

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date:  
08/27/03; Decision Issued: 08/29/03; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq;  
Case No. 5782



# **COMMONWEALTH of VIRGINIA**

## ***Department of Employment Dispute Resolution***

### **DIVISION OF HEARINGS**

### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 5782**

Hearing Date: August 27, 2003  
Decision Issued: August 29, 2003

### **PROCEDURAL HISTORY**

On April 11, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

*Unsatisfactory Job Performance. On 3/9/03 and again on 4/1/03<sup>1</sup> your unit logs were checked by supervision and it was found that the documentation of the required 15 minute checks were seriously behind. You have been counseled a number of times concerning your job performance deficiencies in this area.*

On May 9, 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 August 6, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 27, 2003, a hearing was held at the Agency's regional office.

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<sup>1</sup> The Agency did not present any documentation supporting its contention that Grievant failed to timely complete 15 minute checks on April 1, 2003. The absence of such documentation is not material and does not affect the outcome of this appeal.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Five witnesses

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work 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 Juvenile Justice employs Grievant as a Juvenile Correctional Officer. He works a 12 hour night shift<sup>2</sup> including when wards are sleeping inside their rooms. No evidence of prior disciplinary action was introduced.

Grievant often works in a security post entitled "Pod Officer." Job duties of a Pod Officer are summarized in Post Order 15 as follows:

The Pod Officer carries out the day-to-day supervision of the wards assigned to the Pod, implements the Leader Program, and responds to and documents any problems that arise. He/she is responsible for recognizing and reporting problems with wards, the physical plant, or any other contingency; maintains constant eyesight supervision of all the wards assigned to his/her care; maintains a safe and secure environment for wards and others and provides treatment services via consistent implementation of the approved program and treatment overlay.

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<sup>2</sup> Grievant's shift begins at approximately 6:50 p.m. and ends at approximately 7:15 a.m.

Approximately 24 wards<sup>3</sup> live in the pod Grievant supervises. A sheet is kept for each ward and placed on the front of the door to the ward's quarters. Grievant is required to look through the door window and observe the ward.<sup>4</sup> Upon observing the ward, Grievant must write on the ward's sheet the date, time of the check, abbreviation reflecting what Grievant observed<sup>5</sup>, and then sign his name. Grievant must complete his procedure every 15 minutes for each of the wards under his supervision.

On October 21, 1999, Grievant was approximately 2 to 3 hours behind in conducting 15 minute checks. He received a written counseling informing him that he needed to be more timely. He was also untimely on June 3, 2002 and received a written counseling.

On March 9, 2003, Grievant was approximately 3 hours untimely in completing the 15 minute check sheets for the wards he supervised.

### **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." DHRM § 1.60(V)(B).<sup>6</sup> 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties.

Grievant's Post Order states, "Informal counts shall be made every 15 minutes by the Pod Officer during all shifts and shall be documented every 30 minutes in log books." On March 9, 2003, Grievant failed to complete counts as required by the post order. Because he failed to complete counts as required by his post orders, his

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<sup>3</sup> Grievant supervises sexual offender wards. These wards require greater supervision than do most wards.

<sup>4</sup> From approximately 9:30 p.m. each night, the wards are locked in their rooms and may not come out without permission.

<sup>5</sup> For example, if a ward appears to be sleeping, Grievant should write "AA" on the ward's sheet.

<sup>6</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

behavior was inadequate or unsatisfactory work performance thereby justifying issuance of a Group I Written Notice.

Grievant contends staffing shortages prevented him from completing his 15 minute checks on a timely basis. Several witnesses testified that staffing shortages may cause them to be late in completing 15 minute checks. None of the witnesses, however, testified that being three hours late would be acceptable. Being 45 minutes late was the most any witness other than Grievant had experienced. All of the witnesses other than Grievant indicated that being three hours late would be unexpected and unacceptable. The Agency has established that despite staffing shortages, Grievant should have been more timely in completing his 15 minute checks.

Grievant argues that mitigating circumstances exist requiring a reduction of the disciplinary action because he had experienced the deaths of close family members and marital difficulties. These unfortunate events occurred in December 2002 or several months earlier. Since at least 1999, Grievant has had some difficulty completing his 15 minute checks on a timely basis. Although Grievant was understandably affected by difficult events occurring in his life, the Hearing Officer does not believe those events were the primary or a significant cause of his tardiness; thus, no mitigating circumstances exist.

## **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.<sup>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.