

Issue: Group II Written Notice with 5-day Suspension (failure to follow supervisor's instruction, perform assigned work, follow established written policy); Hearing Date: March 11, 2002; Decision Date: March 11, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5395



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5395

Hearing Date: March 11, 2002
Decision Issued: March 11, 2002

PROCEDURAL HISTORY

On July 5, 2001, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for:

Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On June 21, 2001, [Captain], [Major], and [Sergeant] observed you at 0326 on camera asleep for approximately five minutes while you were assigned to the HU-7 upper control post.

On August 2, 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 February 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 11, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative

HR Manager
Two Sergeants

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with a five workday suspension.

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 is a good worker and has a good work history except for previously receiving a Group II on September 19, 2000 for failure to comply with established written policy.

The Agency has cameras located throughout the Facility. Each camera can be rotated within a specific range to view areas from different angles. A zoom lens feature allows for close-up pictures. Monitors are located in the master control in the Facility's housing unit. While standing in the master control, one can scan through each of the different cameras and observe most areas of the housing unit including inside a control booth where a corrections officer may be working.

A floor of the housing unit contains two rows of cells separated by a wall. The two rows for the shape of a large "V" with a control booth at the bottom of the "V". A corrections officer works inside the control booth and is responsible for opening and closing doors as well as watching the floor officer who may be interacting with the inmates in their cells. Inside the control booth is a panel enabling the control booth officer to open and close doors. In addition, there are two monitors. By keying in the correct code, the control booth officer can observe through various cameras located in the housing unit. Although the control booth officer cannot force the cameras to zoom in or out, he or she can select among different cameras to see different angles of the housing unit.

On June 21, 2001 at 3:17 a.m., the Captain and Sergeant entered the master control room. At approximately 3:26 a.m., the Major joined them. While scanning through the monitors, the Captain observed Grievant not alert in the upper control booth. His head was bobbing backwards with different frequency. When his head moved back, they could see the top of his head and eyes. They observed Grievant for approximately five minutes. The Major called Grievant and asked him why he was not alert. Grievant denied being not alert. The Major handed the telephone to the Sergeant who asked Grievant why his head was bobbing back and forth. Grievant responded that he could not control his head.

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.

“Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of departmental regulations.”¹ DOCPM § 5-22.6(B). Grievant’s post order required him to “Be alert, attentive and observant at all times.”² Grievant received training regarding the obligation to remain alert at all times.³

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant failed to comply with established written policy requiring him to remain alert at all times. Issuance of a Group II Written Notice is appropriate under these circumstances.

Grievant contends he was not asleep but rather knew he was being observed through the master control cameras because he had keyed those cameras into his monitors in the control booth. He says he was nodding his head as if he was nodding “yes” that he knew he was being observed. It is not necessary for the Agency to prove Grievant was not alert with absolute certainty. It is only necessary for the Agency to prove this by a preponderance of the evidence. Having three people observe Grievant not alert is sufficient evidence to prove the Agency’s case.

¹ Agency Exhibits 1 and 4.

² Agency Exhibit 7.

³ Agency Exhibit 11.

Corrective action for a Group II Written Notice may include suspension of up to ten workdays. Given that Grievant had a prior active Group Notice, a five workday suspension is consistent with policy.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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 Resource 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 DHRM, 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