

Issue: Group II Written Notice with 6-day suspension (failure to follow instructions causing certification to expire); Hearing Date: September 17, 2001; Decision Date: October 12, 2001; Agency: Department of Juvenile Justice; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5277



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number 5277

Hearing Date: September 17, 2001
Decision Issued: October 12, 2001

PROCEDURAL HISTORY

On April 30, 2001, Grievant was issued a Group II Written Notice of disciplinary action with six workdays suspension for:

[Grievant] received written notice on 02/21/01 that his required (per job description and per standard VAC 42-10-300 C&D) First Aid and Adult CPR training would expire on 04/22/01. [Grievant] verbally affirmed on 04/10/01 that he was aware of the expiration date of 04/22/01. When no evidence of the mandated training had been received by 04/19/01, [Grievant] was called and asked about the status of the training. [Grievant] stated that he had not obtained nor had he scheduled the training. Since he was unable to schedule training until 04/28/01, six of his shifts had to be covered by other workers.

On May 7, 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 22, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 17, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Assistant Director

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with six workdays suspension.

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 Juvenile Justice employs Grievant as a Juvenile Correctional Officer Senior. He is responsible for supervising the activities and behavior of residents in a halfway house and ensuring a safe, sanitary, and secure living environment for the residents. One of his work duties includes, “maintain required certifications such as first aid, CPR, etc.”¹ Grievant reports to the Institute Manager. No evidence of any prior disciplinary action against Grievant was presented.

In previous years, the Facility arranged for and organized CPR training. It selected the trainer, the dates for training and arranged for a group of employees whose certificates were expiring to attend the training. Grievant attended the CPR training in those previous years.

On February 21, the Assistant Director (training coordinator) sent Grievant a memorandum² stating:

¹ Agency Exhibit 5.

² Agency Exhibit 6.

Your Adult CPR & First Aid will expire on 04/22/01. Therefore, you will need to attend these trainings before then. I am giving you this 60-day notice to allow [you] to attend this training. It will be your responsibility to schedule this training at a convenient time and location and to give a copy of the certificate card to [Ms. S.] If you have any questions please let me know.

On April 10, 2001, the Assistant Director called Grievant regarding the training. Grievant confirmed that he knew he needed to complete his CPR and First Aid training by April 22, 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)³. 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).

Agency staff are expected to appropriately respond to health care emergencies within a four-minute response time.⁴ Agency policy⁵ requires Grievant to have a certificate in cardiopulmonary resuscitation (CPR) issued within the past three years by the American Red Cross or other recognized authority.

The February 21, 2001 memorandum to Grievant states, "It will be your responsibility to schedule this training at a convenient time and location If you have any questions please let me know." Grievant did not understand this instruction. He should have questioned the Assistant Director regarding whether the Facility had changed its procedures or otherwise brought his concern to the attention of his supervisor, the Institution Manager. His failure to do so, constitutes inadequate or unsatisfactory work performance -- a Group I offense.

Grievant contends the Agency failed to follow its Emergency and Health Care Training⁶ policy. This policy provides:

³ The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

⁴ Agency Exhibit 2.

⁵ Agency Exhibit 1.

⁶ Agency Exhibit 2.

Each facility administrator shall designate a coordinator to:

1. monitor when recertifications must be conducted;
2. arrange for the availability of the appropriate training; and
3. notify supervisors when staff must attend.

This policy anticipates the Facility performing three tasks. In previous years, the Facility had arranged and organized the training thereby completing all three tasks. In the most recent year, however, the Facility did not complete task number 2. Instead, it notified Grievant he was responsible for arranging for the availability of the training. Although the Facility did not fully perform under the Agency's policy, this does not excuse Grievant's failure to question or respond to the February 21, 2001 memorandum.

One could argue that when Grievant failed to independently schedule the training, he should have foreseen that the consequences of his behavior would cause him to violate the Agency's training requirement. Thus, one could argue that Grievant should be disciplined no differently than as if he had intended to violate the Agency's policy. This argument cannot be supported under the facts of this case. Grievant was entitled to rely upon the Facility to complete all three tasks of the Emergency and Health Care Training policy independently of the February 21, 2001 memorandum. In essence, the Facility's failure to comply with the Agency's policy prevented Grievant from fully foreseeing the consequences of his failure to comply with the Assistant Director's instruction. Consequently, the Hearing Officer cannot conclude that Grievant knew or should have known his actions would violate Agency policy.

Grievant's Written Notice states that he is suspended from April 22, 2001 to April 30, 2001 with a return to work date of May 1, 2001. During the hearing, the Agency represented to the Hearing Officer that it did not suspend Grievant but rather placed him on leave without pay because he did not have the necessary certificate to work. Whether Grievant may be placed on leave without pay because he lacked the necessary certificate is not an issue that was qualified for a hearing. Thus, the Hearing Officer will not rule on that issue. To the extent the Agency suspended Grievant as part of its disciplinary action, that suspension is reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant's suspension is **rescinded**. GPM § 5.9(a)(2). P&PM § 1.60(D)(1)(a). The Agency is directed to provide the Grievant with **back pay** for the period of suspension, less any interim earnings that the employee received during the period of suspension

and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). P&PM § 1.60(IX)(B)(2).

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.

Carl Wilson Schmidt, Esq.
Hearing Officer