

Issue: Group II Written Notice with termination (failure to follow supervisor's instructions, perform assigned work or otherwise comply with established written policy);  
Hearing Date: 07/11/03; Decision Issued: 07/17/03; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 5755



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5755**

Hearing Date: July 11, 2003  
Decision Issued: July 17, 2003

**PROCEDURAL HISTORY**

On March 11, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

*On March 3, 2003 you were found to possess personal reading material and a cell phone while in Tower 4. This is a violation of Specific Post Duty #6. This constitutes "Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established policy."*

On March 17, 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 June 16, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 11, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee

Agency Advocate  
Six witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to follow established written policy.

## **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:<sup>1</sup>

The Department of Corrections employed Grievant as a Corrections Officer until his removal on March 11, 2003. Grievant's work performance was satisfactory throughout his employment. Grievant received a Group II Written Notice on May 31, 2002 which was reversed by the Circuit Court on May 30, 2003.<sup>2</sup>

The Institution has four towers positioned outside of the fences securing the Institution. In order to enter tower number four, one must open a locked door at the bottom of the tower. The key to the door is kept by the Corrections Officer working at the top of the tower. An intercom is located next to the entrance door. When the intercom is activated, it sounds at the top of the tower so that the Corrections Officer will know that someone is at the door below. The Corrections Officer then lowers the key to the person at the bottom of the tower. Upon entering the tower, one must walk 66 steps to reach the top of the tower. The tower faces one of the corners of the institution and provides a view of the institution's yard and buildings, including a building housing "death row" inmates. To the right, one can see tower number three and the paved access road between towers three and four. The Corrections Officer working at the top

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<sup>1</sup> The parties stipulated that in order to avoid unnecessary duplication testimony that the evidence presented in the case number 5754 would also serve as the evidence for case number 5755.

<sup>2</sup> Agency Exhibit 9 and Grievant Exhibit 3.

of the tower cannot see behind the tower or someone standing at the door at the bottom of the tower unless he or she walks onto a catwalk surrounding the tower.

On March 3, 2003, Grievant was working in tower number four. The Major and Maintenance Supervisor were conducting a check of the towers and the Fence Detection System. They drove their vehicle to tower number three and went inside the tower. Upon completing their inspection of tower three, they drove their vehicle towards tower number four. Grievant observed the vehicle leaving tower number three but believed that the vehicle would be heading to the administration building and bypass tower four. He believed this because he had not heard anyone advise that an inspection of tower four would take place. He began using the toilet located at the top of the tower. When the Major and the Maintenance Supervisor arrived at the base of the tower they waited for the Corrections Officer to lower the key. After waiting for approximately a minute, the Major sounded the vehicle's horn several times. Again, there was no response. The Maintenance Supervisor used his radio to call the tower three times. Grievant used his radio to broadcast that he was busy, but the Major and Maintenance Supervisor did not hear Grievant's initial call. Shortly thereafter, Grievant lowered the key and to the Major and the Maintenance Supervisor who then climbed the tower. The Major and the Maintenance Supervisor had to wait approximately five to seven minutes before Grievant lowered the key.

Once the Major reached the top of the tower, he noticed a bag belonging to Grievant. Inside the bag was: (1) a Radio Shack brand cellphone,<sup>3</sup> (2) How to purchase a Home Magazines, (3) yellow envelopes titled Tax Preparations, and (4) Common Health screening booklet. These items were for personal use.

### **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).

Post Order #17 sets forth the General Duties for a Corrections Officer working the Post. One of these General Duties includes:

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<sup>3</sup> The Lieutenant confirmed the Major's testimony when the Lieutenant testified that Grievant admitted to her that he had a cell phone while working in the tower.

- Do not bring anything into the institution or take anything out of the institution that is not authorized to enter or exit.

The Post Order also sets forth Specific Post Duties. One of these duties includes:

- Personal items are not permitted in the towers, i.e. PERSONAL RADIOS, BOOKS, ALARM CLOCKS, NEWSPAPERS, etc.

Grievant's behavior was contrary to Post Order #17 because he had personal items with him. Accordingly, the Agency has met its burden of proof to uphold issuance of a Group II Written Notice.

Grievant's removal was based upon the accumulation of two Group II Written Notices. Because the Hearing Officer has rescinded the Group II Written Notice issued in case number 5754, there no longer exist a basis to support Grievant's removal. Grievant must be reinstated with full back pay and benefits. The Hearing Officer lacks the authority to order transfer of an employee and, thus, the Hearing Officer makes no order regarding transfer.

Grievant contends that the Agency has retaliated against him because he prosecuted and appealed prior disciplinary action. Based on the evidence presented, the Hearing Officer finds that the Agency did not retaliated against Grievant.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary is **upheld**. Grievant's removal is **rescinded**. The Agency is ordered to reinstate Grievant to his former position or, if occupied, to an objectively similar position. The Agency is ordered to provide Grievant with full back pay less any interim earnings with restoration of full benefits and seniority.

## 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.