

Issue: Group II Written Notice and termination (Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: August 31, 2001; Decision Date: August 31, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5267



# **COMMONWEALTH of VIRGINIA**

## ***Department of Employment Dispute Resolution***

### **DIVISION OF HEARINGS**

### **DECISION OF HEARING OFFICER**

In re:

**Grievance No: 5267**

Hearing Date: August 31, 2001

Decision Issued: August 31, 2001

### **PROCEDURAL HISTORY**

On May 29, 2001, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

*Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On May 13, 2001, you were observed sitting in a chair in a corner with your head back and eyes closed (not alert) by [Captain] via camera for approximately 7-8 minutes while assigned to the upper control booth of HU-8. During this period of time, no log book entries were made.*

On June 20, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 8, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 31, 2001, a hearing was held at the Agency's regional office.

### **APPEARANCES**

Grievant  
Agency Party Designee  
Legal Assistant Advocate  
Captain  
Assistant Warden

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal.

## **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 Corrections employed Grievant for approximately five years as a Corrections Officer. Grievant received a Group III Written Notice on August 8, 2000 for sleeping. During that incident, Grievant was observed standing against the wall with his eyes closed and appeared to be nodding. (Agency Exhibit 10).

The Agency has approximately 48 cameras located throughout the Facility. Each camera can be rotated within a specific range to view areas from different angles. A zoom lens feature allows for close-up pictures. Monitors are located in the master control in the Facility's housing unit. While standing in the master control, one can scan through each of the different cameras and observe most areas of the housing unit.

Inmates live in cells contained in housing units. Within a housing unit is an upper control room<sup>1</sup>. A corrections officer sitting in the upper control room is responsible for monitoring activity in the two sections (pods) of the housing unit. The room is secured and has glass windows and a control panel directly in front of the windows. The control panel allows a corrections officer to open and close doors within the two pods.

On May 13, 2001, Grievant was working the midnight shift and was located in the upper control room of the Facility's housing unit. He was sitting in a chair approximately two and a half feet from the control panel and towards the side of the control room where a slot is located to pass keys and other items into and out of the control room.

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<sup>1</sup> The upper control room should not be confused with the master control room. These areas are located in different parts of the Facility.

While the Captain was making his security checks in the master control, he scanned through each of the 48 camera shots. He stopped scanning when he observed Grievant, and began to focus on Grievant. He used the zoom lens of the camera to get a closer look at Grievant. The Captain watched Grievant for several minutes and observed him sitting in a chair with his hips towards the front of the chair and his back arching over the back of the chair. Grievant's face was angled towards the ceiling and his eyes were closed. After observing Grievant for several minutes, the Captain asked the Lieutenant to call Grievant and ask him a question. When the phone rang, Grievant moved abruptly as if startled and walked to the phone. After the phone call, Grievant returned to the chair and resumed his previous position in the chair and again closed his eyes.

Grievant's post order makes him, "Responsible for observing all floor activity and reporting any unusual activity to the floor supervisor." He reviewed the order on at least a quarterly basis.

### **CONCLUSIONS OF LAW**

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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Failure to comply with applicable established written policy is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant's post order requires him to, "Be alert, attentive and observant at all times." How to measure whether someone is not alert, is not specified in the post order or otherwise in policy. The Hearing Officer believes an appropriate evidentiary standard to prove non-alertness requires an agency to show that an employee was continuously observed for a reasonable period of time and was observed failing to focus on the prescribed duties of the post or position.

The Captain observed Grievant for approximately five to eight minutes. Grievant's position in the chair reflected more than poor posture – he was facing towards the ceiling with his eyes closed. His chair was positioned away from where he could see both pods. Grievant's behavior showed he was not alert. Issuance of a Group II Written Notice is appropriate under the circumstances.

Grievant contends he was not asleep. The Hearing Officer agrees. Showing an employee is not alert is a lesser standard to meet than showing an employee is asleep. The Agency has established that Grievant was not alert.

When Grievant's prior active Group III Written Notice is considered along with his Group II Written Notice, sufficient grounds exist to justify Grievant's removal. No evidence was presented to enable the Hearing Officer to conclude that the disciplinary action against Grievant should be mitigated. Grievant has a pattern of being asleep or not alert and the Hearing Officer has no reason to believe Grievant would not repeat his behavior if reinstated.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7.2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer