

Issue: Group III Written Notice (shirking official duty); Hearing Date: 01/21/14;  
Decision Issued: 02/11/14; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10228; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request  
received 02/24/14; EDR Ruling No. 2014-3827 issued 03/14/14; Outcome: AHO's  
decision affirmed; Administrative Review: DHRM Ruling Request received  
03/26/14; DHRM Ruling issued 04/25/14; 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: 10228**

Hearing Date: January 21, 2014  
Decision Issued: February 11, 2014

#### **PROCEDURAL HISTORY**

On September 9, 2013, Grievant was issued a Group III Written Notice of disciplinary action for shirking official duty.

On October 7, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 25, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 21, 2014, 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 Notice?

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

### **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 employs Grievant as a Master Trooper at one of its divisions. He is responsible for patrolling the highways and enforcing the traffic and criminal laws of the Commonwealth of Virginia. Approximately twenty percent of his work duties include responding to crashes and conducting investigations. Grievant had prior active disciplinary action. On August 3, 2012, he received a Group I Written Notice for abuse of State time.

The Agency records radio and cell phone communications between troopers and dispatchers. Grievant works in the Eastern part of a Locality. The Locality has a sheriff's office with many deputy sheriffs. When the Locality's dispatcher requests assistance from the Virginia State Police, that request is relayed by the Agency's dispatchers. The Locality often also sends one of its deputy sheriffs to crash scenes to provide assistance or conduct investigations. The Agency takes pride in ensuring that its employees maintain a good working relationship with the Locality's sheriff's office staff.

On May 15, 2013, Grievant had "worked" several vehicle accidents on the highways in the Eastern part of his division. His stomach was hurting and he was nauseous. He "cleared" the crash and began driving to a local convenience store to use

the restroom. He called the dispatch office to let the dispatcher know he had finished working the crash.

In the evening of May 15, 2013, Grievant spoke with Dispatcher S over the radio as follows:

Grievant: ACR, UTS, WRK

Dispatcher S: 10-4, can you start for another one, it's at [B Road] and [W Road]?

Grievant: [Inaudible]<sup>1</sup>

Dispatcher S: 10-4 (laugh) It's at [B Road] and [W Road], unknown shoulder, it's two vehicles, a Toyota Prius and a Hyundai. Given to us from [Locality], it's actually south on [Br Road]. Correction it's actually south of [W Road], no injuries.

Grievant: Call them back and tell them I am the only one working the east tonight. See if they got maybe one of their 50 deputies can handle that.

Dispatcher S: 10-4, I'll call them up.

Approximately 20 troopers were able to hear Grievant's and Dispatcher S's radio communication. People in the locality with the appropriate radio receivers could also overhear the conversation.

Dispatcher S called the Locality and asked if a deputy sheriff could respond to the call. The Locality sent a deputy sheriff to respond to the call.

Grievant used his cell phone to call the dispatch office. Dispatcher R answered his call. She had overheard Grievant's radio conversation with Dispatcher S and she perceived Grievant as having been joking when he indicated he would not respond to a call. She told Grievant that Dispatcher S had called the locality and that a deputy sheriff was handling the call. Grievant asked to speak with Dispatcher S. Grievant spoke with Dispatcher S as follows:

Dispatcher S: Virginia State Police [Dispatcher S]

Grievant: Yeah, they ain't gonna use me like a rented mule<sup>2</sup>, you know what I'm saying? (Grievant laughing)

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<sup>1</sup> Grievant testified that he said, "No."

<sup>2</sup> Grievant's use of the phrase "rented mule" referred to being worked so much that he was not able to take a break. Grievant had used this phrase with another employee as a common but light-hearted expression of frustration.

Dispatcher S: I called up [Locality] and I was like is there any way one of your units could handle it? And they were like oh yea no problem.

Grievant: Yeah, yeah, no sh-t we got 50 fricking Troopers out here, yeah right.

Dispatcher S: We were all dying laughing in here, oh God.

Grievant: Yeah, (inaudible) hell can you handle this? No, nope, sorry. (Grievant laughing).

Dispatcher S: Between you and [another trooper] I think you both had your fair share of crashes, like for the rest of the year. So ....

Grievant: Yeah, yeah, sh-t, all right man, well if you got, if you get anything else just give me a call.

Dispatcher S: All right, sounds good sir.

Grievant: All right, Ok, bye.

Dispatcher S: Thanks bye bye.

### **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 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 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 12.02(13)(a).

Group III offenses include “attempting to shirk official duty.”<sup>3</sup> In order to establish a Group III level offense for shirking official duty, the Agency must show that Grievant had the intent to shirk his duties. The Agency has not met this burden. The evidence showed that Grievant intended to delay his response to the call so that he could use the restroom and he intended to make a joke with a new dispatcher to relieve or reduce the stress that is part of being a dispatcher. Grievant intended to respond to the service call but only stopped once he learned that the local sheriff’s office would handle the

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<sup>3</sup> General Order ADM 12.02(13)(b)(24).

response. Grievant testified that he was joking with Dispatcher S because he knew Dispatcher S had a difficult and stressful job. Dispatcher S testified that troopers never refuse service calls. He recognized that Grievant was making a joke by pretending to refuse to take the request for assistance. Dispatcher S and Dispatcher R both laughed at Grievant's supposed refusal to accept the service call. Grievant suspected that any other troopers who overheard his radio call would know he was joking because he had trained most of them and they knew his work ethic. The seeming intensity of Grievant's cell phone call with Dispatcher S was only after Grievant already knew that he was no longer obligated to handle the service request because the service request was being handled by the local deputy sheriffs. It is clear from Grievant's testimony, the tone of Grievant's voice, and his laughing during the cell phone call that Grievant was "putting on a show" for Dispatcher S and that Dispatcher S recognized this. Although Grievant did not intend to shirk his official duty, his actions had the effect that he failed to perform his duties.

Group II offenses include, "[f]ailure to ... perform assigned work ...."<sup>4</sup> General Order ADM 11.00(8) provides, "Sworn ... employees shall be punctual and prompt in response to all calls, requirements of duty, court appointments, and in any other situations where time may be specific." Grievant was assigned responsibility to respond to vehicle crashes or requests for assistance. Grievant's statements to Dispatcher S resulted in the call being assigned to the local sheriff's office. Grievant failed to perform his assigned work thereby justifying the issuance of a Group II Written Notice.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity,<sup>6</sup> (2) suffered an

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<sup>4</sup> General Order 12.02 ADM (12)(B)(1).

<sup>5</sup> Va. Code § 2.2-3005.

<sup>6</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the

adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>7</sup>

Grievant argued that the Agency's disciplinary action was in retaliation for several complaints he had made about the Agency and its operations. These complaints would be protected activities. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between his protected activity and the Agency's disciplinary action. There is no basis for the Hearing Officer to conclude that the Agency acted as a pretext for retaliation. Grievant's request for relief from retaliation is denied.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice.

## 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.

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General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>7</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.