

Issue: Two Group I Written Notices (unsatisfactory job performance); Hearing Date: 06/20/05; Decision Issued: 06/20/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8071, 8072



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8071 / 8072**

Hearing Date: June 20, 2005  
Decision Issued: June 20, 2005

**PROCEDURAL HISTORY**

On February 7, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

*Unsatisfactory Job Performance. On January 20, 2005, and January 28, 2005, you called out sick and [were] informed by the Shift Commander/ Shift Supervisor to provide documentation. You failed to provide the requested documentation.*

On February 7, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

*Unsatisfactory Job Performance. On January 29, 2005, you reported to work in a civilian attire and not the approved Correctional Officers uniform.*

On February 7, 2005, 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 May 23, 2005, the Director of the Department of Employment Dispute Resolution issued Rulings 2005-1029 and 2005-1030 consolidating the two written notice appeals. On May 23, 2005, the Department of

Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 20, 2005, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Agency Representative  
Witness

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action for failing to provide requested documentation of absence and a Group I Written Notice of disciplinary action for reporting to work in civilian attire.

## **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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its facilities. He was removed from employment pursuant to disciplinary action taken not part of this grievance. Grievant was notified in writing of the hearing date and his opportunity to submit evidence. Grievant did not appear at the hearing. Grievant had prior active disciplinary action of a Group II Written Notice issued on March 10, 2004 for failure to follow a supervisor's instructions.<sup>1</sup>

On January 19, 2005, Grievant called the Facility to report that he was ill and not able to work as scheduled. His supervisor informed him to bring in documentation supporting his illness. The Lieutenant subsequently reminded Grievant of his obligation to provide documentation. Grievant did not provide any documentation.

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<sup>1</sup> Agency Exhibit 4.

On January 29, 2005, Grievant reported to work wearing civilian attire instead of his uniform. He was sent home and instructed to report to work on January 30, 2005 in complete uniform. Grievant had been previously counseled to report to work in his uniform and not in civilian attire.

## 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.” DHRM § 1.60(V)(B).<sup>2</sup> 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.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.<sup>3</sup>

Institutional Operating Procedure 114(5) provides, “Supervisors may require a doctor’s excuse at any time and should require one if the employee is exhibiting a pattern of absences.” Grievant was instructed by a supervisor to provide documentation of his absence from work due to illness. He failed to do so. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice for failure to provide documentation requested by a supervisor.

Institutional Operating Procedure 109-4.0 provides, “The wearing of a partial uniform is not permitted. The uniform will be worn to and from work only, and during each tour of duty.” Grievant appeared at work while not in full uniform thereby acting contrary to IOP 109-4.0. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice for reporting to work in civilian attire.<sup>4</sup>

## DECISION

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> Grievant could have been charged with Group II Written Notices for failing to follow established written policy. The Agency elected to issue Group I Written Notices instead.

<sup>4</sup> No credible evidence was presented to justify mitigation of the disciplinary actions in accordance with the *Rules for Conducting Grievance Hearings*.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for failing to provide documentation of an absence from work is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for reporting to work in civilian attire 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>5</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.