner in front of the store. There is no video of the events from Grievant's angle; that is, from his viewing of what occurred on April 19, 2015. The available video is also without audio aide. (Video file and Testimonies of Captain, Deputy Commonwealth Attorney, and Grievant).

4. File 4 of the video shows Grievant pulling into a parking space in his police car at the 7-Eleven Store. This occurs at about seconds 2 – 5 of the video. (Video File).

5. Grievant then gets out of his car and takes about 20 steps to walk to the entrance of the 7-Eleven Store. He then enters the store. During the time Grievant is walking to the store's entrance, 3 to 4 young individuals who appear to be below the legal age to drink are in front of the store to the left of the entrance, one appears to be facing the store's front. At some point, it appears these individuals are looking at Grievant. There is insufficient visibility to determine if Grievant was watching these individuals while he was approaching the store's entrance. Once at the store's entrance, Grievant does not make direct eye contact with the individuals standing outside. (Video File).

Based on the credible testimony of Grievant presented during the hearing, the Hearing Officer finds Grievant observed Customer 1 out of the corner of his eyes as he was approaching and entering the store. (Testimony of Grievant).

File 7 of the Video

6. At the beginning of File 7 of the video, Grievant is still inside the store. At seconds 17-21 of the video, Customer 1 approaches the entrance to the store. It appears he is watching something inside. At least 2 of the other individuals standing outside with him appear to do the same and look inside the store. Next, Customer 1 and the others move toward the entrance doors of the store. A female goes inside. Customer 1 is facing the entrance to the door. Grievant then comes out and starts walking toward his police vehicle. From the video it is not clear if Grievant observed Customer 1 and the others as he was proceeding out of the store. (Video File).

However, based on the credible testimony of Grievant, Hearing Officer finds Grievant observed Customer 1 out of the corner of his eyes as he was exiting the store and/or walking back to his patrol car. (Testimony of Grievant).

File 8 of Video

7. File 8 of the video starts with Grievant continuing to walk toward his vehicle. He opens

the car door, gets inside, and then closes the door. During this time, the four individuals outside the store, gather in front of the store's entrance. Although it appears that Customer 1's face is tilted downward somewhat, it also appears that Customer 1 is facing Grievant's police car and his face is visible to Grievant. It is not clear, what if anything is being stated by Customer 1 or anyone else in the group of 4. Grievant then gets out of his car. He walks at a normal pace toward the group of 4 taking about 7 steps. Grievant then picks up his pace (walking at a very brisk pace/jogging) and takes about another 5 steps toward the group of 4. Customer 1 takes a step back and at that time Grievant grabs him, puts him up against the store, and handcuffs Customer 1. After being handcuffed and turned so that he faced Grievant, Grievant appears to be speaking to Customer 1. (Video File).

Based on credible testimony of Grievant, the Hearing Officer finds Grievant was able to detect an odor of alcohol coming from Customer 1 as he was approaching Customer 1 and when he was several feet away from Customer 1; that is before Customer 1 was under arrest. Grievant was able to determine the odor was coming from Customer 1, because it was this individual, not the other 3 individuals with Customer 1, that was heckling Grievant. Grievant observed Customer 1 was stepping backward and perceived Customer 1 was trying to get away from him. His arms were also flailing. This was after Grievant informed Customer 1 several times that he was under arrest. Grievant did not remember jogging toward Customer 1 for about 4 steps because the incident occurred very quickly. (A Exh. 5, Tr. 2 of 2, p. 61; Testimony of Grievant; A Exh. 5, Tr. 1 of 2).

Moreover, once under arrest, Grievant instructs Customer 1 to breathe into Grievant's face so that Grievant could prove to Customer 1 he was drunk. Customer 1 does not follow the instruction and turns his head to the right. (A Exh. 5, Tr. 2 of 2, p. 28-29).

Files 9 and 10 of Video

8. File 9 shows Grievant leading Customer 1 in handcuffs to his patrol car. In route to the patrol car, Customer 1 attempts to pull away from Grievant. Video 10 shows Grievant placing Customer 1 in the patrol car. (Video File).

Court, Complaints, and Interview

9. As referenced above, Customer 1's trial on the three charges was held on May 19, 2015, and Grievant testified under oath. On the drunk in public charge, among other testimony provided to the court, Grievant testified that Customer 1 had glassy eyes, slurred speech, and an odor of alcohol. In addition, during the trial in general district court, Customer 1 was represented by his defense attorney. This attorney had an opportunity to cross examine Grievant. After the evidence was presented, the court found the evidence sufficient to convict Customer 1 of the drunk in public charge. The court dismissed the other two charges.³ The court took the drunk in public charge under advisement and a finding was deferred. Customer 1 was placed on probation and required to fulfill certain conditions. (A Exh. 5, Tr. 2 of 2, pp. 46, 97; Testimonies of Deputy Commonwealth Attorney and Grievant).

³ The evidence is insufficient to determine if the dismissal was due to a lack of evidence of due to an agreement or the court being merciful to Customer 1. (A Exh. 5 Transcripts. 1 and 2).

10. There is no transcript of the court hearing on May 19, 2015. (Testimonies of Captain).

11. The Agency's Police Department received three (3) written complaints about Grievant regarding the April 19, 2015 arrest. One of the complainants was Customer 1. The complaints alleged that on April 19, 2015, Grievant arrested Customer 1 for no reason while Customer 1 was in front of the 7 Eleven Store. (A Exhs. 11, 12, and 13).

12. An investigation ensued which included, among other actions, Grievant being interviewed by Lieutenant and Captain. First, on the evening of May 27, 2015, Lieutenant interviewed Grievant for about 90 minutes. (A Exh. 4, Grievant's Interview with Lieutenant). Next, Grievant worked the midnight shift. (Testimony of Grievant).

13. Then, the next morning at about 9:00 a.m. on May 28, 2015, Captain interviewed Grievant for 2 hours. Because Grievant had just worked the midnight shift, he had not slept. The Captain's interview lasted 2 hours. (A Exh. 5, Tr. 2 of 2; A Exh. 4, Grievant's Interview with Captain; Testimony of Grievant).

14. During the Captain's interview with Grievant, Captain asked Grievant numerous times if Grievant had probable cause to arrest Customer 1 on April 19, 2015.

Grievant stated multiple times he believed he had probable cause to arrest Customer 1. Early into the interview in response to questions by Captain, Grievant stated that Customer 1 looked directly at Grievant and Grievant observed Customer 1's eyes were glassy from about 6 feet away. Further, Grievant noted that Customer 1's speech was slurred. Grievant stated he observed that Customer's 1 speech was slurred before Grievant even entered the 7-Eleven Store. This was so because Customer 1 was standing outside in front of the 7-Eleven Store and repeatedly stating "Jenny Craig." Grievant appears to be overweight and believed that Customer 1 was directing those comments toward Grievant. In addition, Grievant stated that the time was 3:00 a.m. and Customer 1 was heckling a police officer. (A Exh. 5, Tr. 2 of 2, p. 10-12, 16). Grievant stated that he could smell some odor of alcohol and he felt that he had probable cause to arrest Customer 1. (A Exh. 5, Tr. 2 of 2, pp. 12, 14).

About a fourth of the way into the interview, Grievant again stated that from more than four feet away, Customer 1 appeared to have glassy eyes and slurred speech. (A Exh. 5, Tr. 2 of 2, p. 24).

As the interview proceeds, Captain asked Grievant again if Grievant had probable cause to arrest. Grievant states that he "thinks he did." Grievant notes that probable cause was not determined retroactively. He explains to Captain that the totality of the circumstances caused him to believe Customer 1 was drunk in public. Those circumstances enumerated by Grievant to Captain were heckling the police officer, glassy eyes, slurred speech, 3:00 a.m. in the morning at a time when the bars were closed, and Customer 1's demeanor. Grievant further adds that his lengthy experience as a police officer and encountering intoxicated individuals in public lead him to believe Customer 1 was drunk. Grievant also stated that his first impression of Customer 1 was that Customer 1 was drunk. And further, Grievant stated that he had probable cause to

arrest Customer 1. Grievant initially stated that he decided to talk to Customer 1 in lieu of arresting him. However, as Grievant was approaching Customer 1, he continued to heckle the police officer. This annoyed Grievant. Grievant then decided to arrest Customer 1. (A Exh. 5, Tr. 2 of 2, pp. 19, and 31-38).

An hour into the interview, Grievant states again that almost immediately he was under the impression that Customer 1 was drunk. Further, he confirmed his belief that Customer 1's arrest was lawful. (A Exh. 5, Tr. 2 of 2, p. 53, 56).

Over an hour into the interview, Grievant again states that he definitely remembers smelling an odor of alcohol as he approached Customer 1 and before Customer 1 was touched by Grievant. (A Exh. 5, Tr. 2 of 2, p. 60). Captain declined to accept Grievant's response. Captain told Grievant he was lying. (A Exh. 5, Tr. 2 of 2, p. 61-68).

15. During the interviews with Captain and Lieutenant, Grievant noted that the events unfolded rapidly; that is within seconds. He also noted during the interview that based of his 17 years of training, he was certain Customer 1 was drunk. (A Exh. 5, Tr. 2 of 2, pp. 46, 64; A Exh. 5, Tr. 1 of 2, p. 21).

16. During the course of the two hour interview with Captain, Grievant informed Captain that Grievant had been talking a long time and needed to catch a breath because he was out of breath. Captain proceeded to interview Grievant without providing for a break. (A Exh. 5, Tr. 2 of 2, p. 61).

17. Before Captain interviewed Grievant, he had watched the video of April 19, 2015 arrest. (A Exh. 5, Tr. 2 of 2).

18. Captain is very competent at investigating matters. He has the ability to interrogate an interviewee in a manner to make the interviewee question himself. (A Exh. 5, Tr. 2 of 2). Grievant begins to question himself during his interview with Captain. (A Exh. 5., Tr. 2 of 2).

19. Grievant had worked the midnight shift for years, including the dates he was interviewed by Captain and Lieutenant. At times during the interview, Grievant somewhat retreats from his responses regarding having probable cause, smelling alcohol prior to any arrest, etc. because he was under great duress, intimidated by Captain, and fatigued from having interviewed the night before and having not slept. (Testimony of Grievant).

20. Captain declined to accept Grievant's multiple responses throughout the interview that Grievant believed he had probable cause to arrest Customer 1. Instead Captain asserted his views. For example about midway through the interview with Grievant after Grievant had stated multiple times that he had probable cause and given reasons for his assessment, Captain states "I don't see probable cause yet." (A Exh. 5, Tr. 2 of 2, p. 47). Also, further on in the interview in response to Grievant stating that Customer 1 had "glassy eyes," Captain indicates that Captain does not see how Grievant can say Customer 1 had glassy eyes. (A Exh. 5, Tr. 2 of 2, p. 57). Moreover, Grievant had previously stated during the interview that he smelled an odor of alcohol before he put his hands on Customer 1. When Grievant repeats that statement more than half

way through the interview, Captain states Grievant is lying and in effect notes that Grievant has changed his story during the course of the interview. (A Exh. 5, Tr. 2 of 2, p. 60 – 68).

21. Accordingly, the Hearing Officer finds a reasonable person could infer that the interviewer's goal at the inception of the interview was to "trip up" or discredit Grievant and cause him to begin to doubt whether he had probable cause to arrest.

22. Captain insinuates that Grievant is now using to his advantage the fact that there is no audio to the video. Captain is suggesting Grievant is not being genuine about Customer 1 having slurred speech. Captain also states during the interview that Grievant is not being truthful and that Grievant watched the video after the arrest in an attempt to come up with a story that justifies his actions in the video. (A Exh. 5, Tr. 2 of 2, pp. 48/1 and 67).

23. Grievant did not have the opportunity to fully explain some of his responses during the interview he had with Captain. Also, during portions of the interview, in lieu of questioning Grievant, Captain inserted declaratives as to how he believed the events unfolded on April 19, 2015. (Testimony of Grievant; A Exh. 5, Tr. 2 of 2).

Other

24. Initially when Grievant wrote his report he had indicated Customer 1 had a strong odor of alcohol. Sergeant suggested changing the wording to "light odor of alcohol" and that change was made on the computer screen as the report was being finalized by Grievant and Sergeant. During Grievant's interview with Captain, he informed Captain that Sergeant had edited his report as noted. Captain investigated and determined Grievant's allegation was true. (Testimony of Captain; A Exhs. 8, 14; A Exh. 5, Tr. 2 of 2, pp. 10-11).

25. Drunk in public is a class 4 misdemeanor and the maximum punishment is a \$250.00 fine. (Testimony of Deputy Commonwealth Attorney).

26. Even though drunk in public carries a fine as its maximum punishment, normally when a person is drunk in public, an officer will arrest him because the offender is so intoxicated he is unable to take care of himself. Thus, issuing only a summons in this case would have been inappropriate. (Testimony of Grievant).

27. Grievant provided a police report of the incident that occurred on April 19, 2015. The report reads as follows:

On 04/19/2015, at about 0310 hours, I [Grievant] was on patrol. I stopped at the 7-Eleven store at [123 Ave] to go inside the establishment. As I got out my vehicle I heard an unknown person make remarks he clearly intended for me to hear, about my physical appearance. I could clearly see who was making the remarks, and I ignored them. I went inside the store, bought my food and departed the 7-Eleven Store. On the way to my police vehicle the same individual continued to make inappropriate comments toward me about my appearance. I put my foot in my police vehicle and walked toward the individual with the

intention of explaining to this individual that his remarks were inappropriate and he was making a scene. Upon making contact with the unknown person I could determine that he was intoxicated. I was able to detect the slight odor of alcoholic beverage about his person and his eyes were glassy and fixed. When he began to mimic what I was saying to him, I could determine that his speech was somewhat slurred. I told Customer 1 that he was under arrest and I put my hands on his arm in order to make the arrest, Customer 1 pulled away from me and did not comply with my verbal commands. I continued to try to make the arrest but Customer 1 continued to pull away, until I had directed him to the wall of the 7-Eleven Store. I was able to handcuff Customer 1. (sic) and call for backup. Sgt. immediately arrived seconds later on scene and I explained to him the situation. Customer 1 was transported to jail and warrants were obtained for public intoxication, under age possession, and resisting arrest.

(A Exh. 14, p. 2).

28. Management issued Grievant a Group III Written Notice with termination. The Agency contends the nature of the offence is that Grievant failed to follow policy and that he falsified a record. Captain noted that Grievant was dishonest and what Grievant stated during the interview and what he wrote in his police report were not reflected in the video. Particularly, the Agency contends Grievant's conduct was unethical/illegal and a violation of policies under the Commonwealth of Virginia's Standards of Conduct Policy 1.60 (A Exh. 1; Testimony of Captain). Further it justified Grievant's termination by noting that Grievant's veracity as an officer could be challenged by defense attorneys in criminal cases under the cases. *Giglio v. U.S.*, 405 U.S. 15 (1972) and *Brady v. Maryland*, 373 U.S. 83 (1963), requiring exculpatory evidence to be turned over to defense counsel. The Agency notes that once a police officer has lied under oath, especially to a magistrate and in court, the police officer is normally placed on the *Brady and Giglio* list by the Commonwealth's attorney office. If such is the case, evidence of the dishonesty of a police officer on that list is considered exculpatory and would need to be provided to defense counsel in cases where Grievant would be the officer effectuating the arrest and/or a witness in a criminal case. (Testimony of Captain).

29. Moreover, the Agency contends that Grievant violated several policies of the University's police department. (A Exh. 1, p. 2).

30. First, the Agency asserts, Grievant violated Uniform Standard of Conduct, Policy 1:6 Section B, 2, a & b, Unbecoming Conduct. This policy states in pertinent part the following:

a. Employees of the [University Police Department] will not conduct themselves at any time in such a manner which would be detrimental to the department's image as the law enforcement agency of the University. Unbecoming conduct will include any act or conduct, whether specifically prohibited or not, or which brings the department into disrepute, reflects discredit upon the employee as a member of the department, or which impairs the operational efficiency of the department or employee.

b. Discourtesy, rudeness, or insolence to anyone of the general public, any agency or the community at large will not be tolerated. All employees will be courteous and tactful in the performance of their duties, exercising the utmost patience and discretion even in the face of extreme provocation.

(A Exh. 9, pp. 2-3).

Captain stated that policy 1:6-3 was violated, last paragraph. Grievant had stated he was angry. (A Exh. 9, p. 1; Testimony of Captain).

31. Next, the Agency contends Grievant violated Uniform Standard of Conduct, Policy 1:6 Section R, Truthfulness which states the following:

Upon the order of the Chief of Police, the Chief's designee or a superior officer, employees will truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the department which may be asked of them. Employees will be honest and will not practice deceitfulness. Any attempt to hide or evade the truth or facts no matter how slight will be grounds for discipline up to and including dismissal.

(A Exh. 9, p. 10).

Captain states that Grievant violated this section because he was untruthful. Specifically, Captain notes that Grievant wrote a police report that did not occur as written. For example, Captain states that Grievant said he walked up to Customer 1 when the video shows him running. Also, Captain states that Grievant represented that he could clearly see who was making the remarks. Captain noted that on interview, Grievant said he never looked at them. Based on the distance Grievant was from Customer 1, Captain did not believe Grievant could have determined Customer 1 had glassy eyes before the arrest. Captain believed the charge for resisting arrest was not appropriate because it did not occur. Captain also stated that Grievant stated he put his hands on Customer 1 to make an arrest. Captain says this was not accurately described.

(Testimony of Captain).

32. Also, the Agency contends Grievant violated Use of Force, Policy 1:8, Section 1:8-2 which states in pertinent part the following:

It is the policy of this department, that employees would use only that force that is objectively reasonable and necessary to accomplish lawful objectives.

Deciding to utilize force when authorized in the conduct of official responsibilities is among the most critical decisions made by officers. It is a decision that can be irrevocable. It is a decision that must be made quickly and under difficult, often unpredictable and unique circumstances. Sound judgment

and the appropriate exercise of discretion will always be the foundation of police officer decision making in the broad range of possible use of force situations. It is not possible to entirely replace judgment and discretion with detailed policy provisions. Nonetheless, this directive is intended to provide the best guidance and direction possible to officers when called upon to confront and address the most difficult of situations. Officers whose actions are consistent with the law and the provisions of this directive will be strongly supported by the law enforcement community and any subsequent review of their conduct regarding the use of force. Conversely, officers whose actions are contrary to law and the provisions of this directive may be subject to disciplinary action, up to and including termination and/or criminal prosecution.

(A Exh. 10, pp. 1-2).

Captain said he concluded Grievant violated this policy because the force Grievant employed goes immediately to hard hand control tactics. Thus, the force used was excessive and Grievant failed to try lesser force such as his presence, verbal order, soft hand tactics employed initially. (Testimony of Captain).

33. Captain testified he measured the distance from where Grievant started running toward Customer 1 and it was 18.5 feet. (Testimony of Captain).

34. Captain said from what he saw on the video, he did not see probable cause. Captain also noted that the video shows Grievant running up and in his report Grievant says he walked up to Customer 1. (Testimony of Captain).

35. Captain said he did not see the resisting arrest either and the force used by Grievant was excessive. (Testimony of Captain).

36. Captain contends Grievant's arrest is concerning because Grievant conducted no investigation. He notes this is particularly concerning because there were a group of individuals congregated in front of the 7-Eleven Store. (Testimony of Captain).

37. As of April 19, 2015, the Agency's police department did not have a policy requiring a police officer to complete a probable cause summary. Neither did the police department require officers to conduct field sobriety tests or a breathalyzer test when determining whether to arrest or charge an individual with drunk in public. (Testimony of Grievant; A Exh. 5, Tr. 2 of 2, pp. 12 - 20; A Exh. 5, Tr. 1 of 2). Neither is a blood alcohol test required. (Concession of Agency).

38. Grievant had been taught to have the person who is drunk blow in your face by a former sergeant of the police department. It was part of his training years back. As of April 19, 2015, the evidence is insufficient to show that what Grievant was taught was not policy within the police department. (A Exh. 5, Tr. 2 of 2, p. 41; Testimony of Captain)

39. Captain acknowledged that police officers make arrests on what they believe to be probable cause. (A Exh. 5, Tr. 2 of 2, p. 75).

40. Grievant made an arrest on what he believed was probable cause. The arrest was not made because Grievant was mad at Customer 1. (Testimony of Grievant).

41. Deputy Commonwealth Attorney viewed the video and a memorandum he received from Captain summarizing his interview with Grievant. In that interview, Captain noted that he had determined Grievant was dishonest when he secured warrants from the magistrate and when he testified in court about the charges lodged against Customer 1. Based on his review of the video and of Captain's memorandum, Deputy Commonwealth Attorney concluded that Grievant had no probable cause to arrest Customer 1. Deputy Commonwealth Attorney did not review the transcription of Grievant's interviews with Captain and Lieutenant. (Testimony of Commonwealth Attorney; A Exh. 7).

42. Neither, Deputy Commonwealth Attorney nor Captain was present when the events at issue unfolded at the 7-Eleven Store on April 19, 2015. (Testimonies of Captain and Deputy Commonwealth Attorney).

43. The Agency has reason to believe that Customer 1 may file a civil suit against the Agency.

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

To establish procedures on Standards of Conduct and Performances for employees of the

⁴ Grievance Procedural Manual §5.8

Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60.

On September 30, 2015, management issued Grievant a Group III Written Notice with termination for the reasons stated above in the “Findings of Facts.” The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice? If so was the behavior misconduct?

1. Did Grievant fail to follow policy?

a. Was there use of excessive force?

First the Agency contends that Grievant used excessive force in arresting Customer 1.

A careful review of the facts demonstrates that Grievant had only a few seconds in a difficult situation, to determine what force to use. He testified credibly that he put his hands on Customer 1 and hand cuffed him because from his angle, Customer 1 started moving backward after he informed Customer 1 that he was under arrest. Grievant also gave instructions to Customer 1, and he failed to follow them. Customer 1’s arm was flailing. Captain and Deputy Commonwealth Attorney viewed the video and concluded there was no resisting arrest and the force used was unnecessary. The facts show that the video’s angle of the events that took place was not the same as the Grievant’s view. In fact Deputy Commonwealth Attorney admitted that 10 people could view the video and come up with a different view even from the angle that the video pictures. Neither the Captain nor the Deputy Commonwealth Attorney was there when the events at issue unfolded. The Hearing Officer finds Grievant’s account of his view of the situation in the few seconds it happened credible. Thus, the evidence fails to show excessive force. Accordingly, the Agency has not met its burden and shown misconduct.

b. Was Grievant conduct unbecoming of an officer?

Next, the Agency claims Grievant's conduct was unbecoming of an officer and violated Agency Policy 1:6 Section B, 2, a & b. Specifically, the Agency contends that the reason Grievant arrested Customer 1 is because Grievant was angry about Customer 1 heckling him. A careful review of the evidence demonstrates that prior to arresting Customer 1, Grievant observed Customer 1 to have glassy eyes, slurred speech, and an odor of alcohol. He initially planned to speak to Customer 1, when the heckling continued (in addition to the above factors being present) Grievant informed Customer 1 he was under arrest. Grievant believed he had probable cause to arrest Customer 1. Once Customer 1 was informed he was under arrest, from Grievant's angle he observed Customer 1 move back. This signaled to Grievant that he was attempting to get away. Customer 1 also failed to comply with Grievant's instructions and Customer 1's arms were waving. Grievant then handcuffed Customer 1. Hence, the evidence fails to show a policy violation.

Again, the Agency asserts that the video does not confirm Grievant's accounting of the situation. As noted previously, the events occurred rapidly. Captain was not there. Neither was the Deputy Commonwealth Attorney. Both viewed the events from an angle different from Grievant. Grievant testified credibly. He had split seconds to act. The Agency cannot sustain its burden.

c. Was Grievant untruthful?

The Hearing Officer finds that the Agency is not able to show Grievant was untruthful. The Agency claims Grievant lied on his report. For one, Captain asserts Grievant stated he walked up to Customer 1, but the video shows him running. The evidence establishes that Grievant took about 7 or 8 normally paced walking steps toward Customer 1. He picked up his pace during the next 4 or 5 steps. Of note, a review of the video does not conclusively show the officer jogging. His final 4 or 5 steps could be described as a very brisk walk or a slight jog. Moreover, the evidence demonstrates that the incident occurred within seconds. In light of this speed of events, the Hearing Officer finds it plausible that Grievant may not have remembered "the very brisk walk/jogging." Grievant certainly was walking the majority of the time he was approaching Customer 1. To have a brief lapse in memory and not recall the final 4 running steps – if indeed they were – fails to show untruthfulness.

In addition, Captain claims that from the distance Grievant was from Customer 1, there is no way Grievant could have established Customer 1 smelled of alcohol and/or had "glassy eyes" As referenced above, Captain has viewed the video and made conclusions without having firsthand knowledge of the situation. So too has the Deputy Commonwealth Attorney. Having considered the testimony of these witnesses, their work experience, and observed their demeanors, the Hearing Officer finds Grievant's testimony more convincing. This is so because Grievant was at the location. In addition, Grievant has made several arrest for drunk in public and holds extensive experience as a field police officer. Equally as important, the video viewed by Captain and others fails to picture the situation from the Grievant's angle.

The Agency also contends that Grievant was untruthful about his reporting of the facts about the resisting arrest charge. Grievant testified credibly about the reasons he charged Customer 1 with this offense. The Hearing Officer gives more weight to Grievant's version of what occurred. Grievant's account includes Grievant's announcement that Customer 1 was under arrest. Also, Customer 1 moved back, did not follow the officer's instructions, and was waving his arm. Customer 1 also attempted to pull away from Grievant while he was being led to Grievant's patrol car. Thus, she finds the Agency has failed to meet its burden and show Grievant falsified a report regarding this charge.

In addition, the Agency claims that Grievant's interview responses were different from the police report. The Agency contends that these inconsistencies show Grievant's report was not true and that statements he made to the magistrate and in court were untruthful. The Hearing Officer finds Grievant repeatedly responded to the interview questions indicating he had probable cause to arrest. He gave specific reasons as noted previously for believing he had probable cause.

The Hearing Officer does note that as the interview progressed, Grievant began to question his responses and somewhat backed off on some of his answers. To this point, the Hearing Officer finds that this recalling occurred because Grievant was under duress. Before his interview with Captain, Grievant had been interviewed the night before for 90 minutes. He then worked the midnight shift. After getting off the midnight shift, he was interviewed the next morning for 2 hours by Captain, his superior. Moreover, the evidence illustrates that Captain intimidated Grievant. For example, Grievant was basically called a liar by Captain. Grievant was put in a position of having to oppose his superior who is only subordinate to the Chief of Police. Grievant also asked for a break after he had been questioned for more than an hour. The Captain did not allow one. Captain also cut off some of Grievant's responses and made declarations of his own. Accordingly, the Hearing Officer finds to the extent any of Grievant's responses can be considered inconsistent with his written report, they reflect the manner in which the interview was conducted and not Grievant's lack of veracity.

The Hearing Officer makes this conclusion about the conditions of the interrogation by Captain after listening to the audio recording of the interview, reviewing the transcript, and considering the credible testimony of Grievant.

Of note as well, the Agency contends that Grievant was untruthful before the magistrate and the court. No transcript exists of Grievant's testimony in court or before the magistrate to validate the Agency's assertion. In addition, during the court proceedings, the evidence shows the same video watched by Captain and Deputy Commonwealth Attorney was shown to the court. Further, Customer 1 was represented by defense counsel who had the opportunity to cross examine Grievant. After presentation of the evidence, the evidence was found sufficient to convict Customer 1 of drunk in public.

In sum, the Hearing Officer finds the Agency has failed to meet its burden and show Grievant was untruthful.

2. Did Grievant make false reports?

For the reasons already noted above, the Hearing Officer finds Grievant did not submit or make false reports.

In sum, the Hearing Officer has considered all evidence of record whether specifically mentioned or not. This includes, but is not limited to, testimony by Captain that the relevant distance in this matter from where Grievant was when he approached Customer 1 was about 18.5 feet. And that Captain cannot believe that Grievant could smell alcohol and/or see the glassy eyes without first putting his hands on Customer 1. The Hearing Officer has also contemplated any alleged discrepancies in Grievant's interview responses regarding whether he had probable cause. She finds the Grievant's interview with Captain problematic for the reasons already noted. In addition, the Hearing Officer has considered the testimony of Chief Deputy Commonwealth Attorney. She has contemplated the accusation that Grievant may be deemed in the future a police officer whose name must be placed on the *Brady/Giglio* list. Further, the Grievant's interview with Lieutenant has been reviewed.

Having carefully considered all evidence, the Hearing Officer finds the Agency has failed to show Grievant engaged in any misconduct.

B. Was the discipline consistent with policy and law?

Grievant should not be disciplined for misconduct that the Agency is unable to substantiate. Such is the case here for reasons already mentioned. Thus, the Group III Written Notice with termination is inconsistent with policy and law.

C. Affirmation of Decision

The Hearing Officer affirms her finding that the Agency has failed to meet its burden and show Grievant engaged in the alleged misconduct. Thus, the discipline action against Grievant cannot be upheld.

II. Attorney Fees

The Virginia General Assembly Virginia Code § 2.2 – 3005.1 (A) providing, “[i]n 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 attorney’s 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 as set forth below in the decision section. There are no special circumstances making an award of attorney’s fees unjust. Accordingly Grievant's attorney is advised to submit an attorney's fee petition to the Hearing Officer within 15 days of this decision. The petition should be in accordance with the *Grievance Procedural Manual* §7.2(e).

DECISION AND ORDER

III. Decision and Order

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Agency's issuance to Grievant of a Group III Written Notice with termination is rescinded. The Agency is ordered to take the following action:

1. rescind the Group III Written Notice with termination;
2. pay full back pay for the period Grievant has been separated from his job; however, back pay is to be offset by any interim earnings;
3. appropriately restore other benefits and seniority;
4. reinstate Grievant to his former position or, if occupied, to an equivalent position.

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 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
Departmental of Human Resource Management
101 N. 14th St., 12th 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 N. 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.⁵

Entered this 4th day of January, 2016.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant's Advocate/Grievant
EDR's Director of Hearings Program

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

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10710

Hearing Date: December 1, 2015

Record Closed: December 15, 2015

Decision Issued: January 4, 2016

Addendum to Decision Issued: February 3, 2016

ADDENDUM TO DECISION

In her decision issued January 4, 2016, the Hearing Officer found the Agency failed to meet its burden and show Grievant engaged in misconduct. The Hearing Officer vacated the Group III Written Notice with removal and reinstated Grievant.

The Hearing Officer also noted that the grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.¹ The Hearing Officer determined that Grievant substantially prevailed on the merits of the grievance because she was reinstated and an award of attorney fees would not be unjust.

Grievant's attorney timely submitted a petition for attorney fees. In that petition, Counsel for Grievant requests attorney fees in the amount of \$6,484.50. Counsel represented that she reflected the hourly rate of \$131.00 in the fee request. Thus, the Hearing Officer finds that Counsel's fee request is for 49.5 hours of work. These numbers of hours have been derived from dividing the amount requested in fees by the \$131.00 hourly rate.²

The Agency has objected to a portion of the attorney fees requested for several reasons. First, the Agency contends that some of the fee requested by Counsel is for attorney work performed during the management step process of the grievance procedure. The Agency contends that only fees related to the hearing are reimbursable. Further, the Agency asserts that Counsel for Grievant has estimated some of the time she worked on the case. The Agency contends that such is the case because prior to the Agency terminating Grievant, Counsel charged Grievant a flat fee to perform work on the grievance. The Agency further argues that as a result of this flat fee arrangement, Counsel did not document the work she performed and associated time with the type of detail required when charging a client by the hour. Moreover, the Agency argues that at least some of the preparation time expended by Counsel for Grievant was unreasonable.

The applicable provision of the Grievance Procedure Manual (GPM) is § 7.2(e). In pertinent part, it provides the following:

Attorneys' fees are not available **under the grievance procedure**, with one exception: an employee who is represented by an attorney licensed by the

¹ Va. Code § 2.2-3005.1A.

² The fee request and affidavit are attached here.

challenging his/her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. (emphasis added).

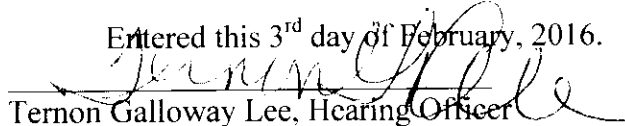
Moreover, a review of the applicable provisions of the GPM and the reasonable interpretation of them indicate that the grievance process cannot begin until the employee is issued a group notice with removal. Further, while attorney fees may be awarded, the grant of such fees must be for legal representation for the grievance hearing. *See EDR Ruling 2007-1671.*

In this case the Agency issued Grievant a group notice with removal on September 30, 2015. In addition, invoices submitted by Counsel that predate the September 30, 2015 date, fail to establish that Counsel was performing work for the grievance hearing. Accordingly, the Hearing Officer finds that under the GPM § 7.2, she does not have the authority to award attorney fees for Counsel's services prior to September 30, 2015.

The Hearing Officer has considered the time and effort expended by the attorney(s), the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate. She has also reviewed the Agency's objections as noted above. Having done so, the Hearing Officer finds Grievant's attorney expended 27.5 hours in preparation for the hearing. Further, she finds that an hourly rate of \$131.00 is reasonable.² Hence, the Hearing Officer approves \$3,602.50 in attorney fees; that is 27.5 attorney hours x \$131.00 = \$3,602.50.

Within 10 calendar days either party may petition EDR for a decision solely addressing whether the fee addendum complies with the Manual and the Rules for Conducting Grievance Hearings.

Entered this 3rd day of February, 2016.


Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate; Grievant's Advocate
EDR's Director of Hearings Program

² This is the maximum hourly amount permitted under the Rules for Conducting Grievance Hearings, Section VI (E) and pursuant to EDR website regarding the allowance of Attorney fees.