

Issue: Group II Written Notice with 11-day suspension (failure to follow supervisor's instructions); Hearing Date: 02/13/03; Decision Issued: 02/14/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5623



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5623

Hearing Date: February 13, 2003  
Decision Issued: February 14, 2003

**PROCEDURAL ISSUES**

Due to the availability of participants, the hearing could not be docketed for hearing until the 36<sup>th</sup> day following appointment of the hearing officer.<sup>1</sup>

Grievant resigned his employment with the agency on January 21, 2003. Because he filed his grievance prior to resignation, he is entitled to pursue his grievance to a conclusion.

**APPEARANCES**

Grievant

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<sup>1</sup> § 5.1 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

Acting Chief Warden  
Two witnesses for Agency

### ISSUES

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.<sup>2</sup> Grievant was also suspended for 11 workdays as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup> The Department of Corrections (Hereinafter referred to as "agency") has employed grievant for six years; he was a corrections officer senior on the date disciplinary action was issued. Grievant has one prior active disciplinary action – a Group II Written Notice issued on May 1, 2002 for failure to report to work as scheduled without proper notice to supervision.<sup>4</sup> Grievant did not file a grievance of the May 1, 2002 disciplinary action.

The agency's overtime policy provides, in pertinent part:

Mandated Overtime:

1. All employees assigned to this facility shall be governed by this policy. Even those employees who are not classified as designated personnel may be required to work during emergency situations and/or unusual occurrences when overtime would be necessary to meet or maintain the needs of the institution and/or department.
2. Failure to comply with provisions of the Institutional Operating Procedure will result in disciplinary action being taken in accordance with the Employee Standards of Conduct.<sup>5</sup>

The same policy also provides for "drafting" employees. In those instances wherein sufficient staff is not available and there are not enough volunteers, the supervisor may draft employees to work beyond their normal

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<sup>2</sup> Exhibit 5. Written Notice, issued October 29, 2002.

<sup>3</sup> Exhibit 1. Grievance Form A, filed November 1, 2002.

<sup>4</sup> Exhibit 4. Disciplinary Hearing Information Sheet.

<sup>5</sup> Exhibit 10. Section 210-7.4, Institutional Operating Procedure (IOP) 210, *Overtime/Draft Procedure*, August 26, 2002.

schedule.<sup>6</sup> Drafting is typically used when a shift becomes short-staffed due to unexpected absences. Corrections officers may refuse one draft within a six-month period. The refusal option available in a drafting situation is not available when mandatory overtime is required. When grievant was hired, he signed a Conditions of Employment form that states, in part, "Corrections Officers must be willing to work any shift and any post; and must be willing to work overtime, weekends and holidays."<sup>7</sup>

On October 22, 2002, grievant worked the midnight shift from 10:15 p.m. to 6:15 a.m. on October 23, 2002. During Muster just before the beginning of the shift, the watch commander (a major) informed all staff that the facility was being locked down and that all employees would be required to work overtime beginning at 6:15 a.m. the next morning. The lockdown's purpose was to conduct a shakedown of all inmates. All officers were given an opportunity to call home to inform families of the situation. After Muster, grievant told the major that he would not work overtime the next morning. He explained that he had driven the family's only operative vehicle to work, and that he had to drive his wife to her job at 7:30 a.m. and take his eight-year old son to school at 8:45 a.m. The major advised grievant that all employees were required to work overtime.

Grievant did not telephone his wife so that she could make alternative arrangements. He did not ask the major if he could leave work to transport his wife and son, and then return to the facility. At 6:15 a.m., grievant went to the major again and reiterated his situation. The major again told grievant that overtime was mandatory and that grievant must remain at work. Grievant told the major that he would rather lose his job than have his wife lose her job. He then signed out and went home; he did not return to work after transporting his wife and son. Following a due process meeting with the warden senior on October 29, 2002, the disciplinary action was issued to grievant.

Grievant learned on October 24, 2002 that another corrections officer had a similar problem on the morning of October 23, 2002. She had explained her situation to the major and then requested permission to leave the facility for a brief period of time to resolve her situation. That officer was granted permission to leave; she left at 6:15 a.m. and returned at 7:50 a.m. to work the balance of the required overtime. Five other officers were allowed to leave at 6:15 a.m. because they had originally not been scheduled to work the midnight shift, but had volunteered to work on their "off" day to fill vacancies. All other officers on the midnight shift were required to work between three and four hours of overtime.

### APPLICABLE LAW AND OPINION

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<sup>6</sup> Exhibit 10. Section 210-7.1(2), *Ibid.*

<sup>7</sup> Exhibit 7. *Conditions of Employment*, signed by Grievant December 20, 1996.

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.

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 his claim by a preponderance of the evidence.<sup>8</sup>

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 Human Resource Management 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 Human Resource Management Standards of Conduct policy 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.<sup>9</sup> The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the

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<sup>8</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>9</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

unique needs of the Department. The DOC Standards of Conduct lists examples of Group II offenses and includes failure to follow a supervisor's instructions.<sup>10</sup>

Grievant admitted that he failed to follow his supervisor's instructions when he left the facility after being directed to work overtime. Therefore, there is sufficient evidence that grievant did commit a Group II offense.

Grievant contends that there is an extenuating circumstance in his case. He contends that the major should have suggested a solution to help grievant resolve his problem. More specifically, grievant feels the major should have suggested to grievant that he leave work, transport his family and return to work – as the female officer was allowed to do. If this had occurred to the major, it would have certainly been reasonable for him to make this suggestion if grievant was not going to be gone for more than a short time. However, grievant resides in a city located at least a half-hour's drive from the correctional facility. If grievant had transported his son to school at 8:45 a.m. and then driven back to the facility, he could not have returned until sometime after 9:15 a.m. The overtime period was over by 9:15 a.m. for the majority of officers. Thus, grievant would not have been able to work overtime.

Moreover, while supervisors should strive to assist subordinates, they are not obligated to find solutions for the personal problems of their employees. Grievant knew when he was hired that he would have to work overtime when necessary. In fact, grievant testified that he had worked overtime on several occasions. Knowing that he could be required to work mandatory overtime on short notice, grievant could have planned in advance how his family would adapt to the infrequent times when grievant had mandatory overtime. Arrangements could have been made for a relative, neighbor, or friend to take grievant's son to school. Grievant's wife could have asked coworkers to give her a ride to work. Grievant cannot fault his supervisor for failing to resolve a problem that grievant himself should have planned for well in advance.

Grievant also contends that he should have been allowed to refuse this overtime because of the drafting policy that permits one refusal in a six-month period. As indicated in the Findings of Fact, the policy that permits refusals applies only in situations in which officers are drafted to fill vacancies. A reading of the entire policy reflects that the refusal language is a subsection of the drafting section of the policy. The mandatory overtime section does not include any language that would permit refusals. In this case, officers were told that all officers must work mandatory overtime due to the lockdown and shakedown of inmates. Therefore, the refusal policy did not apply to this situation.

It must be noted that there was an aggravating circumstance in this case. Instead of asking for permission to leave for a short time, grievant's attitude was

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<sup>10</sup> Exhibit 6. Section 5-10.16, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

that he could not, and would not, stay to work overtime. This attitude of defiance was not well received by either the major or the warden senior.

### DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on October 29, 2002 and the 11-day suspension are 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.<sup>11</sup> You must file a notice of appeal with the clerk of the circuit court in the

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<sup>11</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, Record No. 2853-01-4, Va. App., (December 17, 2002).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>12</sup>

[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]

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David J. Latham, Esq.  
Hearing Officer

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<sup>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.