

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 06/26/19; Decision Issued: 09/27/19; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 11332; Outcome: Partial Relief; **Administrative Review Request Received 10/10/19; EDR Ruling No. 2020-4998 issued 11/06/19; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11332

Hearing Date: June 26, 2019¹
Decision Issued: September 27, 2019

PROCEDURAL HISTORY

On January 24, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow policy.

On February 20, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 11, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2019, a hearing was held at the University's office and was continued to June 26, 2019.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

¹ The hearing began on June 3, 2019 and was continued until June 26, 2019.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 University of Virginia employed Grievant as a Police Officer. He began working for the University on June 27, 2016. Grievant had prior active disciplinary action. He received a Group III Written Notice with a ten workday suspension on January 18, 2018.

Chief S began the Police Chief at the end of July 2018. He replaced the Interim Chief. Chief S created different expectations for staff. According to Lieutenant T, "Guys were told to cut down on running radar and traffic enforcement; we want to be in community engagement."

Sergeant N reported to Lieutenant T who reported to Captain M.

The Driver's motor vehicle license was suspended. She had five active suspensions with the most recent in April 2013. She had failed to pay court costs and fees. In the early morning of November 22, 2018, she was driving a silver Nissan ("the suspect vehicle").

Grievant was driving a marked patrol vehicle ("Patrol vehicle") with police lights.

At approximately 3:44 a.m., the suspect vehicle was travelling eastbound on Ivy Road as it passed the Dynamic Building at 2015 Ivy Road. The patrol vehicle followed the suspect vehicle eastbound on Ivy Road.

At approximately 3:46 a.m., the suspect vehicle was on Ivy Road approaching Emmet Street. As the Driver approached the intersection while on Ivy Road, Ivy Road had three lanes in the Driver's direction. The lane on the right was for vehicles turning right onto Emmet Street. The middle lane was for vehicle passing through the intersection and continuing on Ivy Road. The left lane was for vehicle turning left onto Emmet Street. The suspect vehicle approached the intersection in the center lane and slowed. The vehicle moved partially into the right lane and then continued to turn right from Ivy Road onto Emmet Street. The light was red.² The Driver disregarded a "No Turn On Red" sign at the street light and turned right onto Emmett Street. Grievant observed the Driver's disregard of the traffic sign. The Patrol vehicle turned right onto Emmet Street from Ivy Road following the suspect vehicle.

The Driver recognized that the Patrol vehicle was following her and began taking evasive actions.

The suspect vehicle turned right onto Sprigg Lane at approximately 3:46:51 a.m. and the Patrol vehicle followed. Sprigg Lane was a dead-end road with a turn circle at the end. While on Sprigg Lane, the Driver decided to race away from Grievant. The suspect vehicle slowed near the end of Sprigg Lane but then turned around and drove over the circle at the end of Sprigg Lane. The Driver began driving at a high rate of speed out of Sprigg Lane in the direction of Emmett Street. The suspect vehicle passed the Patrol vehicle. Grievant had activated the blue lights on the Patrol vehicle and then activated his siren. Grievant turned the Patrol vehicle around and began pursuing the suspect vehicle at a high rate of speed. Grievant read the license plate of the suspect vehicle but had not yet identified the Driver as female. Grievant could not see into the suspect vehicle.

At approximately 3:47:30 a.m., the suspect failed to stop at the stop sign on Sprigg Lane and turned left onto Emmet Street heading northbound. The Patrol vehicle followed the suspect vehicle. The suspect vehicle travelled at an excessive rate of speed well above the 40 mph speed limit on Emmet Street.

Grievant told the Dispatcher: "Passing Arlington Blvd, speed 75."

Sergeant N asked over the radio: What's the reason for the stop?
Grievant replied: Was unable to maintain lane.

The Patrol vehicle exceeded 90 miles per hour as Grievant drove on Emmet Street after passing Arlington Boulevard.

² A video of the intersection does not show whether the light was red when the suspect vehicle entered the intersection. The finding that the light was red is based on the investigator's opinion.

Sergeant N asked: What's your location?"

Grievant replied: I'm up on the bypass now, getting ready to go eastbound. Struck the curb twice. Can you see if the county has (not audible) Pantops. On the bypass, passing Meadowbrook Heights. Going about 75. All over the road. Getting ready to hit Rugby Ave., he's going about 50.

Sergeant N said: You might want to pass onto the City, depending on where he goes.

Grievant said: Hold on up, not sure what they're

The Dispatcher asked: are you on Rugby now?

Grievant replied: 10-4, he just took off on me again. We're turning on to Rose Hill. On Amherst Street, white male driver. Alright we're stopped here on Rose Hill, a white female.

Grievant said: All right, we're at Augusta Street, a residence (not audible), 46-ECC release traffic.³

Once the Driver stopped the suspect vehicle and exited the vehicle, Grievant realized inside the suspect vehicle was a four year old child. The Driver informed Grievant she did not have a license to drive. Grievant asked her if that was the only reason she ran and the Driver said, "Yes." Grievant told the Driver the only reason he tried to stop her was because she was "all over the road." Grievant asked the Driver if she knew he was behind her when they were on Sprigg Lane and the Driver said she was scared and knew she did not have a license. Grievant told the Driver that the Driver almost wrecked about four times. Grievant did not perform field sobriety tests on the Driver. Grievant arrested the Driver. The distance of the pursuit was between three and four miles.

Grievant completed an Arrest Information Sheet. He reported that he charged the Driver with felony child endangerment, felony eluding, and driving without a license. Grievant wrote:

I observed a silver Nissan Maxima travelling eastbound in front of me swerve from within its lane and cross over the white fog line as it approached the intersection. It then swerved into the left lane and abruptly made a right turn to proceed southbound onto Emmet Street S with a steady red traffic signal showing without slowing or stopping. I then observed the vehicle swerve within its lane and then abruptly turn onto Sprigg Ln. I initiated a traffic stop on the vehicle by activating my emergency flashing blue lights. The vehicle then made an abrupt u-turn and proceeded back towards Emmet St S at a high rate of speed. I then activated my emergency siren in conjunction with my emergency flashing blue lights as I proceeded northbound on Emmet St behind the vehicle. The vehicle continued to swerve within its lane and was accelerating rapidly. I reached speeds of 70

³ Agency Exhibit 15.

mph with the vehicle still not yielding in a posted 35 mph zone. The vehicle continued to accelerate and I observed on my speedometer that I was travelling 92 mph in a posted 40 mph zone as we travelled northbound passing Barracks Rd on Emmet St. N. The vehicle then struck a curb, swerved, and struck the curb again. It slowed to a speed of approximately 60 mph and then entered the 250 bypass eastbound. The vehicle continued travelling at normal posted speed limits but still did not yield to my emergency signal. Ultimately the vehicle stopped at [address] Augusta St. Immediately [Driver] existed holding a small child. She uttered that she was sorry and that she got scared because she knew she did not have a valid license. She then explained that the child had been unsecured for the entirety of the time she's been operating the motor vehicle while I was trying to stop her. The child is a 4 year old, her grandson. Virginia DMV records indicate that [Driver] has 5 outstanding suspensions on her driver's license.⁴

A Vehicle Pursuit Report was drafted relating to the pursuit. Grievant wrote that the reason for the initial contact was "inability to maintain lane, swerving", the reason for the pursuit was "vehicle failed to yield to emergency signal", and highest speed attained as 95 miles per hour in a 40 miles per hour speed zone.

Grievant submitted a Field Case Report. Grievant wrote that he:

observed a silver Nissan Maxim travelling eastbound in front of me swerve from within its lane and cross over the white fog line as it approached the intersection. It then swerved into the left lane and abruptly made a right turn to proceed southbound onto Emmet St S with a steady red traffic signal showing without slowing or stopping. I then observed the vehicle serve within its lane and then abruptly turn onto Sprigg Ln. I initiated a traffic stop on the vehicle by activating my emergency flashing blue lights in the area of 201 Sprigg Ln.

The vehicle then accelerated and travelled to the end of Sprigg Ln and made an abrupt u-turn by travelling over a curb and proceeded back towards Emmet St S at a high rate of speed. I then activated my emergency siren in conjunction with my emergency flashing blue lights as I proceeded behind the vehicle. The vehicle continued northbound on Emmet St crossing through the intersection of Ivy Rd. *** As the vehicle and my patrol vehicle continued northbound passing the intersection of Barracks Rd I observed that my speedometer that I was travelling 92 MPH in a posted 40 mph zone and the vehicle was slowly pulling away from mine. The vehicle then struck a curb just on the other side of the intersection with Barracks, swerved to the left, swerved back right and struck the curb again. ***⁵

⁴ Agency Exhibit 12.

⁵ Agency Exhibit 11.

Grievant submitted an Arrest Information Sheet in which he wrote, “[t]he vehicle continued to accelerate and I observed on my speedometer that I was travelling 92 MPH in a posted 40 mph zone as we travelled northbound passing Barracks Rd on Emmet St. N.”⁶

The University began an investigation. Grievant met with the Investigator on December 3, 2018. Grievant told the Investigator:

the vehicle swerved to the right over the side white fog line and then abruptly turned into the left hand turn lane of Ivy Road and then the vehicle abruptly turned right onto Emmet Street (southbound) through a red traffic light that was posted, “No Right on Red”.⁷

Grievant presented evidence of prior pursuits by Grievant and other police officers. Grievant initiated a pursuit on June 20, 2017. His reason for initial contact was “reckless driving by speed 58 MPH in posted 35 MPH zone.” His reason for the pursuit was, “Hit & Run immediately after activating emergency equipment to stop the vehicle.” Grievant’s highest speed during the pursuit was 60 mph in a 35 mph zone.

Officer P initiated a pursuit on July 7, 2017. A motorcycle travelling southbound entered the officer’s radar at 78 mph in a 25 mph zone. After activating the patrol vehicle headlights, the speeding motorcycle accelerated. Officer P activated his emergency lights and siren and advised the dispatcher that he was in pursuit of the southbound vehicle. Sergeant S contacted Officer P by radio to request information about the reason for the stop. Officer P notified Sergeant S that the reason was speeding and that his current speed was 96 mph.

Officer T initiated a pursuit on March 30, 2018. The reason for initial contact was “No tail light on the rear.” The reason for the pursuit was, “Motorcyclist failed to yield to activation of emergency equipment.” The highest speed while in pursuit was 75 mph in a 25 mph zone. A supervisor ordered termination of the pursuit.

Officer M initiated a pursuit on May 25, 2018. The reason for initial contact was, “entered the parking lot of Afghan Kabob from Masie at a high rate of speed too close to the front of my patrol vehicle.” The reason for the pursuit was “driver re-entered vehicle and took off.” The highest speed while in pursuit was 98 mph in a 55 mph zone. A supervisor ordered termination of the pursuit.

Officer D initiated a pursuit on July 21, 2018. The reason for the initial contact was, “Headlights Off.” The reason for the pursuit was, “Failure to yield.” The highest speed

⁶ Agency Exhibit 12.

⁷ Agency Exhibit 5.

while in pursuit was 90 in a 45 mph zone. A supervisor ordered Officer D to stop the pursuit.

Officer D initiated a pursuit on August 26, 2018. The reason for the initial contact was, "Possible DUI driver." The reason for the pursuit was, "No Headlights or rear lights." The highest speed while in pursuit was 45 mph in a 45 mph zone. Officer D was counseled regarding this pursuit.

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."⁸ 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."

Written Directive A-3.0 governs Code of Conduct and Ethics. Section V(A)(1) provides:

Employees will not commit or omit any acts which violate any rule, regulation, policy, procedure, or directive of this department or the University. Supervisors will ensure that employees perform the duties of their position in compliance with department directives. Employees will obey all laws of the United States and the Commonwealth of Virginia and of any state or local jurisdiction in which they are present.

Written Directive E-8.0 governs Police Vehicle Operations. This policy defines High Speed Pursuit as:

To follow in an attempt to overtake or capture at speed 20 MPH or more above the posted speed limit. High speed pursuits should take into consideration the totality of the circumstances, to include pedestrian and traffic safety, environmental conditions, and the seriousness of the violation.

Section IV(C) governs Police Vehicle Pursuit:

High speed pursuit is justified only when the officer knows or has reasonable grounds to believe that:

- a. The suspect presents a clear and immediate threat to the safety of other persons; or

⁸ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

- b. The suspect has committed or is attempting to commit a violent felony; or
- c. The necessity of immediate apprehension outweighs the level of danger created by the pursuit.⁹

Failure to follow policy is a Group II offense.¹⁰ On November 22, 2018, Grievant began following the suspect vehicle on Ivy Road as the suspect vehicle approached Emmet Street. Grievant initiated high speed pursuit of the suspect vehicle once the suspect vehicle attempted to elude Grievant while the vehicles were on Sprigg Street. The Driver did not present a clear and immediate threat to the safety of other persons for any reason other than being followed by Grievant. The Driver had not committed and was not attempting to commit a violent felony. The necessity of immediate apprehension did not outweigh the level of danger created by the pursuit. During the high speed pursuit, the danger to Grievant, the Driver, the Child, and other drivers and property along the pursuit route exceeded the necessity of immediate apprehension of the Driver. There is no reason to believe the Driver (whose license had been suspended) was somehow especially capable of driving at high rates of speed on local streets. She drove at an excessive rate because she was being pursued by Grievant and her excessive rate of speed placed herself and others at risk of injury. The University has presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency argued that Grievant should receive a Group III Written Notice. The Agency asserted that Grievant was untruthful. For example, the Agency claimed Grievant falsely reported that the suspect vehicle swerved as it approached the intersection of Ivy Road and Emmet Street. The assertion of untruthfulness is not substantiated for several reasons. First, the video of the intersection of Ivy and Emmet did not show the Driver swerving and crossing the “fog line” as claimed by Grievant. Grievant testified that the Driver’s swerving and crossing the fog line occurred prior to the area observed on the video. Grievant began following the Driver on Rothery Road which was approximately 718 feet from the intersection of Ivy and Emmet. The tree appearing in the video was approximately 116 feet from the intersection. The left turn lane began outside of the view of the video. Thus, the video did not show a lot of the time when Grievant was observing the suspect vehicle. Second, Grievant’s later reports were consistent with his contemporaneous expressions about his observations. Grievant told Sergeant N over the radio that the reason for the stop was “unable to maintain lane.” When Grievant stopped the Driver he told her she was “all over the road.” Grievant claimed the Driver made an “abrupt” right turn onto Emmet Street. The video did not show an “abrupt” turn. Grievant’s inconsistency appears to be more of a simple mistake of recollection than an intentional misrepresentation.¹¹

⁹ This policy became effective May 18, 2017.

¹⁰ See, Attachment A, DHRM Policy 1.60.

¹¹ It is unclear what motive Grievant would have to lie.

The Agency argued that Grievant should have called in the highest speed of 95 or 92 to allow Sergeant N to determine whether to suspend the pursuit. The Agency asserted that Sergeant N would have suspended the pursuit had he known the speeds approached 95 miles per hour. Grievant's speed varied from the beginning of the pursuit to its end. Grievant was focused on driving to ensure his safety and he could not report every change in speed. The evidence showed that Grievant called out his driving speeds at the times he was driving approximately 75 miles per hour. There is no reason to believe Grievant was driving significantly faster than 75 miles per hour at the time he called out those speeds. Grievant drove approximately 95 miles per hour while on Emmet Street between the times the two points where he called out 75 miles per hour. Grievant did not call out his speed at the time he was driving approximately 95 miles per hours because he was completely focused on safely pursuing the Driver. The Agency has not established that Grievant should have called out his speeds more frequently than he did. The Agency has not established that Grievant lied about his highest rate of speed while driving.

Grievant argued that his need to pursue the suspect vehicle was justified because he suspected the Driver might be intoxicated and present a clear and immediate threat to other people. This argument is not persuasive. Although Grievant found marijuana inside the suspect vehicle, he did not conduct field sobriety tests or a preliminary breath test on the Driver. Grievant did not ask the Driver if she had been smoking marijuana or drinking alcohol. In addition, Grievant did not mention this reason in any of his initial reports.¹²

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"¹³ 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.

There are both mitigating and aggravating circumstances in this case. The first mitigating factor is that Grievant presented evidence of prior vehicle pursuits involving enforcement of motor vehicle laws and fleeing once the police officer activated his emergency lights and siren. These pursuits were contrary to policy but the officers did not receive disciplinary action. A new Chief of Police began working for the University after these pursuits and appears to have changed the focus of police officers away from motor

¹² Lieutenant G testified that it would be very dangerous to pursue a drunk driver at a high rate of speed.

¹³ *Va. Code § 2.2-3005.*

vehicle violations. It is unclear whether Grievant received this message. The second mitigating factor is that Sergeant N was aware of Grievant's reason for "the stop" but took no action to stop the pursuit. He should have recognized that Grievant's justification for the stop was not sufficient to support a pursuit under policy and clarified Grievant's reason for the pursuit. Although it does not appear that the University singled out Grievant for disciplinary action, there is sufficient question as to whether the University changed its emphasis on the restrictions of the pursuit policy. The aggravating circumstance in this case is that Grievant could have chosen to end the pursuit at any time. He observed the Driver "almost wreck four times." He should have realized that pursuing the Driver at over 90 miles per hour created a material risk of injury to property and life. Grievant should have ended the pursuit based on his own judgment. His failure to do so was unsatisfactory performance, a Group I offense.

Upon the accumulation of a Group III Written Notice and any other Written Notice, an agency may remove an employee. Grievant has accumulated a Group III Written Notice and with the issuance of a Group I Written Notice, there exists sufficient evidence to support Grievant's removal.

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 I Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.