

Issues: Group II Written Notice (failure to follow supervisor's instructions) and Group III Written Notice with demotion (actions unbecoming a correctional supervisor); Hearing Date: 12/08/04; Decision Issued: 01/19/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 7906, 7927



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7906 / 7927**

Hearing Date: December 8, 2004 and  
December 17, 2004  
Decision Issued: January 19, 2005

**PROCEDURAL HISTORY**

On August 2, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

*On July 6, 2004, I observed you heading towards the Administration area. When I questioned you as to why you frequented that area so much, you stated that you came to use the computer and telephone. When I asked you to report to me whenever you went to this area, you responded "Oh no, I'm not going to do that." As of July 13<sup>th</sup>, you continue to visit this area frequently and you do not advise me when you do so. Therefore you are being issued a Group II for failure to Follow Supervisory Instruction, Perform Assigned Work or Otherwise Comply with established written policy.<sup>1</sup>*

On September 22, 2004, Grievant received a Group III Written Notice with a demotion to Correctional Officer and a five percent pay reduction for:

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<sup>1</sup> Agency Exhibit I-1.

*Actions Unbecoming of a Correctional Supervisor – On September 17, 2004, at approximately 0700 you entered the kitchen and made a remark to inmates that was unprofessional. [Officer BL] advised you not to make those remarks. As you admitted you got upset and cursed toward the Officer. [Officer BL] and [Officer J] witnesses your actions. Further as witnessed by the officers and confirmed by you, you stepped toward [Officer BL] violating his personal space. Your actions [do] not support the goals and objectives of [the Institution] by being supportive or professional.<sup>2</sup>*

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested hearings. On December 7, 2004, the EDR Director issued Ruling Number 2004-911 consolidating grievances regarding the two written notices into one case. On November 22, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 8 and 17, 2004, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction and a Group III Written Notice with demotion for actions unbecoming a correctional supervisor.

## **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.

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<sup>2</sup> Agency Exhibit II-1.



## 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 employed Grievant as a Correctional Sergeant until his demotion to a Correctional Officer effective September 24, 2004. The purpose of his position was: "Provides first line supervision to correctional officers and performs supervision of daily activities on assigned shift."<sup>3</sup> He has been employed at the same Institution for over 18 years. He has received favorable evaluations. On February 5, 2003, Grievant received a Group I Written Notice for failure to follow established written policy.<sup>4</sup>

Grievant found it necessary to use the computer and telephone located in the Administration Building. A telephone was placed in the Administration Building for corrections staff to make personal out-going telephone calls. Grievant worked in the Housing Unit. Grievant's computer in the Housing Unit did not work and Grievant often used the computer in the Administration Building to perform some of his job duties. In order to get to the Administration Building, Grievant must walk out of the Housing Unit, cross "The Boulevard" and walk around J Building. In order to get to the Administration Building using that route, Grievant would have to pass by the Assistant Warden's office located in J Building.

The Assistant Warden observed Grievant going to the Administration Building during inmate lunchtime.<sup>5</sup> Grievant should have been working at the Mess Hall during inmate lunch and not going to the Administration Building. The Assistant Warden had observed Grievant walking to the Administration Building on several occasions.

On July 6, 2004, the Assistant Warden stopped Grievant and said he sees Grievant going to the Administration Building one or two times per day and asked why so frequently. Grievant responded that he walked to the Administration Building three or four times per day to use the computer and go to the restroom. The Assistant Warden was concerned that Grievant was avoiding his duties by going to the Administration Building. The Assistant Warden told Grievant to report to the Assistant Warden before Grievant went to the Administration Building.

Grievant did not like the Assistant Warden's instruction. On July 6, 2004, he spoke with the Warden and informed the Warden of the Assistant Warden's instruction and expressed his displeasure at being expected to comply with the instruction. The Warden later asked the Assistant Warden the basis for his instruction to Grievant. The Assistant Warden replied that he was concerned that Grievant was going to the

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<sup>3</sup> Grievant Exhibit I-1.

<sup>4</sup> Agency Exhibit 5.

<sup>5</sup> Inmate lunch time usually begins at 12:30 p.m. and can end at 2:30 p.m.

Administration Building too often when he was needed elsewhere in the Institution. Soon thereafter, the Warden met with Grievant and told Grievant that the Assistant Warden is the Chief of Security and the Warden suggested Grievant abide by the instruction. The Warden stated, “[Grievant], you can’t win this thing. You’ve got to do what you are told to do.”

Grievant continued to walk to the Administration Building 4 or 5 times per day but did not contact the Assistant Warden prior to doing so. The Assistant Warden observed Grievant walking to the Administration Building several times. On July 13, 2004, the Assistant Warden asked several staff to confirm that Grievant went to the Administration Building on several occasions.

When the Institution is in lockdown, inmates must remain in their cells. Meals are transported from the Mess Hall to inmate cells. On September 17, 2004, the Institution was in lockdown during breakfast. Meal trays had been delivered to Grievant’s Housing Unit, but Grievant believed that milk had not been delivered even though milk should have accompanied the meal trays. Grievant walked from the Housing Unit to the Mess Hall. He entered the Mess Hall and approached Officer BL and demanded to know where was the milk for inmates in his building. Grievant cursed as he made his demand. Officer BL believed that the milk had been delivered to the Housing Unit. A number of inmates were located a few feet away from Officer BL and could hearing Grievant’s and Officer BL’s conversation. Officer BL told Grievant he should not be talking like that, especially in front of the inmates. Grievant responded that Officer BL “did not know what the f—k he was doing.” Grievant placed his face within a few inches of Officer BL’s face as they spoke in a heated manner. Grievant cursed but Officer BL did not.

Officer AJ was in the process of assuming Officer BL’s post when Grievant entered the Mess Hall. Officer AJ observed the conflict initiated by Grievant and became concerned about Grievant’s behavior. As Grievant moved very close to Officer BL, Officer AJ stepped towards them and put his hand between them in order to cause them to separate.

Officer BL later complained to the Lieutenant about Grievant’s behavior and the Agency began its investigation. Grievant apologized to Officer BL.

## **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.

### Group II Written Notice

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>6</sup> Corrections staff operate in a quasi-military manner – they wear uniforms, have rank, and are expected and informed of their obligation to follow instructions of higher ranking employees. Instructions that are lawful, ethical, and consistent with an employee’s work responsibilities must be followed by the employee. Grievant should have complied with the instruction of the Assistant Warden regardless of how much he disagreed with the instruction. This conclusion is especially true given that Grievant was advised by the Warden (the Assistant Warden’s supervisor) that he should comply with the instruction. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

Grievant contends each time he walked to the Administration Building, he attempted to contact the Assistant Warden but the Assistant Warden was not in his office. The evidence does not support Grievant’s assertion. If Grievant walked to the Administration Building four or five times per day and Grievant worked approximately five days from July 6 to July 13<sup>th</sup>, 2004, Grievant would have had over 20 occasions to contact the Assistant Warden. It is unlikely that Grievant would have been unable to find the Assistant Warden in or near his office on that many instances.<sup>7</sup> It is likely that Grievant did not wish to comply with the instruction and failed to do so. Grievant could have contacted the Assistant Warden by radio.

Grievant argues the instruction was improper because he was being singled out improperly. Although it is true that Grievant was being singled out, the Assistant Warden’s action was not based on any improper motive. The Assistant Warden was motivated by his concern regarding whether Grievant was completing his duties at the Institution.

Grievant contends the Assistant Warden “has a personal vindictive against me and it is harassment.”<sup>8</sup> The evidence is insufficient to conclude that the Assistant Warden’s actions arose because of any reason other than his objective of fulfilling his duties.

### Group III Written Notice

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<sup>6</sup> DOCPM § 5-10.16(B)(1).

<sup>7</sup> The Assistant Warden did not work on weekends. He was not on vacation in July 2004.

<sup>8</sup> See, Agency Exhibit I-1, Grievance Form A.

Grievant's interaction with Officer BL rises to the level of a Group II because his actions were "more severe in nature and are such that an additional Group II offense should normally warrant removal." Grievant's interaction with Officer BL was abrasive and confrontational and not done in a manner designed to benefit the Institution. Grievant intentionally moved within inches of Officer BL in order to intimidate him and to challenge him. Grievant unnecessarily angered Officer BL. If Officer AJ had not separated them, the chance of a physical altercation<sup>9</sup> between the two men was realistic. Grievant's actions were in front of inmates.<sup>10</sup> Because of his higher rank and position of supervision, Grievant should have expressed his displeasure with Officer BL through more appropriate means. Based on the accumulation of disciplinary action, the Grievant's demotion and pay reduction must be upheld.

The Agency argues Grievant should be given a Group III Written Notice. Grievant's behavior is not such that a first occurrence would warrant removal. For example, Group III offenses include "acts of physical violence or fighting."<sup>11</sup> Grievant nearly provoked a physical confrontation, but no such confrontation occurred. Grievant's actions were intimidating, but they were not so intimidating as to amount to "threatening or coercing persons associated with any state agency ...."<sup>12</sup>

Grievant argues his behavior rises no higher than a Group I offense for use of obscene or abusive language or disruptive behavior. The Agency did not discipline Grievant for cursing. Cursing in correctional institutions is widespread and frequent. Although Grievant's behavior was disruptive, his position of supervision and interaction with a subordinate makes his behavior more severe than merely disruptive behavior within the context of a Group I offense.

Grievant seeks to be transferred to another Institution. Although the Hearing Officer lacks the authority to order the Agency to transfer Grievant, his request seems appropriate. The Hearing Officer recommends the Agency fully consider Grievant's request to be transferred to another Institution near to his current place of employment.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of

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<sup>9</sup> For example, Officer BL may have felt it necessary to push Grievant away from him in order to remove Grievant from his personal space.

<sup>10</sup> Inmates sometimes attempt to exploit conflict among security employees.

<sup>11</sup> DOCPM § 5-10.17(B)(6).

<sup>12</sup> DOCPM § 5-10.17(B)(12).



disciplinary action for conduct unbecoming a correctional supervisor is **reduced** to a Group II Written Notice. Grievant's demotion with pay reduction is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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>13</sup>

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<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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