

Issue: Group II Written Notice with termination (failure to report to work as scheduled without proper notice to supervisor); Hearing Date: September 12, 2001; Decision Date: October 11, 2001; Agency: Norfolk State University; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5276



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5276**

Hearing Date: September 12, 2001  
Decision Issued: October 11, 2001

**PROCEDURAL HISTORY**

On June 6, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

*Failure to report to work as scheduled without proper notice to supervisor. You did not report to work nor did you contact me on June 4, 2001 and June 5, 2001.*

On June 22, 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 August 21, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 12, 2001, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel

Supervisor  
Director, Risk Management  
VP, Finance and Business

## **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 Norfolk State University employed Grievant as a Safety Specialist in its Physical Plant. One of his duties included verifying the safety and status of fire extinguishers throughout the University. Grievant was a good worker when he was present.

On March 8, 2001, the Supervisor sent Grievant a memorandum<sup>1</sup> stating in relevant part:

We have become concerned with your attendance since you transferred to the Physical Plant Department (see attached Attendance Record). In addition to this excessive leave, on several occasions, you have called to say you would report to work late and failed to report at all, nor did you call to report a change in your status. During this time you have been in a "dock" pay status due to no available leave.

Based on our concerns with your attendance, you are hereby directed to comply with the following procedures:

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<sup>1</sup> Agency Exhibit 8.

2. All personal and/or family sick leave must be reported directly to me. For this purpose you should first call my office phone [number] to report this type of leave. If there is no response then call my digital pager [number] and I will return your call. The essential element is that you talk to either myself or to [ the Director] directly.

The requirements imposed on Grievant were similar to the requirements imposed on other University employees with attendance problems. The University's Human Resource Office provided guidance regarding the requirements. The Supervisor maintained a calendar on which he recorded Grievant's absences and whether Grievant had contacted the Supervisor to obtain approval for the absences.

Grievant did not comply with the Agency's instruction. On March 15, 2001, the Supervisor wrote Grievant another memorandum<sup>2</sup> stating in relevant part:

A memorandum to you, dated March 8, 2001 documented concerns regarding your attendance. In an effort to remedy these concerns four directives were issued. The second of those directives requires you to report directly to me any personal or sick leave. Phone numbers for my office and my pager were provided for that purpose.

On March 14, 2001 you failed to comply with this directive. Specifically, you called Work Management and left a voice mail message that you would be late for work. [JA] reported your message to me. Later in the morning you talked to [JA] and reported that you had trouble getting through to my phone and asked her to report that you would not be coming in due to problems at your apartment. She reported your message to me.

Grievant sent the Supervisor a memorandum<sup>3</sup> dated March 20, 2001 stating:

I have given considerable thought to your memos dated March 8 and March 15 regarding my attendance. I appreciate your concerns as both reasonable and justified.

I completely understand the modified procedures that I am required to follow and my responsibilities under them. Clearly, I cannot effectively contribute to the department's mission if I am not present.

From this point forward I commit myself to make every effort to be present and on time for all scheduled work assignments. Further, I will continue to perform all assigned tasks to the best of my ability.

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<sup>2</sup> Agency Exhibit 9.

<sup>3</sup> Agency Exhibit 10.

Again, I thank you for your concerns and for taking the time to make me aware of them.

On May 24, 2001, Grievant received a Group II Written Notice.<sup>4</sup> Attached to the Written Notice was a memorandum<sup>5</sup> dated May 22, 2001 from the Supervisor to Grievant stating in relevant part:

On April 17, 2001 you paged me. When I arrived at work you had left a voice mail message stating you had broken your glasses. I attempted to call the number on the pager without success. No one answered, therefore I did not talk to you directly. On April 18, 2001 I received a voice mail message that you were at home and to call you if I need you. I did not talk to you directly. On Friday, May 4, 2001, you did not report to work nor did you make any type of notification. From May 8-11, 2001, you also did not report to work nor did you contact me. Again on May 17-18, 2001 and May 7, 2001.

With the above facts considered, an unsatisfactory standard had been established. Although on two different occasions a Group III written notice for abandonment, which could have resulted in discharge, would have been appropriate, this written notice is being issued to you as a Group II notice for (a) failure to follow a supervisor's instruction and (b) failure to report to work as scheduled without proper notice to supervisor(s). I am recommending you be suspended for ten working days as specified on the Written Notice Form. You are also reminded that a second Group II notice should result in discharge.

On June 4 and June 5, 2001, Grievant was scheduled to work but he did not report to work and did not contact the Supervisor or anyone else to let the University know he would be absent. As a result, the University issued Grievant a Group II Written Notice on June 6, 2001 and removed him from employment.

Grievant's absences often occurred because of a serious and sometimes painful stomach problem.

Grievant received a Group II Written Notice on November 18, 1999 and a Group I Written Notice on December 2, 1999. These notices were issued while he was working in another capacity at the University before being transferred to the Physical Plant.

## **CONCLUSIONS OF LAW**

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<sup>4</sup> Agency Exhibit 3.

<sup>5</sup> Agency Exhibit 11.

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 Human Resource Management Policies and Procedure Manual (“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)(a). Grievant was absent on June 4 and June 5, 2001 and he did not make any contact with the Supervisor or otherwise attempt to notify the Supervisor of his absence.<sup>6</sup> Grievant’s behavior constitutes a Group II offense.

The University made every effort to inform Grievant of its expectations regarding his reporting responsibilities. Grievant’s March 20, 2001 memorandum confirms that he knew what was expected of him. The University took measured and progressive steps to discipline Grievant for failing to follow the reporting requirements. The Supervisor’s May 22, 2001 memorandum to Grievant clearly indicates that a second Group II Written Notice should result in discharge. Grievant had ample notice of the consequences he would face if he failed to comply with the Supervisor’s instructions.

Grievant contends that the University’s discipline is too harsh. He argues that because of financial difficulties he was unable to afford a home telephone. When he called the Supervisor it was often from a payphone. If he had paged the Supervisor and entered the payphone number, Grievant would have had to wait an extended period of time at a payphone when he was sick and should be home.

Although Grievant’s difficulties are understandable, there is no basis to reverse the discipline. Grievant did not leave a message on the Supervisor’s voice mail and did not call another employee at the University and ask that employee to notify the Supervisor. Although these actions would not have met the standards established by the University, at least his actions would have demonstrated some attempt to notify his supervisor. In the absence of any attempt to contact the Supervisor on June 4 and 5, 2001, the Hearing Officer cannot reverse the University’s discipline.

Group II Written Notices are cumulative. A second active Group II Written Notice normally should result in removal. P&PM § 1.60(VII)(D)(2)(b). Before his recent

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<sup>6</sup> When the Supervisor gave Grievant the March 8, 2001 memorandum outlining Grievant’s reporting requirements, Grievant questioned whether the University had the authority to impose such a requirement. He argued that it was inconsistent with the reporting requirements of other University employees. The Hearing Officer concludes that the University had the authority to impose the reporting requirements through the Supervisor’s instructions. Grievant’s poor attendance history justified the University in establishing a unique reporting requirement for Grievant.

disciplinary action, Grievant received one active Group I and two active Group II Written Notices. Based on the accumulation of disciplinary action, Grievant's removal is appropriate.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

Although the Hearing Officer understands the difficulty and frustration experienced by the Grievant, the clarity of the University's instruction and the patience demonstrated by the University show there is no basis to reduce the disciplinary action.

## 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.

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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer