

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instructions); Hearing Date: 01/02/03; Decision Date: 01/03/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5608;
Administrative Review: EDR Ruling requested on 01/15/03; EDR Ruling Date: 01/31/03; Outcome: Request untimely. HO's decision is final [Ruling No. 2003-010]



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5608

Hearing Date: January 2, 2003
Decision Issued: January 3, 2003

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Warden Senior
Associate Warden
One witness for Agency

ISSUE

Was the grievant's conduct subject to 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.¹ At the second resolution step, the agency offered to vacate the disciplinary action and substitute a counseling memorandum; grievant rejected the offer. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Corrections (Hereinafter referred to as "agency") has employed grievant for 13 years. She is a correctional officer senior, has a good record, no previous disciplinary action, and is considered a good employee. Grievant became a Seventh-Day Adventist in 1993.³ Since that time grievant's supervisors have accommodated her request not to work on Saturday.⁴ She regularly works Monday through Friday, and is off work on Saturday and Sunday. Since 1993, grievant has never worked on a Saturday.

Grievant works in a work center adjacent to the main correctional center. The work center houses approximately 200-300 non-violent offenders who are classified Level One offenders (the lowest security level). On one Saturday each fall, the facility conducts an annual Family Day during which inmate family members come to the facility, interact with inmates and participate in games. Family Day is conducted from 8:00 a.m. to 2:30 p.m. While the atmosphere is intended to be a relaxing and enjoyable day for inmates and their families, the large number of visitors creates a major security problem. The interaction between so many inmates and multiple family members presents a significant opportunity for smuggling of contraband (money, illegal controlled substances, weapons, etc.)

To control the large crowd and provide added security, the facility normally requires all available security officers to work on Family Day. Exceptions are made for those who had scheduled vacation months earlier. In addition, some employees are not available due to military obligations, workers' compensation leave, sick leave, or out-of-area training. Thus, the pool of available staff is limited and the facility generally requires all available employees to work. The state's budget problems had resulted in a hiring freeze in early 2002. The agency has been unable to replace most employees who left their employment during the year. Thus, the reduced number of employees significantly exacerbated the facility's staffing problem in 2002.

¹ Exhibit 2. Written Notice, issued October 29, 2002.

² Exhibit 1. Grievance Form A, filed November 4, 2002.

³ Seventh-Day Adventists advocate and practice the observance of Saturday as the Sabbath.

⁴ The agency stressed during the hearing that it had never entered into a formal accommodation agreement with grievant. However, the absence of a written agreement is irrelevant. Grievant's supervisors had over the years accommodated her request to be off work on Saturday. Supervisors are part of agency management and their actions, if not repudiated by the agency, become an action of the agency.

The facility requires newly employed corrections officers to comply with certain conditions of employment. At the time of employment, grievant signed a document containing these conditions, thereby indicating her acceptance of the conditions of employment. Condition number 2 states, "Corrections Officers must be willing to work any shift and any post; and must be willing to work overtime, weekends, and holidays."⁵ Although grievant became a Seventh-Day Adventist subsequent to being hired, she nevertheless remained bound by the conditions of employment.

The 2002 Family Day was initially scheduled in September but was subsequently changed to October 12, 2002. All employees were notified on September 9, 2002 that they would be expected to work on October 12. Grievant told the housing unit manager that she did not want to work because of her religion. On September 23, 2002, the housing unit manager advised grievant that she could not grant the request and that grievant would have to work. The housing unit manager reminded grievant of the need to work in early October. Grievant said that she would not work and that she would have to do what she had to do. Grievant did not report for work on October 12, 2002.

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 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.

⁵ Exhibit 5. *Conditions of Employment*, signed December 18, 1989.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove her claim by a preponderance of the evidence.⁶

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 Training⁷ 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.2 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 that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.⁸ 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.⁹

It is undisputed that grievant was instructed by supervision to report for work on October 12, 2002, and that grievant did not report for work. Therefore, the agency has demonstrated, by a preponderance of the evidence, that grievant failed to follow a supervisor's instructions – a Group II offense. The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances.

Grievant disobeyed her supervisor's instruction because she believed it conflicted with her religious obligations. Grievant recognizes that she remains bound by the Conditions of Employment she signed when she was hired in 1989. Her religious belief is that she should not work on the Sabbath (Saturday), however, her religion recognizes that this general rule has exceptions. One of the recognized exceptions is that working on the Sabbath is permissible when life is endangered. In light of this, grievant acknowledged that she would be willing to work on Saturday when there was an inmate escape or a violent disturbance at the facility. However, she considers the inmates' Family Day merely a party

⁶ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁷ Now known as the Department of Human Resource Management (DHRM).

⁸ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁹ Exhibit 3. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

that does not endanger life. Thus, she felt that working on Family Day would be contrary to her religious belief.

When the facility has a Family Day for inmates, the agency must contend with increased security concerns, and the very real possibility of contraband smuggling, especially illegal controlled substances. Both of these concerns have the potential to be life threatening if there should be an escape attempt, or if an inmate overdoses on illegal drugs. The agency therefore made a decision to utilize all available corrections officers on Family Day to minimize the risks of escape and smuggling of contraband. Given the large number of visitors expected at the facility, the agency's decision was reasonable.

Grievant's value judgement that Family Day is nothing more than a party for inmates is an attempt to substitute her own judgement for that of agency management. However, agency management – not corrections officers - has been entrusted with the responsibility to manage its facility in a manner that best protects public safety. If a corrections officer is allowed to make this decision, she could decide in the future that a violent disturbance at the facility is only a minor disturbance that does not require her presence. Obviously, it would be unacceptable to allow corrections officers to decide when and under what conditions they will work. This judgement is an internal management decision made by the agency. This was recognized by the General Assembly when it enacted Section 2.2-3004.B of the Code of Virginia, which states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

Grievant states that the agency rescinded her accommodation but has presented no evidence to support that allegation. The agency has accommodated her by allowing her to be off work every Saturday for the past nine years. As of the date of this hearing, the agency continues to accommodate her by allowing her to be off work every Saturday and Sunday. Grievant has also alleged that asking her to work on one Saturday out of nine years was malicious, arbitrary and capricious behavior. The evidence, however, reflects that requiring her to work was also required of all other available employees. Therefore, the grievant's allegations are unfounded and unsupported by the evidence.

Grievant contends that the agency has failed to make "any minimal effort to provide reasonable accommodation as required by law."¹⁰ The agency has allowed grievant to have rest days on Saturdays for nine years, and asked her to work only one Saturday during the entire period. Her contention that this is not reasonable accommodation is incredible. By any standard, the agency has been more than reasonable in accommodating grievant. The law requires only *reasonable* accommodation. In Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), the Supreme Court clarified an employer's obligation under Title VII to provide religious accommodation. According to Philbrook, the Third Circuit

¹⁰ Exhibit 1. Grievant's rebuttal of Second Step Response, November 17, 2002.

panel said, a reasonable accommodation does not have to be: (1) the “most” reasonable one in the employee’s view; (2) the accommodation the employee suggests or prefers; or (3) the one that least burdens the employee. Rather, the employer is obligated **only** to offer *reasonable* accommodation.

Given the severe staffing shortage, the nature of the unusual event, and the high need for increased security, the facility’s decision to utilize all available officers was not only reasonable but necessary. As grievant’s own witness (also a Seventh-Day Adventist) observed during the hearing, he generally does not work on Saturdays but when the needs of the facility require it, he does report to work on Saturday.

If grievant worked in a factory or as a clerk in an office, it would be relatively easy to make an accommodation that she would never have to work on Saturday. However, grievant works for a correctional facility where the paramount concern is public safety and where unusual events sometimes require that all employees work on what would normally be a rest day. It is grievant’s choice to work for this agency. If she genuinely believes that the agency’s reasonable accommodation for nine years does not comport with her religious belief, she may have to reevaluate whether employment as a corrections officer is the best choice for her.

The grievant’s employment record had been excellent prior to October 12, 2002. She is considered a good employee, has many years of service with the agency and has never previously been disciplined. Given these circumstances, the imposition of a suspension, in addition to a Written Notice, appears unnecessarily harsh. Therefore, although the Written Notice is affirmed, the suspension will be vacated.

DECISION

The decision of the agency is modified.

The Group II Written Notice issued on October 29, 2002 for failure to follow a supervisor’s instruction is hereby UPHELD.

The five-day suspension is VACATED. The agency shall reimburse to grievant any pay withheld as a result of the suspension.

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.¹¹

[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]

David J. Latham, Esq.
Hearing Officer

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.