Issue: Three Group II Written Notices (failure to follow supervisor's instructions, failure to follow established written policy [2-day suspension], failure to follow supervisor's instructions [15-day suspension]); Hearing Date: May 13, 2002; Decision Date: May 29, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Numbers: 5401, 5421, 5434

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos. 5401, 5421, and 5434

Hearing Date: May 13, 2002
Decision Issued: May 29, 2002

PROCEDURAL ISSUES

Alleged non-compliance with grievance process

Grievant alleges (and the agency denies) that facility management did not comply with certain time limits associated with the grievance resolution process. The grievance process provides a remedy when the opposing party fails to comply with any requirement of the process. However, all claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time.[1] In this case, grievant did not timely raise the issue of noncompliance but instead proceeded with her grievance. Therefore, it is held that grievant has forfeited her right to challenge the alleged procedural delays.

[1] § 6.3, Grievance Procedure Manual, *Party Noncompliance,* July 1, 2001.

Delay in docketing cases for hearing

The grievance procedure requires that hearings be held and a decision issued within 30 calendar days of the hearing officer's appointment.[2] The hearing officer received the appointment for one case on February 28, 2002 (Case No. 5401) and the matter was docketed for a hearing on March 26, 2002. Grievant then requested a postponement of the hearing because she had two related grievances then being processed through the resolution steps. Grievant, through her attorney, requested that all three grievances be heard in one hearing because all three disciplinary actions involved the same issue that occurred in three different time periods. Both the agency and the hearing officer agreed that the three grievances should be heard in one hearing and that one decision would address all three grievances. The Department of Employment Dispute Resolution approved consolidation of the three grievances.

The hearing officer received the second grievance (Case No. 5421) on March 26, 2002 and the third grievance (Case No. 5434) on April 16, 2002. By this date, grievant notified the hearing officer that she had retained two attorneys. Grievant was directed to decide which attorney would represent her during the hearing. Once this was resolved, the parties agreed to a hearing date of May 13, 2002.

Multiple attorneys

Grievant retained two attorneys, each from a different law firm, to represent her in this matter. The hearing officer advised her that the standard procedure in a grievance hearing is for each party to have only one attorney or representative. However, it is permissible for a second attorney to attend the hearing to provide support to the primary attorney, or to be an observer. Grievant was advised to talk with her attorneys and designate a primary attorney. Resolution of this issue required approximately three weeks, after which the parties and the hearing officer agreed upon a new hearing date.

Post-hearing correspondence from Grievant

On May 14, 2002, grievant wrote a letter to the hearing officer expressing dissatisfaction with her attorney's performance during the hearing. She also provided an explanation of why she had retained the second attorney (extended illness of the first attorney). In addition, grievant attempted to provide an answer to a question raised during the hearing and to shift responsibility for problems to facility management.

[2] § 5.1, Grievance Procedure Manual, July 1, 2001.

It is regrettable that grievant was dissatisfied with the attorney she selected. Parties to a grievance hearing choose their own representatives or attorneys and a hearing officer can provide no remedy to a party who is displeased with the result of that choice. From her letter, it is apparent that grievant is aware of the appropriate mechanism to address her dissatisfaction. The Hearing Officer did not grant permission to submit any evidence or testimony subsequent to the hearing. A basic requirement in administrative law hearings is that both parties are afforded due process. "The essential requirements of due process … are notice and an opportunity to respond."[3] When grievant proffers to the adjudicator additional information subsequent to the hearing, the agency is denied the opportunity to cross-examine grievant. Therefore, in rendering this decision, the hearing officer will disregard any new information in grievant's letter dated May 14, 2002.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Assistant Warden
Two witnesses for Agency

ISSUES

Did the grievant's actions between October 10 and 16, 2001, between January 7, 2000 and August 21, 2001, and between December 12 and 18, 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 timely grievances from three Group II Written Notices.[4] The first was issued for failure to follow supervisor's instructions by working overtime without authorization during the week of October 10–16, 2001.[5] The second written notice was issued for failure to follow established written policy by not reporting hours worked during the period from January 7, 2000 through August 21, 2001; grievant was suspended for two workdays.[6] The third disciplinary action was issued for failure to follow supervisor's instructions by

[3] Cleveland Board of Education v. Loudermill, et al., 470 U.S. 532; 105 S. Ct. 1487 (March 19, 1985).
[4] Exhibit 16. Grievance Forms A, filed December 5, 2001, January 14, 2002 and February 22, 2002.
[5] Exhibit 12. Written Notice, issued October 31, 2001.
[6] Exhibit 12. Written Notice, issued December 11, 2001.

working overtime without authorization during the week of December 12-18, 2001; grievant received a suspension of 15 workdays.[7] Following a denial of relief at the third resolution step, the agency head qualified the grievances for a hearing.

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant as a corrections institution rehabilitation counselor for 16 years. Her status under the Fair Labor Standards Act (FLSA) is non-exempt.[8]

The facility's procedure regarding overtime states, in pertinent part:

> 4. Overtime is not authorized unless approved by the Duty Administrator (in the absence of the Assistant Wardens), the Assistant Wardens or Warden. Personnel in this category should only be authorized to work over 40 hours during times of emergencies.
> 5. If prior approval is not given to work extra hours or hours are not reported, the employee may be written up under the Standards of Conduct. The employee is held accountable for accurately logging all hours worked.[9]

The same procedure states that both employee and supervisor must sign the time sheet each week and that the completed time sheet must be turned in to the Human Resources Office. [10] All counselors including grievant received copies of institutional operating procedures (IOP). Additionally, changes in IOPs are noted in the newsletter that is distributed to all employees.

The facility has a related operating procedure on overtime draft procedures that states, in pertinent part:

> OVERTIME FOR NON-SECURITY NON-EXEMPT STAFF. Overtime for non-security non-exempt staff is not authorized unless approved by the Duty Administrator, Assistant Warden(s) or Warden. *Personnel in this category should only be authorized to work over 40 hours during times of emergencies.*[11] (Italics added)

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[7] Exhibit 12. Written Notice, issued January 23, 2002.

[8] Exhibit 19. Grievant's *Employee Work Profile*, signed May 1, 2001. Prior to July 1999, counselors had been exempt employees. However, effective July 25, 1999, counselors were notified that they had been reclassified as non-exempt and were thereafter eligible for overtime compensation. See Exhibit 15, Memorandum from Human Resource Director, July 13, 1999.

[9] Exhibit 9. Section 287-7.1, Institutional Operating Procedure Number: 287, *Hours of Work and Leave of Absence,* November 15, 2000.

[10] Exhibit 9. Section 287-7.3, *Ibid.*

[11] Exhibit 10. Section 288-7.2, Institutional Operating Procedure Number 288, *Employee Overtime/Draft Procedures*, November 15, 2000.

The warden had verbally advised grievant during a staff meeting on January 27, 2000 that non-exempt employees were not authorized to work overtime.[12] During this meeting she explained that the agency appreciated the willingness of some employees to work overtime without compensation. However, due to the Fair Labor Standards Act, the agency is required to reimburse any non-exempt employee who works more than 40 hours per week. Because of budget constraints, the agency does not have sufficient funds to pay overtime. Accordingly, the warden stated that no one should work overtime unless the warden approved it in advance. The human resources officer reiterated these points in a July 2000 meeting. On September 24, 2001, the assistant warden of operations reminded grievant that she was not authorized to work overtime. During the week of October 10-16, 2001, grievant worked 15.3 hours of overtime without obtaining authorization.[13] On December 17, 2001, grievant worked 13.7 hours, and on December 18, 2001, she worked 13.5 hours.[14] She did not obtain authorization to work beyond eight hours on either of those two days. During the remainder of that workweek, grievant was suspended without pay for two days and was on sick leave for one day.

Each counselor was required to complete a weekly time sheet documenting his or her hours actually worked. Counselors turned in the time sheets to the supervisor, who reviewed them, signed them and returned them to each counselor.[15] The supervisor had instructed the eight counselors that it was their individual responsibility to turn in the time sheets to the human resources office, after the supervisor's review.[16] All of the counselors, except grievant, followed this procedure. In June 2001 during a routine audit, it was discovered that human resources had no time sheets from the grievant beginning January 7, 2000 to the time of the audit. The other seven counselors had turned in virtually all of their time sheets to human resources. Some counselors had a few missing time sheets but they were able to produce copies when notified of the missing dates. Grievant has not been able to produce her original time sheets or photocopies because she did not retain a copy of the approved time sheet.

After discovery of the missing time sheets, grievant was directed in August 2001 to reconstruct time sheets for the time period involved. Grievant did so but her reconstruction simply showed 8 hours worked per day rather than showing actual time worked. Grievant was directed to redo the time sheets to be consistent with the sign-in log that shows when each employee starts and ends

[12] Exhibit 14. Staff Meeting Notes, January 27-28, 2000.
[13] Exhibit 13. Time Sheet for week beginning October 10, 2001.
[14] Exhibit 8. Time Sheet for week beginning December 12, 2001.
[15] Grievant's supervisor knew that grievant had turned in time sheets because the supervisor's policy is to approve leave activity reporting forms only if a completed time sheet is attached to the leave form. If the time sheet is not attached, leave is not approved. Since the supervisor approved various types of leave for grievant during the 18-month period, she knows that at least some time sheets were turned in to her, approved and returned to the grievant. However, the Human Resources office did not receive any time sheets from grievant.
[16] Exhibit 14. Staff Meeting Notes, February 24, 2000.

work each day.[17] Grievant turned in another set of time sheets but some of the times worked did not coincide with the sign-in log, and some of the time sheets did not account for days that grievant had not worked (due to sick leave, annual leave, etc.) Grievant turned in the last of the corrected time sheets on December 5, 2001.[18]

On August 31, 2001, the warden met with all counselors, including grievant and provided a detailed explanation of FLSA requirements, agency application of FLSA, instructions on time sheet completion and the need for supervisory authorization of overtime. In cases where overtime is authorized, the employee is to utilize compensatory time off within the same workweek so that overtime compensation will not have to be paid. Grievant attended this meeting. Following this, grievant's supervisor told grievant to not work any overtime without first obtaining supervisory permission.

Grievant's supervisor was disciplined and the assistant warden was counseled as a result of the events that precipitated grievant's discipline.

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

[17] Exhibit 1. Memorandum from personnel assistant to grievant, October 9, 2001.
[18] Exhibit 6. Grievant's reconstructed time sheets from January 2000 through September 2001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[19]

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[20] 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 which are more severe in nature than Group I offenses and 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. One example of a Group II offense is failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.[21]

Grievant argued that she didn't know whether she was an exempt employee or a non-exempt employee. This argument is without merit for three reasons. First, although grievant's position was exempt three years ago, she was advised in July 1999 that the position was non-exempt and that she had become eligible for overtime. Second, grievant signed her employee work profiles, which clearly state that her FLSA status is non-exempt. Third, grievant's testimony on this issue was inconsistent. In response to one question, she answered that she didn't know whether she was exempt or non-exempt. During another point in her testimony, she said she, "assumed since January 2000 that I was non-exempt." Grievant did not agree with the change in status, believing that the nature of a rehabilitation counselor's work merits an exempt status. After the change in status three years ago, grievant continued to feel that she should be exempt. However, the fact remains that grievant is a non-exempt employee and has been non-exempt for nearly three years.

Unauthorized overtime during week of October 10-16, 2001

[19] § 5.8, Grievance Procedure Manual, Department of Employment Dispute Resolution, July 1, 2001.
[20] Now known as the Department of Human Resource Management (DHRM).
[21] Exhibit 17. Department of Corrections Policy Number 5-10.15.B.4, *Standards of Conduct,* June 1, 1999.

During the week of October 10-16, 2001, grievant worked more than eight hours on each of the five days of her workweek. By the end of the week, she had worked a total of 55.3 hours – 15.3 hours more than the authorized 40 hours per week. Grievant had been told on repeated occasions not to work overtime unless the warden authorized the time. In fact, grievant had met with the warden on September 24, 2001 and the warden reemphasized that the agency could not afford overtime and that grievant should not work overtime. Notwithstanding the repeated reminders in staff meetings and unambiguous instructions from the warden, grievant worked overtime for five straight days. This constitutes a failure to follow a supervisor's instructions and a failure to comply with applicable established written policy – a Group II offense.

Grievant argues that this was an unusual workweek and that she was working extra hours in order to respond to a memorandum from human resources requesting detailed information about her missing time sheets. She contends that her supervisor knew grievant was reconstructing the missing time sheets and should have known that grievant was working extra hours. However, grievant never requested permission to work beyond her normal workday. From the August 31 and September 24, 2001 meetings with the warden, grievant knew that she must have advance authorization and utilize compensatory time off during the same week so as to avoid working more than 40 hours during the workweek.

Failure to follow written policy from January 7, 2000 through August 21, 2001.

The agency has demonstrated by a preponderance of the evidence that grievant failed to submit time sheets to Human Resources for over nineteen months during 2000 and 2001. Grievant contends that she did turn in some of her time sheets but the Human Resources Office has no record of ever receiving them. Grievant acknowledges that she did not turn in all her time sheets but believes that Human Resources should have received at least some of them. The other seven counselors did turn their time sheets in and Human Resources had them on file, with the exception of a few missing sheets that were quickly located.

Grievant infers that there is something suspicious about the fact that Human Resources did not have her time sheets. She suggests that someone is out to get her, but she cannot think of anyone who has reason to do so. She is unable to identify anyone whom she might have wronged, or anyone who might have motivation to conceal her time sheets. Therefore, the preponderance of evidence supports the conclusion that grievant did not submit time sheets during the period at issue. Her failure to follow both written policy and supervisory instructions over a prolonged period of time constitute a Group II offense.

In September 2001, grievant was counseled about the necessity to submit her time sheets to Human Resources each week. After that counseling, grievant

began submitting her time sheets weekly and has been in compliance since that time.

Unauthorized overtime during week of December 12-18, 2001

A non-exempt employee (i.e., covered by the Fair Labor Standards Act) is entitled to overtime compensation (or leave) providing the employee actually works more than 40 hours in any workweek.[22]

During the week of December 12-18, 2001, grievant worked in excess of eight hours on the two days that she actually worked. However, for FLSA purposes, the agency was not required to compensate grievant for overtime because she did not work more than 40 hours during her regular workweek. Grievant was on sick leave for one day and suspended without pay for two days. Even though she was paid for the day of sick leave, neither that day nor the two days of suspension count towards the 40-hour threshold because grievant did not work on any of those three days. Therefore, the agency was not obligated to pay grievant overtime pay during the week of December 12-18, 2001.

However, the issue that precipitated this disciplinary action is not whether the grievant should have been paid overtime compensation, but whether she failed to follow her supervisor's instructions by working beyond her normal eight-hour workday without first obtaining authorization. The undisputed evidence establishes that grievant did not obtain such authorization – a Group II offense. Grievant was unaware that the agency was not obligated to compensate her for overtime during that week. She did know, however, from multiple staff meetings and discussion with the warden that she was not to work any overtime without advance permission. Given the extensive attention this matter had received, and the two Group II Written Notices she had received in October and December, grievant should have sought permission to work beyond her normal workday. If she had sought such authorization, the Warden would probably have denied the request because the facility believed it would have to pay grievant overtime compensation.

The Standards of Conduct provide for the consideration of mitigating circumstances in the implementation of disciplinary actions. The Standards of Conduct 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:

[22] Sections I & II, DHRM Policy No. 3.15, *Overtime Leave*, September 16, 1993. See also 29 U.S.C. Chapter 8, Fair Labor Standards Act.

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.[23]

In this case, the grievant has received three Group II Written Notices. The Standards of Conduct provides that an employee may be removed from employment for an accumulation of only two Group II Written Notices. The agency gave weight to the grievant's long service with the state and suspended grievant from work for a short period of time in lieu of terminating her employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on October 31, 2001 for failure to follow a supervisor's instructions is hereby AFFIRMED.

The Group II Written Notice issued on December 11, 2001 for failure to follow established written policy and two-day suspension are hereby AFFIRMED.

The Group II Written Notice issued on January 23, 2002 for failure to follow a supervisor's instructions and 15-day suspension are hereby AFFIRMED.

The Written Notices 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

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

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