

Issue: Group II Written Notice with 10-day suspension (leaving work site without permission); Hearing Date: November 16, 2001; Decision Date: November 27, 2001; Agency: Department of Juvenile Justice; AHO: Carl Wilson Schmidt, Esquire; Case Number 5327



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5327

Hearing Date: November 16, 2001
Decision Issued: November 27, 2001

PROCEDURAL HISTORY

On September 18, 2001, Grievant was issued a Group II Written Notice of disciplinary action with ten day suspension for:

On 9/7/01, you left your post without permission, left your post unsecured and your cadets without supervision.

On September 18, 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 November 1, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 16, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Superintendent
Agency Representative
Sergeant

Counselor
Speech Pathologist
Senior Officer

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with 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 Virginia Department of Juvenile Justice employs Grievant as a juvenile corrections officer. No evidence was presented of any prior disciplinary action against Grievant.

Housing Units are square buildings containing four separate equal sized living areas called pods. Each pod has a secured doorway facing a side of a central control station. A juvenile corrections officer works in the central control station and can turn in the direction of each pod and see the pod entrance. A hallway several hundred feet long connects a Housing Unit to the main building.

When staffing levels permit, a juvenile corrections officer is assigned to work in each pod. On some occasions, juvenile corrections officers are permitted by a Sergeant to "float" between two neighboring pods. One duty of juvenile corrections officers assigned to pods is to make sure that checklist sheets are placed on the doors of each cadet room. Checklists are used to monitor cadets' status.

During the morning of September 7, 2001, Grievant was assigned to pod 400. She was out of checklists so she asked the Sergeant if she could look for some extra copies in pod 300. The Sergeant agreed and Grievant left her post and walked over to pod 300. She could only find one checklist in pod 300 so she decided to make copies. She left pod 300 and pod 400 and walked down the hallway several hundred feet to the

room where a copy machine was located. She waited a few minutes to complete her tasks and then returned. When she returned she found the Sergeant and another staff member in pod 400. Grievant had not asked the Sergeant or any other supervisor for permission to leave pod 400 to make copies.

On April 3, 2000¹, Grievant received a memorandum from her supervisor stating:

We have talked about the importance of staying on your assigned post. When all cadets are secured this is not an opportunity to leave the pod without proper relief. If for any reason you need to leave the pod, call on your immediate supervisor or floater. We must not continue to violate this policy.

In July or August 2001, Grievant left her post without permission. The Sergeant met with her to discuss the matter. After that discussion, the Sergeant chose not to issue Grievant a counseling memorandum because that was the first conflict he had had with Grievant.

Grievant's responsibilities are governed by the "Rules For Staff in HB Housing Units" The first item in these rules states, "Do not leave your post without notifying [Supervisor] and [another supervisor] under any circumstances." The Rules also state,

By signing this I agree that the Sergeants have reviewed this document with me and permitted me to ask questions regarding the above rules. I completely understand this document and I also understand that if these rules are not adhered to that any violation could result in the Standards of Conduct. I am also aware that a copy of this document will be placed in my fact file.

On August 10, 2001, Grievant and the Supervisor signed the Rules.

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).² 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

¹ The document presented shows a date of April 3, 2001. Grievant testified credibly that the memorandum was written in 2000.

² The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM) setting forth Standards of Conduct for State employees.

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 instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. P&PM § 1.60(V)(B)(2)(a). Grievant truthfully admitted that her post consisted of the pod and that once she exited the interior door of the pod she was no longer in her post. Once Grievant left the housing unit and walked to the far end of the hallway, she was clearly no longer at her post. Because she did not have the prior approval of her supervisor, her actions were contrary to the Supervisor’s instructions not to leave her post under any circumstances without notifying him. The Agency’s disciplinary action must be upheld.

The Agency determined that Grievant should receive a ten workday suspension. Mitigating circumstances sufficient to reduce this disciplinary action were not presented. Grievant received a written and a verbal instruction not to leave her post without permission and she signed the Rules For Staff in HB Housing Units acknowledging her agreement not to leave her post without permission. She had adequate notice of the Agency’s expectations.

Grievant contends that the level of discipline should be reduced because other staff regularly leave their posts and walk down the hallway to obtain supplies and other necessary items to perform their duties. Although other staff may regularly leave their posts without permission³, their actions do not create an exception to the Rules For Staff in HB Housing Units that Grievant signed.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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:

³ Grievant presented credible evidence that other staff regularly left their assigned pods in order to obtain supplies and other necessary items. She did not present evidence, however, that the Sergeant knew these staff were leaving their posts and was not taking any disciplinary action against them.

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