

Issue: Group II Written Notice (Failure to follow supervisor's instructions); Hearing  
Date: 06/05/03; Decision Issued: 06/06/03; Agency: DOC; AHO: Carl Wilson  
Schmidt, Esq.; Case No. 5731



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5731**

Hearing Date: June 5, 2003  
Decision Issued: June 6, 2003

**PROCEDURAL HISTORY**

On December 19, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

*FAILURE TO FOLLOW SUPERVISOR'S INSTRUCTIONS: You were told by [Lieutenant] to fall in for a second muster. You failed to do so.*

On January 14, 2003, 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 May 15, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Two witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow 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 Officer Senior. He is responsible for providing security at a correctional facility. No evidence of prior disciplinary action against Grievant was introduced.

Security staff are expected to be ready for formation at 5:45 a.m. when their shifts begin. Employees arriving late must wait until the first formation is finished and then fall in for a second formation. In January 2002, the Chief of Security began requiring late employees to attend a second formation so that they can be briefed before beginning their shifts. Sometimes a second formation is not held if only one or two employees are late. Those employees are briefed individually.

On November 13, 2002, Grievant arrived at work approximately two minutes late. He was one of approximately eight other employees arriving late. He and the other employees were instructed to wait until the employees who were on time completed muster. After that, the Lieutenant instructed the late employees to fall in for muster. Grievant was standing next to the wall in the briefing room and did not line up as did the other employees. The Lieutenant noticed Grievant was not in place and specifically told him to fall in for muster. Grievant responded that he could hear the Lieutenant from where he was standing and would not fall into formation. The Captain observed Grievant's behavior and ordered Grievant to go to the watch commander's office.

## **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’s supervisor instructed Grievant to fall into a second formation. Grievant understood the instruction but refused to comply even though the other corrections officers complied with the instruction. Security staff in corrections facilities operate as quasi-military organizations. Employees wear uniforms, hold rank, and are expected to follow orders of employees holding superior rank. The Agency has established that Grievant failed to follow a supervisor’s instruction thereby justifying issuance of a Group II Written Notice.

Grievant admits he made a mistake but argues he was already punished by the Captain and Lieutenant who both counseled him regarding his behavior. He heeded their counseling and has refrained from repeating the behavior he showed on November 13, 2002. Nothing in the Standards of Conducts prohibits an Agency from both counseling an employee and issuing a written notice at the same time.

Grievant argues that a momentary lapse in judgment by an otherwise good employee should not justify issuance of a Group II Written Notice. This argument fails. Even good employees make mistakes and when they do so, disciplinary action is appropriate.

Grievant argues there are a sufficient number of errors in the facts underlying the Agency’s disciplinary action that the written notice should be removed. Although there may have been some errors in the Agency’s facts, the most important fact was not in error, namely Grievant heard an instruction from his supervisor and refused to follow that instruction.

Grievant contends the Lieutenant decided to refer the matter for disciplinary action only after a management change allowed him to bypass the Captain as part of his referral. This argument fails because the Lieutenant made his disciplinary referral on November 13, 2002 before the management change occurred. Moreover, the Captain testified that he told the Lieutenant that the decision whether to refer the matter for disciplinary action was up to the Lieutenant. Disciplinary action was taken a little more than a month after the date of the office. The Agency’s delay was not unreasonable.

## **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>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.

