

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: December 20, 2001; Decision Date: January 11, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5334



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5334**

Hearing Date: December 20, 2001  
Decision Issued: January 11, 2002

**PROCEDURAL HISTORY**

On August 2, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

~~unauthorized entry into the restricted area of the facility.~~

On August 24, 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 November 29, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

~~Agency Representative~~

Major  
Captain  
Sergeant  
Lieutenant  
Corrections Officer Senior

## **ISSUE**

Whether Grievant should receive a Group I 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 employs Grievant as a Corrections Captain. No evidence was presented of prior disciplinary action against Grievant.

Correctional facilities located throughout the Commonwealth often exchange inmates. Each facility makes a “transportation run” to a central location to make the exchange. It is important that a facility delivering an inmate to the exchange point be on time so as not to delay the officers receiving the inmate in returning to their facility.

Grievant’s Facility has a sister facility a short distance away. Under the normal routine, the transportation officer at the sister facility would drive a van to Grievant’s Facility and load inmates. Two officers are required to transport inmates. A transportation officer from Grievant’s Facility would then join the transportation run and the van would be driven back to the sister facility. Once the sister facility’s inmates were loaded into the van, the van would depart at 5 a.m. for the transportation run.

Grievant was the watch commander at the Facility on July 13, 2001. As watch commander he was in charge of the Facility’s operations during his shift beginning at 6 p.m. and ending at 6 a.m. He reports to the Chief of Security. His post order required

him to “Coordinate and supervise institutional counts and transportation runs” and “Coordinate transportation runs.”<sup>1</sup>

On July 13, 2001, the transportation officer at the sister facility arrived at Grievant’s facility at 3:45 a.m. The transportation officer at Grievant’s Facility was late reporting to work. An officer working in master control called the tardy officer at 4:35 a.m. but did not get an answer. The tardy officer called the Facility at 4:45 a.m. and advised Agency staff that he had overslept and would arrive at 5:30 a.m. He actually arrived at 5:20 a.m.

When the transportation officer from the sister facility arrived at Grievant’s Facility and learned that Grievant’s Facility did not have a transportation officer ready to travel, he returned to the sister facility. Staff at the sister facility loaded their inmates and then returned to Grievant’s Facility to load inmates at 5:51 a.m. The tardy transportation officer was at work by the time the van arrived and he joined the transportation run which left at approximately 6:09 a.m.<sup>2</sup>

### **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.

“Inadequate or unsatisfactory job performance” is a Group I offense. DOCPM § 5-10.15(B)(4). Grievant was responsible for ensuring that the transportation run left on time. Once Grievant realized the transportation officer would be late, he should have selected another employee to serve as a transportation officer thereby enabling the transportation run to leave on time. Grievant’s failure to fully staff the transportation run constitutes inadequate or unsatisfactory job performance. The Agency’s issuance of a Group I Written Notice must be upheld.

Grievant argues he had to wait for the tardy officer to arrive at the Facility because no other staff were available to take the officer’s place. The Agency has established, however, that Grievant had available staff to substitute for the tardy officer.

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> The Written Notice indicates that Grievant was disciplined because the transportation run left two hours late when in fact it left one hour and nine minutes late. The Hearing Officer concludes that this error is not material and that if the Agency had known the delay was only one hour and nine minutes, the Agency still would have disciplined Grievant.

One officer regularly worked on an early day shift beginning at 4:15 a.m. or 4:30 a.m. and would have been available for the transportation run. If Grievant did not want to use this employee, he could have had his assistant watch commander relieve a manned post and use the relieved officer for the transportation run. Once the tardy officer arrived at work, he could have relieved the assistant watch commander.

Grievant contends he properly notified his superiors of the problem because he called and spoke with the Administrative Duty Officer and because he left a telephone message for the Major who serves as Chief of Security. When a voice message is left on .8(ft) Tc0.eft

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