

Issue: Group II Written Notice (unsatisfactory performance); Hearing Date: 04/16/14;  
Decision Issued: 04/18/14; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10306; Outcome: Partial Relief.



# **COMMONWEALTH of VIRGINIA**

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

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

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

In re:

**Case Number: 10306**

Hearing Date: April 16, 2014

Decision Issued: April 18, 2014

#### **PROCEDURAL HISTORY**

On December 3, 2013, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance.

On December 25, 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 March 17, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 16, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

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

### **BURDEN OF PROOF**

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

### **FINDINGS OF FACT**

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

Old Dominion University employs Grievant as a Sergeant in its Police Department. No evidence of prior active disciplinary action was introduced during the hearing.<sup>1</sup>

The Old Dominion University's football team was scheduled to play another University's football team at that University's campus on October 26, 2013 at 1 p.m. The football team was to board buses and then depart the ODU campus at 11:20 a.m. The team was to be escorted by two police vehicles. Police vehicles were to be positioned in front of and at the end of the group of buses.

Sergeant M was in charge of scheduling football team events. Police employees could volunteer to work Special Events and receive additional compensation from the Agency. Grievant and Officer C volunteered to escort the football team. Their names were typed onto the Request for Police Services Special Events Form. The Form showed a Start Time of 10:30 a.m. and an End Time of 4:30 p.m.

On October 26, 2013, Grievant drove his personal vehicle to the Police Headquarters and arrived at 10:30 a.m. He obtained a Police vehicle. He remained at the Headquarters for over 35 minutes. He drove the Police vehicle to the Sports

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<sup>1</sup> The Agency alleged the Grievant had prior active disciplinary action but did not produce the written documents to support this assertion. The Agency has not presented sufficient evidence to support the assertion the Grievant had prior active disciplinary action.

Complex where the buses were located. The Sports Complex was his post that day. He arrived at the Sports Complex at approximately 11:15 a.m.

Grievant was slow to arrive at the Sports Complex. The Assisting Assistant Chief received several telephone calls asking when Grievant would arrive at the Sports Complex. Grievant was expected to arrive at the Sports Complex sooner than 11:15 a.m. The buses departed after 11:20 a.m. with Grievant driving his Police vehicle in the front.

After the game ended, Grievant escorted the buses back to the Sports Complex and then returned to Headquarters. He wrote on the Request for Police Services Special Events Form that he worked six hours. The Agency compensated him for working six hours.

### **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>2</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.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>3</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On October 26, 2013, Grievant reported to the Headquarters at 10:30 a.m. The evidence showed that the amount of time necessary for Grievant to obtain a Police vehicle and drive that vehicle to the Sports Complex from the Headquarters should not have exceeded 10 minutes. Thus, Grievant should have arrived at the Sports Complex by 10:40 a.m. Instead, Grievant arrived at the Sports Complex at 11:15 AM, 35 minutes later. As a result of Grievant’s delay in arriving to his post, the Acting Assistant Chief received telephone calls inquiring why Grievant had not yet arrived at his post. Grievant’s slow arrival to his duty post was unsatisfactory work performance thereby justifying the issuance of a Group I Written Notice.

The Agency argued that Grievant should receive a Group II Written Notice for failure to follow Agency policy. Under Procedure 13–08, Grievant was expected to

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See Attachment A, DHRM Policy 1.60.

“report and be on assigned post on time.” The Agency argued that for Grievant to be at his post on time he would have had to arrive at the Sports Complex by 10:30 a.m. The evidence showed that this was not the expectation of Sergeant M who was in charge of the football special event program. Grievant had to go to the Headquarters to obtain a Police vehicle and then drive that vehicle to the Sports Complex. If Grievant’s Start Time was to be 10:30 a.m., it would not be possible for him to be at the Sports Complex post at 10:30 a.m. The Request for Police Services Special Events Form stated that Grievant’s Start Time was 10:30 a.m. The Form did not specify that his Duty Post would be the Sports Complex or specify a different time for which Grievant was to report to that Post. It was appropriate for Grievant to believe that he was to be at the Headquarters by 10:30 a.m. so he could obtain a Police vehicle to use as part of the escort. Although the Agency has not established that Grievant acted contrary to Agency policy, the Agency has established the Grievant was slow to move from the Headquarters to the Sports Complex. Grievant did not offer any explanation as to why he could not have arrived at the Sports Complex within 10 minutes after his arrival at the Headquarters. Grievant’s delay was unnecessary.<sup>4</sup>

The Agency argued that Grievant falsified the Request for Police Services Special Events Form because he wrote that he worked six hours even though he arrived at his Post at 11:15 a.m. The evidence showed the Grievant arrived at the Headquarters at 10:30 a.m. and, thus, he was at work. He finished working at 4:30 p.m. He worked six hours and correctly reported his time on the Form. The Agency has not established that Grievant falsified any document.

*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.

## DECISION

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<sup>4</sup> In his grievance documents, Grievant claimed he was delayed due to illness. He did not testify and there is no credible evidence to explain Grievant’s delay.

<sup>5</sup> *Va. Code § 2.2-3005.*

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

## **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>6</sup>

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.