

Issue: Two Group II Written Notices and subsequent termination (repeated failure to follow supervisor's instruction; leaving work site without permission); Hearing Date: May 17, 2002; Decision Date: May 17, 2002; Agency: Department of Correctional Education; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5433



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5433**

Hearing Date: May 17, 2002  
Decision Issued: May 17, 2002

**PROCEDURAL HISTORY**

On February 14, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

*Repeated failure to follow supervisor's directions with regards to notification of a school administrator in the event of any unplanned absences from duty. Coupled with incidences of leaving work without proper authorization. You failed to respond to counseling and the stipulated corrective action.*

The notice listed the date of the offense as January 25, 2002.

On February 14, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

*Leaving the workplace on 29 Jan. 02 without proper authorization during the conducting of a counseling session regarding your repeated failure to notify an administrator of unplanned absences. You stated in leaving the session "Do what you want, I am through with this."*

The notice listed the date of the offense as January 29, 2002. Based on the accumulation of two active Group II Written Notices, the Agency removed Grievant from employment effective February 14, 2002.

On February 22, 2002, Grievant timely filed a grievance to challenge the disciplinary action.<sup>1</sup> The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 17, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2002, a hearing was held at the Agency's regional office.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Principal

### **ISSUE**

Whether Grievant should receive two Group II Written Notices 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 Department of Correctional Education employed Grievant as an Academic Teacher at one of its schools until his removal on February 14, 2002. He had worked

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<sup>1</sup> Grievant seeks to be reinstated, awarded back pay and given a written apology. The Hearing Officer lacks the authority to force an Agency to apologize even in those instances where the Hearing Office believes an agency should apologize.

for the Agency for over three years. Grievant's work hours were from 7:45 a.m. to 4:15 p.m. with a thirty-minute lunch break. His performance evaluations show improvement and that he was rated as a contributor in his most recent evaluation.<sup>2</sup>

On January 7, 2002 Grievant was injured by a student who hit him. His injuries caused neck pain, headaches, blurred vision, and pain in his right eye.<sup>3</sup> He had to miss time from work<sup>4</sup> and began taking medication with drowsiness as a side effect. He also had to receive medical treatment. Grievant's medical providers were located approximately one and a half miles from his home and two and a half miles from the school where he worked. He required less than fifteen minutes to drive from his home or school to the medical appointments.

On January 25, 2002,<sup>5</sup> Grievant had a physical therapy appointment at 9:30 a.m. and a doctor's appointment at 11:00 a.m. Grievant could have come to work at 7:45 a.m. and worked for approximately one hour and fifteen minutes with sufficient time remaining to enable him to arrive for his 9:30 a.m. medical appointment. He did not come to work that morning and did not inform the Agency that he would not be arriving at work before attending the medical appointments.<sup>6</sup>

Grievant completed his medical appointments by approximately 11:40 a.m. but was sleepy because of the medication<sup>7</sup> he was taking. Grievant asked the doctor if the doctor would excuse him from work for the rest of the day so that could go home and sleep. The doctor refused and said Grievant was authorized for limited duty but that Grievant should check with his employer about working for the rest of the day. On his way home, Grievant called the Principal and indicated that he would not be returning to work. Grievant told the Principal that he was taking medications and that he felt sleepy. Grievant misled the Principal into thinking that the doctor had excused Grievant from work so that Grievant could sleep.<sup>8</sup>

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<sup>2</sup> Grievant Exhibit 22.

<sup>3</sup> Agency Exhibit 9.

<sup>4</sup> Grievant filed a worker's compensation claim. Grievant Exhibits 11 – 16.

<sup>5</sup> The Agency offered evidence of previous incidents when Grievant failed to notify the school of his absence. The Hearing Officer will not evaluate those incidents regarding whether they support disciplinary action since the first Group II Written Notice mentions only the date of January 25, 2002 as the date of the offense.

<sup>6</sup> Grievant only informed the Principal that he had medical appointments scheduled for 9:30 a.m. and 11 a.m. Grievant Exhibit 19.

<sup>7</sup> Grievant was taking Skelaxin (Metaxlone) with a warning that, "This medication may cause drowsiness or dizziness ..." He was also taking Ultram (Tramadol) with the possible side effect of "dizziness, nausea, drowsiness, ...." Grievant Exhibits 17 and 18.

<sup>8</sup> The Agency disputes that Grievant went home to sleep. There is insufficient evidence for the Hearing Officer to conclude that Grievant went elsewhere.

The Agency had previously repeatedly counseled Grievant regarding work attendance and notifying the Agency when he was unable to work due to illness or for other reasons. For example, on January 7, 2002, the Principal counseled Grievant for failing to report to work on January 4, 2002 without notifying the Agency.<sup>9</sup>

On January 29, 2002, the Agency held a due process meeting to inform Grievant of the possible disciplinary action to be taken against him and to inform him of his opportunity to respond to the charges. During the meeting, the Principal informed Grievant of the basis for taking disciplinary action and that he was recommending Grievant's dismissal. Grievant felt uncomfortable and a tightness in his chest. Grievant told the Principal that he was going to find someone who would listen and he left the room and the Facility. He went home and called the Agency Head and a Human Resource employee. The Agency Head was unavailable to answer Grievant's call. Grievant spoke with the Human Resource employee who informed him that he should return to the work place if Grievant wanted her to be on his side. At approximately 3:05 p.m., Grievant returned to work but was denied admittance under the instructions of the Principal. Due to the stress he experienced that day, Grievant went to the hospital at approximately 4:30 p.m. and was admitted overnight.

## **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).<sup>10</sup> 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).

### First Group II Written Notice

State employees are expected to "report to work as scheduled."<sup>11</sup> They "should report unexpected absences, including reporting to work late or having to leave early, to supervisors as promptly as possible."<sup>12</sup> Grievant failed to report to work at 7:45 a.m. on January 25, 2002 and failed to inform his supervisor that he would not be at work that

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<sup>9</sup> Agency Exhibit 4.

<sup>10</sup> The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

<sup>11</sup> P&PM § 1.60(III)(A)(1).

<sup>12</sup> P&PM § 1.60(III)(A)(2)(b).

morning. Grievant expected his supervisor to assume he would be absent from work beginning at 7:45 a.m. for a medical appointment beginning at 9:30 a.m. Since his medical provider was located less than a fifteen minute drive from his place of work, Grievant could have gone to the school and worked for at least one hour and fifteen minutes with sufficient time for him to leave the school and attend his medical appointment. Grievant's "failure to follow ... established written policy"<sup>13</sup> and "failure to report to work as scheduled without proper notice"<sup>14</sup> is sufficient to justify the Agency's issuance of the first Group II Written Notice.

Grievant contends he should not be issued a Group II Written Notice because he notified the Principal of the medical appointments. This argument fails because an employee is permitted to take sick leave only for the amount of time relating to the medical appointment.<sup>15</sup> Grievant was absent for more than the amount of time necessary to be away from work for his medical appointment.<sup>16</sup>

### Second Group II Written Notice

"Leaving the work site during work hours without permission" is a Group II offense.<sup>17</sup> Before the conclusion of the disciplinary meeting on January 29, 2002, Grievant abruptly left the meeting and walked off the work site without permission to do so. The Agency has met its burden of proof to support issuance of the second Group II Written Notice.

### Mitigation

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).

There are several mitigating factors justifying reversal of Grievant's termination. First, disciplinary meetings are often very emotional and stressful. This increases the

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<sup>13</sup> P&PM § 1.60(V)(B)(2)(a).

<sup>14</sup> P&PM § 1.60(V)(B)(2)(d).

<sup>15</sup> This period of time includes travel to and from the medical appointment. In addition, See generally, P&PM § 4.55 and 4.57.

<sup>16</sup> Grievant also argues that because he did not have any classes on January 25, 2002, his absence should have been excused. This argument fails because Grievant could have performed other duties. Even if the Hearing Officer were to agree that Grievant was not needed by the Agency that morning, Grievant should have requested annual leave from the Agency. It is the Agency's responsibility to determine when to permit an employee to take leave.

<sup>17</sup> P&PM § 1.60(V)(B)(2)(c).

risk that an employee may make an error in judgment. Second, Grievant mistakenly was informed that he could be terminated and upon being told this, he became extremely upset and left the meeting. Taking into consideration all of the facts existing prior to the January 29<sup>th</sup> meeting, terminating Grievant may have been possible but was not likely. Indeed, the Agency ultimately issued Grievant a Group II Written Notice for the January 25 offense. Since Grievant did not have any prior disciplinary action, a single active Group II Written Notice would not have justified his termination. Third, the underlying reason for disciplining an employee who leaves the work site without permission is to prevent employees from neglecting their work duties. Grievant's work duties involved teaching. He did not neglect his teaching duties when he left since he did not have any classes in the afternoon. Fourth, Grievant returned to work approximately two hours later. Although he did so at the request of another Agency employee, the fact remains that he returned to work thereby suggesting that he realized he made mistake by leaving. Fifth, Grievant's recent evaluation shows he is a good teacher. He has made improvement over the years and is in the process of obtaining his teaching certificate. Reinstating Grievant will not adversely affect the Agency's ability to deliver educational services. Thus, the Hearing Officer will uphold the second Group II Written Notice but reverse the termination. The Hearing Officer will not award back pay.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action is **upheld**. Grievant's removal is **reversed**. The Agency is ordered to **reinstate** Grievant without back pay.

## **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

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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer