

Issue: Group II Written Notice with suspension (failure to work required overtime);  
Hearing Date: 12/10/03; Decision Issued: 12/11/03; Agency: DJJ; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 455



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 455**

Hearing Date: December 10, 2003  
Decision Issued: December 11, 2003

**PROCEDURAL HISTORY**

On September 24, 2003, Grievant was issued a Group II Written Notice of disciplinary action with suspension from September 24, 2003 to October 2, 2003 for:

*Refusal to work overtime as required. On 9-18-03 [Grievant] refused to work mandatory overtime during an emergency situation. On 9-19-03 [Grievant] failed to call or report for his assigned shift.*

On October 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 November 20, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 10, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Agency Party Designee  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to work required overtime.

## **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 Juvenile Correctional Officer, Sr. The purpose of his position is:

To provide a safe, secure and healthy environment for youth, staff and visitors to the facility while ensuring that scheduled treatment, programs and educational needs of youth are met to enhance their ability to return to society as productive citizens.<sup>1</sup>

No evidence of prior disciplinary action against Grievant was introduced.

On September 18, 2003 a hurricane caused trees to fall, electricity lines to fall, and water to flood around the Facility where Grievant worked. The Facility's power was out and it was operating using generators. Grievant wished to leave at the end of his shift. Since the Facility operates 24 hours per day, Grievant was not permitted to leave his post until someone replaced him.<sup>2</sup> Because of the hurricane damage, the shift that would have replaced Grievant's shift could not come to the Facility. Towards the end of Grievant's shift, the Lieutenant notified all staff that they had to stay at the Facility because no one could enter or leave the Facility. Grievant stated, "I don't have lights at home. I need to go home." Shortly thereafter, Grievant went into an office to obtain his bag and gear. The Lieutenant asked Grievant where he was going. Grievant responded that he was going home. The Lieutenant informed Grievant that no one was

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<sup>1</sup> Agency Exhibit 11.

<sup>2</sup> Grievant's Post Order states, "No officer will be relieved until all wards have been accounted for. Only the Shift Commander or above can give the order for the off-going officer to be relieved." The Shift Commander did not give Grievant an order permitting him to be relieved of his post.

going home. Grievant responded that he was going home and he then departed the Facility. Grievant was unable to pass through the fallen trees and live electricity lines and flooded areas. He returned to the Facility and waited until the following morning to leave the Facility.

## 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>3</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).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>4</sup> “The normal disciplinary action for a Group II offense is issuance of a Written Notice only, or a Written Notice and up to ten workdays of suspension without pay.”<sup>5</sup> The Agency has presented sufficient evidence to support its disciplinary action.<sup>6</sup> When the oncoming shift was unable to reach the Facility, the Lieutenant notified Grievant and the other staff that they had to remain at the Facility.<sup>7</sup> Since the Facility operates 24 hours per day, it must be staffed at all times in order to supervise wards residing at the Facility. Grievant refused to work mandatory overtime as instructed by his supervisor thereby justifying issuance of a Group II Written Notice. Grievant’s suspension did not exceed ten workdays.

Grievant contends the Lieutenant told him he could leave once the count cleared. For this to be true, the Lieutenant would have had to testify untruthfully during the hearing. She plainly stated that she notified all staff that they had to stay at the Facility.

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>5</sup> DHRM § 1.60 (VII)(D)(2)(a).

<sup>6</sup> The Agency also argued that Grievant failed to call the Facility to notify his supervisor that he would not be coming to work as scheduled on September 19, 2003. Agency witnesses testified that outgoing telephone lines at the Facility were working on September 19<sup>th</sup>. Grievant testified that he tried to call the Facility several times but he did not receive an answer. Given the damage caused by the hurricane, it is possible that Grievant’s telephone line was unable to connect with the Facility. Sufficient evidence remains, however, to support the Agency’s disciplinary action regardless of whether Grievant attempted to call the Facility on September 19<sup>th</sup>.

<sup>7</sup> Grievant is an essential personnel who is “required to work if scheduled ....” See Standard Operating Procedure 104-4.1 and DJJ Procedure 05-015(V)(A)(1).

She asked Grievant where he was going and told him no one was supposed to leave the Facility. Grievant left anyway. In order to support Grievant's assertion that the Lieutenant said he could leave, it would be necessary to conclude that the Lieutenant identified Grievant as the one person among her staff permitted to leave and that she then relieved him of his post thereby desiring to change her supervisory duties to those of a correctional officer in a particular living area. No evidence was presented suggesting the Lieutenant knew that the hardship surrounding having Grievant remain at the Facility was any greater than the hardship of her other staff remaining at the Facility. No evidence was presented suggesting that the Lieutenant expressed concern for Grievant's hardship such that she would wish to permit him to leave. The evidence showed that the Lieutenant believed that no one would be able to leave the Facility and that belief turned out to be correct.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution

830 East Main St. STE 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. 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>8</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>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.