

Issue: Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: August 28, 2002; Decision Date: August 29, 2002; Agency:
Department of Corrections; AHO: David J. Latham, Esq.; Case No.: 5511



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5511

Hearing Date: August 28, 2002
Decision Issued: August 29, 2002

PROCEDURAL ISSUE

During the hearing, grievant raised the issue of the agency's noncompliance with the grievance procedure because the third-step response was filed 60 days after grievant advanced his grievance to the third step.¹ While the agency was clearly in noncompliance with the procedure, grievant failed to follow the proper procedure to remedy the noncompliance. The grievance process provides a remedy when the opposing party fails to comply with any requirement of the process. However, all claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time.² In this case, grievant did not timely raise the issue of noncompliance but instead proceeded with his grievance. Therefore, it is held that grievant has forfeited his right to challenge the procedural delay.

¹ The agency's third-step respondent is required to provide a written response on Grievance Form A or an attachment with five workdays of receiving the grievance. § 3.3, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

² § 6.3, EDR Grievance Procedure Manual, *Party Noncompliance*, July 1, 2001.

In any event, this hearing afforded grievant full due process rights making moot any effect of the procedural delay.

APPEARANCES

Grievant
Representative for Grievant
Assistant Warden
Unit Manager
Two witnesses for Agency

ISSUES

Did grievant's conduct warrant 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 for failure to follow a supervisor's instructions.³ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a correctional officer for five years. He is a pod officer in a housing unit at the facility.

The agency has a policy regarding overtime and schedule adjustments that provides, in pertinent part:

Dependent upon the schedule adopted by the institution, security employees may have day(s) identified on the work schedule as a "star, S, or comp" day or some other designation. That day will be a day scheduled as an off duty day unless management specifically requires the employee to report for duty.⁵

In the institution in which grievant was employed, the agency used an "X" on the Master Work schedule as its designation for "star" or "comp" days. Grievant is familiar with this policy and knows that agency management can and does change "X" days whenever necessary to satisfy institutional security requirements. Grievant is also aware the agency must sometimes schedule "X"

³ Exhibit 4. Written Notice, issued March 14, 2002.

⁴ Exhibit 5. Grievance Form A, filed April 14, 2002.

⁵ Exhibit 3. DOC Procedure Number 5-15, *Overtime and Schedule Adjustments*, June 1, 1999.

days on previously scheduled rest days in order to assure a sufficient number of correctional officers are on duty. Grievant has previously worked "X" days when he had initially been scheduled for rest days. The operations lieutenant had discussed this policy with grievant several times in the past.

During the 28-day cycle from February 25, 2002 through March 24, 2002, grievant's Master Work schedule indicated that he had one "X" day scheduled for March 12, 2002. During the second or third week of February 2002, the operations supervisor (a lieutenant who is responsible for scheduling employees) told grievant that he would have to work an additional "X" day in the upcoming cycle and asked him when he would be available. Grievant said he didn't know when he could do it but that he would tell the lieutenant later. Grievant never selected a date and the lieutenant had to complete the schedule; she therefore selected the date of March 2, 2002. On or before February 23, 2002, the operations supervisor telephoned grievant and advised him that he was required to work on March 2, 2002 and that he was to consider that an "X" day. Grievant responded with words to the effect of, "I won't work on March 2nd because I have already made plans, so just do what you have to do." He then hung up the phone.

The Master Work Schedule had originally scheduled grievant for rest days (designated with an "R") for March 1, 2 & 3, 2002.⁶ Grievant had planned to use those three days to visit his mother in New York but he never advised either his supervisor or the operations lieutenant about his trip. The trip was not an emergency but rather a preplanned visit. The grievant failed to report to work on March 2, 2002, and failed to notify his supervisor or the agency that he was not reporting to work that day. The following day, another lieutenant notified several management people by e-mail that grievant had failed either to report to work or to call in.⁷ Among those notified were two assistant wardens, the operations supervisor, the housing unit manager and a captain.

In order to get a day off, the policy and practice is to submit a written request for approval and obtain written permission for the day off. After being told that he would have to work on March 2, 2002, grievant did not submit a request to have the day off.

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 procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the

⁶ Exhibit 2. Master Work Schedule for year 2002.

⁷ Exhibit 6. E-mail disciplinary referral from lieutenant, March 3, 2002.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁸

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training⁹ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁰ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC Standards of Conduct addresses Group II offenses; one example is failure to follow a supervisor's instructions.¹¹

⁸ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

⁹ Now known as the Department of Human Resource Management (DHRM).

¹⁰ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹¹ Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

The agency has demonstrated by a preponderance of evidence, and grievant has admitted, that grievant failed to follow a lieutenant's direct instruction to report for work on March 2, 2002. The lieutenant's instruction was unambiguous and grievant understood the instruction. Grievant was physically able to work and could have reported on March 2, 2002, but chose to take a pleasure trip out of state. Failure to follow a supervisor's instruction is a Group II offense. The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances.

Grievant contended during the hearing (for the first time) that he had spoken with the captain between February 23 and March 1, 2002 and that the captain had authorized grievant to work on March 12, 2002 as his "X" day and excused him from working on March 2, 2002. He further contends that the captain had been with the operations lieutenant when she called him on or before February 23, 2002. However, grievant did not request this witness to testify during the hearing. Nevertheless, the hearing officer attempted to obtain this witness's testimony by paging him during the hearing with an emergency page.¹² Grievant's contentions are deemed less than credible for one significant reason. The lieutenant's e-mail of March 3, 2002 (Exhibit 6) was sent to the captain. If the captain had excused grievant from working on March 2nd, it is more likely than not that the captain would have intervened in this matter once he received the e-mail message. The fact that he did not intervene suggests that he had not excused grievant from working on March 2nd.

Grievant further argues that this incident is attributable to a mix-up or lack of communication between the operations lieutenant and the captain. However, if this is so, grievant has failed to explain why he never raised this issue until the day of the hearing. The incident occurred nearly six months prior to the hearing. In that time, the grievance has progressed through three resolution steps during which grievant had ample opportunity to raise this defense. He never mentioned this to any of the three step respondents, and never asked the captain to testify on his behalf. Grievant's raising of this issue only at the eleventh hour, when the captain is out of state, significantly taints the credibility of grievant's argument.

Grievant has failed to produce evidence of mitigating circumstances sufficient to overcome the offense. Therefore, the discipline must be upheld.

DECISION

The decision of the agency is hereby affirmed.

¹² If the captain had received the emergency page, policy requires him to call in immediately and not more than 15 minutes from receiving the page. The captain was not working on the hearing date and was believed to be traveling out of state.

The Group II Written Notice issued on March 14, 2002 for failure to follow a supervisor's instructions is UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer