

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instruction, perform assigned work, comply with established written policy); Hearing Date: April 1, 2002; Decision Date: April 1, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5407



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5407

Hearing Date: April 1, 2002
Decision Issued: April 1, 2002

PROCEDURAL HISTORY

On January 11, 2002, Grievant was issued a Group II Written Notice of disciplinary action with five workdays suspension for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On 12-17-01, you were instructed by [Lieutenant] to bring in a doctor's note and you failed to do so. You returned to work on Dec. 24, 25, and 26 without the doctor's note. [Lieutenant] issued a counseling letter to you on 12-25-01 instructing you once again to bring in the doctor's note and you failed to do so. You were released of your duties on 12-27-01 and later faxed a doctor's note. You failed to follow your supervisor's verbal and written instructions, therefore, this notice is issued.

On January 11, 2002, 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 March 6, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 1, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's counsel
Agency Representative
Sergeant
Lieutenant
Unit Manager

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 Department of Corrections employs Grievant as a Corrections Officer Senior. Since began working for the Agency approximately four years ago and has received satisfactory performance evaluations. On March 16, 2001, Grievant received a Group I Written Notice for obscene or abusive language. On April 18, 2001, she received a Group II Written notice for failure to follow supervisor's instructions.

On December 17, 2001, the Sergeant, Grievant's immediate supervisor, instructed Grievant to assist with a shakedown in Dorm F in Housing Unit 12. Grievant has asthma; so she told the Sergeant she could not work in Dorm F where inmate smoking was permitted. She said she had documentation in the personnel office supporting her request. The Sergeant assigned Grievant to another work area and instructed her to bring in a doctor's note verifying that she could not work in a smoking dorm and to bring the note when she returned to work. Grievant responded that she would obtain a note from her doctor during her rest days and would have the note when she returned to work on December 24, 2001. On December 19, 2001, Grievant obtained a note from her doctor regarding her asthma. When Grievant returned to work

on December 24, 2001, the Sergeant questioned her about whether she had obtained a doctor's note. She responded that she had seen her doctor but forgot to bring the note to work. On December 25, 2001, she was questioned again about the note and she said she had left the note at home. The Lieutenant issued a written counseling outlining what had happened and stating, "You are required to bring this form [the doctor's note] in on Dec. 26th". On December 26, 2001, Grievant was asked again about the note and she said she did not have the note. As a result of this, the Lieutenant sent a memorandum to the Housing Unit Manager asking her to consider disciplinary action against Grievant. On December 27, 2001, Grievant arrived to work without the doctor's note. At approximately 8:15 a.m., the Housing Unit Manager informed Grievant she had to work Dorm F or be sent home. Grievant refused to work Dorm F and went home. Grievant's doctor faxed a note to the Agency's personnel office later in the day. The note stated that it was a second attempt and outlined restrictions regarding Grievant's working conditions.

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

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant was instructed by her supervisor on December 17, 2001 to bring in a doctor's note regarding her medical condition. She was reminded of that instruction on December 25th. She went to the doctor but failed to bring in the note because she lost it. Grievant did not follow her supervisor's instruction thereby justifying issuance of a Group II Written Notice.

Grievant contends she did not intend to violate her supervisor's instruction and, therefore, she should not be given a Group II Written Notice. The Department of Corrections is a paramilitary organization where corrections officers have rank and are expected to follow the instructions of their supervisors. It is not necessary for the Agency to show that Grievant intended to violate her supervisor's instruction so long as it can show that she knew the instruction. The Agency has established that she was aware of the instruction and that she failed to follow the instruction without proper excuse.

Grievant's five-day suspension was appropriate given her prior disciplinary history. At the time of the events giving rise to this grievance, Grievant had an active

Group I and an active Group II Written Notice. She could have been terminated, demoted, transferred, or suspended for up to 30 days. A five workday suspension is reasonable in light of what action could have been taken against her.

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 three 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 Resource 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.

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 DHRM, 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