Issue: Group II Written Notice with 5-day suspension (unauthorized absence); Hearing Date: January 30, 2002; Decision Date: February 5, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case No.: 5367

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5367

Hearing Date: January 30, 2002
Decision Issued: February 5, 2002

PROCEDURAL ISSUE

During the hearing, grievant contended that a court had overturned 16 inactive disciplinary actions issued from 1983 through 1998, and that his attorney had written proof. The grievant requested, and the Hearing Officer granted, five additional days following the hearing to submit proof from his attorney. By the fifth day, neither grievant nor his attorney submitted any evidence regarding these prior disciplinary actions.

APPEARANCES

Grievant
Warden
Seven witnesses for Agency

ISSUES

Did the grievant's actions on October 7, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued on October 17, 2001 because he failed to report to work as scheduled without proper notice to supervision on October 7, 2001.[1] He was placed on suspension from October 20, 2001 through October 25, 2001. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant as a sergeant for 21 years. The grievant has two active written notices. A Group I Written Notice was issued on September 5, 2001 for unsatisfactory attendance, specifically, abuse of sick leave.[2] A Group I Written Notice was issued on October 11, 2001 for insubordination.[3]

Grievant is considered to be a satisfactory employee when he works, however, he had previously established a long-standing pattern of unsatisfactory attendance and tardiness.[4] He received a Group II Written Notice on August 7, 1984. He received Group I Written Notices on November 9, 1983, September 18, 1986, December 23, 1986, January 29, 1987, July 15, 1987, August 8, 1988, May 29, 1990, September 25, 1990, January 18, 1991, June 14, 1991, June 25, 1991, and August 15, 1996.[5] He has also been counseled, verbally and in writing, about his absenteeism on numerous occasions. On February 9, 2001, he was placed on leave restriction for six months. During this period, he was required to provide written documentation to support any absence from work.

The agency's Standards of Conduct policy provides that, "Unexpected absences should be reported as promptly as possible to supervision prior to the beginning, or at the start of the employee's work schedule as determined by

[1] Exhibit 2. Written Notice, issued October 17, 2001.
[2] Exhibit 6. Written Notice, issued September 5, 2001. Grievant filed a grievance that was taken to a hearing; a Hearing Officer affirmed the disciplinary action in Case No. 5356, issued January 18, 2002.
[3] Exhibit 5. Written Notice, issued October 11, 2001. Grievant filed a grievance that was taken to a hearing; a Hearing Officer affirmed the disciplinary action in Case No. 5357, issued January 18, 2002.
[4] Exhibit 7. Written Notices, issued between 1983 and 1998.
[5] Grievant has also received three Written Notices for other offenses unrelated to absenteeism. Even though these Notices were included with the agency's document package, the hearing officer gave no evidentiary weight to them in making this decision.

agency management."[6] Designated employees (supervision) who must be absent because of illness, shall personally notify the Support Commander or supervisor on duty at least two (2) hours in advance of the beginning of their shift.[7] When a supervisor is absent, it becomes necessary to draft a replacement – a procedure that can be disruptive to the smooth operation of the facility. Supervisors are held to a higher standard because they are expected to set an appropriate example for the corrections officers that they supervise.

On Sunday, October 7, 2001, grievant was scheduled to work an 11.5-hour shift beginning at 5:45 a.m. By 6:40 a.m., grievant had neither reported for work nor called in to report his absence. Grievant's supervisor (a lieutenant) telephoned grievant at his residence; grievant was sleeping when he called. He told the lieutenant that he had overslept and that he would report to work. Grievant lives approximately a one-hour drive from the facility. At 8:00 a.m., grievant called his supervisor to advise that he had a nosebleed and would not be coming to work. Grievant also said that he was going to see a physician.

Grievant stayed home and slept most of the day; he awakened as it was getting dark again that evening. Grievant did not go to the emergency room and did not see a physician on October 7, 2001; he made an appointment to see a physician during the week following this incident.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2.3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for

[6] Exhibit 1. Department of Corrections Procedure Number: 5-10.8.C, *Standards of Conduct*, June 1, 1999.
[7] Exhibit 3. Department of Corrections Institutional Operating Procedure 202-7.12

> the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[8]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[9] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 defines Group II offenses to include acts and behavior more severe in nature are such that an additional Group II offense should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. The DOC Standards includes as an example of a Group II offense the failure to report to work as scheduled without proper notice to supervision.[10]

The undisputed evidence in this case demonstrates that, on Sunday morning, October 7, 2001, grievant failed to report to work as scheduled and failed to provide proper notice to supervision. There are three factors that suggest this absence occurred due to reasons other than stated by grievant. First, grievant has a long history of attendance problems, particularly in connection with rest days; this absence occurred on a Sunday morning. Second, grievant's stated reason for his absence (discussed in more detail below) is somewhat suspect, especially considering that grievant has not provided any corroboration. Third, grievant's allegation of a management conspiracy is a smokescreen intended to divert attention from his own conduct.

Grievant contends that his nose bled "off and on for most of the day" on October 7, 2001. This testimony is not credible. If grievant had experienced a nosebleed for most of the day, he would have lost a significant amount of blood.

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[8] § 5.8 Grievance Procedure Manual, Department of Employment Dispute Resolution.
[9] Now known as the Department of Human Resource Management (DHRM).
[10] Exhibit 1. Department of Corrections Policy Number 5-10.16.B.4, *Standards of Conduct,* June 1, 1999.

Grievant's testimony that, when he awoke in the evening of October 7, 2001 his pillow had some blood on it, suggests that his nose may have bled for a relatively short time. Had it bled for most of the day, grievant would have experienced much more serious symptoms and almost certainly would have been unable to sleep for several hours. Moreover, if grievant had experienced a nosebleed that lasted most of the day, it is inconceivable that he would not have sought prompt medical intervention.

Grievant also contends that, when he saw a physician one week later, the physician attributed grievant's nosebleed to medication the grievant had been taking since August 2001. However, grievant does not know the name of his medication. Moreover, grievant did not submit any statement from a physician either to show that he actually saw a physician or to show that the physician causally linked the medication to the nosebleed.

Grievant maintains that his wife was aware of his nosebleed situation. However, he did not ask her to testify on his behalf or obtain an affidavit from her to corroborate this assertion. Grievant also avers that he called the lieutenant at about 8:00 a.m. from his cell phone. However, grievant did not submit a copy of his cell phone bill to verify that such a call was actually made.

Grievant argues that agency management conspired against him by discussing this case in advance. In fact, most of the witnesses testified under oath that they had not discussed the details with the warden prior to the hearing. However, even if such discussions had taken place, the grievant has not demonstrated that anything inappropriate occurred. It is not inappropriate to discuss the case in advance unless a witness is coerced into testifying falsely. The grievant has not shown that any witness testified falsely or that any coercion was used to make a witness change his testimony.

Mitigation

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
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> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[11]

[11] Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

Grievant contended during the hearing that a court had overturned his disciplinary actions prior to 2001, and that his attorney had written proof. The hearing officer agreed to allow grievant to submit written proof of this assertion providing it was received not later than 5:00 p.m. on February 4, 2001. Neither grievant nor his attorney submitted any evidence regarding his inactive disciplinary actions.

Grievant objected to the agency's proffer of inactive disciplinary actions during the hearing. On February 5, 2001, he submitted a copy of Section 5-10.19 of the agency's Standards of Conduct in support of his argument. Section 5-10.19C addresses the "Active" Life of Written Notices and states, in pertinent part:

> Written notices that are no longer active as stated in 5-10.19A-B above shall not be taken into consideration in the accumulation of notices or the degree of discipline for a new offense.[12]
> (Underscoring added)

The evidence in this case reflects that, in determining the level of discipline, the agency did not accumulate any notices other than the two active Group I notices issued in September and October 2001. Further, the agency did not consider any inactive discipline when it determined the appropriate level (degree) of discipline for this offense. Therefore, the agency has properly complied with the limitation imposed by Section 5-10.19C of the Standards of Conduct.

In evaluating this case, the Hearing Officer has also complied with Section 5-10.19C in deciding to affirm the agency's action. Evidence of prior similar disciplinary actions is relevant and admissible in an administrative proceeding, even though they are inactive, because they corroborate a continuing pattern of absenteeism. Moreover, even if the inactive disciplinary actions are adjudged inadmissible, the remaining evidence is sufficient to conclude that the Group II Written Notice is justified.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on October 17, 2001 and the five-day suspension are hereby AFFIRMED.

[12] Section 5-10.19C, Department of Corrections *Standards of Conduct*, dated June 1, 1999.

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.

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David J. Latham, Esq.
Hearing Officer