

Issue: Group III Written Notice (failure to follow instructions and policy); Hearing Date: 09/19/13; Decision Issued: 10/18/13; Agency: DGIF; AHO: Carl Wilson Schmidt, Esq.; Case No. 10169; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10169

Hearing Date: September 19 2013
Decision Issued: October 18, 2013

PROCEDURAL HISTORY

On June 4, 2013, Grievant was issued a Group III Written Notice of disciplinary action for failure to follow instructions and policy.

On June 29, 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 September 3, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Attorney
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 Department of Game and Inland Fisheries employs Grievant as a Special Agent. The purpose of his position is:

To conduct covert investigations into the commercialization of wildlife. To investigate acute violations that are occurring where the uniformed force is rendered ineffective and other investigations as assigned by the Special Agent in Charge. To conduct boat theft/fraud investigations as assigned.¹

Grievant began working for the Agency in 1988. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to Captain H. Captain H instructed the special agents working undercover including Grievant not to make arrests but rather to assist with uniformed officers when they make arrests. The reason for this instruction was because a person being arrested by a uniformed officer rather than an undercover agent would be more likely to understand the authority of the officer making the arrest

The Department was conducting a "bait boat" operation where a global positioning satellite tag was placed on a boat and the boat's motor. Once the GPS signal showed the boat or motor moving, Grievant and three other Special Agents would begin tracking the stolen item to apprehend the individual or individuals involved in the theft. On April 23, 2013, Grievant was the "officer in charge" of the bait boat operation.

¹ Agency Exhibit 7.

Mr. L is a black male with a long “dreds” hairstyle. He did not engage in any criminal activity on April 23, 2013 but had a history of criminal behavior including grand larceny and eluding the police.

On April 23, 2013 at approximately 9 p.m., the boat motor GPS signal activated showing that someone had stolen the boat motor. Grievant and three other agents were in a surveillance vehicle. It was unmarked meaning the vehicle did not appear as a law enforcement vehicle. Special Agent A was driving the surveillance vehicle. Grievant was seated directly behind Special Agent A. Special Agent H was seated in the front passenger seat and was operating the laptop and GPS system to track the bait boat motor. Special Agent D was seated behind Special Agent H. None of the agents in the surveillance vehicle were wearing uniforms. They had badges that they could display if they wished to do so.

Special Agent A drove the surveillance vehicle near to a residential location where the GPS signal was identified. Three men walked out of a building and got into a silver truck. Special Agent H had difficulty seeing the three men because of the darkness, but he believed he saw two white males sit in the back of the truck and one black male sit in the front of the truck in the driver’s seat. Special Agent A told the other three agents in the surveillance vehicle that he observed one black male and two white males in the silver truck. Grievant heard Special Agent A describe the suspects and believed that there were two white men in the truck and one black male driving the truck.

The special agents followed the suspect vehicle as it travelled to a local convenience store. The suspect vehicle pulled into a parking space facing the convenience store. Special Agent A parked the surveillance vehicle in a parking space facing the convenience store but at least a parking space away from the suspect vehicle. The driver of the suspect vehicle exited the vehicle and entered the convenience store. Special Agent A observed that the driver was a white male and not a black male. Special Agent A did not announce to the other agents that the person he thought was a black male was in fact a white male. Grievant did not see the driver of the suspect vehicle leave the vehicle and walk into the convenience store. He was busy talking to a uniformed officer, Officer M, with his telephone. Grievant was giving directions to the uniformed officer who was in route to the convenience store.

Several customers were inside the convenience store but only one was a black male. Special Agent D was looking inside the convenience store at Mr. L. Special Agent D believed that Mr. L had identified the agents as law enforcement officers and said to the other agents, “they made us.” As a result, they decided to take action. Grievant told Special Agent A to “block the truck.” Special Agent A positioned the surveillance vehicle at an angle so that it prevented the suspect’s truck from backing out but allowing the agents to get out of their vehicle.

Special Agent D got out of the surveillance vehicle and approached the passenger side of the suspect vehicle. He observed one white male in the front passenger seat and one white male in the back passenger side seat.

A white male exited the front of the convenience store and walked to his left away from the suspect and surveillance vehicles. Special Agent A got out of the surveillance vehicle and walked quickly behind the man. Special Agent A did not know if the man was one of the three men who had exited the silver truck. Special Agent A spoke with the man and asked him to “standby” until he was notified he could leave. The man agreed. Special Agent A then went inside the store and apprehended the driver of the suspect vehicle.

As Special Agent A exited the surveillance vehicle, Mr. L walked out of the convenience store carrying a bag. Grievant exited the surveillance vehicle and began pursuit of Mr. L. Mr. L was walking with a steady pace toward the gasoline pumps and toward the road. Officer M was operating a marked police unit and drove the vehicle into the parking lot of the convenience store in the path that Mr. L was walking. Mr. L changed his direction in order to get around the marked vehicle but continued to walk at the same pace. After Grievant got out of his vehicle, he observed Mr. L walking away and not towards the suspect vehicle. Grievant concluded Mr. L was attempting to leave the area. Grievant used a “command voice” and instructed Mr. L that he was with the police and that Mr. L should stop. Grievant gave this command several times. Mr. L did not see Grievant because Grievant was approaching Mr. L from behind but Mr. L should have been able to hear Grievant. Officer M was in his marked unit with the window up and he heard Grievant yell, “Stop police” to Mr. L as Mr. L was near Officer M’s vehicle. Grievant did not know that Officer M had entered the convenience store parking lot until he began running after Mr. L. Grievant ran up behind Mr. L and grabbed his shoulder. Grievant was expecting Mr. L to begin running. Mr. L’s hair became entangled with Grievant’s grip. Mr. L began turning around in response to Grievant’s action. Grievant grabbed Mr. L’s wrist and pulled it downward while pushing downward on Mr. L’s shoulder. Mr. L fell to the ground behind Officer M’s police unit. Grievant placed Mr. L in an arm bar and held him face down on the ground. Mr. L asked repeatedly “why are ya’ll arresting me?” He asked who is going to pay for his “dreds.” Mr. L was angered and agitated.

After Mr. L was placed on the ground, Officer M assisted with handcuffing Mr. L while Grievant went to assist other agents. Officer M told Mr. L he was under investigative detention.

Grievant and Officer M transported the suspects to a local jail. Mr. L was released.

As a result of the takedown, Mr. L suffered physical injury including having his hair pulled out and possibly some injuries to one of his hands. Mr. L later told the Agency’s investigator that he thought he was being robbed.

Because Grievant used force on Mr. L, he was obligated to notify Captain H immediately. If Captain H was not available, Grievant could have contacted Major H.

Following the incident, the four agents discussed when to report what had happened and to whom. None of the agents suggested calling Captain H immediately.

Shortly after the incident ended, Officer M called his supervisor, Captain R, and told him of the incident. Captain R called Major H and told him of the incident. On April 24, 2013, Major H called Captain H and asked him if he knew about the bait boat incident the prior night.

On April 24, 2013 at 9:30 a.m., Grievant sent Captain H an email notifying him of the incident. Captain H read the email at about 10:30 a.m. that day. Captain H had instructed the special agents including Grievant to report immediately any time they used force when carrying out their duties.

Special Agent A received a written reprimand but not formal disciplinary action. Special Agent D received a letter of reprimand but not formal disciplinary action. Special Agent H did not receive a written notice.

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.”² 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.”

Failure to follow policy is a Group II offense. Failure to follow a supervisor’s instructions is a Group II offense.³

Policy 2 governs Use of Force. Section 2.2 provides, in part:

Force – a physical action used by a sworn employee, with or without a weapon, that would be considered an effort above and beyond voice command to gain compliance, to physically arrest a perpetrator, or to protect himself/herself or another person.

Reasonable force – the amount of force that would be deemed necessary by an ordinary, prudent, person with the same knowledge of the situation as the sworn employee.

Section 2.3 provides that “sworn employees have the authority, responsibility and expectation to use a reasonable amount of force necessary to ... [t]ake a person(s) into custody.”

Section 2.4 provides:

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

³ See, Attachment A, DHRM Policy 1.60.

Officers are required to immediately notify supervision in all circumstances where a sworn employee uses any amount of physical force with or without a weapon, to overcome resistance, effect an arrest, or forcefully restrain another individual. Additionally, the sworn employee will

Complete within the next working day, through the RMS routing process, a report that documents and describes the event and the force applied. The Lieutenant Colonel will review and take actions as may be deemed appropriate.

Agency Policy 4 governs Direction. Section 4.5 provides:

At the scene of any incident/event where multiple sworn employees are present, the ranking officer, or senior officer (by tenure) of the same rank, shall assume command of the scene and operations.

The senior/ranking officer present will provide on scene direction. They have authority and responsibility to direct and oversee the work at an incident or event unless relieved by a superior or, through mutual agreement, surrender command to other personnel with expertise in the particular incident.

The scene commanders are responsible for ensuring the incident is brought to appropriate conclusion, and any/all related forms, reports or other paperwork are completed in the particular incident.

The Agency took disciplinary action for three reasons – unauthorized use of force, failure to follow Captain H's instructions not to make arrests while undercover, and failure to timely report the use of force incident.

Excessive use of force. The Lt. Colonel testified that Grievant's use of force was excessive. He asserted that Grievant should have identified himself as a police officer to Mr. L and made certain that Mr. L realized that Grievant was a law enforcement officer. If Mr. L did not stop, then Grievant should have placed a hand on Mr. L. without taking Mr. L to the ground. If Mr. L had not resisted, then Grievant could have questioned Mr. L and, if necessary, handcuff Mr. L without forcing Mr. L to the ground.

Grievant presented the testimony of Officer D who served as a defensive tactics instructor for the Agency. Officer D testified that in order to "take down" a suspect, an agent should approach the subject from behind at a 45 degree angle, grab the suspects wrist, pull the wrist downward and use the other hand to push the suspects shoulder forward and downward. He testified that no policy required an agent to get in front of a suspect before taking down that subject. He testified that once an agent identifies himself as a law enforcement officer and gives a command to a suspect to stop, the suspect is expected to stop. He said that in his 19 years as a law enforcement officer, if he was walking behind a suspect and told a suspect to stop, the person hearing the command would stop to determine the source of the command. If the suspect began

running after hearing the command, the suspect would be considered “fleeing” and force may be used to take down the suspect. A key point of his testimony was that if the suspect did not run but did not stop while continuing to walk at a steady pace, the suspect would be “fleeing” and force could be used to take down the suspect.

Officer D taught Agency employees how to use force based on his knowledge of the Agency’s policies and based on the standards and policies set forth by the Department of Criminal Justice Services. DCJS sets the standards applicable to use of force situations, according to Officer D.

When determining whether Grievant used excessive force, the Hearing Officer must consider the training Grievant received. Grievant was entitled to rely on the training he received from the Agency. Although Agency managers would have preferred that Grievant touch Mr. L’s shoulder and wait until Mr. L turned around so Mr. L could observe that he was talking to a law enforcement officer, the Agency trained its employees that if a suspect continues to walk after being asked to stop, the suspect is fleeing. Grievant was authorized to use force to take down a fleeing suspect and Mr. L was a fleeing suspect under Agency training. There is no basis to discipline Grievant for his use of force.

Failure to follow Captain H’s instructions. Captain H instructed Grievant and the other agents not to make arrests when they were undercover and to rely on uniformed officers to make arrests. Grievant was the senior officer for the operation and he decided to initiate the arrests. His actions were contrary to the instruction given by Captain H.

Failure to timely report. Grievant was obligated to immediately report the use of force incident after it concluded. Grievant notified Captain H of the incident approximately 12 hours after it occurred. His notification was not “immediate” and, thus, Grievant’s failure to timely report was contrary to Agency Policy 2, section 2.4 and Agency Policy 4, section 4.5.

Grievant argued he was too busy to call Captain H and did not wish to interrupt Captain H during the early morning hours. This argument fails. Grievant had several opportunities to stop his other post-incident activities and call Captain H. The policy requires immediate notification. Approximately 12 hours after the incident ended is not “immediate” notification.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy and failure to follow a supervisor’s instructions.

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”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

⁴ Va. Code § 2.2-3005.

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.

There are mitigating and aggravating factors affecting the disciplinary action of this case. A mitigating factor is that none of the other special agents received written notices. The other three special agents failed to notify Captain H immediately and failed to comply with Captain H's order to refrain from making arrests while undercover. An aggravating factor is that Grievant was the senior officer in charge and had greater decision-making responsibility and, thus, greater accountability than the other special agents. Another aggravating factor is the possible impact on the Agency resulting from Grievant's use of force on an innocent citizen. The Department's image with Mr. L was severely damaged and Grievant's action placed the Agency at risk of legal action by Mr. L.

When both mitigating and aggravating factors are considered, the appropriate level of disciplinary action for Grievant is a Group II Written Notice.

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 14th St., 12th 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 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.