

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy); Hearing Date: 01/10/05; Decision Issued: 02/01/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 7933



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7933**

Hearing Date: January 10, 2005  
Decision Issued: February 1, 2005

**PROCEDURAL HISTORY**

On August 4, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from August 5, 2004 to August 17, 2004 for:

*Failure to Follow Supervisor's Instructions, perform assigned work, or otherwise comply with established policy and procedure. On July 16, 2004 you supervised an unauthorized cell extraction in the removal of [Inmate] from cell 2C37.*

On August 17, 2004, 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 2, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 10, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to comply with established written policy.

## **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 Lieutenant at one of its Facilities. On July 16, 2004, Grievant was serving as Watch Commander. As Watch Commander, Grievant was responsible:

to ensure all essential posts are adequately manned and function properly on the shift. In addition, he/she shall ensure that all shift personnel functions are completed including duty roster management, time keeping and personnel leave forms.

On July 16, 2004 at approximately 9:30 p.m., the Inmate and Officer H engaged in a physical altercation in the pod area resulting in a gunshot having to be fired to stop the conflict. Following the altercation, the Inmate returned to his cell and the door was closed and locked. Grievant and several other corrections officers approached the Inmate's cell. Grievant spoke with the Inmate and instructed him to present himself to be handcuffed. The Inmate refused. Grievant ordered the cell to be opened. Grievant and at least three officers entered the cell and physically restrained the Inmate. He was then removed from the cell. None of the security personnel were wearing protective gear. No video tape was made of the events.

## **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.

Post Order #6 provides for Housing Unit Supervisors provides:

any time there is a use of force and time permits, the incident will be videotaped, and this includes cell extractions. The individual using the camera will be familiar with the operation of the camera and the proper procedures for videotaping an incident. When videotaping an incident the taping will be narrated, step-by-step coverage and the camera should never be turned off until the complete incident has been resolved.

On July 16, 2004, Grievant ordered an inmate cell extraction. Once the inmate refused to present himself to be handcuffed and Grievant decided he and his subordinates should enter the cell to restrain the inmate, the procedure for a cell extraction using physical force began. Grievant failed to see that the cell extraction was videotaped. Grievant also failed to instruct his subordinates to put on appropriate safety gear such as vests and helmets. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice for failure to follow established written policy. A suspension of up to 10 workdays is appropriate when an employee receives any Group II Written Notice.

Grievant contends the Inmate was not removed as part of a cell extraction. Credible witness testimony, however, showed that a group of officers assembled outside the Inmate's cell and entered the cell after the Inmate refused to exit. This is a cell extraction. Grievant should have followed the proper procedures to complete a cell extraction.

Grievant argues he was disciplined differently from other employees. To the extent Grievant's subordinates received different disciplinary action, the Agency did so because they were following Grievant's order's. Under most circumstances a subordinate is expected to follow a supervisor's order. Grievant offered the example of another supervisor who removed an inmate from a cell without videotaping the removal. The evidence showed that the inmate presented himself to be handcuffed and voluntarily exited the cell. This is not a cell extraction. Grievant has not been singled out for disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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>1</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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<sup>1</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer