Issue: Group I Written Notice (abuse of State time); Hearing Date: 10/15/03; Decision Issued: 10/16/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5800

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5800

Hearing Date: October 15, 2003
Decision Issued: October 16, 2003

PROCEDURAL ISSUE

Although the hearing was initially docketed within 30 days of appointment of the hearing officer, it was postponed due to the arrival of Hurricane Isabel on the hearing date. The next available date to reschedule the hearing was October 15, 2003. Therefore, the decision could not be issued until the 50th day following appointment.[1]

APPEARANCES

Grievant
Two witnesses for Grievant
Warden

[1] § 5.1 of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

Advocate for Agency
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 I Written Notice issued for abuse of state time.[2] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Department of Corrections (Hereinafter referred to as "agency") has employed grievant as a corrections officer for seven years.

The agency's written policy provides that disciplinary action may be taken when an employee takes leave without advance approval.[4]

On May 12, 2003, grievant worked his regularly scheduled shift from 3:40 p.m. to 12:10 a.m. For the shift beginning at midnight, two employees called in sick. Grievant and one other officer were "drafted" to fill the vacancies created by the sick employees.[5] When grievant left the facility at 8:10 a.m. on May 13, 2003, he went home, arriving there at about 8:45 a.m.[6] Grievant was scheduled to be back at the facility at 3:40 p.m. in order to work his regularly scheduled evening shift. He went to sleep at 10:00 a.m. but did not make any arrangements to be awakened in time to get to work.[7] Grievant lives with his parents and three siblings. He did not set an alarm clock, and did not ask any of the other five family members to awaken him. Instead, he told his family that he was too tired to work and told them not to awaken him if anyone called for him.

Facility policy requires that employees who are ill or otherwise unable to report to work must call the facility not later than two hours prior to their reporting

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[2] Exhibit 1. Written Notice, issued May 22, 2003.
[3] Exhibit 2. Grievance Form A, filed June 9, 2003.
[4] Exhibit 5. Departmental Operating Procedure 213, *Hours of Work or Leaves of Absences and Temporary Adjustments to Work Assignments*, July 31, 2001. Section 213-7.2.A.2 states, "Leave taken without advance approval may be considered unauthorized leave which may result in disciplinary action in accordance with the Employee Standards of Conduct."
[5] Exhibit 6. Institutional Operating Procedure 213.1, *Security Drafting*, May 16, 1999 establishes uniform written procedures for the recruitment of staff to work overtime to ensure essential staffing coverage. Section 213.1-6.0 provides that employees may be methodically selected at the discretion of the Watch Commander to work extra hours to staff critical positions.
[6] Exhibit 2. Attachment to Grievance Form A.
[7] Exhibit 2. *Ibid.*

time.[8] Grievant's reporting time was 3:40 p.m. Grievant awoke at 2:25 p.m. and called a lieutenant at the facility. He told the lieutenant that he was too tired to work and that he would not report to work for his scheduled 3:40 p.m. shift. The lieutenant instructed grievant to call back later and speak with his own watch commander when the watch commander arrived at the facility. Grievant then went back to sleep and never called the watch commander. At 4:44 p.m., a corrections officer, acting on the instructions of the evening shift watch commander, called grievant's residence. The person who answered the telephone advised that the grievant had left. The officer asked the person who answered to tell grievant to call the facility when he returned. At 5:45 p.m., the watch commander called grievant's residence and spoke with the grievant. When asked why he was not at work, grievant said he was very tired. The watch commander told grievant he had not received prior approval to be absent and that he would be "X'd" (docked pay) for the absence.

Each watch commander maintains a rotating draft list of all corrections officers on the shift. The daily duty roster lists post assignments for corrections officers and is posted in front of master control. When the list is not posted corrections officers can check their assignments by calling their lieutenant, the captain, or the master control office. The daily duty roster also lists the names of the top five officers on the draft list so that those employees who are likely to be drafted receive a day or two of advance notice. On May 11, 2003, grievant was listed as the third name on the draft list; on May 12, 2003, he was the second name on the draft list.[9]

The facility was short-staffed in May 2003 because of normal attrition and a hiring freeze that had been in effect from January through April 2003. Although recruiting and hiring had begun by early May, new officers had not yet completed the training process. Grievant and all corrections officers were well aware of the staffing shortage and the likelihood that they might be drafted once during each 28-day work cycle. Grievant understood the drafting policy and had been drafted on previous 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 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

[8] This requirement is designed to allow watch commanders ample time to draft employees needed to maintain the minimum staffing level for critical security posts.
[9] Exhibit 7. *Daily Duty Rosters*, May 11 & 12, 2003.

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.[10]

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 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.1 of the Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe offenses.[11] 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 5-10.15 of the DOC Standards of Conduct addresses Group I offenses; one example is abuse of state time including unauthorized time away from the work area.[12]

The agency has shown, by a preponderance of evidence, that grievant took leave on May 13, 2003 without having received advance approval. Moreover, grievant does not dispute the essential facts in this case. He acknowledges that he told a lieutenant that he was not going to report to work for his scheduled shift. He also admits that when he went to sleep at 10:00 a.m., he

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[10] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.
[11] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[12] Exhibit 9. Section 5-10.16.B.4, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

told family members not to awaken him and he did not set an alarm clock so that he could be awakened in time to go to work. Grievant's clear intent was to sleep rather than to report to work as scheduled.

Grievant contends that he was very tired from having just worked a double shift and that if he had returned to work at 3:40 p.m., he would not have been sufficiently alert to perform his duties in an effective/efficient manner. While grievant might have been more alert if he had been able to obtain his regular amount of sleep, he has not presented persuasive evidence that he could not have performed his job at a reasonably effective level. Had he promptly gone home and slept until it was time to return to work, grievant could have slept for 5½ to 6 hours. While this amount of time might not be enough for grievant on a regular basis, it is certainly ample on an occasional basis.

Agency policy permits drafting, provided not more than two consecutive shifts are worked in order to provide an adequate rest period.[13] The policy does not define "adequate rest period" but it is commonly interpreted to mean that an employee must have at least one shift off before returning to work for another shift. In most cases, factoring in commuting time, employees should be able to obtain about six hours of sleep before returning to work for their regularly scheduled shift. Since drafting for any one person typically occurred only once per month, six hours of sleep, although not ideal, is certainly adequate.

Grievant argued that another employee should have been drafted to work the midnight to 8:00 a.m. shift on May 13, 2003. However, the agency provided a satisfactory explanation for having adjusted the first person off the draft list. Moreover, grievant did not grieve this issue on his grievance form. He did not object to being drafted at the time he worked the shift, and he never raised this issue until after he was disciplined. The written grievance raised only the issue of grievant's disciplinary action.

One of grievant's witnesses testified that she had traded workdays with another officer. On one of those days, the other officer's name came to the top of the draft list. Grievant's witness was drafted to work because she had agreed to work for the other officer. Grievant proffered testimony that two other witnesses (who did not come to the hearing) had also experienced a similar situation. These two cases are not relevant to grievant's situation since his drafting did not involve switching workdays with another officer. Moreover, drafting was not the issue. The grievance herein involves only the disciplinary action grievant received for failing to report to work as scheduled.

Grievant cited the case of an officer who, as her name neared the top of the draft list, volunteered to work the draft at a time more convenient to her –

[13] Exhibit 6. *Ibid*. Section 213.1-7.1.8 states, "Except in emergency situations as determined by the Warden or Administrative Duty Officer, no more than two (2) consecutive shifts may be worked by an employee in order to provide an adequate rest period."

such as a break day. Grievant contends that this arrangement amounts to favored treatment for that officer. However, the Warden testified that any officer is permitted to do the same thing if they desire. Grievant had simply not been aware that this arrangement is available for any officer, one time during each 28-day cycle.

Grievant also alleges that some officers who have been drafted call in sick for their next scheduled work shift and that they are not disciplined. The agency notes that grievant did not call in sick but merely said he was tired and would not report for work. Moreover, employees who call in sick in such situations are generally required to provide a physician's certificate to support their illness.

Grievant complained that his pay was docked for the shift he did not work on May 13, 2003. Grievant was paid eight hours for having worked from midnight to 8:00 a.m. on May 13, 2003. He correctly notes that he was not paid for the evening shift from 4:00 p.m. to midnight on May 13, 2003. The agency is entitled to dock grievant's pay for that evening shift because grievant did not work, was not sick, and had not received prior approval to use leave to cover his absence.

Grievant suggested at the end of the hearing that the Warden's secretary might have unduly influenced one of his witnesses not to appear for the hearing. Grievant had sent a list of his witnesses to the hearing officer at least four workdays prior to the hearing. Although he did not request in writing that orders be issued, he called and made a verbal request. The Hearing Division faxed Orders to the Warden's office for delivery to the officers. The secretary left verbal or written messages for three of the witnesses. She spoke with the fourth witness and read the language of the Order to her. The Order notes that attendance may be excused if the witness speaks with the Hearing Officer and provides a satisfactory reason for inability to attend. The secretary's testimony that she did not attempt to influence any witnesses was clear, credible and convincing.

Grievant suggests that he should not have received a disciplinary action because he had no prior history of discipline. The Standards of Conduct provides that corrective action may take the form of counseling or formal disciplinary action. The agency has the discretion to determine which form of corrective action is most appropriate based on the circumstances of each case.[14] In this case, the agency determined that grievant's unilateral decision to take unauthorized leave was sufficiently serious to warrant disciplinary action pursuant to IOP § 213.7.2.A.2. It must be observed that grievant's actions involved a failure to follow supervisory instructions because he did not call his watch commander as instructed by the lieutenant. He also failed to report to

[14] Exhibit 8. *Ibid*. Section 5-10.11.B states, "While it is anticipated that most performance and behavior problems can be resolved through a counseling process, counseling is not a prerequisite to taking formal disciplinary action." (Underscoring added)

work as scheduled without proper notice to his supervisor when he called in less than two hours prior to his reporting time. Both of these failures are Group II offenses. The hearing officer finds that the agency's decision to issue only a Group I Written Notice was reasonable under the circumstances.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on May 22, 2003 for abuse of state time 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.[15] You must file a notice of appeal with the clerk of the circuit court in the

[15] 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[16]

[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

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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