

Issue: Group II Written Notice with 5-day Suspension (failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: July 2, 2002; Decision Date: July 3, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5470; **Administrative Review: Hearing Officer Reconsideration Request received 07/12/02; Reconsideration Decision Date: 07/26/02; Outcome: Newly discovered evidence identified; request to reopen hearing granted**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5470**

Hearing Date: July 2, 2002  
Decision Issued: July 3, 2002

**PROCEDURAL HISTORY**

On May 1, 2002, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On May 6, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 12, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 2, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Corrections Officer  
Captain  
Two Senior Wardens  
Executive Secretary  
Personnel Analyst

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension.

## **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 Lieutenant. On December 27, 2000, Grievant received a Group I Written Notice for "Unsatisfactory attendance or excessive tardiness."<sup>1</sup> On November 20, 2001, Grievant received a Group I Written Notice for "Inadequate or Unsatisfactory Job Performance."<sup>2</sup>

The Agency Facility conducts at least five formal inmate counts per 24-hour period. Corrections officers through out the Facility count the number of inmates in their areas and then report those totals to certain staff in the Facility who add those totals and determine the total number of inmates in the Facility. If all inmates are accounted for, the count clears. If the count does not clear, it means an error was made or an inmate(s) is missing. Maintaining an accurate count is essential to Facility operations.

On April 22, 2002 at approximately 11:30 a.m., the Facility conducted an inmate count. Inmates in the 400 pod returned to their cells and awaited the count. Grievant and a Corrections Officer walked past each cell in the bottom tier of the pod and counted inmates. Grievant and the Corrections Officer were separated by several cells<sup>3</sup> as they walked down the tier. Once they both reached the end of the tier, they compared their totals and the totals matched at 29 inmates. Next, one of them walked down the top tier of the pod and counted inmates. The other one followed and counted

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> Agency Exhibit 10.

<sup>3</sup> IOP 411 requires the two count officers to be separated by at least four cells as they count inmates in a section.

inmates. They compared totals for the top tier and their totals matched at 33 inmates. Each showed 62 as the total number of inmates in the pod.

The count for the Facility did not clear and a second count had to be conducted at approximately 12:05. The second count showed that the top tier had 34 inmates and not 33 as both Grievant and the Corrections Officer had concluded. Grievant and the Corrections Officer did not accurately count the number of inmates in each cell thereby resulting in an error for the total number of inmates in the pod. They did not realize they had made errors because they obtained the same total number of inmates for each tier.

The Senior Warden testified during the hearing that he believed Grievant had inadequately performed his duties rather than acting contrary to the Agency's policy.

### **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>4</sup> Grievant mistakenly counted the number of inmates in the pod. Grievant's behavior was inadequate job performance thereby justifying issuance of a Group I Written Notice.

"Upon the accumulation of three active Written Notices for Group I offenses, the employee normally should be suspended without pay for no more than five workdays."<sup>5</sup> Grievant has three active Group I Written Notices and, thus, he may be suspended. "When necessary to impose a suspension for an exempt employee for reasons other than an infraction of a safety rule of major significance, the suspension shall not be less than a full workweek, i.e., 40 hours."<sup>6</sup> Grievant is a Corrections Lieutenant and is an exempt employee under the Federal Fair Labor Standards Act. Since suspension is appropriate and Grievant is an exempt employee, the Agency's five workday suspension is upheld.

The Agency contends that Grievant's inadequate counting was a failure to follow Internal Operating Procedure 411. The Senior Warden who served as the second step

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<sup>4</sup> DOCPM § 5-10.15(B)(4).

<sup>5</sup> DOCPM § 5-10.15(C)(2).

<sup>6</sup> DOCPM § 5-10.23(A).

respondent in the grievance and who testified at the hearing concluded that Grievant did not fail to follow the policy; rather Grievant failed to perform his job adequately. Based on the evidence presented, including this testimony, the Hearing Officer finds that Grievant did not fail to comply with IOP 411. The Written Notice must be reduced from a Group II to a Group I offense.

Grievant contends he should not have been suspended for five workdays for failing to properly count. He contends he was treated inconsistently from other employees who failed to properly count inmates. The evidence was insufficient for the Hearing Officer to conclude that the Agency inconsistently disciplines its employees. Grievant could offer no examples of an employee with three active group one written notices who was not suspended.

Grievant asks the Hearing Officer to order that he be transferred to another Facility. The Hearing Officer lacks the authority to order transfer<sup>7</sup> of an employee.<sup>8</sup> Grievant's request for transfer must be denied.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I. The Agency's five workday suspension is **upheld**. Grievant's request for transfer is **denied**.

## 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.

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<sup>7</sup> An exception may exist in a case where an agency transfers an employee as part of disciplinary action and the Hearing Officer reverses the disciplinary action. The effect may be to order the transfer of an employee. Grievant in this case was not transferred by the Agency.

<sup>8</sup> GPM § 5.9(b)(2).

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