

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: April 12, 2002; Decision Date: April 15, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5411



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5411**

Hearing Date: April 12, 2002  
Decision Issued: April 15, 2002

**PROCEDURAL HISTORY**

On October 23, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

*Inadequate or Unsatisfactory Job Performance: On October 8, 2001, you were told by [Lieutenant] to perform a task in a certain way. Later you were told by her to report to her office. You did not do either of the two things she asked, even knowing that she had asked you to come and even with the other two officers doing what she asked. Your reason for not doing these things are not acceptable.*

On November 18, 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 she requested a hearing. On March 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 12, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action.

## **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. She reports directly to the Lieutenant.

On October 8, 2001 at approximately 10 a.m. Grievant was working in the recreation yard of the institution where she is assigned. A recreation yard is an open outdoor space where inmates gather for sporting events, etc. A tall fence secures the recreation yard from other portions of the correctional institution. Grievant and another corrections officer were leaning on the fence in order to talk with another corrections officer on the other side of the fence.

Grievant reports directly to the Lieutenant. The Lieutenant observed the three corrections officers talking for approximately 15 minutes and concluded that they were not properly observing the inmates located in the yard. She approached them and told them to disburse and make rounds. Grievant responded that the Colonel had instructed the three officers to stay together for security purposes. The Lieutenant reaffirmed her instructions and told them that she would speak with the Colonel regarding his instruction.<sup>1</sup> Grievant glared at the Lieutenant and began looking her up and down in an unflattering manner. Two of the three officers began conducting their rounds while Grievant remained at the fence. The Agency's practice is that the last order given by a superior officer controls over a prior order given by a different superior officer. Thus,

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<sup>1</sup> The Lieutenant believed the three officers had misconstrued the Colonel's instructions. It would be appropriate for the officers to stay near each other in the sense of being able to see one another while working on the yard in the event inmates became unruly. It would not be appropriate, however, for the officers to stand next to each other talking.

Grievant was obligated to follow the Lieutenant's order rather than the Colonel's order (assuming Grievant had properly construed the Colonel's order).

Following the incident, the Lieutenant instructed another corrections officer to inform Grievant to come to the Lieutenant's office after Grievant completed her rounds on the yard. Grievant received the message but did not go to the Lieutenant's office after leaving the yard. The Lieutenant called Grievant three times on the radio but Grievant would not respond. Grievant had heard the radio calls but chose not to respond.

Grievant and the Lieutenant have a history of being in conflict and not liking each other. Grievant did not report to the Lieutenant's office because she did not wish to become involved in a likely heated argument with the Lieutenant.

### **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.

"Inadequate or unsatisfactory job performance" is a Group I offense.<sup>2</sup> Grievant's behavior constituted inadequate or unsatisfactory job performance.<sup>3</sup> She was instructed by her immediate supervisor to come to the supervisor's office to discuss what the supervisor perceived as a problem with Grievant's work performance. Grievant's obligation as an employee is to follow the instructions of her supervisor. This is especially true in the Department of Corrections which operates as a paramilitary organization with employees holding rank, wearing uniforms, and taking oaths to uphold laws. Grievant knew that she was instructed to go to the Lieutenant's office, yet she refused to do so. Her behavior was inadequate and unsatisfactory job performance thereby justifying issuance of a Group I Written Notice.

Grievant contends she did not have to follow the Lieutenant's order because the Lieutenant had created a hostile work environment and obeying the Lieutenant's order would result in a breach of security.

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<sup>2</sup> DOCPM § 5-10.15(B)(4).

<sup>3</sup> Grievant's failure to follow her supervisor's instruction could have resulted in a Group II Written Notice under DOCPM § 5-10.16(B)(1). The Agency chose to mitigate the disciplinary action.

Grievant offers as examples of a hostile work environment<sup>4</sup> when the Lieutenant reprimanded Grievant for inappropriate radio traffic even though Grievant was not inappropriately using the radio. In addition, on a prior occasion, the Lieutenant instructed Grievant to come to the Lieutenant's office to be counseled and the Lieutenant had a sergeant as an observer. Grievant attempted to bring her own witness but the Lieutenant instructed that witness to leave the room. Grievant believed the Lieutenant wanted only a person who favored her to serve as a witness. Because of the problems Grievant perceived with the Lieutenant, Grievant felt she had to file incident reports to complain about the Lieutenant. None of Grievant's complaints about the Lieutenant were upheld following a review by the Human Resource Department staff. If the Hearing Officer assumes for the sake of argument that Grievant's objections to the Lieutenant are correct, the hostile work environment alleged by Grievant would not be sufficient for Grievant to ignore the instruction of her immediate supervisor.

Grievant contends Post Order 11 authorized her to disregard the Lieutenant's instruction. This order states, "Obey all orders given to you by your supervisor. \*\*\* Do not obey any order issued by anyone that would cause a breach in security or serious injury to yourself or others." Grievant contends if she went to the Lieutenant's office, she may have been in jeopardy of serious injury from the Lieutenant because of the Lieutenant's likely misrepresentations about the meeting. This argument is untenable. Post Order 11 is referring to the situations of serious physical injury. It is not referring to injuries to one's emotions or character resulting from a supervisor's misrepresentations during or after a meeting.

Grievant contends she cannot be given a written notice because she had been previously counseled for her actions. This argument is not supported by policy. Nothing in DOCPM § 5-10 prohibits formal disciplinary action in addition to verbal counseling.

This case represents the conflict that may arise when there is a meltdown of the supervisor-employee relationship. Both Grievant and the Lieutenant have significantly different views of the prior encounters and both believe their views are more accurate than the other's view. It is not the Hearing Officer's responsibility<sup>5</sup> to correct conflicts between managers and employees. The Agency may wish to consider how best to manage the relationship between Grievant and the Lieutenant and Grievant.

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<sup>4</sup> Grievant refers to the work environment as being hostile. She is not referring to "hostile work environment" as the term is used in civil rights laws and analysis. The Hearing Officer is adopting Grievant's usage for the sake of simplicity.

<sup>5</sup> Grievant requested that the Hearing Officer take whatever actions possible to investigate the management practices of the Lieutenant. The Hearing Officer only has the authority given to him by the Grievance procedure and conducting investigations is not within the Hearing Officer's authority.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer