

Issues: Group II (failure to follow instructions/policy), Group III (disclosure of confidential information), Group III (failure to answer questions truthfully), and Termination; Hearing Date: 12/12/16; Decision Issued: 01/04/17; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10902; Outcome: Partial Relief; **Administrative Review**: EDR Ruling Request received 01/12/17; EDR Ruling No. 2017-4478 issued 02/02/17; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 01/17/12; DHRM Ruling issued 02/02/17; 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: 10902

Hearing Date: December 12, 2016

Decision Issued: January 4, 2017

PROCEDURAL HISTORY

On September 28, 2016, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and/or policy. Grievant was also issued a Group III Written Notice with removal for disclosure of confidential information. Grievant was issued a second Group III Written Notice with removal for failure to answer questions truthfully.

On October 14, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 2, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of State Police employed Grievant as a Sergeant at one of its divisions. He began working for the Agency in 1997. No evidence of prior active disciplinary action was introduced during the hearing. Grievant consistently received favorable evaluations during his tenure with the Agency.

Criminals engaging in illegal rooster fighting often travel in two vehicle. They have the roosters in one vehicle and have the equipment used for fighting in another vehicle.

On December 20, 2015 Trooper J stopped an SUV on the Interstate. He searched and arrested the three individuals in the vehicle for being involved in rooster fighting and arranged to have their vehicle towed to the Service Station to be searched. Trooper P and Trooper A were also at the scene on the Interstate.

At 9:54 a.m., Trooper J left the scene at the Interstate to travel to the local Jail. A local Sheriff took the three individuals to the Jail. An Animal Control Officer took possession of several roosters.

Trooper J asked Trooper P to escort the SUV to the Service Station and keep it secured pending further investigation. Trooper P agreed to do so. A Tow Truck carried the SUV to the Service Station and Trooper P drove his vehicle to the Service Station and remained there.

At approximately 10:39 a.m., Trooper J called Trooper P while Trooper P was driving to the Service Station. Trooper J said that two individuals may arrive at the Service Station to try to pay the wrecker bill and Trooper J wanted Trooper P to detain them. Trooper P asked why Trooper J wanted the individuals detained but the cell phone connection ended abruptly. Trooper P waited a few minutes with the hope that their cell phone connection would be better and then he called Trooper J but was unable to speak with Trooper J. Trooper P remained with the SUV once they arrived at the Service Station.

Trooper J also called Trooper A and told him to be on the lookout for a second vehicle and to find a way to stop that vehicle because it might be carrying knives that hook on to rooster spurs. Trooper A drove to the Service Station to assist Trooper P.

At 10:41 a.m., Grievant and Trooper J spoke by telephone. Trooper J informed Grievant that he was at the local jail and needed a search warrant on electronics. Trooper J said he had acted with the advice of the local Assistant Commonwealth's Attorney. Grievant said he would obtain help from the Agency's Bureau of Criminal Investigation (BCI).

Grievant contacted the BCI regarding providing assistance to Trooper J.

At approximately 10:42 a.m., Grievant spoke with Trooper J by telephone. They talked about storage of the SUV. Trooper J told Grievant that the local Commonwealth's Attorney wanted the vehicle stored. Grievant told Trooper J that the Commonwealth's Attorney would have to pay the storage costs if the SUV was not taken to the Agency's storage lot. Trooper J told Grievant about a second vehicle that might be involved in the rooster fighting.

At approximately 10:53 a.m., two men came to the Service Station. They were driving the Sedan as Trooper J had described to Trooper P. Trooper P told the men they were being detained and that the primary trooper who was more familiar with the case was on his way. He asked the Driver to exit the vehicle. Trooper P told the Driver, "For my safety and your safety, is it ok if I pat you down?" The Driver said, "Sure." As Trooper P patted down the Driver, he felt what he thought might be a pocket knife. The item was actually a small glass smoking device. Trooper P also found a black leather change purse with marijuana inside. Trooper P patted down the Passenger and retrieved several items. Trooper P put the items on top of the Sedan.

At approximately 10:56 a.m., Trooper A arrived at the Service Station and spoke with Trooper P. Trooper P told Trooper A that he had detained the men because Trooper J asked him to do so. Trooper P told Trooper A he found marijuana on the Driver when he searched them for his safety. Trooper A told Trooper P they could not search someone for their safety, they could only pat them down.

Trooper A told Trooper P he wanted to speak with the men individually in his vehicle. Trooper A then questioned the men while Trooper P returned his focus to the SUV. Trooper A asked the Driver how much marijuana he had on him. The Driver said about 5 grams. Trooper A asked if he could search the Sedan to make sure there were

no weapons used for rooster fighting. The Driver agreed. Trooper A searched the Sedan but did not find any equipment used for illegal rooster fighting.

At 11:06 a.m., Grievant spoke with Trooper J by telephone and told Trooper J that BCI was on its way to provide assistance. Trooper J told Grievant that a second car had been detained at the Service Station. The call ended abruptly.

At approximately 11:14 a.m., Grievant spoke with the First Sergeant by telephone. Grievant told the First Sergeant about Trooper J's status and the assistance provided by BCI. The First Sergeant did not indicate that Grievant should report to the Service Station or Jail.

At approximately 11:35 a.m., Grievant spoke with Trooper P by telephone. Grievant said, "Please tell me that at no time did you tell them they were under arrest." Trooper P said "No sir" and told Grievant he had detained a vehicle based on Trooper J's instructions. Trooper P told Grievant he did not know why Trooper J wanted the vehicle detained and had had difficulty reaching Trooper J. Grievant told Trooper P he had attempted to get in touch with Trooper J for the past half hour but had been unsuccessful. Trooper P asked Grievant if Grievant knew the reason for the detainment and Grievant said he did not know the reason.

Trooper P gave his telephone to Trooper A, who then spoke with Grievant. Grievant asked Trooper A what was going on because after speaking with Trooper P and Trooper J, he was confused about the whole situation. Trooper A told Grievant that the vehicle was illegally detained and that Trooper J conducted an illegal search at the Interstate. Trooper A did not mention that Trooper P found drugs on the two individuals at the Service Station.

Trooper A handed the phone back to Trooper P. Trooper A left the Service Station to respond to another call. Grievant discussed with Trooper P "fruit of the poisonous tree" rules, reasonable suspicion, and probable cause. Grievant said, "Let me give you some advice. Here is what I would tell them. Tell them that they are free to go but that pending further investigation, the vehicle is to remain here. I will leave it up to you as to what you do with your find."

Trooper P walked to the two men, thanked them for their patience and being polite, and told them they were free to go but pending further investigation, the SUV would remain at the Service Station. Trooper P gave the key to the Sedan to the two men and walked away without retaining the marijuana. Trooper P should have retained the marijuana. Returning the marijuana was a mistake that he should have recognized without having been told by Grievant or another Trooper that doing so was a mistake.

Trooper P understood Grievant's comment that he was free to do what he wanted with "his find" to be referring to the marijuana. It is not clear, however, what Grievant meant by the word "find".

At approximately 11:49 a.m., Trooper A called Grievant and said he felt bad about the incident. At the conclusion of their conversation which lasted for

approximately 15 minutes, Trooper A mentioned that drugs were seized at the Service Station. Grievant sounded “caught off guard” when Trooper A mentioned the marijuana. Grievant asked Trooper A what Trooper P did with the marijuana. Trooper A said he had no idea. Grievant said he would call Trooper P. Their call was interrupted when Grievant received another call.

At approximately 12:06 p.m., Grievant called Trooper A. It is unclear what was said during that telephone call.

At approximately 1:08 p.m., Grievant spoke with Trooper P by telephone. Trooper P told Grievant that the drugs he found were returned. Trooper P told Grievant it was the right thing to do based on their previous conversation about reasonable suspicion and detention. Grievant told Trooper P not to discuss the matter with anyone including the First Sergeant.

At approximately 1:35 p.m., Grievant spoke with the First Sergeant by telephone. Grievant told the First Sergeant that Trooper P had seized drugs and returned them. The First Sergeant asked Grievant how much drugs were seized but Grievant did not know the answer.

At approximately 2:07 p.m., Grievant spoke with Trooper A by telephone and asked Trooper A how much marijuana Trooper P recovered during the earlier detention. Trooper A told Grievant it was approximately 5 grams of marijuana.

At approximately 4:52 p.m., Grievant spoke with the First Sergeant by telephone and told the First Sergeant approximately 5 grams of marijuana was seized and returned by Trooper P.

Grievant supervised Trooper C. They were also friends. Trooper C was off duty on December 20, 2015 and not involved in the investigation of rooster fighting. Grievant spoke with Trooper C at 1:04 p.m., 1:19 p.m., 1:53 p.m., 6:09 p.m., and 8:38 p.m. on December 20, 2015. During one of those calls Grievant told Trooper C that Trooper P returned suspected marijuana he obtained during a stop. Grievant did not tell Trooper C to keep the information secret.

Trooper C told Trooper W who told other troopers in the area. The matter became widely known among staff in the area.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” General Order ADM 12.02(11)(a). Group II offenses “include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal.” General Order ADM 12.02(12)(a). Group III

offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order ADM 12.02(13)(a).

The Agency combined four allegations into one Group II Written Notice. The Agency issued a Group III Written Notice with removal for allegation five and a Group III Written Notice with removal for allegation six.

Group II Written Notice (Allegations 1 through 4)

The Agency’s first allegation was that Grievant failed to respond to the scene of a criminal investigation involving asset forfeiture and multiple arrests in which he doubted one or more of the on-scene troopers’ abilities to handle the matter lawfully.

The Agency has not presented sufficient evidence to support this allegation as a basis for disciplinary action. Grievant did not go to the Service Station or to the Jail, but it is unclear what standard applied requiring him to do so. The Agency claimed Grievant acted contrary to General Order ADM 11.00 paragraph 30 which states, “Sworn employee will exercise sound discretion in carrying out duties and responsibilities.” Grievant had discretion regarding whether to perform his duties by telephone or go to where his troopers were working. Grievant initially had no reason to believe the detention of the two men was anything more than ordinary. He did not know about the drugs Trooper P obtained until after Trooper P returned them to the two men. Grievant could not have anticipated that Trooper P would make such a mistake because it should have been obvious to Trooper P or any other trooper that illegal drugs should not be returned to the owner.

The Agency’s second allegation was that Grievant instructed Trooper P to release suspects detained in the course of an investigation without consulting the Assistant Commonwealth’s Attorney.

The Agency has not presented sufficient evidence to support this allegation as a basis for disciplinary action. Although Grievant did not consult with the local Commonwealth’s Attorney, the Agency did not present a policy requiring consultation with a local Commonwealth’s Attorney before releasing detained individuals. Grievant’s advice to Trooper P to release them was appropriate. Waiting for approval from a local Commonwealth’s Attorney may have caused unnecessary delay.

The Agency’s third allegation was that after learning Trooper P recovered marijuana from individuals Grievant instructed Trooper P to release, Grievant failed to immediately contact Trooper P and advise him how to properly handle the marijuana.

The Agency has not presented sufficient evidence to support this allegation as a basis for disciplinary action. Based on the evidence presented, it is most likely that Trooper P had improperly returned the marijuana before Grievant learned Trooper P had obtained the marijuana. He contacted Trooper P within an hour of speaking with Trooper A. Grievant had no reason to believe that Trooper P would act improperly to return marijuana.

The Agency's fourth allegation was that Grievant instructed Trooper P to withhold information from the First Sergeant regarding marijuana returned by Trooper P.

The Agency has not presented sufficient evidence to support this allegation as a basis for disciplinary action. Grievant told many people not to discuss the incident with anyone else because he knew an investigation would be pending. Grievant was not trying to prevent the First Sergeant from learning of the incident. Approximately one half hour after telling Trooper P not to discuss the incident with anyone, Grievant told the First Sergeant that Trooper P had returned marijuana. The First Sergeant was aware of Trooper P's actions.

The Agency's Group II Written Notice must be reversed.

Group III Written Notice for Untruthfulness

The Agency's fifth allegation was that in Grievant's interviews on January 20, 2016 and March 21, 2016, and his written responses dated February 4, 2016 and March 31, 2016, Grievant made false official statements when he claimed he did not know Trooper P recovered suspected marijuana from a person he detained at the time Grievant instructed Trooper P to release that person.

The Agency has not established that Grievant was untruthful. This is not a case of a cover up. Grievant told the First Sergeant on December 20, 2015, that Trooper P had returned the drugs to the two men. Grievant gave a written statement on December 21, 2015 and December 22, 2015 in which he recounted with reasonable specificity the events that occurred on December 20, 2015. He adequately described his conversations with Trooper J in detail. He described his conversation with Trooper P with adequate detail. He wrote of advising Trooper P what it meant to detain someone for an ongoing criminal investigation. He wrote of his conversation with Trooper A after Trooper P handed Trooper A the cell phone. Grievant wrote that Trooper A told him Trooper A was uncomfortable with some of the stuff that was going on and wanted to leave. Grievant wrote that Trooper A said Trooper A was uncomfortable with the pat down that Trooper J performed on the three subjects at the Interstate. Grievant wrote about his conversation with Trooper P after Trooper A handed the cell phone back to Trooper P. Grievant wrote he asked Trooper P if he had arrested anyone at the Service Station and advised Trooper P not to detain the people any longer unless he had more than a reasonable suspicion that they were involved in a crime. Grievant wrote about his telephone call with Trooper A beginning at approximately 11:48 a.m. during which Trooper A informed him that Trooper P had also gotten drugs from the people at the Service Station. Grievant described calling Trooper P again and asked about the drugs. Grievant wrote that Trooper P said he had given them back to the two men.

The Agency argued Grievant was untruthful because he gave several inconsistent statements. Grievant's most reliable statement was the one given on the day following the event because it was soon after the event. His subsequent statements may have differed slightly as to descriptions of what occurred and the times they occurred, but those differences are easily accounted for by the lapse of time.

Grievant made additional oral or written statements approximately four weeks, six weeks, twelve weeks, and thirteen weeks after the event on December 20, 2015. Grievant had telephone conversations with many people on December 20, 2015. It is neither surprising, nor unusual for his statements to have varied in some details given that memory fades with time. Indeed, Grievant responded to several of the Investigator's questions by saying he did not remember.

The Group III Written Notice for untruthfulness must be reversed.

Group III Written Notice for Disclosure of Confidential Information

The Agency's sixth allegation was that Grievant divulged to Trooper C information regarding suspected marijuana returned to a suspect by Trooper P.

General Order ADM 12.02 sets for the Agency's disciplinary measures. General Order ADM 12.02(14)(b)(20) provides:

Engaging in conduct whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.

General Order ADM 12.02(14)(b)(22) provides:

Disclosure of confidential information to any person except those who may be entitled to such information or when directed by the Superintendent or a supervisor.

These are Group III offenses.

General Order ADM 11.00 sets forth the Agency's Standards of Conduct. General Order ADM 11.00(1) provides:

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of Department business ...

General Order ADM 11.00(2) provides:

The following information shall be confidential:

- a. Memorandums, correspondence, information, evidence, and complaints related to official investigations, and reports submitted to the Department in confidence. Also, personal information contained in the Internal Affairs files as defined by the Freedom of Information Act and Privacy Protection Act contained in the Code of Virginia.

- b. Personnel records and any other record or information designated as confidential by the Superintendent.

The Agency has presented sufficient evidence to support the issuance of disciplinary action based on this allegation. Grievant knew or should have known that Trooper P's action of returning marijuana was confidential information. Grievant knew that Trooper P made a mistake when he returned the marijuana. Grievant instructed several troopers including Trooper P not to discuss the incident with anyone else. Grievant did so because he knew that an investigation by Internal Affairs of Trooper P's action was likely.

Grievant disclosed confidential information to Trooper C. Trooper C had no involvement in the investigation and had no reason to know of Trooper P's action. Trooper C told another trooper who told other troopers. What was supposed to be confidential information was no longer confidential. Grievant undermined his ability to supervise because he disclosed a personnel related matter of Trooper P to one of Trooper P's peers which resulted in most of Trooper P's peers knowing of his incorrect action.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that rumors spread widely among Agency staff and that the information did not undermine the Agency's operations. The evidence showed that the reason so many employees knew of Trooper P's action was because Grievant disclosed the information. Grievant impaired his reputation by disclosing confidential personnel information and disregarding his own instruction to others for them to refrain from discussing the matter pending an investigation.

Mitigation

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 Human Resource Management"¹ 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.

¹ *Va. Code § 2.2-3005.*

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.