

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instructions, perform assigned work or otherwise comply with established written policy);  
Hearing Date: 04/09/03; Decision Issued: 04/11/03; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq; Case No. 5675



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Grievance No: 5675**

Hearing Date: April 9, 2003  
Decision Issued: April 11, 2003

**PROCEDURAL HISTORY**

On January 6, 2003, Grievant was issued a Group II Written Notice of disciplinary action with five workday suspension for:

*Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On 12/28/02 at approximately 12:05AM, [Lieutenant] instructed you twice that you were to remain at front entry to observe, identify and hand out ID's of the 4-12 Security Staff as they exited the compound. You refused twice stating you were going home and you walked out the door.*

On February 5, 2003, 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 March 13, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate

Two Lieutenants  
Two Sergeants  
Captain  
Two Corrections Officers

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instructions.

## **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 Sergeant. He began working for the Agency on February 1, 1976. On April 25, 2001, he received a Group I Written Notice for unprofessional conduct of a supervisor.<sup>1</sup>

When security staff enter the facility, they leave their identification cards ("IDs") at the main entrance. At the end of a shift, security staff retrieve their IDs as they exit the building. In order to make sure an inmate does not try to leave in the place of a corrections officer, a supervisor will hand out IDs to the proper persons. This procedure usually takes not more than a few minutes. On the majority of days, a supervisor will volunteer to hand out IDs. If no one volunteers, then a Captain or Lieutenant will select a Sergeant to hand out IDs.

On December 28, 2002, grievant was working the 4:00 p.m. to midnight shift. He volunteered to work the shift of another employee who was attending a wedding. As Grievant's shift ended, the Lieutenant instructed Grievant to hand out IDs to exiting staff. Grievant said "No, I'm not going to do it." The Lieutenant was surprised at Grievant's refusal and again instructed Grievant to hand out IDs. Grievant replied, "No,

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

I'm going on vacation" and then walked out the front door. The Sergeant standing next to the Lieutenant could tell that the Lieutenant was displeased by Grievant's actions.

Never before had Grievant disobeyed an order from the Lieutenant. He did so on this occasion because he believed the Lieutenant was joking with him and did not actually intend for Grievant to comply with the order.

## **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 is a Group II offense.<sup>2</sup> Grievant failed to follow his supervisor's instruction to hand out IDs. The Agency has met its burden of proof to show that Grievant should receive a Group II Written Notice. A suspension of up to ten workdays may accompany a Group II Written Notice. Given that Grievant has an active Group I Written Notice, a five workday suspension is supported by the evidence.

Grievant argues he should not receive a Group II Written Notice because he did not intend to disobey the Lieutenant's order.<sup>3</sup> Grievant has established that he and the Lieutenant and other supervisors joke with each other. What Grievant has not shown are instances where the Lieutenant gave Grievant an order but the order was not intended to be followed because the Lieutenant was actually joking. Without such evidence, the Hearing Officer concludes that when Grievant refused to comply with the Lieutenant's order, Grievant assumed the risk that the Lieutenant may not have been joking. When the Lieutenant instructed Grievant to hand out IDs for a second time, Grievant had the opportunity to verify whether or not the Lieutenant was joking.

## **DECISION**

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<sup>2</sup> DOCPM § 5-10.16(B)(1).

<sup>3</sup> Grievant argues that since he did not volunteer to hand out IDs he was not obligated to do so. The evidence showed that although the practice of handing out IDs was usually voluntary, if no one volunteered then a Lieutenant or Captain selected someone to hand out IDs. Even if the Hearing Officer were to conclude that the Agency's practice always was to wait for a volunteer, the Lieutenant had the authority to override that practice and designate Grievant as the one who should hand out IDs.

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>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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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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.

