

Issue: Group II Written Notice with Demotion and Transfer (unauthorized leave);
Hearing Date: February 25, 2002; Decision Date: March 1, 2002; Agency:
Department of Corrections; AHO: David J. Latham, Esquire; Case Number:
5400; **Judicial Review: Appealed to the Circuit Court in the County of
Sussex on 03/28/02; Outcome: Case dismissed on 05/10/02 due to lack of
jurisdiction**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5400

Hearing Date: February 25, 2002
Decision Issued: March 1, 2002

PROCEDURAL ISSUES

Post-hearing document submission by Grievant

Following this hearing, grievant submitted to the Hearing Officer additional documentation that he had not presented during the hearing. Grievant did not request permission to submit such documentation nor was such permission granted. Grievant did not provide a copy of the documentation to the opposing party.

Prior to this hearing, the hearing officer conducted by telephone a pre-hearing conference with the parties during which they were given the opportunity to ask any questions relating to the conduct of the hearing. As part of the conference, the parties were advised that they must submit **all** documents that they intend to rely on during the hearing to both the opposing party and the hearing officer not later than four working days prior to the hearing. The purpose of this exchange is to give both parties ample opportunity prior to the hearing to

review the documents that will be relied upon during the hearing. It should be noted also that grievant has recently had three other grievance hearings and is quite familiar with the hearing process.

Grievant's submission of documents following the hearing does not include any assertion that grievant could not have obtained the documents prior to the hearing by using due diligence. Grievant's post-hearing submission has denied the agency an opportunity to examine the documents, to cross-examine grievant about them or to offer rebuttal. Moreover, there is no authentication of the documents to establish whether they are genuine. For these reasons, the documents will not be considered as part of the evidence in this case.

Technical errors in Written Notice

Section II of the Written Notice mentions five dates, two of which were incorrectly typed. The date of October 17, 2001 should have been October 7, 2001. The failure to call in dates should have been November 13 & 14, 2001 (not November 14 & 15).

In addition, the agency acknowledged during the hearing that the only dates for which grievant is being disciplined on this Written Notice are November 13 & 14, 2001. The other dates (October 7, September 28 and November 22, 2001) were included in Section II to document other recent absences or tardiness.¹ However, Section II is intended to describe only the offense for which grievant is being disciplined. Thus, these latter three dates constituted background information to support the offense described and should have been included in Section IV of the Written Notice. The Regional Director acknowledged these technical errors to the grievant.² Accordingly, the only issue being adjudicated by the Hearing Officer is grievant's failure to call in on November 13 & 14, 2001.

APPEARANCES

Grievant
Warden
Two witnesses for Agency

¹ The grievant's discipline for failure to report to work as scheduled without proper notice to supervision on October 7, 2001 was previously adjudicated (and affirmed) in Case No. 5367. See Exhibit 2.

² Exhibit 1. Step III Response from Regional Director to grievant, January 30, 2002.

ISSUES

Did the grievant's actions on November 13 & 14, 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 December 7, 2001 because he failed to report to work as scheduled without proper notice to supervision on November 13 & 14, 2001.³ Grievant was demoted with a ten-percent salary reduction and transferred to a different facility. 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 four active written notices. A Group I Written Notice was issued on September 5, 2001 for unsatisfactory attendance, specifically, abuse of sick leave.⁴ A Group I Written Notice was issued on October 11, 2001 for insubordination.⁵ A Group II Written Notice was issued on October 17, 2001 for failure to report to work as scheduled without proper notice to supervision.⁶ A Group II Written Notice was issued on December 7, 2001 for failure to follow applicable established written procedure.⁷ All four disciplinary actions were grieved and have subsequently been affirmed by Decisions of Hearing Officers.

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.⁸ 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, 1996.⁹ 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.

³ Exhibit 1. Written Notice, issued December 7, 2001.

⁴ Exhibit 4. Decision of Hearing Officer, Case No. 5356, issued January 18, 2002.

⁵ Exhibit 3. Decision of Hearing Officer, Case No. 5357, issued January 18, 2002.

⁶ Exhibit 2. Decision of Hearing Officer, Case No. 5367, issued February 5, 2002.

⁷ Decision of Hearing Officer, Case No. 5386, issued February 26, 2002.

⁸ Exhibit 6. Written Notices, issued between 1983 and 1998.

⁹ 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 them no evidentiary weight in making this decision.

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 agency management."¹⁰ 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.¹¹ 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 whom they supervise.

Grievant was absent from work on November 13 & 14, 2001. The grievant subsequently submitted to the agency notes from his physician excusing him from work on these two dates. On the basis of this documentation, the agency permitted the grievant to utilize sick leave to cover the two missed days of work. However, the issue that precipitated discipline in this case is whether grievant gave proper notice of his absence to the agency. The agency maintains a call-in logbook containing: the names of people calling in sick, the date, the assigned work unit, the reason for calling in and the names of the person filling out the logbook.¹² The logbook does not contain any entries for grievant during the time period from November 11-16, 2001. Grievant did not offer the testimony of the person he says he called to report his absences.

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

¹⁰ Department of Corrections Procedure Number: 5-10.8.C, *Standards of Conduct*, June 1, 1999.

¹¹ Department of Corrections Institutional Operating Procedure 202-7.12

¹² Exhibit 1, p. 17. Call-in Logbook for the period from November 11-16, 2001.

grievance procedure shall afford an immediate and fair method for 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.¹³

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 Training¹⁴ 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.¹⁵

The agency has demonstrated by a preponderance of the evidence that grievant failed to report to work as scheduled and failed to provide proper notice of his absence to his supervisor. The agency has provided documentation that grievant failed to call in his absence on either November 13 or 14, 2001. Although grievant maintains that he did call in, he did not offer the testimony of any person to whom he claims to have talked to on those two dates.

Grievant claims that there is another document that contains call-in information, however, he failed to provide evidence of this document at the time of the hearing. Subsequent to the hearing, grievant submitted a typed summary of call-ins to his housing unit. As noted above, grievant's failure to submit this document prior to or during the hearing precludes its admission as evidence. Nevertheless, in reviewing the document, it was concluded that it is not as probative as the original hand-written logbook. Since the typed summary is a

¹³ § 5.8 Grievance Procedure Manual, Department of Employment Dispute Resolution.

¹⁴ Now known as the Department of Human Resource Management (DHRM).

¹⁵ Exhibit 5. Department of Corrections Policy Number 5-10.16.B.4, *Standards of Conduct*, June 1, 1999.

transcription of information from multiple sources, it is subject to error and not likely to be as accurate as the actual call-in logbook.

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:

- 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.¹⁶

Grievant objected to the agency's proffer of inactive disciplinary actions during the hearing. 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.¹⁷
(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, and the active Group II notice issued in 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

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

¹⁷ Section 5-10.19C, Department of Corrections *Standards of Conduct*, dated June 1, 1999.

inadmissible, the remaining evidence is sufficient to conclude that the Group II Written Notice is justified.

Prior to this disciplinary action, grievant had two active Group I Written Notices and two active Group II Written Notices. The normal discipline for a second Group II Written Notice is removal from employment. In this case, grievant has now incurred a third Group II Written Notice; a third such Notice should warrant automatic removal from employment. Nonetheless, because of his length of service, the agency elected to demote and transfer grievant rather than discharge him. Given grievant's disciplinary record, the agency has been unusually generous by allowing grievant to remain employed.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on December 7, 2001, the demotion, salary reduction and transfer to another facility are hereby AFFIRMED. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section 5-10.19.A of the Standards of Conduct.

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.

David J. Latham, Esq.
Hearing Officer