Issue: Group II Written Notice with demotion and salary reduction (failure to follow supervisory instructions); Hearing Date: 06/19/06; Decision Issued: 06/22/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8341; Outcome: Employee granted full relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

REVISED DECISION OF HEARING OFFICER

In re:

Case No: 8341

Hearing Date: June 19, 2006
Decision Issued: June 22, 2006

PROCEDURAL ISSUES

This hearing was initially docketed for May 19, 2006. On the morning of May 19, 2006, the hearing officer drove to the hearing site and learned that grievant had called the EDR hearing office after close of business the previous night. Grievant left a message stating that the Army had called him and told him to report to Pittsburgh the following morning for assessment preparatory to possible deployment to the Middle East. The hearing officer contacted grievant's military Unit Administrator and verified that, in fact, grievant was flying from Richmond to Pittsburgh on the morning of the hearing. The hearing officer postponed the hearing until grievant's situation could be resolved. The hearing was rescheduled for June 19, 2006 – the first available date for all concerned.

Grievant requested as relief that he be reinstated to the position of sergeant. Subsequent to filing his grievance, grievant resigned from state employment on April 28, 2006. He understands that he cannot be reinstated to employment because a hearing officer cannot rescind an employee's resignation. However, if the discipline is rescinded, grievant desires to have his record reflect that he resigned as a sergeant, and that he receive the difference in salary

between sergeant and corrections officer senior for the days between the March 10th effective date of demotion and his resignation on April 28, 2006.

Grievant also requested that he be paid for two days of leave without pay for military training he attended on January 28-29, 2006. The agency offered testimony, and grievant agreed, that it has already paid grievant for those two days. Therefore, this issue is now resolved.

APPEARANCES

Grievant
Warden
Advocate for Agency
Two witnesses for Agency

ISSUE

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group II Written Notice for failure to follow supervisory instructions.[1] As part of the disciplinary action, grievant was demoted with a ten percent salary reduction effective March 10, 2006. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.[2]

The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 12 years. He was a corrections sergeant before being demoted to corrections officer senior. Grievant has two prior active disciplinary actions – a Group II Written Notice for failure to report to work without proper notice.[3] In this case, grievant did not report for work claiming that he was attending a military unit drill. Later, however, grievant admitted that he had not attended drill. He subsequently received another Group II Written Notice for failure to perform assigned work by not reporting for work as scheduled.[4]

[1] Agency Exhibit 1. Group II Written Notice, issued March 7, 2006.
[2] Agency Exhibit 2. Grievance Form A, filed March 16, 2006.
[3] Agency Exhibit 6. Group II Written Notice, issued November 21, 2004
[4] Agency Exhibit 6. Group II Written Notice issued August 4, 2005.

The practice of grievant's facility has been to require proof of military training before allowing employees to be excused from work. The warden has personally counseled grievant about this practice. The facility has accepted two types of proof – a copy of the military "orders" issued to the employee, or an annual calendar from the Army showing the annual unit drill dates.[5] The agency asserts that this is written policy but did not produce such a policy during the hearing. The relationship between employers and the uniformed military services is governed by the Uniformed Services Employment and Reemployment Rights Act (USERRA). The agency submitted what appears to be a fact sheet explaining this relationship. It states, *inter alia*, that USERRA law requires an individual to give written or verbal notice to their employer prior to departure for military service.[6] At hearing, the warden acknowledged that he would also have accepted a verbal verification by telephone from grievant's commanding officer.

On January 26, 2006 grievant received a call at the facility from the first sergeant at his Army reserve unit notifying him that he had been scheduled for military combat lifesaver training on January 28 & 29, 2006. The first sergeant faxed to the facility a fax cover sheet and a course description flyer.[7] Grievant took these documents to the watch commander (a captain) who told grievant he could not attend the training because he had already received CPR training and because the Army had not sent formal "orders." Grievant called his first sergeant and relayed what the watch commander had said. The first sergeant agreed to fax additional documentation to the facility. That afternoon, the first sergeant faxed to the facility a roster of personnel scheduled to attend the combat lifesaver training; grievant was listed on the roster.[8]

On January 27, 2006, grievant attempted to speak with the watch commander but he was not at work. Grievant spoke with his lieutenant who was not aware of the watch commander's instruction to grievant to obtain "orders." The lieutenant told grievant that he could attend the training but that he would have to bring back documentation showing that he had actually attended the military training. Grievant attended the military training and subsequently produced a letter from Department of the Army verifying that he attended the combat lifesavers training.[9] The agency has accepted this proof that grievant attended the training and has reimbursed grievant for January 28 & 29, 2006. The Army has verified that formal "orders" were not issued to grievant for this training class because grievant lives within 60 miles of the Army's training facility.[10]

APPLICABLE LAW AND OPINION

[5] Agency Exhibit 4. Memorandum from commanding officer, September 10, 2005.
[6] Agency Exhibit 4. USERRA fact sheet.
[7] Agency Exhibit 3. Four pages faxed on 1-27-06 at 1130 hours.
[8] Agency Exhibit 3. Three pages faxed on 1-27-06 at 1500 hours.
[9] Agency Exhibit 4. Memorandum from Army Unit Administrator, February 7, 2006.
[10] *Id.*

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B of Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[12] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section XI of the DOC *Standards of Conduct* addresses Group II offenses, which are

[11] § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.
[12] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

defined identically to the DHRM *Standards of Conduct*.[13] Failure to follow supervisory instructions is a Group II offense.

In the attachment to the Written Notice, the agency cites two reasons for issuing discipline. First, it points out that grievant has not produced any military "orders" for the training. Because of the prior disciplinary action in 2004 when grievant had lied about attending military drill, the agency was suspicious about grievant's request for time off in the instant case. The agency notes that it usually receives "orders" when other Army reservists are called to duty, and therefore, cannot understand why there were no orders in this case. However, the undisputed evidence reflects that, in fact, "orders" were not issued in this case. Moreover, the Army provided a written explanation for not issuing "orders" in grievant's case. Therefore, it was impossible for grievant to submit "orders" that were never produced. Grievant has submitted other documentation to show that the Army scheduled him for training, and that he attended the training as scheduled. An employee cannot be disciplining for failing to comply with an impossible request.

The agency was also suspicious because neither grievant nor the agency could get grievant's commanding officer to return telephone calls. It is understandable, given grievant's prior disciplinary action, that the failure of grievant's commanding officer to return calls was suspicious. However, grievant has offered uncontroverted testimony that the commanding officer was, himself, being transferred to another unit for deployment to the Middle East. Being presumably busy resolving his military and personal situation, the commanding officer delegated the resolution of grievant's situation to the Unit Administrator – a first sergeant. Grievant's testimony about this is credible and the agency has not produced any evidence to the contrary. In the Army, an enlisted person such as grievant cannot force a captain to make a telephone call. While grievant can request, the commanding officer will do as he sees fit. Grievant cannot be disciplined because the commanding officer chose to delegate grievant's problem to the first sergeant.

Second, the agency cites grievant in this case for attempting to abuse military leave time. There is no evidence to support this allegation. The undisputed evidence reflects that grievant's Army reserve unit required him to attend training, that grievant did attend the training, and that grievant obtained all the documentation available from the Army to prove that he attended.

At hearing, the agency argued that grievant was disciplined for a third reason – that he had allegedly deceived his lieutenant by not telling him that the watch commander had asked grievant to obtain "orders." The agency cannot add charges to a Written Notice after the fact. Neither the Written Notice nor the one-page attachment cites an allegation that grievant deceived the lieutenant. It is true that grievant did not mention his conversation with the watch commander to the lieutenant. However, the agency has not shown that this was a deliberate

[13] Agency Exhibit 7. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.

deception. If the Army had issued "orders," grievant would have willingly provided them. Grievant felt that the lieutenant's advice to submit proof of attendance would solve the problem.

The fact is that grievant was faced with a difficult decision. He knew that he had to attend the military training or else face military justice. If he did not attend the military training because no "orders" were produced, he risked punishment by the military; if he did attend the military training, he felt that, based on his lieutenant's assurance, all he had to do was submit proof of attendance to resolve the agency's concern. If grievant had told the lieutenant about the watch commander's request for "orders," grievant would still have had to make the same decision - to attend or not attend the military training. Under the circumstances, grievant made a reasonable decision to rely on the lieutenant's advice.

DECISION

The decision of the agency is reversed.

The Group II Written Notice, demotion, and reduction in salary are hereby RESCINDED.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[14] 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.[15] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[14] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[15] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.