

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instructions); Hearing Date: 01/27/04; Decision Issued: 01/28/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 520



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 520

Hearing Date: January 27, 2004  
Decision Issued: January 28, 2004

APPEARANCES

Grievant  
Treatment Program Supervisor  
Assistant Warden  
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.<sup>1</sup> Grievant was suspended for five workdays as part of the disciplinary action. Following failure of the parties 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 corrections officer for five years. Grievant has three prior active Group II Written Notices – one for failure to report for work as scheduled, one for leaving the work site without permission during working hours, and one for failure to follow a supervisor's instructions.<sup>3</sup> He did not file grievances for any of the three disciplinary actions and they became final 30 days after issuance.

The work schedule for corrections officers at this facility is generally six days on, and three days off. Grievant was scheduled off for rest days on September 28, 29 & 30, 2003. However, September 30, 2003 was a "star day." Grievant had volunteered to work on the star day, which meant that he was required to report for work on that day. If the shift commander determined that staffing was sufficient without grievant, she could have given him the day off. However, grievant was not given the day off on September 30, 2003 because the facility was short staffed.

Grievant's regular work schedule during September was from 2:00 pm to 10:00 p.m. At some time between 11:00 a.m. and noon, grievant called the facility to advise the shift commander that he had apply for FEMA aid and would be late coming to work.<sup>4</sup> The shift commander told grievant that he would note that grievant would be two hours late and would pass the information on to grievant's shift commander. He also instructed grievant to call his own shift commander when she reported for work (she reported for work at 1:00 p.m.).

Grievant's wife had been attempting to obtain FEMA aid from the local Department of Social Services (DSS) for two days. On September 30, 2003, she said she was tired and wanted grievant to accompany her to DSS. She went to DSS at 5:30 a.m.; grievant joined her at about noon and stayed there until the end of the day. At about 6:30 p.m., grievant called his shift commander and told her he could not report for work because he was tired. The shift commander told grievant that he had to report for work because the shift was short staffed. When

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<sup>1</sup> Exhibit 1. Written Notice, issued October 23, 2003.

<sup>2</sup> Exhibit 7. Grievance Form A, filed November 7, 2003.

<sup>3</sup> Exhibit 4. Written Notices issued December 19, 2002, January 28, 2003, and April 24, 2003.

<sup>4</sup> On September 18, 2003, Hurricane Isabel caused widespread power outages throughout Virginia. Grievant and his family were without power for several days resulting in the loss of their perishable food. The Federal Emergency Management Agency (FEMA) provided financial assistance to affected people through a program administered by DSS.

grievant said he was not coming in, the shift commander told him that she would have to report him. Grievant told her to “Do what you have to do.” The shift commander documented the incident and referred the matter to her superior.<sup>5</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>6</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.

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<sup>5</sup> Exhibit 3. Disciplinary Referral form, September 30, 2003.

<sup>6</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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.<sup>7</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, which are defined identically to the DHRM Standards of Conduct.<sup>8</sup>

The agency has demonstrated by a preponderance of evidence that grievant failed to follow his supervisor's instructions by not reporting on a scheduled star day, and by not reporting after she directed him to do so. Grievant acknowledges that he did not report for work even though he was scheduled to work, and even though he was directed to report. Therefore, the burden of persuasion shifts to grievant to demonstrate any mitigating circumstances.

Grievant contends that he was unable to work on September 30, 2003 because he had an "emergency." Grievant went to DSS to file paperwork in connection with his claim for financial assistance as a result of Hurricane Isabel. However, grievant has not shown that he could not have done this on a different day, or that his wife could not have done this by herself. Grievant has not shown what date the economic assistance filing deadline was.<sup>9</sup> While his wife may have been frustrated with the lengthy wait at DSS, this does not absolve grievant of his obligation to work on scheduled work days. Thus, grievant has not shown that filing of an economic assistance claim at DSS constituted an emergency on September 30, 2003.

The agency has demonstrated an aggravating circumstance which affected its decision as to the appropriate level of discipline. Grievant's previous disciplinary actions demonstrate an on-going pattern of similar behavior. In November 2002, grievant failed either to call in or to report for work as scheduled. In January 2003, he left the work site without permission during work hours. In April 2003, grievant refused to report for work on a scheduled star day. Grievant received Group II Written Notices for each of these three incidents. He did not grieve any of the three disciplinary actions.

In the instant case, grievant was suspended for five work days as part of the disciplinary action. Grievant had previously received three Group II Written Notices during the past year. Accordingly, the agency concluded that a five-day suspension should be added to the disciplinary action to emphasize to grievant the seriousness of his offense. Based on the Standards of Conduct, the agency

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<sup>7</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

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

<sup>9</sup> News reports indicate that the filing deadline was December 4, 2003.

could have removed grievant from employment after his second or third Group II Notices. It could also have terminated grievant's employment after this fourth Group II Written Notice. By giving him only a five-day suspension, the agency has been exceptionally lenient. Therefore, the hearing officer can find no basis to disturb the agency's decision.

Grievant has also raised three potential agency grievance procedure noncompliance issues. First, grievant contends that the warden did not meet with him at the second resolution step of the grievance process. The warden indicated on the grievance form that he met with grievant on November 17, 2003; grievant denies that any such meeting took place. The agency did not rebut grievant's testimony. The agency's failure to conduct a second-step resolution meeting with grievant constitutes noncompliance with the grievance procedure.<sup>10</sup> However, the grievance procedure provides a remedy for such noncompliance, which grievant failed to take advantage of. Grievant could have followed the procedure outlined in the *Grievance Procedure Manual* to place the agency on notice of its noncompliance.<sup>11</sup> However, by failing to do this, grievant forfeited his right to challenge the noncompliance at this late juncture. In any case, now that grievant has received the full due process protection afforded by this grievance hearing, the agency's noncompliance is moot.

Second, grievant contends that the warden intimidated him by suggesting to him that he ought to look for another job. Since the agency did not rebut grievant's testimony on this point, it is presumed that the warden did make such a suggestion to grievant. Under the circumstances in this case, it is not surprising that the warden might make such a suggestion. Grievant could have been terminated from employment in January 2003 when he received his second Group II Written Notice, in April 2003 when he received a third Group II, or in October 2003 when he received the fourth Group II. That the grievant is still employed suggests that the agency is bending over backward to help him to correct his behavior before discharging him. Thus, the warden's suggestion appears more likely than not to have been appropriate advice rather than intimidation.

Finally, grievant contends that the agency has, in effect, retaliated against him by changing him from evening shift to day shift. On or about December 3, 2003, grievant was moved to the day shift (6:00 a.m. – 2:00 p.m.). The assistant warden and the Chief of Security had conferred in late November about grievant's continuing performance problems and decided that grievant required closer supervision. Therefore, they decided to move grievant to the day shift when more supervisory and management people are at work. Grievant notes that he received notice of the shift change on the same day he requested that his grievance be advanced to a hearing.

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<sup>10</sup> § 3.2 EDR *Grievance Procedure Manual*, *Ibid*.

<sup>11</sup> § 6.3 *Ibid*. Grievant could have notified the agency in writing of the noncompliance, thereby giving the agency five days in which to correct the noncompliance by holding the step meeting.

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.<sup>12</sup> To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant meets the first prong of this test because he engaged in the protected activity of filing a grievance. However, grievant has not shown that he suffered an adverse employment action. Most employees prefer day shift to evening or night shifts. Grievant has not alleged that the day shift is in any way adverse to him. Moreover, even if grievant were to allege an adverse effect from being placed on day shift, he has not shown that the change in shift was causally linked to his request for a hearing. The undisputed testimony established that the decision to move grievant to day shift occurred several days before grievant requested a hearing. Finally, the agency has offered a non-retaliatory reason for moving grievant to the day shift where it can better supervise and manage his performance. Therefore, grievant has not borne the burden of proof to demonstrate retaliation.

### DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on October 23, 2003 for failure to follow a supervisor's instructions 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

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<sup>12</sup> EDR *Grievance Procedure Manual*, p.24

explain why you believe the decision is inconsistent with that policy. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

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>

[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]

*S/David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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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.