

Issue: Group II Written Notice with 5-day suspension (Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: September 6, 2001; Decision Date: September 10, 2001; Agency: "Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5271



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Grievance No: 5271**

Hearing Date: September 6, 2001  
Decision Issued: September 10, 2001

**PROCEDURAL HISTORY**

On May 22, 2001, Grievant was issued a Group II Written Notice of disciplinary action with five days suspension for:

*Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On May 5, 2001, [Captain] observed you on camera asleep in the lower control booth of HU-4. You admitted that you were asleep during that time [Captain] observed you.*

On June 13, 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 14, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 6, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative

Warden Senior  
Associate Warden, Special Housing  
Chief Warden  
Captain  
Sergeant  
Corrections Officer  
Captain  
Unit Manager

## **ISSUE**

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

## **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 three years as a Corrections Officer. He often worked the midnight shift.

On April 29, 2001, Grievant injured his knee and went to the local Hospital Emergency Room. His injury caused him to feel considerable pain. After completing his exam of Grievant, the doctor instructed Grievant to apply ice to his knee several times a day and to keep his leg elevated as much as possible. The doctor also prescribed Naproxen for Grievant to take two times per day but did not tell Grievant that the drug may cause drowsiness. Grievant remained home for approximately three days and complied with the doctor's instructions. Neither he nor anyone else noticed that the drug made him drowsy.

Although Grievant's knee was not completely healed, he wanted to return to work. When Grievant started work at approximately 10 p.m. on May 4, 2001, he informed the Sergeant that his knee still was not 100% and asked if he could remain in the booth for his entire shift. Normally Grievant works half of his shift in the control booth looking out into the housing units and the other half out on the floor of the housing

unit. Being on the floor would require more walking. The Sergeant agreed to let Grievant remain in the booth for his shift and advised Grievant to keep his leg elevated as the doctor has instructed.

Later in his shift, Grievant fell asleep. He fell asleep because of the medication he was taking, the fact that his shift is very quiet, and he had been to the doctor on the day his shift began when he would otherwise have been sleeping.

## 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.” By falling asleep Grievant acted contrary to established written policy thereby justifying the Agency to issue a Group II Written Notice.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee’s long service with a history of otherwise satisfactory work performance. DOCPM § 5-10.13(B).

The Hearing Officer is impressed with Grievant’s work ethic. Grievant’s comments during the hearing show he has a strong desire to work and perform well. His supervising Sergeant expressed his surprise at finding Grievant asleep because Grievant was his best officer. Grievant has no previous active group notices. In light of these factors, the Hearing Officer will reduce Grievant’s discipline to a Group I offense. Grievant’s mistake was to exercise poor judgment in returning to work too early. After making this poor decision, what followed was essentially inevitable.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant’s suspension for five days is **rescinded**. GPM § 5.9(a)(2). The Agency is

directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3).

## 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.

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