

Issue: Group I Written Notice (insubordination, unacceptable behavior); Hearing Date: January 14, 2002; Decision Date: January 18, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5357; **Administrative Review: EDR Ruling requested 01/28/02; EDR Ruling Date: 04/04/02; Outcome: Hearing Officer's decision upheld (Ruling #2002-045)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5357

Hearing Date: January 14, 2002
Decision Issued: January 18, 2002

PROCEDURAL HISTORY

On October 11, 2001, Grievant was issued a Group I Written Notice¹ of disciplinary action for:

On September 24, 2001, during a telephone conversation with [AWHP], [Major] and [Unit Manager], you were informed that your shift had been changed to the 6 AM to 6 PM shift. You stated that you were not going to report to the day shift and were on your way out of town, then stated "go ahead and put it on paper, do what you have to do." You then hung up the telephone before the conversation was concluded. This action demonstrated insubordinate, unacceptable behavior, and in accordance with Department of Corrections Procedure 5-10.7C, and Department of Personnel and Training Policies and Procedures Manual 1.60, this is an offense which, in my judgment as the Agency Head, undermines the effectiveness of the agency's activities or your performance.

¹ Grievant correctly pointed out that the original written notice issued by the Agency was in error because it showed the inactive date of the discipline as being in 2004. The Agency corrected its mistake during the grievance step process. Group I offenses are active for only two years and, thus, the inactive year should be 2003.

On October 25, 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 18, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 14, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Unit Manager
Major
Assistant Warden

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:

At the time of the disciplinary action, the Department of Corrections employed Grievant as a Corrections Sergeant. The Agency has employed Grievant for approximately 21 years. He has an active Group I Written Notice issued September 5, 2001.

During a meeting among managers on September 24, 2001, the Agency decided to change Grievant's shift from the evening to the day shift. The Assistant Warden stepped out of the meeting to call Grievant at home to inform him of the shift change and prevent Grievant from coming to work as previously scheduled. When Grievant reacted negatively, the Major and Unit Managers joined the conversation on speakerphone. The Unit Manger described the conversation as follows:

Today at approximately 2:50 p.m., [Grievant] was called and informed that effective Thursday September 27, 2001, his shift would be changed to 5:45 a.m. – 6:15 p.m. from Housing Unit 1 to Housing Unit 3. [Grievant] stated that his shift was not going to be changed. He was asked by [the Assistant Warden] did he understand that this change would take place, [Grievant replied] that he was not going to change. [Major] asked [Grievant] did he understand the order that [the Assistant Warden] had given him regarding the shift change. [Grievant] stated no that he didn't understand. Then the major asked him 3 times if he could come to the institution today by 4:30 p.m. so he could discuss this matter with him. [Grievant] stated that he could not , due to he was going out of town. The major asked if he was on vacation, [Grievant] did not respond to the question [and] just replied that he would not be in and [then] hung up the telephone.²

The Major asked Grievant to travel to the Facility if Grievant did not understand the shift change. Grievant arrived at work on the scheduled date and time to begin his new 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.

Group I offenses include, “[d]isruptive behavior.” DOCPM § 5-10.15(B)(5). Grievant was given a simple instruction that his shift had been changed, yet he acted as though he did not understand the instruction and stated that he would not comply with the instruction. He also abruptly hung up the telephone without saying “Good-bye”. Grievant’s behavior was disruptive because his behavior reflected insubordination to his supervisors.

Corrections officers and supervisors operate in a paramilitary environment. Employees and their supervisors have titles reflecting rank and are expected to follow orders of employees with superior rank. Although all corrections employees are entitled to express their opinions and concerns, the method by which they communicate is

² Agency Exhibit 1.

important to maintain the proper operations of correctional units. Grievant did not appropriately express his objection to the Agency's action.

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 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.

Carl Wilson Schmidt, Esq.
Hearing Officer