

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions); Hearing Date: 09/06/05; Decision Issued: 09/07/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8154



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8154**

Hearing Date: September 7, 2005  
Decision Issued: September 7, 2005

**PROCEDURAL HISTORY**

On April 18, 2005, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for:

*On April 14, 2005, you were instructed by [Assistant Warden] to do a report. You failed to follow his instruction, which is a violation under the standards of conduct.*

On May 16, 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 August 4, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer.

After repeated attempts to contact Grievant without a response, the Hearing Officer scheduled the original hearing date on August 26, 2005. The Hearing Officer sent Grievant a letter dated August 15, 2005 notifying of the hearing and a message was left on his answering service. Grievant contacted the Hearing Officer and said August 26, 2005 was not an available date for him. The Hearing Officer re-scheduled the matter for September 7, 2005 at 9 a.m. because that was a date available to both parties. On August 17, 2005, the Hearing Officer sent the parties a letter confirming the hearing date. On August 30, 2005, the Agency contacted the Hearing Officer and

asked for a change in the hearing date because several of its witnesses recently received subpoenas requiring them to be in a local circuit court on September 7, 2005. The Hearing Officer found just cause to change the hearing date and re-scheduled the hearing date to be September 6, 2005. On August 30, 2005, the Hearing Officer sent the parties a letter confirming the new hearing date. The Hearing Division secretary called Grievant and left a message advising him of the date.

On September 6, 2005, the Agency presented its evidence. Grievant did not appear. After the hearing was concluded, Grievant called the Hearing Officer and indicated he did not receive notification of the September 6<sup>th</sup> hearing date. The Hearing Officer advised Grievant he would be permitted to present his evidence on September 7, 2005 at 9 a.m. at the Agency's facility. Grievant asked for a copy of the hearing tape and Agency exhibits and said he would pick them up on September 6, 2005. A copy of the hearing tape and Agency exhibits was made for Grievant and available for him to obtain. Grievant called the Hearing Officer sometime after 4 p.m. and said he would be at the EDR office at five minutes until 5 p.m. to pick up the documents. Grievant did not appear at the EDR offices to obtain the items. On September 7, 2005, the Hearing Officer appeared at the Agency's facility to receive Grievant's evidence. Grievant did not appear.

## **APPEARANCES**

Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

## **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 Officer at one of its facilities. He began working for the Agency in 1996. No evidence of prior disciplinary action against him was presented during the hearing.

Grievant had a number of complaints about his post assignments, scheduling of voluntary overtime, and conflicts with other staff. On April 14, 2005, Grievant met with the Assistant Warden to discuss his concerns. The Captain and the Sergeant were also present. The Captain brought the volunteer overtime book to the meeting so that the procedures could be discussed. Because of the nature of the complaints and their possible impact on Agency operations, the Assistant Warden instructed Grievant to write a report setting forth the details of his complaints.<sup>1</sup> After receiving the written report, the Assistant Warden would be able to investigate each complaint and make any necessary changes in the Agency's operations. After Grievant expressed reluctance to make a written report, the Assistant Warden repeated his instruction to Grievant to "put it in writing." Grievant refused to write the report.

### **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.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant was instructed by a supervisor to write a report regarding his concerns about the Agency's operations. Grievant failed to write such a report thereby acting contrary to the supervisor's instruction. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. A three workday suspension is permitted by the Standards of Conduct upon the issuance of a Group II Written Notice.<sup>2</sup>

During the Step Process, Grievant argued he was transferred as a result of the disciplinary action. No evidence was presented regarding the reasons for Grievant's

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<sup>1</sup> This was the Assistant Warden's customary practice.

<sup>2</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

transfer. He also argued he was discriminated and retaliated against. No evidence was presented regarding Grievant's allegation.

## 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>3</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>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.