

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 03/10/03; Decision Issued: 03/11/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5656



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5656

Hearing Date: March 10, 2003
Decision Issued: March 11, 2003

PROCEDURAL HISTORY

On September 24, 2002, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work performance. On October 22, 2002, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 13, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 10, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Officer F
Sergeant
Officer M
Officer C
Nurse
Captain
Officer W

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

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 Correctional Officer Senior at one of its Facilities for women. He has been employed by the Agency for approximately 12 years. No evidence of prior disciplinary action against Grievant was presented.

On August 25, 2002, Grievant was working on the first floor of a two-story building. Inmates receiving medical treatment or awaiting transfer for medical treatment reside on the first floor of the building. Grievant's unit had only one inmate in residence at approximately 7:50 p.m. on August 25, 2002. Two nurses were working on the unit along with Grievant.

Grievant was in the restroom when he heard loud sounds of chairs and other furniture being moved around on second floor directly above him. He heard Officer F make an emergency radio¹ call asking for assistance to her unit.² After finishing using the restroom, Grievant left the restroom and walked straight down the hall approximately 50 feet to the main entrance of the building. He met the Nurse who asked him if the radio call was for a medical emergency or a security emergency. If the call had been for a medical emergency, the Nurse would have been needed to provide assistance. Grievant told the Nurse he thought the call was for security and not medical.

¹ Officer F called a "1033" which means, "Help me quick."

² Officer F made approximately three emergency radio calls.

Officer M and Officer C were outside of the building a distance away. They heard the emergency radio calls from Officer F and quickly approached the building. The entrance to the building was locked and Officer C's key would not work. Officer M unlocked the door and Officer C and Officer M quickly passed Grievant at the entrance and ran down the hall in the direction of the restroom Grievant exited. Officer M and Officer C went up the stairs adjacent to the restroom in order to reach Officer F. When they got up stairs, they observed that Officer F had stopped a fight between two inmates.

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.

"Inadequate or unsatisfactory job performance" is a Group I offense.³ Grievant heard the furniture being moved and the emergency radio call from Officer F. He knew an emergency was taking place on the floor directly above him. Upon exiting the restroom, he should have walked upstairs to see if Officer F needed assistance. Instead, he walked down the first floor hallway without taking any action to assist Officer F. His failure to respond constitutes inadequate or unsatisfactory job performance.

Grievant contends he could not go up stairs to help Officer F because doing so would have required him to abandon his post. The evidence, however, showed that his post included the stairway such that he could have easily checked on Officer F without violating his post orders. In addition, it was common practice for Grievant and the other officers working his post to walk upstairs to deliver mail or ask the upstairs officer to relieve the officer working downstairs.

Grievant contends he did not hear an instruction from the Sergeant ordering him to go up stairs to help Officer F. The Hearing Officer agrees that because of the many "dead zones" within the Facility, Grievant did not hear the radio instruction from the Sergeant. Whether Grievant heard the Sergeant's instruction is irrelevant. Grievant hears Officer F's emergency radio call and he should have rendered assistance upon exiting the restroom.

Grievant contends he could not have left his post because an inmate was in the shower which is not a secured area. The evidence, however, showed that Grievant

³ DOCPM § 5-10.15(B)(4).

could have asked one of the two nurses to watch the inmate while he went upstairs. Each of the nurses had received the same training received by correctional officers with the exception of firearms training. Nurses at the Facility are capable of supervising inmates and there was only one inmate to supervise on August 25, 2002.

Grievant argues the incident occurred so quickly that he had insufficient time to respond to assist Officer F. This argument fails because the length of the incident is not important. Grievant's decision to walk down the hall on the first floor rather than going up the stairs to the second floor is the primary basis for Grievant's unsatisfactory job performance.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.