

Issue: Group III Written Notice with suspension (leaving the worksite without permission); Hearing Date: 01/12/06; Decision Issued: 01/17/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8221; Outcome: Employee granted partial relief



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8221**

Hearing Date: January 12, 2006  
Decision Issued: January 17, 2006

**PROCEDURAL HISTORY**

On September 8, 2005, Grievant was issued a Group III Written Notice of disciplinary action with a three workday suspension for leaving the work site during working hours without permission. On September 8, 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 November 21, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for December 20, 2005 but it was continued at Grievant's request after the Hearing Officer found just cause to grant Grievant's request. On January 12, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Representative  
Agency Advocate  
Witnesses

## **ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## **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 has been employed by the Agency for approximately 18 years. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On August 8, 2005, Grievant was working as the Compound Entry Officer. His shift was scheduled to end at 6 p.m. He was located at the front gate of the Facility and was responsible for "supervision of all persons and vehicles into and out of [the Facility] Reception."<sup>1</sup> Grievant needed to use the restroom located several feet from his post. He called the Master Control officer and said he would be using the restroom for a few minutes. At approximately 2:15 p.m. and while Grievant was in the restroom, Officer H, was escorting three inmates from inside to outside the Facility.<sup>2</sup> She had obtained a key that would enable her to exit the Facility without requiring Grievant to grant her access. She went to the front gate and did not observe Grievant so she exited the

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Officer H was assigned to another Institution.

Facility with the three inmates. She wished to return the key to Facility staff. Since she did not see Grievant, she told the inmates to sit on the front steps and she walked to Master Control. Although the three inmates were in restraints, they appeared to be unescorted.

The Assistant Warden observed the three inmates who appeared to be unescorted and became concerned. She did not know Officer H had walked away from the inmates. Grievant exited the restroom and returned to his post. He observed the three inmates but did not know how they passed through the exit he controlled. The Assistant Warden approached him and asked "Why are the inmates on the steps in cuffs? What is wrong with this picture?" She knew that Grievant was an experienced security officer and wanted to coach him by finding out whether he knew what security problems existed. Grievant, on the other hand, interpreted the Assistant Warden's questions to be an accusation that he had failed to perform his duties. Grievant understood the Assistant Warden's questions to mean the Assistant Warden believed he was responsible for leaving the three inmates without supervision thereby possibly jeopardizing the Facility's security. Grievant and the Assistant Warden began a heated conversation.

The Assistant Warden concluded that their conversation needed to take place elsewhere. Another employee relieved Grievant of his security post. Grievant and the Assistant Warden went to the Assistant Warden's office for further discussion. The Lieutenant also was in the Assistant Warden's office. For over 30 minutes, the Assistant Warden and Grievant discussed the incident. The Lieutenant also spoke.

Grievant became frustrated with the conversation. He said "Forget it, I can not take this!" He turned off his radio and removed it from his uniform. He placed the radio down on the Assistant Warden's desk and left the office. The Lieutenant followed Grievant and tried to persuade Grievant to walk around and "cool off" but not to leave the Facility. Grievant disregarded the Lieutenant's comments. He turned in his keys at the central control room and left the Facility. He entered his vehicle and drove away.

Grievant was upset by the encounter. He sought medical assistance. He missed time from work.

## **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.

[L]eaving the work site during working hours without permission” is a Group II offense.<sup>3</sup> On August 8, 2005, Grievant was scheduled to work until 6 p.m. He left the Facility prior to the conclusion of his shift. He did not have permission to leave the Facility. Accordingly, Grievant left the work site during working hours without permission thereby justifying the issuance of a Group II Written Notice. A suspension of up to ten workdays is permitted for a Group II offense. The Written Notice must be reduced from a Group III with a three workday suspension to a Group II with a three workday suspension.

Grievant argues that he did not ask for permission to leave because he knew the Assistant Warden would not grant his request. The Assistant Warden testified that if Grievant had asked for permission to leave, it would have been granted. Grievant did not have the authority to independently determine whether he should continue working. By making a decision to leave without first permitting the Assistant Warden to determine whether to give permission to leave, Grievant engaged in the decision-making process reserved for the Assistant Warden. He did so at his own risk. Grievant should have asked for permission to leave the Facility and explained why he needed to leave.

The Agency contends Grievant should receive a Group III Written Notice. “[L]eaving a security post without permission during working hours” is a Group III offense.<sup>4</sup> The Agency’s position cannot be upheld for two reasons. First, the Written Notice describes Grievant’s behavior as “Leaving the work site during working hours without permission.” This is the same language used in the Standards of Conduct to describe an example of a Group II offense. An Agency may not describe an employee’s behavior as an example of a Group II offense but discipline the employee as if the offense was a Group III offense. The Agency’s action is not consistent with policy. Second, Grievant was not working at a security post when he made the decision to leave the Facility. He had been relieved of his security post and was meeting with a supervisor in the supervisor’s office. He was not directly involved in inmate supervision at the time he decided to leave. In addition, this is not an instance where Grievant was very briefly relieved of his post to a nearby location with the expectation of immediate return. Grievant remained in the Assistant Warden’s office for over 30 minutes. The Agency’s focus was not for Grievant to provide security, but for Grievant to receive information as part of a coaching session that could have lasted much longer than 30 minutes had Grievant not abruptly ended the conversation with his exiting of the Facility. In short, the Agency has not established that Grievant left a security post.<sup>5</sup> There is no factual basis to support the Agency’s issuance of a Group III Written Notice.

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<sup>3</sup> DOCPM § 5-10.16(B)(3).

<sup>4</sup> DOCPM § 5-10.17(B)(14).

<sup>5</sup> Although Grievant’s absence may have caused a staffing shortage among security positions, that fact alone does not mean Grievant left a security post.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice with a three workday suspension.

## 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>6</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.