Issue: Group II Written Notice (excessive absenteeism); Hearing Date: 07/09/03; Decision Issued: 07/14/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5748

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5748

Hearing Date: July 9, 2003
Decision Issued: July 14, 2003

PROCEDURAL ISSUE

Due to availability of participants, the hearing could not be docketed for hearing until the 30th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Warden
Advocate for Agency
Two witnesses for Agency

[1] § 5.1 of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual,* effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for excessive absenteeism.[2] Following failure to resolve the grievance during the resolution process, the agency head qualified the grievance for a hearing.[3] The Department of Corrections (hereinafter referred to as "agency") has employed the grievant for eight years; he is a corrections officer senior.

The Commonwealth's Department of Human Resource Management (DHRM) has not promulgated a policy on the topic of attendance. The DHRM Standards of Conduct policy addresses attendance in a general fashion, emphasizing the need to arrange planned absences in advance with supervisors and report unexpected absences as promptly as possible.[4] It is left to each state agency to formulate an attendance policy that is appropriate to the needs and requirements of that agency.

The facility at which grievant is employed has published a procedure that addresses hours of work, and sick and annual leave, which states, in pertinent part:

> Designated personnel who must be absent because of illness, shall personally notify the Shift Commander or his/her supervisor on duty at least two (2) hours in advance of the beginning of their shift.
>
> Employees may use up to three work days of unverified sick leave during a performance year. All sick time lost in excess of the above which is charged to sick leave balances or annual leave balances must be verified by a doctor's "original" certificate.[5]

The policy also provides for a progressive disciplinary process for excessive tardiness. For the fourth occurrence of tardiness, a Group I Written Notice is specified. Tardiness in excess of four occurrences is treated under the Standards of Conduct.[6]

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[2] Exhibit 13. Written Notice, issued November 4, 2002.
[3] Exhibit 16. Grievance Form A, filed December 4, 2002.
[4] Exhibit 14. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[5] Exhibit 2. Section 207-7.3, Institutional Operating Procedure (IOP) 207, *Hours of Work, Sick and Annual Leave*, May 1, 2000.
[6] Exhibit 2. Section 207-7.7, *Ibid*.

Grievant has a long-tem tardiness problem. Following counseling in 1999 and 2000, grievant received a Group I Written Notice for excessive tardiness in April 2000.[7] Grievant was notified on his 2001 performance evaluation that he had a tardiness problem that required correction.[8] He was counseled in March 2002 regarding tardiness.[9] Grievant's tardiness was noted as an area needing improvement on an interim evaluation form in April 2002.[10] He was counseled again for tardiness in May 2002.[11]

During the performance year from November 2001 through October 2002, grievant was tardy on six occasions and, absent due to personal or family illness on 14 occasions (totaling 22 days missed work).[12] On several occasions, grievant did not call to report his absence until after the beginning of his shift. Grievant was working the day shift from 6:00 a.m. to 6:00 p.m. Grievant was 2.4 hours late to work on October 25, 2002 because he overslept. He called in sick on October 26, 2002 at 8:25 a.m. Following this tardiness and absence, it was concluded that a Group II Written Notice should be given to grievant because previous discipline and counseling had not achieved the desired improvement.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between

[7] Exhibit 12. Written Notice, issued April 25, 2000.
[8] Exhibit 9. Grievant's Performance Evaluation, signed October 23, 2001.
[9] Exhibit 4. Record of Corrective Counseling, March 1, 2002.
[10] Exhibit 3. Interim Evaluation Form, signed April 13, 2002.
[11] Exhibit 5. Record of Corrective Counseling, signed May 7, 2002. *See also* Exhibit 7, Supervisor's Review Sheet, May 16, 2002.
[12] Exhibit 1. Grievant's Attendance Record, November 1, 2001 – October 31, 2002.

state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe; one example of a Group I offense is unsatisfactory attendance.[14] Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses should warrant removal from employment. The offenses listed in the Unacceptable Standards of Conduct are not all-inclusive but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of the department head, undermines the effectiveness of the departmental activities, may be considered unacceptable and treated in a manner consistent with the provisions of the Standards of Conduct policy.[15]

The agency has demonstrated, by a preponderance of evidence, that grievant has compiled a long-term record of tardiness and absenteeism, which exceeds that of other corrections officers. Grievant has been disciplined once and counseled repeatedly about the need to improve his attendance. Accordingly, the agency has shown that discipline is warranted.

Grievant notes that, after the allowable three unverified illnesses, the rest of his absences due to illness were verified as required by IOP 207. While the verifications complied with procedure, the fact remains that grievant was absent from work on an excessive number of occasions. As discussed during the hearing, one of the agency's paramount concerns is the proper staffing of corrections facilities in order to assure public safety. When a corrections officer is absent, another corrections officer must be pulled from his or her duties to replace the grievant. On some occasions, a corrections officer must be drafted (held over from a prior shift) and work a double shift to cover for grievant's

[13] § 5.8 Grievance *Procedure Manual*, Effective July 1, 2001.
[14] Exhibit 14. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[15] Exhibit 14, Section V.A, DHRM Policy 1.60, Standards of Conduct, September 16, 1993.

absence. Each such absence creates a hardship for another corrections officer. While a small number of absences may be expected of each employee, excessive absenteeism creates an unfair burden on coworkers. Further, on several absences, grievant failed to notify the shift commander at least two hours prior to the beginning of his shift. This prevents the shift commander from having adequate time to arrange for a replacement to fill grievant's post and is unnecessarily disruptive. The fact that grievant's absences were verified does not reduce the additional burden those absences placed on coworkers and the shift commander. Therefore, verification of illnesses does not constitute a mitigating circumstance.

In mitigation, grievant stated that he had been employed in two different part-time jobs during 2002. This additional work often contributed to exhaustion, and consequently to oversleeping and perhaps some of his illness. While grievant's secondary employment may explain some of his attendance/tardiness problem, it does not excuse it. Grievant's primary job and responsibility is to be ready and able to work as a corrections officer. This requires him to appear for work on time, and on a regular basis. Grievant notes that he is no longer working at either of the part-time jobs and should therefore be able to improve his attendance record.

Grievant objects to being given a Group II Written Notice because the Standards of Conduct lists unsatisfactory attendance as an example of a Group I Written Notice. The agency felt that a Group II Written Notice was necessary because past disciplinary action and subsequent counseling did not correct grievant's absenteeism and tardiness problems. The Standards of Conduct are written such that the least severe offenses (such as unsatisfactory attendance) merit only a Group I Written Notice. However, the Standards incorporate a provision for the accumulation of offenses so that four Group I Written Notices are considered equivalent to a Group III offense (the most severe level of offense).[16] The consistent practice of this agency (as well as other state agencies) has been to issue multiple Group I Written Notices when an employee has a continuing absence/tardiness problem. While the agency's concern about grievant's problem is understandable, it has not been demonstrated that the offense in this case fits within the definition of a Group II offense.

The agency correctly notes that it could have issued a Written Notice much earlier than it did. While this is certainly correct, the agency chose to forego issuing discipline earlier for reasons known only to the agency. However, by failing to issue discipline at the time it was appropriate, the agency lulled grievant into a false sense of security regarding what constitutes acceptable attendance. The delayed issuance of justified discipline does not now constitute justification for an escalation of discipline to the next severity level. To paraphrase an old folk saying, "Discipline delayed is worse than no discipline."

[16] Exhibit 14. Section VII.D, *Ibid.*

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued to the grievant on November 4, 2002 for unsatisfactory attendance is hereby REDUCED TO A Group I Written Notice. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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.[17] You must file a notice of appeal with the clerk of the circuit court in the

[17] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002). *See also* Virginia Department of Agriculture and Consumer Services v. Tatum, 2003 Va. App LEXIS 356, which holds that Va. Code § 2.2-3004(B) grants a hearing officer the express power to decide de novo whether to mitigate a disciplinary action and to order reinstatement.

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[18]

[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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David J. Latham, Esq.
Hearing Officer

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