

Issue: Group I Written Notice (inadequate or unsatisfactory job performance); Hearing Date: 07/22/02; Decision Date: 07/24/02; Agency: Virginia Polytechnic Institute & State University; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5479; **Judicial Review: Appealed to the Circuit Court in the County of Montgomery on 08/15/02; Outcome pending**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5479**

Hearing Date: July 22, 2002  
Decision Issued: July 24, 2002

**PROCEDURAL HISTORY**

On April 18, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

*Failed to report to Cardinal Criminal Justice Academy for a class that he was scheduled to teach. He did not inform the Academy that he would not teach.*

On May 16, 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 26, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Counsel

Supervisor  
Training Coordinator  
Academy Director  
Administrative Coordinator  
Secretary  
Captain

## **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:

Virginia Tech employs Grievant as a Police Sergeant in its Police Department. He has been employed there since 1994 without any prior disciplinary action.<sup>1</sup>

The Police Department sends its staff to teach and to receive training at the Cardinal Criminal Justice Academy. When Department staff are requested to teach at the Academy, the Department permits the employees to teach only if the Department has adequate staffing to cover its essential functions.

On November 14, 2001, the Department held a staff meeting.<sup>2</sup> Minutes from the meeting state:

[Captain W] and [Training Coordinator] will handle all employees' training going to Cardinal Academy. Individual officers or supervisors are not to call Cardinal Academy to check on getting in a school for yourself or any

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<sup>1</sup> Grievant received counseling memorandums in October 2001.

<sup>2</sup> Although Grievant was absent from the staff meeting, he reviewed the meeting minutes.

of your people. [Training Coordinator] will get the confirmation on schools.<sup>3</sup>

Law enforcement officers in the Police Department hold rank and report to higher-ranking employees under a chain of command. A police lieutenant supervises Grievant. This Supervisor sets Grievant's work schedule.

In January 2002, the Academy staff sent the Training Coordinator a request to have Grievant teach at the Academy beginning Thursday April 11, 2002 and ending on the following Friday, April 19, 2002. The Training Coordinator sent the request to Grievant's supervisor for consideration. On January 15, 2002, the Supervisor wrote a memorandum<sup>4</sup> to the Training Coordinator stating:

I can only give tentative approval for the following dates.

April 11, 2002 1 pm – 4 pm

April 15-19, 2002 8 am – 5 pm

Please advise the Academy that I may have to change this approval due to manpower and other events going on.

I disapprove April 12, 2002 8 am – 5pm

The Training Coordinator informed the Academy of Grievant's availability to teach.

On January 21, 2002, the Academy Secretary sent the Department head and Grievant a post card indicating the dates Grievant was scheduled to teach at the Academy.

On January 30, 2002, Grievant and the Supervisor received an email<sup>5</sup> from an Administrative Assistant informing them that they had been enrolled in a supervision class that would be meeting on Mondays including April 15, 2002. Neither the Supervisor nor Grievant informed the Academy that Grievant would not be able to teach at the Academy on April 15, 2002.

On January 31, 2002, the Supervisor sent an email<sup>6</sup> to another lieutenant indicating that Grievant would work in the place of another sergeant on April 16, 2002. Neither the Supervisor nor Grievant informed the Academy that Grievant would not be able to teach at the Academy on April 16, 2002.

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<sup>3</sup> Grievant Exhibit 1.

<sup>4</sup> Grievant Exhibit 5.

<sup>5</sup> Grievant Exhibit 11.

<sup>6</sup> Grievant Exhibit 4.

Sometime before April 2, 2002, Grievant called the Administrative Coordinator and the Secretary at the Academy to discuss his teaching schedule. He wanted to make sure the Academy knew he had not been approved to teach on Friday, April 12.

As the number of days before the training class lessened, the Supervisor became concerned about whether he would have adequate staffing to enable Grievant to attend the Academy training. On April 8, 2002, the Supervisor informed Grievant that he could not teach at the Academy on any of the dates originally approved except for Friday, April 19, 2002. Neither Grievant nor the Supervisor informed the Training Coordinator or the Academy that Grievant would not be teaching on any dates other than April 19, 2002.

On April 15, 2002, Grievant and the Supervisor were in supervisor's training class at the University. The Academy staff contacted the Department Training Coordinator and questioned why Grievant was not at the Academy providing training.

### CONCLUSIONS OF LAW AND POLICY

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." P&PM § 1.60(V)(B).<sup>7</sup> 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." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the University must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties.

Section V(B) of the Department's Directives Manual addresses training requirements and states:

When it is necessary for an individual to be absent from training (i.e. court, illness, etc.), the individual will notify the [Training Coordinator] as far in advance as reasonably possible. **Individuals attending training outside the department will notify the person in charge of that training.** The individual is responsible for making up any mandatory training missed due

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<sup>7</sup> The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

to absence. Unexcused absences from scheduled training may result in disciplinary action. (Emphasis added.)

Although this policy is directed primarily at employees attending training as students, its wording and subject matter show that it also applies to those attending training as instructors.<sup>8</sup> This policy, however, is made confusing by the November 14, 2001 staff meeting minutes. These minutes suggest that Grievant should not make any calls to the Academy but rather should rely on his chain of command for notification to be provided to the Academy.<sup>9</sup>

This case is very close. Its resolution depends on whether Grievant knew or should have known that he was supposed to call the Academy to inform Academy staff that he would not be teaching on the days originally scheduled. Although no one instructed Grievant that it was his responsibility to call the Academy and Grievant was subject to a chain of command, the Hearing Officer finds that Grievant knew or should have known he was to call the Academy regarding his schedule. This conclusion is based solely on the fact that Grievant made a telephone call to the Academy's Administrative Coordinator and a call to the Academy's Secretary to inform them that he had not been approved to teach on April 12, 2002. Grievant denies making the calls. The Hearing Officer finds that the University has met its burden of proof regarding Grievant's contact with the Academy based on presenting two credible witnesses who were familiar with Grievant and could identify his calls.

Grievant contends that he was not obligated to call the Academy because it was his supervisor's responsibility to notify the Academy pursuant to the chain of command. The Hearing Officer agrees that the Supervisor should have notified the Training Coordinator and/or the Academy staff that Grievant would not be in attendance. The Supervisor's failure to do so, however, is not a sufficient basis to mitigate the disciplinary action taken against Grievant.

## 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

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<sup>8</sup> See Section IX(B) of the Directive which establishes requirements for instructors regarding lesson plans.

<sup>9</sup> The University argues that the staff meeting notes apply only to persons attending training as students and not as instructors. In contrast, the University argues that the Directives Manual provision applies to individuals attending training as either students or instructors.

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