

Issue: Group II Written Notice (failure to report to work without proper notice to supervision); Hearing Date: 10/22/03; Decision Issued: 10/23/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5820



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5820

Hearing Date: October 22, 2003  
Decision Issued: October 23, 2003

**PROCEDURAL ISSUES**

Grievant requested as part of his relief that he receive a transfer. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.<sup>1</sup> However, hearing officers do not have authority to transfer employees.<sup>2</sup> Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." The warden has previously advised grievant that he must submit a written application if he desires to initiate a transfer to another facility.<sup>3</sup>

Grievant also requested two days of pay. The agency docked grievant for two days' pay because he did not work as scheduled on July 26 & 27, 2003.

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<sup>1</sup> § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>2</sup> § 5.9(b)2. *Ibid.*

<sup>3</sup> Exhibit 6. Warden's second step resolution memorandum, September 4, 2003.

However, the agency's decision not to pay grievant for days he did not work is a management matter unrelated to the disciplinary action. The docking of pay for days not worked is an internal management decision pursuant to the citation in the preceding paragraph. Grievant was not suspended and did not lose pay as a result of the disciplinary action.

In his written grievance, the grievant expressed concern that the major may retaliate against him. The Commonwealth's grievance procedure prohibits retaliation, stating, in pertinent part, "An employee may ask EDR to investigate allegations of **retaliation** as the result of the use of or participation in the grievance procedure...."<sup>4</sup> EDR will investigate such complaints and advise the agency head of its findings.

### APPEARANCES

Grievant  
Warden  
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 II Written Notice issued for failure to report to work without proper notice to supervision.<sup>5</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>6</sup>

The Department of Corrections (Hereinafter referred to as "agency") has employed grievant as a corrections officer for one and a half years. Grievant has one active disciplinary action – a Group I Written Notice issued for sleeping on the job.<sup>7</sup>

Agency policy provides that security employees must notify the shift commander or the officer in charge at least two hours before the shift begins if they will be absent.<sup>8</sup>

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<sup>4</sup> § 1.5, EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>5</sup> Exhibit 2. Written Notice, issued August 5, 2003.

<sup>6</sup> Exhibit 5. Grievance Form A, filed August 27, 2003.

<sup>7</sup> Exhibit 1. Memorandum from major to assistant warden, August 4, 2003.

<sup>8</sup> Exhibit 4. Section 5-12.10.D.2, Agency Procedure Number 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997 states: "Shift workers shall notify the officer in charge, or the shift commander, at least two hours before the beginning of their shift, if they will be absent."

Until this incident, grievant had been assigned to work on the 12-hour night shift from 6:00 p.m. to 6:00 a.m. He was scheduled to work this shift on the nights of July 24, 25, 26 & 27, 2003. On July 23, 2003, grievant obtained a letter from his physician that diagnosed grievant with sleep apnea and recommended that he be placed on an eight-hour work restriction.<sup>9</sup> Grievant brought the letter to the human resources office on July 24, 2003. Grievant then called in sick for the evening shift on that date.

On Friday, July 25, 2003, grievant called the Chief of Security (major) around noon. After grievant explained the physician's recommendations, the major told grievant that he would temporarily place him on a 6:00 p.m. to 2:00 a.m. shift. The major then said he would review the physician's note and speak with grievant when the major returned to work on the following Monday. Later in the afternoon of July 25, 2003, grievant called to speak with the major again because he was unsure whether he should also work only eight hours on Saturday and Sunday. By that time, the major had left work and grievant was unable to speak with him.<sup>10</sup> Grievant did not attempt either to call the major at home or to page him. Grievant worked on Friday night from 6:00 p.m. to 2:00 a.m. as directed by the major.

During the eight hours he worked on Friday, July 25, 2003, grievant did not speak with his shift commander or anyone else to resolve his question about working on the following two nights. Grievant did not report to work on either Saturday, July 26, or Sunday, July 27, 2003. He did not call his shift commander or anyone else to advise that he would not be reporting to work on these two days.<sup>11</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).

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<sup>9</sup> Exhibit 8. Letter from physician to whom it may concern, July 23, 2003.

<sup>10</sup> Exhibit 7. Grievant's written statement, undated.

<sup>11</sup> Exhibit 6. Warden's second resolution step memorandum, September 4, 2003.

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>12</sup>

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 offenses normally should warrant removal from employment.<sup>13</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; one example is failure to report to work without proper notice to a supervisor.<sup>14</sup>

The essential facts in this case are undisputed. The agency has shown, by a preponderance of evidence, that grievant was scheduled to work on July 26 & 27, 2003, that he failed to report to work on both days, and that he failed to provide any notice to supervision. 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 shift commander know in advance who will be absent so that he can draft replacements to fill vacancies. Grievant's failures to report for work, and to call in constitute a Group II offense.

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<sup>12</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>13</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>14</sup> Exhibit 3. Section V.B.2.d, DHRM Policy 1.60, *Standards of Conduct*, September 16, 2003.

Grievant acknowledges these facts and agrees that it was his error. He nonetheless feels that the withholding of pay and the disciplinary action were unfair. As explained above, the agency automatically withholds pay when any employee fails to report to work without proper notice. Even if the agency had not issued a written notice, grievant would not have been paid for the two days he did not work. The withholding of pay is not a punitive matter; rather, it is just common sense that an agency is not going to pay any employee for not working – unless the employee has been granted some form of leave (sick, annual, etc.). Grievant's absence was unauthorized and was not covered by any form of leave. Accordingly, the agency was entirely justified in docking grievant's pay for the two days he did not work.

The Group II Written Notice (disciplinary action) was appropriate to the circumstances. Grievant knew when he placed a second telephone call to the major on the afternoon of July 25, 2003 that he had a question about whether he should work on Saturday and Sunday evenings. Rather than finding someone in a position of authority to answer the question, grievant made a unilateral decision not to work. He compounded the offense when he failed to advise his shift commander or anyone else in authority that he would not be reporting to work. Grievant admitted that he should have obtained an answer to his question, and he admitted that he made a mistake when he failed to notify anyone that he was not reporting to work.

### 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 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.<sup>15</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>16</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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David J. Latham, Esq.  
Hearing Officer

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<sup>15</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>16</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.