

Issues: Group III Written Notice (failure to follow policy & violation of drug/alcohol policy), Group III Written Notice (willful disobedience of lawful command), Group II Written Notice (misuse of State property), and Termination; Hearing Date: 11/20/12; Decision Issued: 01/14/13; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 9802, 9924; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9802 / 9924**

Hearing Date: November 20, 2012

Decision Issued: January 14, 2013

### **PROCEDURAL HISTORY**

On December 16, 2011, Grievant was issued a Group III Written Notice of disciplinary action for failure to follow a supervisor's instructions, failure to carry his pistol while operating his State vehicle, and consuming alcohol while on duty. On August 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for willful disobedience of a lawful command. On August 17, 2012, Grievant was issued a Group II Written Notice of disciplinary action for unauthorized use or misuse of state property.

Grievant timely filed grievances to challenge the Agency's action. On August 31, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3426 consolidating the grievances for a single hearing. On September 11, 2012, EDR assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in his grievance due to a medical condition of a participant. On November 20, 2012, a hearing was held at the Agency's office.

### **APPEARANCES**

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

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written 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 State Police employed Grievant as a Senior Special Agent. He had been employed by the Agency for approximately 23 years prior to his removal effective August 17, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

On August 24, 2011, Grievant left his Department issued pistol in an undercover vehicle. He later realized he did not have his pistol but did not return to the Task Force Office to retrieve the pistol. He believed his weapon was secured in a co-worker's desk at the Task Force Office and had been there since August 24, 2011. Grievant worked on August 30, 2011. He did not report to the Task Force Office to retrieve his pistol. He drove his Department vehicle without being in possession of his pistol.

On August 30, 2011, Grievant met with First Sergeant S in First Sergeant S's office to discuss Grievant's performance evaluation. First Sergeant S detected an odor of alcohol coming from Grievant. He asked if Grievant had consumed alcohol that morning and Grievant denied doing so. Grievant said he had consumed seven or eight

beers the night before at approximately 10:30 p.m. First Sergeant S considered using a Preliminary Breath Test but then chose to instruct Grievant to go to the Task Force Office to await further instructions. The Task Force Office was approximately one hour away from their location. Grievant drove to his residence instead of the Task Force Office. He arrived at his residence at approximately 12:40 p.m. Lieutenant O told First Sergeant S to call Grievant and determine his location and to instruct him to go to the Task Force Office to be administered a Preliminary Breath Test. Lieutenant O wanted to determine how much alcohol Grievant had consumed. First Sergeant S called Grievant at approximately 12:42 p.m. Grievant initially told First Sergeant S that he was on Route 17 but then said he was at his residence. Lieutenant O asked First Sergeant S for the telephone and Lieutenant O spoke with Grievant. Lieutenant O told Grievant that he was being given a direct order to go to the Task Force Office and to stand by for First Sergeant J to administer a Preliminary Breath Test for alcohol. Grievant told Lieutenant O that he was at home. Grievant's home was approximately a twenty minute drive from the Task Force Office. Grievant told Lieutenant O that he was so upset about his evaluation that he would be on sick leave. Grievant said he had consumed two beers.

Grievant did not notify First Sergeant S or obtain permission to be absent from work prior to driving to his residence. Grievant consumed the two beers prior to First Sergeant S calling him at approximately 12:42 p.m. and asking for his location. Grievant marked "off duty" at 12:45 p.m.

Grievant had been counseled in 2004 regarding his use of alcohol. Grievant's behavior renewed the Agency's concern regarding Grievant's use of alcohol. Captain R presented Grievant with a memorandum dated November 21, 2011 stating, in part:

On your scheduled workdays, you will report to the [Drug Enforcement Office] daily at 9 a.m. for instructions. You will not deviate from this schedule unless prior approval has been granted by a supervisor. Additionally, you are prohibited from the following without prior supervisory approval: being at your residence during scheduled working hours, possession or use of alcohol during scheduled work hours for any purpose, and possession of props used to portray alcohol consumption for undercover operations during scheduled working hours. \*\*\*

The instructions above are direct orders and your compliance is mandatory. Failure to do so will nullify your fitness for full duty status and result in action under the standards of conduct. These orders will only be modified or rescinded by memorandum.<sup>1</sup>

Captain R read the memorandum to Grievant and then added an instruction that Grievant was not to possess alcohol in his State vehicle under any circumstances. Grievant indicated he understood the instruction. Captain R asked First Sergeant S to

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<sup>1</sup> Agency Exhibit 3.

inspect Grievant's vehicle to make sure that there were no alcoholic beverages or empty containers for alcoholic beverages inside the vehicle. After First Sergeant S searched the vehicle, the vehicle was returned to Grievant.

On December 12, 2011, Grievant did not report to work because "I'm in bed with stomach virus"<sup>2</sup> and because his son was sick too. Grievant used sick leave to cover his absence. Later that day, Grievant drove his State vehicle from his residence approximately one mile to local grocery store and purchased a twelve pack of beer and other items. Grievant placed the beer in the back seat of the State vehicle and drove to his residence.

### **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>3</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."

General Order 12.02(12)(1) provides that Group II offenses include, "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."<sup>4</sup>

General Order 12.02(13)(b)(3) provides that Group III offenses include, "use of alcohol or unlawful use or possession of controlled substances while on the job."

General Order 12.02(12)(b)(21) provides that Group III offenses include, "[w]illful disobedience of a lawful command of a supervisor."

General Order 3.11(1) provides that the, "use of state-owned and state-leased automobiles shall be limited to official state business."

General Order 1.08 governs Firearms and provides that:

1. While on duty, each sworn employee will carry a Department issued handgun. When carrying a handgun in civilian clothes, the sworn employee will carry the weapon as inconspicuously as possible.

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<sup>2</sup> Agency Exhibit 16.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> Agency Exhibit 14.

6. Sworn employees are accountable for the security and safe storage and handling of issued Department firearms at all time and will display the utmost caution. Firearms will not be left in Department vehicles when the vehicle is left in the care of non-Department personnel.

General Order 3.11(9) provides, “[s]worn employees are required to carry their issued pistols or approved off-duty weapons when operating the vehicles.”

*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 ....”<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.

#### Group III Written Notice Issued December 16, 2011

The Agency combined several fact scenarios into one Group III Written Notice. The Hearing Officer must consider each fact scenario separately and determine whether any one scenario supports the issuance of a Group III Written Notice.

Grievant operated his vehicle without his Department issued weapon. His behavior was contrary to policy but the Agency considered it to be a Group I offense.

On August 30, 2011, Grievant failed to comply with First Sergeant S’s instruction to go to the Task Force Office. Grievant failed to comply with Lieutenant O’s order to go to the Task Force Office. Grievant’s behavior rises to the level of a Group II offense for failure to follow a supervisor’s instructions.<sup>6</sup>

Grievant argued that he was sick and needed to go to his residence. While at his residence he consumed two beers. Grievant’s behavior does not form a basis to excuse or mitigate the disciplinary action. First Sergeant S instructed Grievant to leave their meeting and go to the Task Force Office. Grievant failed to do so. If Grievant was

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<sup>5</sup> Va. Code § 2.2-3005.

<sup>6</sup> The Agency did not discipline Grievant for willful disobedience of a lawful command, a Group III offense, for failure to report to the Task Force Office.

sick, he could have called First Sergeant S and obtained permission to go to his residence instead of the Task Force Office.

Grievant did not “mark off” until 12:45 p.m. and, thus, remained on duty until 12:45 p.m. Grievant spoke with Lieutenant O at approximately 12:42 p.m. and stated that he had consumed two beers prior to speaking with Lieutenant O. This means that Grievant consumed two beers while he was on duty. The Agency has established that Grievant used alcohol while on the job thereby supporting the issuance of a Group III Written Notice.

Mitigating circumstances exist to reduce the Group III to a Group II Written Notice. Although Grievant consumed two beers prior to the end of his shift, he did so at his home at a time he expected to discontinue working.<sup>7</sup> He could have marked off prior to consuming the beers without much difficulty. The basis of Grievant’s inappropriate behavior was his failure to contact his supervisor to obtain permission to deviate from the supervisor’s instruction. Grievant’s behavior is best described as a failure to comply with First Sergeant S’s instruction to go to the Task Force Office.

#### Group III Written Notice Issued August 17, 2012.

On November 21, 2011, Captain R instructed Grievant not to possess alcohol under any circumstances. On December 11, 2011, Grievant was in possession of alcohol while operating a State vehicle for a personal errand. Grievant disregarded Captain R’s lawful command thereby justifying the issuance of a Group III Written Notice.

#### Group II Written Notice issued August 17, 2012

The Agency argued that Grievant should receive a Group II Written Notice for unauthorized use or misuse of State property because Grievant used his State vehicle while on sick leave to drive to a local grocery store for a personal errand. Grievant clearly violated this policy as written, however, the evidence showed that the Agency did not enforce the policy. One witness testified that employees with State vehicle who had ended their shifts and were driving home were permitted to stop at grocery stores to purchase food items. Operating a State vehicle to complete a personal errand even if on the way home at the end of a shift would not be materially different from Grievant’s use of his State vehicle on December 11, 2011. In both cases, the State vehicle was being driven to accomplish a personal errand outside of what would be expected for an employee to perform his job duties. The Agency’s failure to enforce the policy forms a basis to mitigate the disciplinary action such that it should be reversed.

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<sup>7</sup> It is possible that Grievant falsely claimed to have consumed two beers as a pretext to avoid travelling from his home to the Task Force Office and/or as a basis to explain a Preliminary Breath Test showing he had consumed alcohol. The Agency, however, did not contest Grievant’s claim that he drank two beers.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action issued December 16, 2011 is **reduced** to a Group II Written Notice. The Agency issuance to the Grievant of a Group III Written Notice of disciplinary action with removal issued August 17, 2012 is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action issued August 17, 2012 is **rescinded**.

## APPEAL RIGHTS

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

1. If you 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 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>8</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>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.