

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: December 21, 2002; Decision Date: January 18, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5341



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5341**

Hearing Date: December 21, 2001  
Decision Issued: January 18, 2002

**PROCEDURAL HISTORY**

On July 24, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

**UNSATISFACTORY ATTENDANCE:** From January 01, 2001 through July 18, 2001 you have called in sick twenty-five (25) times of which twenty-four (24) were in conjunction with your rest days. Also on at least two occasions you did not comply with the doctor's slip by not returning to work on the dates indicated on the slips.

On August 18, 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 3, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 21, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee

Agency Party Representative  
Captain  
Major  
Lieutenant  
Corrections Officer Senior  
Corrections Officer Senior  
Sergeant

## **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 Officer Senior. He and other corrections officers work under a 28 day cycle which is designed to minimize overtime and account for days worked and leave taken. The cycle establishes set rest days during which Grievant does not work. Grievant is a good employee who is dedicated to his profession.

Grievant was ill during the months of January, March, April, June and July. He was absent from work due to illness for at least 25 days<sup>1</sup> from the beginning of the year until July 18, 2001.

## **CONCLUSIONS OF LAW**

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<sup>1</sup> The Agency's calculation of the number of days of leave taken is inaccurate, but the inaccuracy is not material.

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.

Group I offenses include “[u]nsatisfactory attendance.” DOCPM § 5-10.15(B)(1). Policy 5-10 does not provide a minimum number of days of absences that must be met before a Group I is justified. Each case must be evaluated on an individual basis. Taking into consideration the number of days absent from work over the six and a half-month period, Grievant’s absences were excessive because they disrupted the Agency’s operations.

Most disciplinary action is directed at correcting employee behavior that, in itself, is wrong or improper. The objective of correcting unsatisfactory attendance, however, is not necessarily to correct a malicious or improper action by an employee, but is to prevent harm to the Agency’s operations that may result from being unable to properly staff its operations. Understaffed correctional facilities may jeopardize employee and inmate safety. The Agency must be able to properly plan for its manpower needs and be able to rely on the ability of its staff to work as scheduled. In this case, Grievant used his accrued leave balances when he was sick. He did not go on leave without pay status. Although he could not control when and if he was sick, his absences disrupted Agency operations. Thus, the Agency appropriately issued Grievant a Group I Written Notice for unsatisfactory attendance.

There is little evidence of any fault on Grievant’s part. The Agency suggests that Grievant has established a pattern of taking sick leave to extend his rest periods and that his claims of being sick may be questionable. The Hearing Officer finds that although there may be a pattern of leave taking, that pattern does not show Grievant is taking sick leave when he is not actually ill. The pattern is a coincident. Grievant regularly attended work even on days his doctor advised him not to work. No evidence was presented suggesting Grievant was feigning illness on his sick leave days. Although Grievant is without fault for his inability to work regularly, he may be disciplined for unsatisfactory attendance.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.<sup>2</sup>

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<sup>2</sup> It is unnecessary for the Hearing Officer to address the issue of whether Grievant’s doctor’s excuses were sufficient to excuse his leave taken. The disciplinary action can be upheld irrespective of whether Grievant’s doctor’s excuses were adequate.

## 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:

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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