

Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing Date: December 27, 2001; Decision Date: January 25, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5338; **Judicial Review: Appealed to the Circuit Court in Sussex County (02/15/02); Outcome: Dismissed due to lack of jurisdiction (05/10/02)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5338

Hearing Date: December 27, 2001
Decision Issued: January 25, 2002

PROCEDURAL HISTORY

On August 10, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

Inadequate and unsatisfactory job performance.

On September 10, 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 December 5, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 27, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Captain:
Captain
Assistant Warden
Major

Lieutenant

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. He serves as Watch Commander of his shift, which means he is in charge of the institution during his shift.

On July 16, 2001, Facility corrections officers changed from working eight-hour shifts to twelve-hour shifts. Grievant was the Watch Commander for the 6 p.m. to 6 a.m. shift beginning on July 16th and ending in the morning of July 17th.

At approximately 5 p.m. on July 16th, the Assistant Warden, Major, and Captain met with Grievant to review his roster for the upcoming shift. It was clear to them that Grievant would need additional staff to fill his shift. The Major took the lead and informed Grievant of the staff he needed to assign to his shift and the posts he could close in the event some staff failed to arrive at work due to illness or for other reasons. The Major mentioned that several corrections officers who worked the 10 p.m. to 6 a.m. shift beginning on July 15th and ending in the morning of July 16th would have to return on July 16th at 6 p.m. Essentially these staff were coming to work four hours earlier because their work shift had been expanded from eight hours to twelve hours. Grievant did not mention to the Major that previously he had told at least six of the corrections officers on the 10 p.m. to 6 a.m. shift that they did could take leave on July 16th and did not need to return to the facility at 6 p.m. on July 16th. Without knowing this information, the Major included the six employees on Grievant's roster. When the Major, Assistant Warden, and Captain left the meeting, they believed Grievant was fully staffed for his shift.

Grievant had spoken with other corrections officers and expected them to substitute for the six officers he had previously informed did not need to work. Unfortunately, those other corrections officers did not come to work on Grievant's shift as he had expected and he was at least six corrections officers short. Approximately seven or eight other officers did not come to work on Grievant's shift for various reasons. The effect was that Grievant's shift was significantly short staffed. Upon learning of the shortage, Agency managers quickly contacted corrections officers and properly staffed Grievant's shift.

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). In order to prove inadequate or unsatisfactory job performance, an agency must show that the employee was assigned a particular duty and that he or she failed to properly perform that duty. Post Order #2 required Grievant to "[r]eview duty rosters and make necessary adjustments."¹ Managing the duty roster is an essential function for a Watch Commander. If a correctional facility is not properly staffed, the safety of inmates, staff, and the public can be placed in jeopardy. Grievant allowed scheduled employees to take leave thereby leaving his shift understaffed. Grievant failed to adequately manage his duty roster thereby justifying issuance of a Group I Written Notice.

Grievant contends that even if the six to eight staff that he permitted to take leave are excluded from consideration, his shift remained short staffed such that additional employees had to be drafted. Although it may be true that the shift would be understaffed regardless of whether Grievant allowed certain employees to take leave, the fact remains that his actions increased the degree of understaffing.

Grievant contends that had he not let the six employees take leave and they had worked their shifts as scheduled, then those employees would have worked 20 hours in a 24 hour period, contrary to policy. After considering the employees' schedules, the Hearing Officer concludes that none of the employees would have had to work 20 hours in a 24-hour period. They would have had a twelve-hour break between ending work at

¹ Agency Exhibit 1.

6 a.m. on July 16th and returning to work at 6 p.m. that same day. They could not have worked 20 hours in a 24-hour period.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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 three 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.

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.

Carl Wilson Schmidt, Esq.
Hearing Officer