

Issue: Group I Written Notice (failure to follow supervisor's instruction); Hearing Date: 05/22/02; Decision Date: 05/22/02; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5438



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5438**

Hearing Date: May 22, 2002  
Decision Issued: May 22, 2002

**PROCEDURAL HISTORY**

On January 23, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

*On 12/7/01, [Grievant] was instructed by her Shift Commander, [Captain], prior to exiting the facility on 12/7/01 that she must be seen by a doctor on 12/7/01 in order to be allowed to leave. [Grievant] stated on 12/7/01 and on 1/15/02 that she understood the direction of the requirement upon return. [Grievant] failed to follow instructions issued to her by [Captain] and was not seen by a doctor on 12/7/01;<sup>1</sup> therefore, she failed to follow supervisor's instructions in accordance with procedure #5-10.*

On February 21, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to

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<sup>1</sup> The Written Notice does not accurately state the charge for which Grievant was disciplined. It was not Grievant's failure to go to the doctor for which Grievant was disciplined, but her failure to bring documentation showing that she went to the doctor or hospital emergency room on December 7, 2001. The Agency's philosophy is that "if it is not documented, it did not happen." At each step in the grievance process, the Agency made Grievant aware that she was being disciplined for failing to follow the Captain's instruction which included bringing in documentation. Grievant has not contended that she was misled by the wording of the notice. Thus, the Hearing Officer deems the Agency's incomplete drafting of the Written Notice to be harmless error.

the Grievant and she requested a hearing. On May 2, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 22, 2002, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Representative  
Captain  
Major

## **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 works on the 8 a.m. to 8 p.m. shift. Many other corrections officers at the Facility work the 5 a.m. to 5 p.m. shift.

The Agency operates using a 28 day cycle where employees are scheduled to work for 168 hours but only work 160 hours. To reduce their scheduled time by eight hours, employees are permitted to take "adjusted leave."

In the morning of Grievant's shift on December 7, 2001, Grievant asked the Shift Commander for two hours of adjusted leave so that she could leave work early at 6 p.m. Her request was granted. At approximately 4 p.m., an inmate unexpectedly needed to be transported to a hospital. This caused two corrections officers to be removed from their normal duties to escort the inmate to the hospital and left the Facility short-handed.

Since many of the corrections officers at the Facility were scheduled to depart by 5 p.m., the Captain informed<sup>2</sup> Grievant she would not be able to leave at 6 p.m. Grievant replied to the Captain that she had been sick all day and needed to take sick leave. The Captain asked Grievant why she did not previously inform her supervisor that she was ill. Grievant responded that she had not been feeling well for several days but wanted to try to perform her duties as best as she could. The Captain instructed Grievant that in order for her to be excused from her shift, she needed to (1) seek medical attention that evening from her doctor or if the doctor's was unavailable to seek medical attention from a hospital emergency room and (2) bring in documentation showing she had visited the doctor or hospital.

Grievant left the Facility and went to her doctor's office. She got there as the doctor's office was closing and was told to come back the following morning. Grievant did not go to the hospital emergency room because she could not afford the additional cost of doing so. She went to her doctor on December 8, 2001 and received treatment. Grievant was ill on December 8<sup>th</sup> and 9<sup>th</sup>. When she returned to work on December 12, 2001, she brought a note dated December 11, 2001<sup>3</sup> from her physician stating, "Excuse this patient from work on Dec. 7, 8, 9 due to illness."<sup>4</sup> The note was not in accordance with the Captain's instructions because it was not dated December 7, 2001 or reflects that she had visited the doctor on December 7, 2001.

On September 25, 2001, Grievant was counseled regarding taking excessive leave. Her attendance improved significantly following the counseling.<sup>5</sup>

## **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.

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<sup>2</sup> The Captain asked another officer to inform Grievant that she could not leave early. When the Captain learned of Grievant's illness, he spoke with her by telephone.

<sup>3</sup> Grievant told the Captain she went to the doctor's office on December 8, 2001 and obtained a note dated December 8, 2001 but lost the note. She went to the doctor's office on December 11, 2001 to obtain a replacement note.

<sup>4</sup> Agency Exhibit 8.

<sup>5</sup> Agency Exhibit 1.

The Agency operates as a paramilitary organization with its corrections staff wearing uniforms, holding rank, and following orders. The Captain instructed Grievant to go to the doctor's office or to the hospital if the doctor's office was closed. Grievant went to the doctor's office but did not go to the hospital. She did not bring in documentation showing she went to the doctor's office or hospital on December 7, 2001. Thus, Grievant failed to follow the specific order given to her by the Captain.

Although one can question the necessity of ordering Grievant to produce documentation of illness when there is no dispute that she was ill, the fact remains that the Captain gave Grievant a specific order and that Grievant understood that order. The order was not unlawful, unethical, or ambiguous. Thus, Grievant should have followed the order with the detail needed to accomplish that order. Grievant's failure to do so is inadequate or unsatisfactory job performance<sup>6</sup> and justifies issuance of a Group I Written Notice.

Grievant argues that Agency policy permits her two workdays to provide adequate documentation of her illness and, thus, the note dated December 11, 2001 was adequate. This argument fails. Grievant was not disciplined for failing to timely produce documentation; she was disciplined for failing to produce documentation meeting the criteria specified by the Captain.

Grievant contends that the note she obtained from her doctor on March 6, 2002 was sufficient to excuse her absence. The note, however, does not confirm that Grievant went to the doctor's office on December 7, 2001, it only states that Grievant told the doctor that she went to his office on December 7, 2001 as the office was closing. The note is insufficient to meet the Captain's directive.

Grievant contends she has established her illness and, thus, has sufficiently documented her absence from work. The Agency does not dispute Grievant's illness but did not base its discipline on whether or not Grievant was ill. She was disciplined for failing to follow instructions, not for failing to establish her illness.

## **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

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<sup>6</sup> DOCPM § 5-10.15(B)(4).

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