

Issue: Group III Written Notice with suspension (leaving security post without permission); Hearing Date: 12/23/03; Decision Issued: 12/24/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 472



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 472**

Hearing Date: December 23, 2003  
Decision Issued: December 24, 2003

**PROCEDURAL HISTORY**

On September 17, 2003, Grievant was issued a Group III Written Notice of disciplinary action with 24 hour suspension for:

*On or about August 20, 2003, you were instructed to limit your on the job contact with [Officer C] as required for professional communications. You failed to do so. On Friday September 19, 2003, you left your security post in Bldg. 1 without permission and went to the [Facility] parking lot to see [Officer C]. [Officer C], who was on her day off, was reportedly crying in the parking lot.*

On October 1, 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 December 3, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 23, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for leaving a security post without authorization.

## **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 Corrections employs Grievant as a Corrections Officer Senior at one of its Facilities. He is a well-respected and dedicated employee without prior disciplinary action.

On August 20, 2003, Grievant was working at the Facility when he received a telephone call from his wife who also worked at the Facility. He became upset and left. The Lieutenant observed Grievant become distressed during the telephone call but was distracted by other duties while Grievant left. After the Lieutenant realized Grievant had left, the Lieutenant walked outside the building and caught up with Grievant between Building 1 and the operations building. The Lieutenant asked Grievant what he thought he was doing. Grievant said he had to go talk to somebody. The Lieutenant told Grievant that he understood that Grievant and others were upset but that Grievant could not just walk off his post without permission. The Lieutenant reminded Grievant that another Lieutenant had addressed Officers leaving their posts without permission in a recent briefing.<sup>1</sup> The Lieutenant said Grievant was setting himself up for possible disciplinary action that could include termination. Grievant and the Lieutenant returned to Building 1 where they talked for a few minutes before Grievant resumed his duties.

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<sup>1</sup> During muster on August 16, 2003, the Watch Commander informed security staff, including Grievant that, "All officers must stay on assigned post unless removed by a [supervisor or] watch commander." Agency Exhibit 4.

The Assistant Warden instructed Grievant to limit his communication with Officer C to only matters pertaining to his work at the Facility. Officer C had worked on Grievant's shift but was moved to another shift. The Assistant Warden added that whatever contact they had away from the Facility was not her concern.

On September 12, 2003, Grievant was working as a floor officer in a housing unit. Only Grievant and another Officer were responsible for approximately 215 inmates. Officer C was outside of the Facility in the parking lot. She was not scheduled to work. She came to the Facility because she was upset. She called the control room and asked the control room officer to speak with Grievant. After speaking with Officer C, Grievant became concerned about Officer C. Grievant walked to the break room and "stuck his head in" to tell his supervisor, the Sergeant, that he "would be right back." The Sergeant was in the break room with another Sergeant. She did not notice Grievant attempt to communicate with her and she did not authorize him to leave his post. Before waiting for an acknowledgement that he could leave, Grievant walked to the control room and told the control booth officer to permit him to leave the building. Grievant also left the Facility compound and went to the Facility parking lot to speak with Officer C. Officer C was crying. Grievant spoke with her for a short period of time and began walking back to the Facility.

Someone reported to the Major that Grievant was in the parking lot speaking with Officer C. The Major called the Sergeant and asked if she knew where Grievant was. The Sergeant responded that Grievant was in the building. The Major said that was not correct and that Grievant was in the parking lot. The Sergeant responded that what the Major said could not be true and that Grievant was in the building. The Sergeant began looking for Grievant and realized he was not at his post. She had not authorized him to leave his post.

## **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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"[L]eaving a security post without permission during working hours" is a Group III offense.<sup>2</sup> Grievant's Post Orders state:

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<sup>2</sup> DOCPM § 5-10.17(B)(14).

Do not leave your Post until properly relieved. Remain on your Post until shift change Count has cleared unless your Supervisor states otherwise.<sup>3</sup>

Grievant left his security post during working hours and without obtaining the permission of his supervisor. He left the interior of the Facility without being permitted to do so by the Chief of Security. Accordingly, the Agency has presented sufficient facts to justify its issuance of a Group III Written Notice.

Grievant contends there were two supervisors in the break room who could have substituted for him in the event of an emergency. Whether other employees could have assumed Grievant's duties in the event of an emergency has no bearing on whether or not he abandoned his post.

Grievant argues he simply was trying to help someone in need and he could not ignore her. Grievant's intent to assist, however, does not outweigh the Agency's need for security.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III 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.
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

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<sup>3</sup> Agency Exhibit 3.

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>4</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>4</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.