

Issue: Group II Written Notice (failure to follow supervisor's directive); Hearing Date: 02/12/03; Decision Issued: 02/13/03; Agency: VMI; AHO: Carl Wilson Schmidt, Esq.; Case No. 5630



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5630**

Hearing Date: February 12, 2003  
Decision Issued: February 13, 2003

**PROCEDURAL HISTORY**

On October 26, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

[Grievant] failed to follow supervisor's directive dated 18 December 1998 regarding calls for assistance. [Grievant] assisted the [County] Sheriff's Department on Wednesday, 16 October 2002 on a pursuit outside VMI's jurisdiction. [Grievant] failed to notify Central Dispatch, document the incident on his daily log sheet, and failed to notify his supervisor in a timely manner.

On November 6, 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 9, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Agency Representative  
Chief

## **ISSUE**

Whether Grievant should receive a Group II 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:

The Virginia Military Institute has employed Grievant as a Police Officer since September 1995. He is one of six full time and one part-time police officers. He works from 9 p.m. until 7 a.m. and is usually the only officer on duty. His worksite is the VMI campus and property. He has no active prior disciplinary action.

Central Dispatch receives calls for service from citizens and then dispatches law enforcement officers to respond to the calls, such as 911 calls. Central Dispatch serves Rockbridge County, the City of Lexington, and VMI.

On December 18, 1998, the Agency's Chief of Police sent the Central Dispatch Director a letter<sup>1</sup> stating:

Recently Central Dispatchers have been calling VMI Post Police Officers on duty for complaints in the city. This is, of course, off our jurisdiction and without the request of the Lexington Police Department. I have discussed this problem with [the Lexington Police Chief], and I would like you to inform Central Dispatchers not to summons VMI Officers for complaints in the city unless requested by the Lexington Police Department.

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<sup>1</sup> Agency Exhibit 4.

I am notifying [the Lexington Police Chief], by copy of this letter, to inform his officers that if assistance is needed, VMI Police will assist whenever possible. Lexington Police Officers, however, should notify Central to call the VMI Post Police officer on duty or the officer may call us directly by portable radio.

This letter also serves as notice to all VMI Post Police Officers. Answering complaints/calls outside Virginia Military Institute jurisdiction jeopardizes VMI property, students, faculty & staff, employees, and visitors.

Grievant received a copy of this letter. The Chief of Police verbally reminded his staff, including Grievant, of the policy on several occasions.

On October 17, 2002 at approximately 4 a.m., Grievant was listening to the police radio and heard a Rockbridge County Deputy Sheriff asking for assistance. The Deputy was pursuing several suspects in a vehicle. First the Deputy called for another deputy to help, but no one was available. Next, he called for a State Trooper, but no one was available. Finally, the Deputy called for an officer from the Lexington Police Department. The Deputy Sheriff did not ask for assistance from the VMI Police. Meanwhile, the vehicle had stopped behind a hotel and the suspects fled on foot. Several Lexington City police responded to assist with the search of the suspects. Because the Deputy Sheriff called for the assistance of the other law enforcement officers, Grievant drove 1.3 miles from the VMI campus to the hotel. He did not activate his emergency lights or notify Central Dispatch that he was responding to the call. When he arrived at the hotel, he saw the Lexington Police Officers. Once the incident was resolved by the Deputy Sheriff and City Police officers, Grievant returned to his worksite.

Grievant is required to complete a daily log sheet describing information pertaining to his shift. At the conclusion of Grievant's shift on October 17, 2002, Grievant turned in his log sheet but failed to reference the assistance he provided to the Deputy Sheriff. He also did not inform the Chief that he had responded to a call outside of the Agency's campus. During the Chief's shift, the Chief learned from another source that Grievant had responded to a call outside of the Agency's campus. When Grievant returned to work the following evening at 9 p.m. to begin his next shift, he realized he had not updated his log. He amended the log to say "went to check on deputy who was asking for backup."

### **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.” DHRM § 1.60(V)(B).<sup>2</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.” DHRM § 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.” DHRM § 1.60(V)(B)(3).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>3</sup> Grievant knew or should have known that he should not respond to calls outside of the VMI campus unless his assistance was requested by a police officer through Central Dispatch or portable radio. He left the Agency’s campus without notifying anyone he was doing so and without being requested to do so. By leaving VMI campus, Grievant acted contrary to his supervisor’s instructions thereby justifying issuance of a Group II Written Notice.

There is a distinction between violating a supervisor’s instruction and being excused for violating a supervisor’s instruction after having done so. Grievant points to several statements made by the Chief suggesting the Chief would not have issued disciplinary action against him under certain circumstances. Those circumstances address whether the Chief would have excused Grievant’s failure to follow instructions and not whether he failed to follow instructions. For example, Grievant argues the true reason the Agency took disciplinary action against him was because he did not timely complete his log and notify the Chief of what had happened during the shift. The Chief’s testimony shows he would have excused Grievant’s leaving the worksite without authorization had Grievant timely informed the Chief of what had happened.

Grievant contends the December 18, 1998 directive does not require him to call Central Dispatch before responding to a call and, thus, he did not violate the directive. This argument fails because Grievant was not disciplined for failing to call Central Dispatch. Had Grievant called Central Dispatch, however, the Agency may have excused his failure to follow supervisor’s instructions.

Grievant contends he was acting responsibly to assist a deputy sheriff seeking assistance. Grievant’s motive cannot be questioned; however, his actions were contrary to the directive he received. When he acted contrary to the directive, he assumed the risk that the Agency would not agree with the necessity of his leaving the campus.

Grievant argues he sometimes transports students to the hospital which is located outside of the VMI campus. He asserts his response to the Deputy Sheriff is no different from when he travels to the hospital. This argument is untenable because he

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> DHRM § 1.60(V)(B)(2)(a).

is given authorization to transport students. Grievant was not given authorization to respond to calls off of the campus without first being requested to do so.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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>4</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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<sup>4</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.  
Hearing Officer