

Issue: Group II Written Notice (failure to follow supervisor's instructions);
Hearing Date: 04/14/03; Decision Issued: 04/16/03; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 5684



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5684

Hearing Date: April 14, 2003
Decision Issued: April 16, 2003

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks, an award of damages in the amount of \$50,000. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.¹ However, hearing officers do not have authority to award monetary damages.²

APPEARANCES

Grievant
Two witnesses for Grievant
Warden
Representative for Agency

¹ § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001. .

² § 5.9(b)1 *Ibid.*

Three witnesses for Agency

ISSUES

Did grievant's conduct 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 appeal from a Group II Written Notice issued for failure to follow a supervisor's instructions.³ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a correctional officer for five years. The grievant has one other active disciplinary action – a Group II Written Notice for failure to follow a supervisor's instructions.⁵ A hearing officer affirmed that disciplinary action following a hearing; grievant did not appeal the decision and it became final on September 28, 2002.⁶

When hired, grievant signed an agreement that states, in pertinent part, "Corrections Officers must be willing to work any shift and any post; and must be willing to work overtime, weekends and holidays."⁷ When an incoming shift commander becomes aware that he will be short-staffed because of absences or tardy arrivals, he notifies the on-duty shift commander that a certain number of on-duty corrections officers will have to be "drafted." A draft occurs when it is necessary to order an employee to work beyond the end of his regularly scheduled shift.⁸ Draftees fill otherwise vacant posts until incoming officers arrive to replace them. During the fall of 2002, the facility was shortstaffed and it was very common that several officers from each shift would be drafted to stay beyond the end of their shift. Each shift commander maintains a list of his corrections officers in order of date they were last drafted. Those who have gone longest without being drafted rise to the top of the list and become the next to be drafted.

Grievant is assigned to the midnight shift with hours from 9:45 p.m. to 6:15 a.m. Muster of incoming officers for this shift begins at 9:45 p.m. During the fall of 2002, grievant's shift commander routinely told all officers at each muster that,

³ Exhibit 6. Written Notice, issued November 6, 2002.

⁴ Exhibit 9. Grievance Form A, filed December 6, 2002.

⁵ Exhibit 7. Written Notice, issued March 14, 2002.

⁶ EDR *Decision of Hearing Officer* Case No. 5511, August 29, 2002.

⁷ Exhibit 4. *Conditions of Employment*, Item 2, signed November 10, 1998.

⁸ Exhibit 1. Institutional Operating Procedure (IOP) Number 206, *Overtime/Draft Procedures*, December 15, 1998.

if anyone could not stay beyond the end of their shift, they should notify him during or immediately following muster. On the evening of October 23, 2002, grievant's shift commander advised him during muster that he was sixth on the draft list and that it was likely he would be drafted to stay over at the end of the shift. Grievant did not tell the shift commander at that time that he had any problem that would preclude his being drafted.

Oncoming shift corrections officers are required to notify their own shift commanders at least two hours before their shift if they must be absent due to illness or unanticipated reasons.⁹ That shift commander then notifies the on-duty shift commander how many corrections officers will have be drafted to fill vacancies in the oncoming shift. At about 4:00 a.m. on October 24, 2002, grievant called his residence and his fiancée purportedly told him that the person who takes care of his son could not do so because she had to go to a physician's appointment. Grievant attempted to contact the shift commander but was unable to speak with him at that time. About 5:30 a.m., the shift commander announced over the radio that grievant (and several others) had been drafted to stay beyond the end of the shift. When grievant did not respond to the radio call, the shift commander called grievant on the telephone. Grievant told the shift commander that he could not stay because he had to leave at the end of his shift to pick up his seven-year-old son. The shift commander told grievant he should have told the commander during muster. Grievant said he had to leave. The commander told him to leave if he couldn't stay but that he would have to write grievant up. Grievant left and the shift commander wrote a disciplinary referral to the Chief of Security.¹⁰

Agency policy provides that notice of an offense and a reasonable opportunity to respond shall be given to an employee only if the proposed disciplinary action will involve demotion, transfer, suspension or removal from employment.¹¹ It is the unwritten practice of the agency to provide employees up to 48 hours notice prior to issuing disciplinary action. Grievant received notice of the proposed disciplinary action 28 hours prior to actual issuance of the discipline.

Grievant does not have a reputation for attempting to avoid drafts and, in fact, has volunteered for drafts on several occasions.

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

⁹ Exhibit 4. *Conditions of Employment*, Item 17.

¹⁰ Exhibit 3. Disciplinary Referral, October 25, 2002.

¹¹ Exhibit 8. Section 5-10.14, Procedure No. 5-10, *Standards of Conduct*, June 15, 2002.

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 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.¹²

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 Personnel and Training¹³ 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁴ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC

¹² § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

¹³ Now known as the Department of Human Resource Management (DHRM).

¹⁴ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Standards of Conduct addresses Group II offenses; one example is failure to follow a supervisor's instructions.¹⁵

The agency has demonstrated, by a preponderance of evidence, that grievant was instructed by a supervisor to work overtime during the next shift on October 24, 2002, and that he failed to comply with this instruction. The burden of persuasion now shifts to grievant to demonstrate whether there were any circumstances that might mitigate his offense.

Grievant testified that he had to leave work at the end of his shift because his son had diarrhea and his fiancée had to go to work. There is no evidence to corroborate grievant's testimony on this point. First, grievant did not tell the shift commander that his son was ill. The shift commander acknowledges that grievant said something about having to pick his son up but grievant did not tell him that his son was ill. Second, grievant did not mention this in his detailed, written attachment to the grievance form. Third, grievant did not advise anyone in the disciplinary hearing about the alleged illness of his son. Fourth, grievant did not mention this to any of the three step respondents during the grievance resolution process. Fifth, grievant has not submitted any evidence to demonstrate that his son was sick on the morning of October 24, 2002. He could have, but did not, submit either a physician's note, or at least an affidavit from his fiancée to corroborate his assertion. For these reasons, grievant's story is less than credible.

Further, grievant had told the assistant warden during the disciplinary hearing, that he had to leave in order to put his son on the school bus at 8:00 a.m. because his fiancée left home for her job at 7:30 a.m. He had also said that a woman who cares for his son was not available that morning because she had a physician's appointment. This version of events cannot be reconciled with the story in the preceding paragraph. If grievant's son had diarrhea, he would certainly not be going to school. Thus, grievant's two stories are in conflict with each other. Moreover, if the woman who cares for his son had a prescheduled physician's appointment on October 24th, grievant would have known about that prior to coming to work on the night of October 23rd. If he had known about the appointment, grievant could have told his shift commander about it during muster. Since he did not bring this up during muster, it appears more likely than not that this excuse also lacks credibility.

Grievant contends that the shift commander told him to leave, and then told him on the way out that he was going to "write him up." However, grievant had made it clear to the shift commander that he was going to leave because his son was more important to him. Once the shift commander realized that grievant intended to leave regardless of the instruction given him, he told grievant to leave if he had to, but that he intended to write him up. At that point, grievant could have decided to stay but he instead left the facility.

¹⁵ Exhibit 8. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

Grievant expressed concern because he felt that he had not received due process leading up to the issuance of discipline. However, the agency's policy does not require notice of contemplated discipline when, as in this case, the agency anticipated issuing only a written notice without imposing demotion, transfer, suspension or removal from employment. Nonetheless, grievant was given at least 28 hours notice of his disciplinary hearing. During that hearing, grievant had ample opportunity to explain his position.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on November 6, 2002 for failure to follow a supervisor's instructions is UPHeld. The disciplinary action shall remain active for the period specified in Section 5-10.19.A 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.¹⁶ 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.¹⁷

[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]

David J. Latham, Esq.
Hearing Officer

¹⁶ 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).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.