

Issue: Group II Written Notice with 5-day suspension (failure to report to work without proper notice to supervisor); Hearing Date: 05/05/03; Decision Issued: 05/06/04; Agency: DOC; AHO: David J. Latham; Case No. 5700



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5700

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

PROCEDURAL ISSUE

Grievant participated in a prehearing conference on April 17, 2003 and agreed to the hearing date, time and location. A notice of hearing confirming this information was mailed to grievant on the same date. Prior to the hearing grievant submitted one document as evidence, and advised that an attorney would represent him at the hearing. On the day of the hearing, grievant called his shift commander and advised that he would not be coming to work. Neither the grievant nor his attorney called the hearing officer to request a postponement of the hearing. The hearing was conducted with the party and witnesses who did appear.

APPEARANCES

Warden  
Assistant Warden  
Two 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 report to work without proper notice to supervisor.<sup>1</sup> As part of the disciplinary action, grievant was suspended for five days. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a correctional officer senior for three years. Grievant has three active prior disciplinary actions including one Group I Written Notice and two Group II Written Notices.

When he was hired, grievant received and agreed to written conditions of employment, one of which requires that, "Corrections Officers must be willing to work any shift and any post; and must be willing to work overtime, weekends and holidays."<sup>3</sup> The facility's procedure on overtime provides, in pertinent part:

In those instances wherein sufficient staff is unavailable and there is [sic] not enough volunteers for overtime, the supervisor may draft (order) employees to work beyond their normal schedule.<sup>4</sup>

The Post Order for grievant's position requires officers to report any illness, injury, or condition that would prevent him from reporting for duty at least two (2) hours prior to the start of his assigned shift.<sup>5</sup> In such a case, grievant is required to call either the Watch Commander or the Operation Supervisor to report the problem.

Grievant was scheduled to work the 6:00 a.m. to 2:00 p.m. shift on both December 2 & 3, 2002. After working his regularly scheduled shift on December 2, 2002, grievant was "drafted" to work the 2:00 p.m. to 10:00 p.m. shift in order to fill a vacancy. On December 3, 2002, grievant failed to report to work as

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<sup>1</sup> Exhibit 1. Written Notice, issued December 16, 2002.

<sup>2</sup> Exhibit 2. Grievance Form A, filed January 14, 2003.

<sup>3</sup> Exhibit 6. Conditions of Employment, signed May 30, 2000.

<sup>4</sup> Exhibit 5. Section 206-7.1.B, Institutional Operating Procedure Number 206, *Overtime/Draft Procedure*, December 15, 1998.

<sup>5</sup> Exhibit 8. Post Order #57A, p.2, item 4.

scheduled for his regular 6:00 a.m. to 2:00 p.m. shift. Grievant also failed to call the shift commander or anyone else prior to the start of his shift to advise that he would not be reporting to work.<sup>6</sup> At about 10:30 a.m., grievant called the Chief of Security stating that he had overslept and would not be coming to work.

Grievant received written notice of his offense, sufficient explanation of the evidence, and a reasonable time within which to prepare a response. Grievant signed a receipt of delivery for this notice on December 14, 2002 – more than 50 hours notice prior to issuance of discipline.<sup>7</sup>

### 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 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.<sup>8</sup>

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

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<sup>6</sup> Exhibit 3. Disciplinary Referral, December 4, 2002

<sup>7</sup> Exhibit 3. Memorandum from Chief of Security to grievant, December 13, 2002.

<sup>8</sup> § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

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 Standards of Conduct 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.<sup>9</sup> 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 Standards of Conduct addresses Group II offenses; one example is failure to report to work without proper notice to a supervisor.<sup>10</sup> Grievant received a copy of the Standards of Conduct.<sup>11</sup>

The agency has demonstrated, by a preponderance of evidence, that grievant failed to report for his regularly scheduled shift on December 3, 2002, and that he also failed to provide proper notice to a supervisor. Therefore, grievant committed an offense that is subject to a Group II disciplinary action. The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances for his misconduct. Grievant failed to appear for the hearing, or otherwise submit any mitigating evidence or testimony on his own behalf.

In his written grievance, grievant contends that he did not receive due process because he was neither counseled nor given a written warning prior to the issuance of discipline. The agency's Standards of Conduct policy provides that, prior to a disciplinary suspension, an employee shall be given: 1) oral or written notice of the offense, 2) an explanation of the agency's evidence; and 3) a reasonable opportunity to respond.<sup>12</sup> There is no requirement that an employee be counseled or given a written warning prior to issuance of discipline. Grievant did receive written notice of his offense, sufficient explanation of the evidence, and more than 50 hours notice in which to prepare a response. Therefore, it is concluded that grievant received the due process required by the agency's policy.

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<sup>9</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>10</sup> Exhibit 4. Section 5-10.16.B.4, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>11</sup> Exhibit 7. Receipt of Standards of Conduct, signed May 30, 2000.

<sup>12</sup> Exhibit 4. Section 5-10.14.A, Procedure Number 5-10, *Ibid*.

## DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on December 16, 2002 for failure to report to work without proper notice to a supervisor, and the five-day suspension are 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.<sup>13</sup> 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>14</sup>

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<sup>13</sup> 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).

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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