

Issue: Counseling Memo; Hearing Date: 10/09/14; Decision Issued: 10/28/14;
Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10450; Outcome:
Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10450

Hearing Date: October 9, 2014
Decision Issued: October 28, 2014

PROCEDURAL HISTORY

On May 15, 2014, Grievant received a counseling memorandum. On May 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 September 8, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 9, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether the written counseling given to Grievant was arbitrary or capricious?

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the Agency's counseling was arbitrary or capricious. 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 Police Sergeant. His work shift began on February 15, 2014 and ended on February 16, 2014. He was responsible for supervising Officer E and Officer F.

A group of students resided in an apartment adjacent to the University campus but within the jurisdiction of the local City. On February 16, 2014, the students held a party at their apartment and invited other students to attend. An uninvited male non-student entered the party and a confrontation began. The uninvited male shot a student in the stomach. ODU police responded quickly to the crime scene. Police from the local City also responded immediately.

Because the crime occurred in the City, the local City police took command of the investigation. The City police sent several police officers including SWAT officers to the scene. The ODU police provided assistance as needed.

Officer E arrived at the crime scene at approximately 12:44 a.m. When he arrived, the scene was chaotic. People at the party were upset and trying to get help for the shooting victim. Officer E began assisting with setting up the crime scene, "taping off" areas, and separating witnesses. Officer F helped with taping off areas. Officer E called the dispatch officer and provided a description of the suspect.

Mr. S was a witness to the shooting. Officer E spoke with Mr. S about the shooting. Mr. S said there was a group of approximately four or five men with the shooter and provided Officer E with their description. Officer E and Officer F discussed the information and also mentioned this information to Grievant.

Officer E had all of the information and a clear understanding of the shooting at approximately 2 a.m. He learned of the identity of other possible suspects around 2 a.m.

Office E spoke with Grievant two or three times during the incident.

During the incident, Grievant called the Assistant Chief seven times and she called him two times. At 2:18, the Assistant Chief told Grievant not to call her back unless the scene needed updating. Rather than calling her back when he learned there

might have been four or five more suspects, Grievant sent the Assistant Chief an email containing that information.

On May 15, 2014, the Assistant Chief issued Grievant a counseling memorandum for unsatisfactory performance. The memorandum stated, in part:

(1)

On February 16, 2014, at approximately 12:44 a.m. at [address] you were the supervisor that responded to the report of the shooting. Once on scene, you were responsible for making command notification and providing a detailed account of the events for the Chief of Police to be briefed. You notified me at 00:51 a.m. to report the shooting. At this time, you were unable to provide pertinent information related to the incident and our communication required nine additional phone calls. Updates should not require nine phone calls unless the situation is continuing to deteriorate or the information changes the scope of the event; not to convey information that should have been or was stated to have been available earlier, if an appropriate initial assessment had been conducted.

(2)

Your response is concerning, there are a number of inconsistencies related to the event on February 16, 2014 and it indicates that you still do not realize the importance of assessing a crime scene or situation accurately, and quickly relaying that information to your subordinates or supervisors in this case. I will touch on them briefly; however, the importance of this notice is to ensure that as a sergeant, understand the importance of your actions or lack thereof.

(3)

You stated that during conversation, you told me that an emergency text message should be sent out because you considered the suspect a threat to the university community. That is inaccurate, the only method discussed was a "timely warning" and I advised you that was the reason for providing information to the Chief of Police who has the responsibility to make that decision. There was no mention of an emergency text and procedures for handling emergency text messages are not even documented in the Old Dominion University Directive 10:26 – Campus Crime Statistics Act.

(4)

In regards to the notification of the number of possible suspects; [Officer E] and [Officer F] stated that they both notified you at approximately 1:21 a.m. regarding the possibility of 4-5 additional suspects or persons of interest fleeing the area. They both stated that they verbally advised you separately; however inconsistencies are noted in their statements regarding how you were notified or updated. Further, you noted in your

response that you did not notify me of updated information regarding the number of suspects or persons of interest because you did not have the information at the time of our last call. That should not have prevented you from calling me back to provide updated relevant information. Your decision to not immediately pass on the information stands as neglectful. Further, you misquoted me stating, "I am going back to bed now do not call me anymore unless the suspect is caught or the victim dies." To say the least, I did not make this quote and interestingly enough, during the presentation of the Form 31 meeting, you actually misquoted me then as well. When I stated to you that you were not telling the truth and that your quote was inaccurate at that time and not true, you actually in my presence attempted to amend the quote and began to recite it differently. Hence, your quote in the response is inaccurate as well. It is my responsibility to be available when on call and would never tell you "not to call me" regarding work related issues.

(5)

Dispatch review of all available audio is always one of the processes in an investigation. In your response, you stated that you "strongly suggest" that I listen to it. A review was conducted and there was no evidence to support that you believed this event was such an emergency that it required an emergency text. In fact, you provided some information pertaining to the suspect description and stated to advise the security officers and patrol aides but never requested to have dispatch place the channel on emergency in order to provide information for a BOLO, nor is there a record of one being sent. Further, there is no evidence that you advised dispatch that "...I have called you and gave you additional information on this matter." Dispatch audio notes that you were speaking with an officer stating that you needed to let me know and [Sergeant J] transmits that "you" needed to do it (make contact) and stated a list of information that you would need to provide.¹

CONCLUSIONS OF POLICY

Section (B)(I), Department of Human Resources Policy 1.60, Standards of Conduct, provides:

Counseling is typically the first level of corrective action but is not a required precursor to the issuance of Written Notices. Counseling may be an informal (verbal) or formal (written) communication which conveys that an employee's conduct or performance was improper and must be corrected. This level of corrective action would be appropriate for conduct and/or performance issues resulting in minimal impact to business

¹ Paragraph numbers were added by the Hearing Officer.

operations, to the safety and well-being of others, or that involve minor infractions of policies or laws.

Counseling may be documented by a letter or memorandum, but not on the Written Notice form. Documentation regarding counseling should be retained in the supervisor's files, and not in the employee's personnel file, except as necessary to support subsequent formal disciplinary action.

A counseling memorandum represents an opinion and may not be reversed unless it is arbitrary or capricious. Section 9 of the Grievance Procedure Manual defines arbitrary or capricious as, "[i]n disregard of the facts or without a reasoned basis."

The Agency did not disregard any material facts when issuing the counseling memorandum. The Agency's opinion is well-reasoned except with respect to paragraphs one and two of the counseling memorandum.

The Agency's criticism of Grievant in paragraphs one and two is inconsistent to some extent. The Agency criticized Grievant for calling the Assistant Chief too many times even though the crime scene remained stable and had not deteriorated. On the other hand, the Agency criticized Grievant for not immediately informing the Assistant Chief that there might be four or five other suspects with the shooter. The Agency's assertion that Grievant should have waited until he had obtained a significant amount of information before calling the Assistant Chief is not consistent with its assertion that he immediately call the Assistant Chief once he learned there might be additional suspects.

The Agency asserted that Grievant had been informed by Officer E of other possible suspects before 2:18 a.m. but he failed to inform the Assistant Chief at 2:18 a.m. The time frames offered by Officer E were approximate. Officer E may have known the identity of other suspects by approximately 2 a.m. but it is unclear when he informed Grievant of this information. The Hearing Officer does not believe Grievant omitted any significant information that he knew when he spoke with the Assistant Chief. He provided the Assistant Chief with the information of which he was aware at the time of his telephone calls with the Assistant Chief.

For a police department or any State agency to operate efficiently the timely transmission of relevant information from a subordinate to a superior is often essential. Although a particular supervisor may prefer fewer reports of an incident, it is unusual for an organization to benefit from fewer reports from a subordinate to a supervisor. Grievant's decision to initiate contact with the Assistant Chief on a frequent basis was appropriate under the circumstances. This is especially true given that the matter being reported involved a shooting of a student at the University which would necessarily invoke much attention and discussion among University students, staff, and the public. The Assistant Chief's preference that Grievant make fewer calls with information better organized appears to be more of a personal preference of the Assistant Chief than an organization necessity or operational efficiency.

The Agency asserted that Grievant did not fully assess the crime scene or situation accurately, and quickly relay that information to his subordinates or supervisors. The evidence showed that the City police took control of the incident. Grievant spoke with Officer E two or three times and also with Officer F. Officers E and F were knowledgeable police officers who were able to perform their duties independently. Grievant was actively assisting with the investigation and providing information to the Assistant Chief. The Agency's assertion has not been established.

Paragraphs one and two of the counseling memorandum must be reversed.

Grievant did not testify and did not present any evidence to refute the Agency's allegations regarding his misquoting the Assistant Chief, discussion regarding available audio, and having dispatch place the channel on emergency.

The Agency's recommendations that Grievant utilize a note pad and review certain directives appear appropriate regardless of whether or not Grievant was appropriately counseled.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a counseling memorandum is **reversed** with respect to paragraph's one and two but otherwise **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
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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.