

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE
MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
IN RE CASE NUMBER: 12089**

DECISION OF HEARING OFFICER

I. SUMMARY

The Virginia State Police issued to the grievant a Group II Written Notice on November 29, 2023. The disciplinary action accused the grievant of activities undermining the effectiveness or efficiency of the department. The grievant challenges the issuance of the formal discipline. For the reasons hereinafter stated, I uphold the issuance of the Written Notice.

II. PROCEDURAL BACKGROUND

The grievant filed his Form A challenging the Written Notice on December 26, 2023. I was appointed as hearing officer on March 4, 2024. I conducted a prehearing conference call with the advocates for the parties on March 11. By agreement, I scheduled the matter for hearing on April 25. On April 9, the parties submitted to me a written stipulation regarding certain of the alleged conduct giving rise to the discipline. The hearing took place as scheduled, lasting approximately three hours.

The agency was represented by one of its officers. A different officer was present throughout the hearing as the agency representative. The agency called five witnesses in its case in chief, including the grievant. Prior to the hearing the agency submitted thirteen exhibits, consisting of 355 pages. These were accepted into evidence without objection.

The grievant was represented at the hearing by an attorney. The grievant testified on his own behalf but presented no additional witnesses. The seven exhibits submitted by the grievant were also accepted into evidence without objection.

III. ISSUE PRESENTED

Whether the agency was justified in issuing the grievant a Group II Written Notice on November 29, 2023 for conduct undermining the effectiveness of the agency?

IV. FINDINGS OF FACTS

The grievant is an approximately six-year veteran of the agency. He is classified as a sworn employee. At the time of the subject incidents, he served as a trooper in a mostly rural area of the Commonwealth.

At approximately 10:38 pm on September 1, 2023, the grievant was dispatched to the scene of a single vehicle accident within his usual coverage area. He proceeded directly to the crash site. Upon his arrival, he noted that an ambulance and emergency services workers had already arrived. He learned the driver of the vehicle involved in the accident (hereafter “the driver”) had been placed in an ambulance, which was still at the scene.

Also present at the scene when the grievant arrived was a female who gave indications of being under the influence of alcohol or other substance, or otherwise in need of assistance. She was extremely agitated and refused to remain off the portion of the roadway that was not blocked by the accident. After speaking with the female for a short amount of time, the grievant returned to his vehicle to begin writing traffic summonses for the driver of the vehicle. While he was in the vehicle, the female expressed her agitation or frustration by pounding on the vehicle with her fists. The grievant took no steps to bring her under control at that point.

Instead, the grievant radioed that he needed assistance at the scene. He asked that the responding units get there as fast as humanly possible. Another trooper and multiple local law enforcement officers arrived in response to the call for assistance.

The other trooper proceeded to take steps to control the female. He briefly interviewed the driver in the ambulance, detecting a strong odor of alcohol about him. The driver was alert although injured. The other trooper and the local officers had succeeded in controlling the female without the assistance of the grievant. Due to her agitated state, she was placed in handcuffs, the decision having been made to charge her with obstruction of a law enforcement officer. The only assistance provided by the grievant was providing his handcuffs. The female was transported to a local magistrate by the local officers. The grievant went there for purposes of providing the necessary information to obtain a warrant for the female. She was charged with disorderly conduct.

While the grievant was dealing with the charging of the female, the driver was taken by ambulance to a hospital approximately a 45-minute drive away from the accident scene. At the time the grievant was finished dealing with the female; he was the only agency officer on duty in the county. Because of that, he chose not to drive to the hospital to further investigate the condition of the driver. The grievant had detected a faint odor of alcohol on him. One of the local

law enforcement officers had apprised the grievant of finding a jar containing a clear liquid in the vehicle.

For the next few days following the accident, the grievant was off duty. When he returned, his First Sergeant inquired whether he had obtained the blood sample taken from the driver at the hospital. The grievant had not done so. The First Sergeant reminded him that the hospital did not keep blood samples indefinitely and that it may already be too late for him to obtain the blood sample.

The First Sergeant then requested an Internal Affairs investigation of the grievant's conduct on the evening of September 1 and his handling of the crash investigation. The grievant was interviewed in October as a part of the Internal Affairs investigation. He denied the allegation that he had failed to properly control the female. He admitted that he had failed to conduct a proper investigation of the accident, including whether the driver had been intoxicated or under the influence of a substance at the time of the accident.

As a result of the findings of the Internal Affairs investigation, the agency issued the grievant the subject Group II Written Notice on November 29, 2023. The grievant then proceeded to obtain a search warrant for the medical records of the driver. He learned that the blood sample had been destroyed by the hospital as part of its normal procedures. The medical records revealed the driver's blood alcohol content to be 0.295. After receipt and review of the records the grievant consulted with the Commonwealth's Attorney for the county and obtained a charge of DWI/DUI against the driver. That case remains pending in the General District Court for the county where the accident occurred.

Prior to November 29, 2023 the grievant received no formal written disciplines from the agency. He received a verbal counseling for uniform and equipment issues on September 1, 2023.

V. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance a hearing officer shall review the facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice?
- II. Whether the behavior constituted misconduct?
- III. Whether the discipline was consistent with policy? and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The agency proceeded to discipline the grievant for his failure to control the female at the accident scene and for conducting an inadequate investigation. His actions and omissions regarding the female at the accident scene are as stated above; these were the subject of the stipulation between the parties. The facts regarding the alleged improper investigation are as forth above. These two issues are addressed separately.

Agency General Order OPR 8.00 (Criminal Investigations) applies to the acts of the grievant. Once the female began pounding on his vehicle, a crime had occurred. The policy requires an investigating officer to observe and record all relevant conditions and events. Because the grievant was otherwise preoccupied with writing summonses for the driver, he made the arrest only after the other officers were able to control the female. He further failed to investigate the exact circumstances surrounding the behavior of the female, as required by the policy. The other officers at the scene determined that she was not intoxicated, under the influence of drugs, or mentally ill.

The failure to control the female led to the need for another trooper, and local law enforcement, to be dispatched. Instead of dealing directly with the female, the grievant chose to remain in his vehicle and complete the summonses for the driver. Those charges were for driving an uninsured vehicle and failure to keep a vehicle within the prescribed lane of travel. Both charges are Class 3 misdemeanors, which carry only a maximum punishment of a fine of \$250. In contrast, the charge eventually placed against the female was a Class 1 misdemeanor carrying with a possibility of a fine of up to \$2,500.00 and a jail sentence of up to 12 months.

The grievant failed to thoroughly investigate the actions of the driver and the crash. In particular, the grievant failed to take many steps to investigate whether the driver should properly receive a charge of violating Code of Virginia Section 18.2-266. Agency General Order OPR 4.00 requires a sworn employee of the agency to conduct a proper investigation of motor vehicle crashes. One of the elements of a proper investigation is to interview all persons possibly having relevant information regarding the crash. There is no indication that the grievant attempted to interview the female with a goal of determining whether she had information regarding the crash. More importantly, the grievant did not interview the driver despite having reasonable suspicion of his having recently consumed alcohol. That reasonable suspicion was provided by the odor about the driver (described as faint by the grievant), a late night, unexplained single vehicle accident, and the presence of a clear liquid in a jar in the vehicle.

The grievant further failed by not taking steps to request that the hospital not destroy the blood sample before he had the opportunity to obtain it for processing and analysis. The statement by the First Sergeant that it was probably too late to obtain the blood should have triggered a response from the grievant, including taking immediate steps to obtain either the blood or the records from the hospital. He did neither of those things until after being issued the

Group II Written Notice weeks later. If the officer had instructed him to cease the investigation, then his inaction would likely be excusable.

A reasonable trooper of the experience of the grievant should also have considered whether a charge of driving under the influence could be placed against the driver in the absence of the blood sample. Although the testing results from the hospital may be used by the prosecution during the trial in this case, the driver lost the opportunity to have an independent laboratory test the blood sample, as provided for by Code of Virginia Section 18.2-268.7. Even if this flawed investigation still results in a conviction, that is not pertinent to whether the investigation was conducted properly.

The failure to properly control the female at the accident scene posed some risk to her safety, as well as that as the traveling public. General Order ADM 12.02 provides that a Group 2 Written Notice is appropriate for instances of neglect of duty or violations of policies and procedures. The issuance of the formal discipline was entirely appropriate. I cannot find that it was unreasonable for the agency to charge the grievant with a Group II offense, based on the entirety of the circumstances surrounding the female and the flawed investigation of the driver.

No mitigating evidence not considered by the agency. The grievant has approximately six years' experience with the agency with no prior formal discipline. As a possible aggravating factor, I note the discrepancy between the statement of the grievant during the investigation regarding his actions and the video evidence considered by the agency. The discipline is consistent with law and policy. The grievant established that another employee of the agency had been involved in similar conduct without formal discipline. Because that employee was only a probationary employee not subject to the standards of conduct, he is not an appropriate comparator.

VI. DECISION

The actions and omissions of the grievant constituted a neglect of duty and clearly caused an interruption to the operations of the agency. The grievant admitted that his relationship with his fellow officers has become strained since these events. That is sufficient to establish that the effectiveness of the agency has been impaired. For these reasons, I uphold the issuance of the Group II Written Notice to the grievant on November 29, 2023.

VII. APPEAL RIGHTS

The parties may file an administrative review request within fifteen calendar days from the date this decision is 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 Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile 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 fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The 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 contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant.

DECIDED this May 3, 2024

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer