

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 01/09/15;  
Decision Issued: 01/30/15; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10491; Outcome: Partial Relief.



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 10491**

Hearing Date: January 9, 2015  
Decision Issued: January 30, 2015

#### **PROCEDURAL HISTORY**

On August 21, 2014, Grievant was issued a Group II Written Notice of disciplinary action for use of excessive/unnecessary force during an arrest/custody procedure which was not consistent with training or established written policy.

On September 15, 2014, 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 10, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 9, 2015, 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?

### **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 Senior Trooper at one of its locations. He began working for the Agency in 1999. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency does not train its law enforcement officers regarding what to do when a person suspected of possessing marijuana is eating the evidence that would be used against him. Grievant knew that the local prosecutor would not likely prosecute a defendant for possessing marijuana unless the marijuana was presented as evidence during a trial. He had a conversation with one local prosecutor who indicated that if a suspect was eating evidence, it would be appropriate to use a reasonable amount of force to recover the evidence.

On April 1, 2014, Grievant operated a State Police vehicle with a dashboard camera. He had a microphone on his uniform. Most of his words could be heard on the video recording. Most of what Mr. Z said, however, was unintelligible. This may have been because Mr. Z's voice was not heard by the microphone, Mr. Z was eating marijuana as he spoke, and/or Mr. Z's voice was muffled by the noise coming from highway traffic.

Grievant was driving his State Police vehicle on a major Interstate in Virginia. The Interstate had three lanes of traffic heading in each direction. Traffic on the Interstate was moving without interruption.

Mr. Z was operating a vehicle on the interstate. He was driving his vehicle in the high occupancy vehicle lane reserved for vehicles with multiple occupants even though he was the only person in the vehicle. Mr. Z was in possession of marijuana and he knew that possessing marijuana was illegal.

Grievant activated his emergency lights and began following Mr. Z's vehicle, a Toyota Camry. The Camry moved from the far left HOV lane to the far right shoulder and slowed. Mr. Z then accelerated and continued back onto the highway. Grievant continued to pursue Mr. Z. Mr. Z slowed his vehicle and pulled to the far right shoulder of the interstate highway. Grievant stopped his vehicle directly behind the Camry. Insufficient room existed between the Camry and the highway guard rail for Grievant to approach the vehicle on the passenger side.

Grievant got out of his vehicle and quickly walked a few paces towards the driver's side of the Camry. Mr. Z remained in the Camry. Grievant observed Mr. Z leaning to his side in a manner that Grievant believed showed Mr. Z was reaching for something or hiding something. Grievant used his left hand to open the driver's side door. Grievant leaned into the car and asked Mr. Z "What did you put down there?" Grievant could smell marijuana and said "That's a bag right there." Grievant told Mr. Z to "Step out, step out! Get out of the car! Get up!" Mr. Z leaned away from Grievant. Mr. Z was eating marijuana. Grievant reached in and grabbed Mr. Z's arms and pulled him out of the vehicle. Mr. Z stepped upward and he had his arms behind him with Grievant holding Mr. Z's arms near the wrists. As Mr. Z stood up, Grievant positioned Mr. Z in the "V" of the open passenger door and the body of the car. Mr. Z was facing towards the front of the car with Grievant behind him holding his arms at the wrists. Grievant asked Mr. Z "you got marijuana?" Mr. Z leaned forward into the "V" and then straightened upward. Grievant put handcuffs on Mr. Z and said, "You are trying to get rid of the evidence, marijuana." "You are on video tape, sir." Grievant said "Look at me, open your mouth." Mr. Z turned to his left and toward Grievant. Grievant could see that Mr. Z was eating marijuana. Grievant continued to tell Mr. Z to open his mouth and look at Grievant. Grievant said "You ate it. Spit it out. You are on video tape. You are chewing it. Stop chewing it." Grievant placed his right hand on Mr. Z's jawline with Mr. Z's chin in the gap between the thumb and index finger of Grievant's hand. Grievant was attempting to have Mr. Z open his mouth. Grievant said, "You are chewing it, stop chewing the weed." Grievant told Mr. Z to "Stick out your tongue. Stick out your tongue." Grievant placed his right hand on the left side of Mr. Z's neck underneath the jawline and applied pressure. Grievant was using a pressure point technique to force Mr. Z to open his mouth. The technique was unsuccessful. Grievant said, "You are choking on it. You are going to the hospital now."

Grievant used his left hand to hold Mr. Z's left side and placed his right hand flat against Mr. Z's neck and then pulled Mr. Z towards him. Grievant turned Mr. Z

counterclockwise and used his left hand to shove Mr. Z's chest into the side of the roof of Mr. Z's vehicle. Grievant looked down to the handcuffs on Mr. Z to begin checking Mr. Z's pockets for objects. Mr. Z turned to his head to his left and partially turned his upper body to his left. Grievant used his body to return Mr. Z to facing the Camry. Grievant said, "You are eating the marijuana." Grievant placed his left hand on Mr. Z's mouth. Mr. Z turned his head to his right and spit marijuana out of his mouth and onto the road shoulder to avoid Grievant being able to obtain it as evidence. Grievant observed Mr. Z spitting and placed his left hand on the back of Mr. Z's head and pushed Mr. Z's head forward and onto the top of the roof of the Camry. Grievant said, "You're spitting it right now. It's all over your teeth." Grievant pushed Mr. Z's head onto the top of the roof and held it there so that if Mr. Z spit marijuana again, Grievant would be able to retrieve the marijuana as evidence. Grievant said, "Spit it on the car." Mr. Z raised his head off of the car roof with Grievant's hand in the back of Mr. Z's head. Instead of spitting, Mr. Z continued to chew the marijuana. Grievant said, "All right we are pumping your stomach." Grievant pulled Mr. Z away from the Camry and moved Mr. Z to the front of Grievant's Police vehicle.

Once they were in front of the Police vehicle, Grievant said "Stay right here" as Grievant began to search Mr. Z for weapons or objects in his pockets. Mr. Z leaned forward on the hood of the Police vehicle. Grievant said, "Hey, stand and face the car, you are on video tape. I'm checking you for weapons, stand up." Grievant pulled Mr. Z's arms away from the Police vehicle to cause Mr. Z to stand up straight. As Mr. Z continued to protest, Grievant pointed his left finger at Mr. Z and said, "You are eating weed and obstructing justice. I told you to spit it out. You are not spitting it out, you are sucking it up." Grievant lowered his left hand and continued to search Mr. Z's clothing. Grievant said, "You are destroying evidence." Grievant used his left hand to hold Mr. Z's arms at the handcuffs and searched the front of Mr. Z's clothing with his right hand. Grievant then switched hands and searched the other side of Mr. Z's clothing in the front.

After Grievant finished checking Mr. Z's clothing for weapons, Grievant said, "Face me" and turned Mr. Z so that Mr. Z's back was to the front of the Police vehicle. Mr. Z continued to claim he did not eat any marijuana. Grievant said, "Open your mouth and stick out your tongue." Trooper S arrived to assist. Grievant placed his left hand on the right shoulder of Mr. Z and turned Mr. Z in the direction of the Trooper S. Grievant turned Mr. Z so that Trooper S could see the marijuana inside Mr. Z's mouth. Grievant opened his mouth wide and said, "Go Ah ah". Mr. Z did not comply. Grievant asked, "Why are you swallowing?" Grievant then turned Mr. Z toward the front of the Police vehicle and said, "Stand up in front of the camera and go ah. You can't do it, can you?" Mr. Z responded and Grievant said, "You are obstructing justice, you are eating the evidence." Mr. Z responded and Grievant used the tip of his right hand to tap on Mr. Z's stomach as if to make a point. Grievant said, "You don't smell that coming from your breath." As Grievant held Mr. Z's handcuffs with Grievant's left hand, he held his right hand open. Grievant used the tips of his fingers to tap on Mr. Z's chest as Grievant said, "You ate a bag of weed and you are going to jail." Grievant tapped on Mr. Z's chest in a manner as if Grievant was emphasizing a point he was making.

Grievant searched the Camry and found marijuana in the driver's console and portion of a clear plastic sandwich bag. Grievant charged Mr. Z with possession of marijuana and transported Mr. Z to the local Magistrate. Mr. Z was not injured by Grievant during the stop and arrest.

Grievant received training regarding use of force. The instruction manual for this training provided:

1. Privileged force

- a. Because of the nature of your job, the courts have recognized that controlling an offender's behavior sometimes requires the use of force.
- b. This force is considered privileged or "legally permissible" utilization of force.
- c. Force that is recognized as "privileged" for law enforcement must occur in the following situations:
  1. Self-defense
  2. Defense of a third person
  3. Effecting an arrest (enforcing laws)
  4. Prevent an escape
  5. Prevent the commission of a crime.

2. Excessive Force

- a. The courts have set up certain boundaries over official actions by government powers.
- b. As long as the officer is acting within these boundaries, he/she has the "privilege" to legally use force when necessary.
- c. It is when the officer exceeds these boundaries that the courts consider the force as excessive.

\*\*\*

C.3

Officers should avoid unintentional and/or unnecessary antagonistic and provoking verbal and non-verbal factors i.e. ... "[p]utting hands on persons without intent to arrest or restrain."<sup>1</sup>

Grievant also received training regarding Do's and Don'ts of arrests:

---

<sup>1</sup> Agency Exhibit 7.

A. Don't be unnecessarily rough.

1. Polite
2. Firm
3. Pleasing personality<sup>2</sup>

## **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).

General Order OPR 5.01 governs Use of Force. Under this policy:

Sworn employees will use only that force reasonably necessary to effectively bring an incident under control, while protecting the life of the sworn employee or others. The sworn employee is in the best position to determine which level of force or which technique is most appropriate in any given situation.

Sworn employees will use only that force which is necessary and proper to take a person into custody and safely detain and deliver to confinement or to disperse persons participating in an unlawful assembly. When the use of authorized less lethal weapons (issued night sticks, riot batons, ASP batons, taser, O.C. spray and patrol canine) is necessary, they will be used in a manner consistent with Department-approved training.

The Agency argued that Grievant used excessive force by placing his right hand around Mr. Z's neck. Grievant did not grasp Mr. Z's neck in a manner designed to choke Mr. Z. Grievant placed his right hand on the left side of Mr. Z's neck in order to press against a pressure point and cause Mr. Z to open his mouth. Grievant's action was justified. Grievant's objective was (1) to cause Mr. Z to open his mouth and spit out the evidence he was attempting to swallow and (2) to prevent Mr. Z from choking on the marijuana.

The Agency argued that it does not train Troopers to apply pressure points in the manner Grievant selected. For example, the Agency trains its employees to apply the technique Grievant attempted by approaching the suspect from the side or rear but

---

<sup>2</sup> Agency Exhibit 6.

Grievant was facing Mr. Z. This argument is unpersuasive. The Agency also does not train Troopers regarding how to respond to suspects eating evidence and placing themselves at risk of choking. The Agency admitted that it cannot train employees to respond to every situation and sometimes must rely on the judgment of the law enforcement officer. Grievant was in a position to improvise and his approach of pushing a pressure point on Mr. Z's neck was a logical action under the circumstances.

The Agency argued that Grievant used excessive force when he shoved Mr. Z's chest into the roof of the Camry. The evidence showed that it was necessary for Grievant to use force to move Mr. Z from the "V" of the door to facing the roof of the Camry. Grievant's objective was to position Mr. Z so that when he spit the marijuana out of his mouth, the marijuana would fall on the roof of the vehicle so that Grievant could retrieve it to assist in prosecuting Mr. Z. The manner in which Grievant used force, however, is best described as "rough." Grievant pushed Mr. Z quickly rather than placing Mr. Z against the Camry.

The Agency argued that Grievant used excessive force when he pushed Mr. Z's head down to the roof of the Camry. The evidence showed that Mr. Z turned his head to his right and spit out marijuana on the roadway so that Grievant could not obtain it. Grievant responded by pushing Mr. Z's head down on the roof. By doing so, Mr. Z would spit on the roof instead of on the roadway and be able to obtain the evidence necessary to prosecute Mr. Z. It was appropriate for Grievant to control Mr. Z's head to prevent him from repeating this behavior. Grievant's action is best described as a reaction and as being "rough."

The Agency argued that Grievant used excessive force when he used his finger tips to tap Mr. Z on the chest. The evidence showed that Grievant tapped Mr. Z on the chest several times, but his action was not forceful. Grievant did not touch Mr. Z in a manner that moved or hurt him. Grievant's objective was to emphasize the point he was making as he spoke and not to harm Mr. Z. Grievant did not use excessive force when he tapped Mr. Z in the chest several times. Grievant's action could have been antagonistic and contrary to Grievant's training.

There is little doubt the Agency considers allegations of excessive force to be serious and worthy of complete scrutiny. Agency managers carefully considered Grievant's behavior and measured it against the high expectations they have for Agency employees. The Agency's objective of maintaining a highly functional and effective work force cannot be disputed.

Nevertheless, when an employee acts contrary to his or her training, the employee has engaged in behavior giving rise to at least a Group I Written Notice. If an employee has also acted contrary to a written policy, then the employee may receive a Group II Written Notice. When Grievant's behavior is viewed within the context of a unique and uncertain event, his behavior is best described as a "rough" arrest, a Group I offense, rather than as an excessive or unnecessary use of force, a Group II offense.



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>3</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

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.

### 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:

---

<sup>3</sup> Va. Code § 2.2-3005.

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>4</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.