

Issue: Group II Written Notice with termination (Repeated failure to follow supervisor's instructions in regards to established guidelines and procedures); Hearing Date: August 6, 2001; Decision Date: August 6, 2001; Agency: Department of Correctional Education; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5250

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Department of Correctional Education Case Number 5250

Hearing Date: August 6, 2001

Decision Issued: August 6, 2001

PROCEDURAL HISTORY

On March 8, 2001, Grievant was issued a Group II Written Notice of disciplinary action with removal effective March 8, 2001 for:

Repeated failure to follow supervisor's instructions in regards to established guidelines and procedures.

On April 27, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 9, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Deputy Superintendent
Principal

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal.

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 Correctional Education employed Grievant as a Physical Education teacher at one of its youth correctional Facilities. He began working at the facility in June 1998 until he was removed effective March 8, 2001.

The Principal requires all teachers to submit lesson plans on the Friday of each week. A lesson plan outlines what the teacher expects to teach in the following week. It serves to document the teacher’s efforts in teaching and allows a substitute teacher to know what to teach if the regular teacher is absent. The Principal met with all of the teachers individually when she first started working at the Facility in July 2000. She explained in detail her requirements for the lesson plans.

On September 21, 2000, the Principal sent Grievant a memorandum stating:

Since the beginning of the first grading period, September 5, 2000, you have not turned in any lesson plans. Your lesson plans are past due for the weeks of September 4, September 11, and September 18. These plans are due in my office along with your plans for the week of September 25, by 4:00 p.m. on September 22.

(Agency Exhibit 8). Grievant failed to respond to the Principal’s request and he was issued a Group II Written Notice on September 28, 2000 for failure to follow supervisor’s instructions. (Agency Exhibit 3).

On Friday, March 2, 2001, Grievant failed to submit a lesson plan for the following week. Grievant was reminded that day that a lesson plan was due. Because Grievant failed to submit a lesson plan as of Tuesday, March 6, 2001, Grievant received a Group II Written Notice for failure to follow supervisor’s instructions. Because this was his second active Group II Written Notice, the Agency removed him from employment effective March 8, 2001.

CONCLUSIONS OF LAW

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.” P&PM § 1.60(V)(B). 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.” P&PM § 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.” P&PM § 1.60(V)(B)(3).

Failure to follow a supervisor’s instruction is a Group II offense. P&PM § 1.60(V)(B)(2). There is no dispute that Grievant was instructed to submit lesson plans on Friday of every week and that he failed to do so on March 2, 2001. The Agency appropriately issued Grievant a Group II Written Notice. Grievant’s removal was appropriate because he had received a second active group notice.

Grievant does not seek reinstatement. He wishes to tender his resignation in lieu of termination appearing on his employment record. The Agency has refused his offer. The Hearing Officer lacks the authority to compel the Agency to accept Grievant’s proposal.

Grievant contends that preparing a lesson plan is of no value. He testified that he rarely followed any lesson plans he prepared because of the type of students at the Facility and the way it is operated. The Hearing Officer concludes that if Grievant were reinstated, he would likely continue his refusal to prepare lesson plans. Thus, reinstatement is not an option under these circumstances.

Grievant offered numerous proposals to improve the management and operations of the Facility for the betterment of its teachers. Management reserves the exclusive right to manage the affairs and operations of State government. *Va. Code § 2.2-3004*. The Hearing Officer lacks the authority to require an Agency to modify its management practices and operations even in those instances where the Hearing Officer believes a change may benefit the agency and its employees.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq., Hearing Officer