

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 09/16/13;
Decision Issued: 09/18/13; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case
No.10152; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10152

Hearing Date: September 16, 2013

Decision Issued: September 18, 2013

PROCEDURAL HISTORY

On May 22, 2013, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On June 13, 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 she requested a hearing. On August 13, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 2013, 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 in one of its Areas. She has been employed by the Agency for approximately 17 years without active disciplinary action. The purpose of her position is:

Responsible for patrolling the highways and enforcing the traffic and criminal laws of the Commonwealth. *** The employee in this position is aware of and is proactive in ensuring a strong internal control environment to include: potential risks are reduced or communicated to management; data and reports are accurate and reliable; department assets are safeguarded to prevent waste, loss, unauthorized use or misappropriation; department objectives are achieved by maximizing operation efficiency and effectiveness; and applicable laws, regulations, and policies are consistently followed.

The Agency requires its Troopers to report their work activities on a weekly basis. For example, employees must report the number of the incidents such misdemeanors, traffic infractions, unattended vehicles, etc. and the amount of time devoted to each incident. A Trooper must also disclose time spent devoted to activities such as instructing, public speaking, training, court appearances etc. The Agency uses these reports to identify production levels for employees and compare employees based on their production levels.

When a Trooper stops a motorist for speeding, the Trooper may take several actions including issuing a citation or giving a warning. If the Trooper gives a motorist a warning instead of a citation, the Agency's reporting forms provide a space for the Trooper to indicate the amount of time devoted to that activity.

On December 13, 2011, the Supervisor sent Grievant a memorandum stating, in part:

Your enforcement activities during the Thanksgiving C.A.R.E.¹ reporting period [were] unsatisfactory. You worked 4 days for the C.A.R.E holiday. Your weekly report and C.A.R.E enforcement data collection sheet indicated 1 traffic stop with a summons issued for [an] inspection sticker violation and 4 warrants served in [County]. In addition, you assisted 1 motorist for 10 minutes.

There were no other traffic stops, traffic crashes, DUI arrests, criminal or drug arrest during this time. You had 531 patrol miles for 31 hours worked. The department expects you to strictly enforce all traffic violations and be visible to the traveling public during the C.A.R.E holidays. ***

In the future, you are expected to follow the department and division policy during the C.A.R.E holidays. You are to be pro-active in your traffic enforcement.²

On July 24, 2012, the Supervisor sent Grievant a memorandum stating, in part:

Your enforcement activities during the July 4 C.A.R.E. holiday reporting period was unsatisfactory. You worked four days of the C.A.R.E. holiday. Your C.A.R.E. enforcement data collection sheet indicated one summons issued for speed and one motor assist. You worked 32 hours and drove 560 miles. There were no crashes investigated, criminal or other drug investigations.

During the C.A.R.E. holidays, the department expects you to pro-actively enforced the traffic laws in Virginia and be visible to the traveling public during the C.A.R.E holidays. The division commander wrote a memo to all areas about strict enforcement of the traffic laws. ***

Your lack of patrol mileage and attitude about traffic enforcement contributes to your unsatisfactory performance. You are expected to

¹ The Agency participates in a state-sponsored national program called Combined Accident Reduction Effort (C.A.R.E.) which is designed to reduce crashes, fatalities, and injuries caused by speeding, impaired driving, and failure to use occupant restraints.

² Agency Exhibit 3.

follow the department and division policy at all times including the C.A.R.E holidays.

This continued performance will be handled under the Standards of Conduct.³

On August 27, 2012, Grievant received a Notice of Improvement Needed/Substandard Performance. She was placed on a 90 day performance plan stating, in part:

You are to enforce all criminal and traffic laws, with emphasis on motor vehicle laws. You are to remain as visible as possible to heighten public awareness of police presence. You will utilize moving and stationary patrol tactics in your enforcement efforts. You are to utilize available and issued equipment such as radar and tint meter.⁴

Grievant's work performance was to be reviewed by the Supervisor within the 90 day period.

On September 5, 2012, the Supervisor sent Grievant a memorandum stating, in part:

Your enforcement activities during the Labor Day C.A.R.E. holiday reporting period was unsatisfactory. You worked 4 days of the C.A.R.E. holiday. Your C.A.R.E. enforcement data collection sheet indicated four summonses issued. You work 32 hours and drove 753 miles. ***

You are expected to follow the department and division policies that all times including the C.A.R.E holidays.

This continued performance will be handled under the Standards of Conduct.⁵

On November 8, 2012, Grievant and her Supervisor met with the Lieutenant to counsel Grievant on her lack of enforcement activities. The Lieutenant told Grievant that Grievant's first-quarter enforcement statistics for 2012 were lower than what was expected of her duty post. The Lieutenant discussed the need for Grievant to be more proactive with her enforcement efforts. The Lieutenant expressed her concerns about Grievant's low traffic enforcement statistics as well as DUI and criminal arrest. During the meeting, Grievant disclosed that she had been having a difficult time with a personal matter during the previous 10 months. The Lieutenant explained to Grievant that

³ Agency Exhibit 4.

⁴ Agency Exhibit 6.

⁵ Agency Exhibit 7.

although she understood and sympathized with Grievant's situation, Grievant needed to try to stay focused on her job while she was at work for safety reasons. The Lieutenant asked Grievant to find something to motivate her and focus on whatever that was during working hours.

During the Thanksgiving C.A.R.E. holiday from November 21, 2012 through November 25, 2012, Grievant's enforcement activities were satisfactory to the Agency. She worked 5 days for a total of 37 hours worked and drove 829 miles. She issued 16 summonses, 9 speeding tickets, 2 reckless driving tickets, and 5 other tickets. She assisted 3 motorists, and reported a workable crash. There were no other traffic stops, DUI, criminal or drug arrest during that time.

On January 16, 2013, the Supervisor met with Grievant to review her enforcement activities during the time she was under the Substandard Job Performance Plan beginning August 30, 2012. From August 30, 2012 to January 5, 2013, Grievant reported a total of 59 summonses and arrests for 67 days work. This was an average of 0.88 summonses per day. The Supervisor told Grievant that her performance activities were satisfactory on those days he rode with her but there was a lack of effort in her enforcement when she was by herself. He told Grievant that she showed marked improvement during the 2012 Thanksgiving C.A.R.E holiday and that she demonstrated she had the capacity to satisfactorily perform her job.

The Supervisor compared Grievant's activities to the activities reported by two other troopers working Grievant's Duty Post. From August 30, 2012 to January 5, 2013, these two other employees averaged 109 summonses written, 62 days work, and a daily average of 1.70 summonses written.

On February 27, 2013, the Supervisor met with Grievant to review of her second-quarter activity for the period October 28, 2012 and ending January 26, 2013. During the second quarter, Grievant work 55 adjusted days and wrote 44 summonses with a daily average of 0.80. Grievant's daily average enforcement activities decreased from 0.97 in the first quarter to 0.80 in the second quarter.

The Supervisor compared Grievant's activities with the enforcement activities of two other troopers working Grievant's Duty Post. From October 28, 2012 to January 26, 2013, the two other troopers showed an average of 57 summonses written, 33 days work, in a daily average of 1.72 summonses written.

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 which are 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).

Inadequate or unsatisfactory job performance is a Group I offense.⁶ In order to prove inadequate or unsatisfactory job 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.

Grievant was responsible for performing enforcement activities including stopping motorists committing traffic offenses. During the period August 30, 2012 to January 5, 2013, Grievant issued an average of 0.88 summonses per day. Two other troopers working Grievant’s Duty Post issued an average of 1.70 summonses on a daily basis. During the period October 28, 2012 to January 26, 2013, Grievant issued an average of 0.80 summonses per day. Two other troopers working Grievant’s Duty Post issued an average of 1.72 summonses per day. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Grievant argued that her work performance improved. For example, she wrote more tickets during the 2012 Thanksgiving holiday C.A.R.E. than the other two troopers working her Duty Post. Although her work performance during that time period was satisfactory to the Agency, her work performance over a several month period was not satisfactory.

Grievant argued that the Agency was prohibited from establishing a quota⁷ for traffic infractions and imposing that quota on Grievant as a job expectation. The evidence, however, showed that the Agency did not establish a quota for Grievant to meet in order for her performance to be considered adequate. The Agency compared Grievant’s work performance to the work performance of two other troopers working Grievant’s Duty Post. Grievant’s production was significantly less than the production of the two other troopers over the same time periods.

Grievant argued that her work performance was adequate in areas other than issuing traffic summonses. Grievant established this point. The Trooper II testified that Grievant’s report writing was “immaculate”, Grievant was given more difficult cases because of the quality of her report writing, and that Grievant was knowledgeable and helpful to other troopers. Although Grievant established that her work performance in some areas was satisfactory, she did not establish that her work performance in all areas was satisfactory. An agency may take disciplinary action against an employee whose work performance is not satisfactory in all areas within the employee’s work responsibilities.

⁶ General Order ADM 12.02 (11)(b)(4).

⁷ See, Va. Code § 46.2-102.

Grievant argued that when she stopped speeding motorists, she sometimes would give them warnings rather than issuing them tickets and, thus, the Agency's statistics may underestimate her enforcement activities. The evidence showed that Grievant had the opportunity to disclose on the Agency's forms instances where she had stopped a motorist and given a warning rather than a citation. To the extent the Agency's statistics may have underestimated Grievant's work performance that inaccuracy was under Grievant's control and has not been measured.

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"⁸ 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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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

⁸ Va. Code § 2.2-3005.

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.