

Issue: Group II Written Notice (failure to follow supervisor's instruction); Hearing Date: August 7, 2001; Decision Date: August 8, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5251

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

**DECISION OF HEARING OFFICER**

In the matter of Department of Corrections Case Number 5251

Hearing Date: August 7, 2001

Decision Issued: August 8, 2001

**PROCEDURAL HISTORY**

On April 23, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

*Failure to follow supervisor's instruction.*

On May 8, 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 she requested a hearing. On July 10, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 7, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Captain  
Sergeant  
Lieutenant  
Major  
Corrections Supervisor  
Sergeant 2  
Corrections Officer

**ISSUE**

Whether Grievant should receive a Group II Written Notice 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:<sup>1</sup>

The Department of Corrections employs Grievant as a Corrections Officer. Grievant is posted at a security unit located in a hospital. A wing at the hospital with fifteen beds is set aside to receive inmates from various corrections facilities across the State. Some inmates require treatment that must be rendered in other portions of the hospital outside of the dedicated wing. Security staff must accompany these inmates at all times. If the number of inmates outside of the dedicated wing increases more than expected, correctional officers who would otherwise be off-duty must be “drafted” to return to work.

Whether a corrections officer must be drafted to work on his or her off-duty day depends on whether the officer’s name has been placed on the “draft list”. Typically the names of no more than one or two officers are placed on the draft list for a particular day. If an officer’s name is on the draft list for the evening shift beginning at 7:00 p.m., the officer must call the supervisor by 5:00 p.m. that day and ask whether the officer is needed to work. If the officer is needed, the supervisor will instruct the officer to arrive for work at 7 p.m.

On Thursday, April 12, 2001, Grievant’s regular supervisor was away from work receiving training. Another Sergeant served as the substitute supervisor. The Sergeant had a clipboard of papers he had to review and process during his shift. He took the draft list on the clipboard and presented it to Grievant. The list showed Grievant was scheduled to be drafted to work on Saturday, April 14, 2001 in the event there were sufficient inmates requiring her to work on a day that would otherwise be her day off from work. Grievant refused to sign the list and told the Sergeant that she would not sign the list because it was prepared and presented to her too early when compared to the practice of Grievant’s regular supervisor. The Sergeant again asked the Grievant to sign the list and when she refused, he wrote on the list “Refused to sign”. Grievant was not animated or unnecessarily confrontational with the Sergeant as she refused to sign the list -- she simply reflected her difference of opinion regarding the appropriateness of the request. The Sergeant instructed Grievant that although she refused to sign the draft list, she still

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<sup>1</sup> The Agency presented evidence relating to Grievant’s leave practices and balances. The Hearing Officer finds this evidence not to be relevant to these proceedings.

had to call by 5 p.m. on Saturday, April 14. On April 14<sup>th</sup>, Grievant did not call her supervisor to see if she needed to come to work.

Grievant's Security Post Orders require her to, "Carry out all oral/or written instructions given by the Department of Corrections and/or your supervisor." (Agency Exhibit 4).

## 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." Department of Corrections Procedure Manual "(DOCMPM)" § 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." DOCMPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCMPM § 5-10.17.

Failure to follow a supervisor's instruction is a Group II offense. DOCMPM § 5-10.16(B)(1). Grievant was instructed by her supervisor to sign the draft list and to call her supervisor. She failed to do both. Her failure justifies a Group II Written Notice.

Grievant contends the Sergeant asked her to sign the draft list that was prepared and presented too early. Although her contention may be true, it does not relieve her of her responsibility to sign the draft list. The Sergeant's request may have been too early, but it was not contrary to any written policy or post order. Grievant should have followed her supervisor's instruction to sign the list and to call in on her day off.

Grievant presented a memorandum suggesting that the Major has previously instructed her to refuse to sign the draft list until all of the other employees had been through the draft rotation. (Grievant's Exhibit 7). The Major flatly denied ever making that statement. Had the Major supported the statement in the memorandum or Grievant could have otherwise established its basis, she may have demonstrated compliance with the order of a supervisor superior to her immediate supervisor.

Inconsistent application of policy is a basis to mitigate discipline. Grievant presented evidence that other corrections officers had refused to sign the draft list and were not disciplined. The evidence is insufficient, however, to show that the Agency's treatment of employees is inconsistent. For example, one employee who refused to sign the draft list later apologized to her supervisor and telephoned on the day required by the list even as if she had signed the list.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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