Issue: Group II Written Notice with termination due to accumulation (failure to report to work without proper notice to supervision) and Group I Written Notice (abusive language); Hearing Date: 09/24/03; Decision Issued: 09/29/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5810

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5810

Hearing Date: September 24, 2003
Decision Issued: September 29, 2003

PROCEDURAL ISSUE

Due to the effects of Hurricane Isabel, grievant requested the hearing be postponed. He indicated he had no power or water during the past six days and was unsure if the roads had been cleared. In lieu of postponement, the hearing officer suggested to grievant that his participation by telephone was a viable alternative if he wanted to utilize that option. Grievant agreed and the hearing was conducted with grievant's participation via speakerphone in the hearing room.

APPEARANCES

Grievant (by telephone)
Warden
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 report to work without proper notice to supervision, and from a Group I Written Notice for abusive language.[1] In conjunction with the disciplinary action, grievant was removed from employment due to an accumulation of several disciplinary actions. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a correctional officer senior for three years. Grievant has seven active prior disciplinary actions including two Group I Written Notices (excessive tardiness, and abusive language), four Group II Written Notices (two instances of failure to report to work as scheduled without proper notice to supervision, failure to follow a supervisor's instructions, and using racial slurs towards inmates), and one Group III Written Notice (failure to follow instructions resulting in a weakening of security).[3]

On April 20, 2003, as grievant exited the dining hall, he said loudly to another corrections officer, "Let's get these motherfuckers out of here!" Grievant was referring to the inmates. At that time, there were approximately 90-100 inmates in the dining hall; those nearest grievant could easily hear him. Two lieutenants were walking by the dining hall and also heard grievant's statement. One of the lieutenants then escorted grievant to the watch commander's office and reported the incident.[4]

Grievant was absent on May 5, 2003 and called in early that morning to report that he felt bad with a headache and nausea. He advised his supervisor that he intended to see a physician the same day. He also said he didn't expect to be in for two or three days. On May 6, 2003, grievant was scheduled to work from 6:00 a.m. to 2:00 p.m. He failed to report for work and failed to notify supervision that he would be absent. Grievant called in sick on May 7, 2003. He remained absent due to illness through May 9, 2003 and then had three scheduled days off.

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[1] Exhibit 1. Written Notices, issued May 19, 2003.
[2] Exhibit 5. Grievance Form A, filed May 23, 2003.
[3] Exhibit 3. Active Written Notices.
[4] Exhibit 2. Disciplinary referrals, incident reports, and complaint forms.

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.[5]

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.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

[5] § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

offenses normally should warrant removal from employment.[6] 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.[7] Use of obscene language is a Group I offense.[8]

The agency has demonstrated, by a preponderance of evidence, that grievant committed both offenses for which he was disciplined. Moreover, grievant admitted both that he had made the obscene statement, and that he had failed to call in on May 6, 2003 to notify supervision of his absence.

The use of obscene language by any state employee is a Group I offense. It is particularly troublesome when a corrections officer uses an inflammatory obscenity to refer to inmates in their presence. Some inmates are volatile and easily agitated when offended, particularly by a corrections officer. It is not unknown for inmates to foment physical disturbances when provoked by language such as that used by grievant. Moreover, grievant had twice before been disciplined for the same offense. On July 8, 2001, grievant called an inmate "nigger." On November 23, 2001, grievant called another corrections officer "snitch boy." In view of the previous discipline, and based upon the seriousness of the April 20, 2003 incident, the Group I Written Notice was entirely appropriate and must be affirmed.

Grievant knew that he is required to call in an absence prior to his shift. The facility must assure that sufficient corrections officers are present to provide adequate coverage and protect the public safety. Therefore, it is vital that the watch commander know in advance who will be absent so that he can draft replacements to fill vacancies. Grievant did not call in on May 6, 2003 because he had called in the previous day and said he expected to be out for two or three days. However, such an anticipatory guess that he might be physically unable to work in the future does not comply with the agency's requirement. If grievant had, for example, broken a leg, then it might be reasonable to expect him to be absent for several weeks and the daily call-in requirement could be waived.

However, in this case, grievant had a headache and nausea, and planned to see a physician the same day. In the normal course of events, one would expect that prescribed medication and rest might very well permit grievant to return to work the next day. Thus, grievant was obligated to call in on a daily basis if he continued to be ill. Grievant understood this obligation well since he had been disciplined for the same offense on two previous occasions. He failed to report for work without notice to supervision from April 21-26, 2002, and again

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[6] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[7] Exhibit 4. Section 5-10.16.B.4, DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

[8] Exhibit 4. Section 5-10.15.B.3, *Ibid*.

on December 2, 2002. He received Group II Written Notices for each of these offenses. Therefore, in view of his recidivist tendency, the Group II Written Notice in the instant case was entirely reasonable and appropriate.

Grievant had previously accumulated more than enough disciplinary actions to have been removed from state employment on prior occasions. The agency had previously elected to give grievant additional chances to correct his errant behavior because he was generally a satisfactory performer. However, with the addition of a third Group I Written Notice and a fifth Group II Written Notice, grievant's active disciplinary actions now total nine in less than two years. The agency correctly concluded that further attempts to correct grievant's behavior would be useless.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice for failure to report for work without proper notice to supervision, and the Group I Written Notice for obscene language issued on May 19, 2003 are UPHELD. Grievant's removal from employment due to the accumulation of disciplinary actions is UPHELD.

The disciplinary actions 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.[9] 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.[10]

[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

[9] 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).

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