Issue: Group II Written Notice with 10-day Suspension (unauthorized leave); Hearing Date: April 4, 2002; Decision Date: April 9, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5404

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5404

Hearing Date: April 4, 2002
Decision Issued: April 9, 2002

APPEARANCES

Grievant
Assistant Warden
Five witnesses for Agency

ISSUES

Was the grievant's conduct from January through September 2001 subject to 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 November 19, 2001 for failure to report to work as scheduled without proper

notice to a supervisor.[1] She was suspended without pay for ten days. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Corrections (Hereinafter referred to as "agency") has employed grievant as a correctional officer for four years.

Grievant was given written counseling regarding tardiness on June 21, 2001, and regarding failure to call her supervisor to notify of an absence on September 23, 2001.[2] She also has two active disciplinary actions – A Group III Written Notice for sleeping during working hours,[3] and a Group I Written Notice for unsatisfactory attendance and excessive tardiness.[4] Generally, the agency considers more than 48 hours of sick leave per year to be unsatisfactory.

During the period from January 2001 through September 2001, grievant was absent from work 10 days due to sickness. She was absent two additional days due to sickness of a family member. Grievant has also been a member of the National Guard and the Army Reserve and used all of her approved military leave during this period, usually taking it one day at a time.[5] On September 19 and 22, 2001, grievant called the night shift commander two hours prior to the start of the day shift to advise of her absence. She also left her home telephone number where she could be contacted.

The attachment to the written notice also listed two dates on which grievant was cited as on Leave without Pay (shown as XX). However, Section IV of the written notice states that this information was erroneous, that she has subsequently been given credit for working those two days, and that they were not taken into consideration in issuing the disciplinary action. The warden issued a Group II Written Notice to grievant on November 19, 2001 and suspended grievant from work for 10 workdays.[6]

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

[1] Exhibit 2. *Grievance Form A*, filed December 19, 2001.
[2] Exhibit 3. Counseling documentation.
[3] Exhibit 6. Written Notice, issued May 19, 2000.
[4] Exhibit 5. Written Notice, issued December 5, 2000.
[5] DHRM Policy 4.50, *Military Leave*, provides that state employees are entitled to a period of approved absence, not to exceed 15 workdays in a federal fiscal year, during which employees continue to be paid by the state while engaged in active military duty or state or federally-funded military training duty. Employees are also entitled to unconditional military leave without pay for duty indicated in their military orders that is not covered by leave with pay. Grievant's military specialty is personnel; the nature of her work in the Guard and Reserve has required her to perform her military duties one day at a time.
[6] Exhibit 1. Written Notice, issued November 19, 2001.

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.
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> In disciplinary actions, the agency must show by a preponderance of

proper notice to supervision.[10] Group I offenses are less severe and include unsatisfactory attendance.

Grievant acknowledged that she had been absent on the days cited as SP or SF in the attachment to the written notice, except for the date of May 14, 2001. Grievant did not remember being out on that date, but she had no evidence to contradict the agency's assertion that she was absent that day. She also acknowledged that the unusual demands of her military reserve duties have required frequent days off, which is more disruptive to the agency than if she were absent for two straight weeks.

Grievant asserts that she should not be disciplined for failing to give proper notice to her supervisor. She did call in to the night shift supervisor to report her absence and left her home telephone number with him. She maintains that she was at home on both days but did not receive a telephone call from her supervisor and her voice mail did not record any calls. The agency's telephone records verify that there were no telephone calls completed between the facility and grievant's home on September 19 & 21, 2001. However, it is undisputed that the telephone record includes only calls that result in a connection with the number dialed.

Grievant's supervisor testified that he attempted to call grievant at her correct home telephone number but no one answered and no answering machine came on. It is possible that the supervisor mistakenly dialed an incorrect number, or that grievant's telephone was temporarily inoperative, or that the supervisor hung up before the voice mail was activated. Accordingly, it is concluded that grievant complied with policy by calling in and leaving her telephone number with the shift supervisor. The agency has not shown, by a preponderance of the evidence, that the unsuccessful attempts to contact grievant at home prove that she was malingering. Therefore, grievant did properly notify supervision when she was unable to report to work.

Grievant believes that her discipline is harsh because she has no control over her illnesses or the requirements of her military reserve duties. She also points out that four of the days she was absent (March 25 through April 1, 2001) were attributable to one illness – a kidney infection. Similarly, her absences on August 25 & 26, 2001 were caused by the need to take care of her four-year-old sister during an illness. Likewise, her absences on September 19 & 22, 2001 were due to a swollen knee. However, even if one views each of these three situations as an "occurrence," the grievant still had seven occurrences in a period of only nine months.

All employers view absenteeism seriously because absences disrupt the normal flow of work. When an employee is absent from a job in the private

[10] Exhibit 7. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

sector, perhaps production will be delayed. However, in a correctional facility, an absence means that another correctional officer must be found to cover grievant's post; the agency cannot leave a post unmanned if it is to fulfill its mission of protecting public safety. Thus, the agency is significantly affected by any absence – regardless of how justified the absence may be. The more frequently a correctional officer is absent, the more disruption occurs when attempting to schedule employees for work and filling vacancies. In grievant's case, she is also frequently absent due to her military obligations. This significantly complicates the scheduling problem.

Grievant's desire to serve her country by fulfilling a military obligation is commendable. However, grievant must evaluate how the demands of this obligation affect her ability to fulfill her obligation to her employer. The Commonwealth provides a significant amount of both paid and unpaid time to employees to fulfill their military obligations. However, each agency has an obligation to the public to assure that employees fulfill their responsibilities to the agency that employs them. One of the tools used by all agencies to evaluate employees is attendance. Frequent absenteeism, regardless of the reason, is cause for concern.

Grievant has previously been counseled and disciplined about her unsatisfactory attendance. One of the purposes of disciplinary action is to assure that the employee clearly understands how importantly the agency views the issue for which discipline is given. Grievant could have been removed from state service for sleeping during working hours in April 2000 but the agency was lenient. She could have been discharged again for a second disciplinary action in December 2000. With this third disciplinary action in November 2001, the agency once again could have dismissed her but, again opted to show leniency. Grievant should not be mislead by the agency's reduction of discipline in the past. She is encouraged to reassess whether her employment as a corrections officer is a good fit with her military obligations. It may be that other types of employment might be more accommodating to the frequent absences required by her military obligation.

It is concluded that grievant was not guilty of failure to report to work as scheduled without proper notice to supervision. However, grievant's overall attendance continues to be unsatisfactory – a Group I offense. Therefore, the disciplinary action must be modified.

DECISION

The decision of the agency is hereby modified.

The Group II Written Notice and suspension issued on November 19, 2001 are VACATED. The agency shall prepare a Group I Written Notice for

unsatisfactory attendance for the period of January–September 2001. The agency shall restore to grievant any pay withheld as a consequence of the suspension. The disciplinary action shall remain active 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.

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David J. Latham, Esq.
Hearing Officer