

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instructions); Hearing Date: 01/23/03; Decision Issued: 01/23/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5629



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5629**

Hearing Date: January 23, 2003  
Decision Issued: January 23, 2003

**PROCEDURAL HISTORY**

On October 16, 2002, Grievant was issued a Group II Written Notice of disciplinary action with five days suspension for failure to follow supervisor's instructions. On November 4, 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 January 2, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Assistant Warden

**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 Officer Senior. On September 21, 2002, the Sergeant observed Grievant smoking a cigar in a housing unit where smoking was prohibited by policy. The Sergeant instructed Grievant to stop smoking the cigar and reminded him of the Facility's policy. Fifteen minutes later the Sergeant returned to the same area and observed Grievant with a cigar and the room filled with smoke. She confronted Grievant about whether he had continued to smoke and Grievant admitted he continued smoking after being instructed to stop smoking in the housing unit.

## **CONCLUSIONS OF 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." 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.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant was instructed by a supervisor to stop smoking in the housing unit. Grievant disregarded that instruction and the Facility's policy and continued smoking. His actions justify issuance of a Group II Written Notice. A five-day suspension is within the number of days permitted to be issued for a Group II Written Notice and is appropriate in this case. The suspension must be upheld.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

### **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.<sup>1</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.