

Issue: Group II Written Notice (failure to follow supervisor's instruction, perform assigned work, or otherwise comply with established written policy); Hearing Date: 08/23/02; Decision Date: 09/10/02; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5500



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5500

Hearing Date: August 23, 2002
Decision Issued: September 10, 2002

PROCEDURAL HISTORY

On April 1, 2002, Grievant was issued a Group II Written Notice of disciplinary action with three¹ workday suspension for:

Failure to follow a supervisors instructions, perform assigned work or otherwise comply with applicable established written policy.

On April 29, 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 August 7, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 23, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative

¹ Grievant works 12-hour shifts. The effect of a three workday suspension is to approximate a customary five-day workweek.

Agency Representative
Two Lieutenants
Assistant Warden Operations

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. She received a Group I Written Notice on July 18, 2001 for excessive tardiness.

Facility policy² requires staff who may be absent on a particular day to call their supervisor two hours before their shifts begin.³ Grievant's twelve-hour shift begins at 5:30 a.m. In Grievant's case, she would have to call her supervisor before 3:30 a.m. The reason for this practice is to enable the Agency to find replacement workers for the oncoming shift thereby ensuring adequate staffing.

On March 9, 2002 at 4:10 a.m., Grievant called the Lieutenant to inform the Lieutenant that Grievant would not be coming to work that day due to personal family business. As was her usual practice, the Lieutenant instructed Grievant to call back and speak with the Watch Commander for Grievant's shift.⁴ Grievant failed to call the Watch Commander.

² Grievant's conditions of employment state in relevant part, "Shift workers are expected to notify the officer in charge or the shift commander at least two (2) hours prior to the beginning of their shift if they will be absent due to illness or other unanticipated reasons." Agency Exhibit B.

³ Internal Operating Procedure 213-7.2(3)(f)(1).

⁴ A notation of "told to call w/c[Watch Commander]" was made in the Staff Call-In Status reference sheet. Grievant Exhibit C-2.

On March 29, 2002, the Agency learned that Grievant had been convicted in court of an offense relating to abusive language and fined for that offense. Grievant reported neither the arrest nor the conviction to the Agency.

Rather than issuing Grievant two separate Group II Written Notices, the Agency combined the offenses into one Group II Written Notice.

CONCLUSIONS OF LAW AND POLICY

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 ...” is a Group II offense.⁵ Grievant was instructed by a supervisor to call the Watch Commander. Grievant failed to do so thereby failing to follow a supervisor’s instruction. Her omission supports the Agency’s issuance of a Group II Written Notice.

Grievant contends that Agency policy does not require Grievant to call the Watch Commander after having notified a supervisor that Grievant would be absent. This argument fails because the application of policy and a supervisor’s instructions are separate considerations. It may be the case that a policy does not require a certain action by an employee; but if a supervisor instructs an employee to take a lawful and ethical action, the employee must comply or risk receiving disciplinary action. Grievant’s actions may have been consistent with Agency policy; however, her omission was contrary to a supervisor’s instruction. She should have complied with the Lieutenant’s instruction to call the Watch Commander.

“Failure to ... comply with established written policy” is a Group II offense.⁶ DOCPM § 5-45.6(C) states:

Employees who are convicted of a criminal conviction of any kind shall inform their organizational unit head immediately if received during normal working hours or the next work day if received during non-working hours.

⁵ DOCPM § 5-10.16(B)(1).

⁶ DOCPM § 5-10.16(B)(1).

Grievant was convicted⁷ of a criminal offense but failed to report her conviction to the Agency. Grievant failed to comply with established written policy thereby justifying issuance of a Group II offense.

Grievant contends she was out on maternity leave at the time of the conviction and did not have to report the conviction. This argument fails because at some point Grievant returned to work and should have reported the conviction upon her return to work.

Discipline for a Group II Written Notice “shall normally take the form of the notice and up to 10 workdays maximum suspension without pay.”⁸ Grievant was suspended for approximately three workdays, which is within the maximum permitted. In light of Grievant’s prior disciplinary action and the nature of the Group II Written Notice issued as part of this grievance, the suspension is appropriate.

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

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

⁷ DOCPM § 5-45.6(B) requires employees to report when they have been charged with an offense regardless of conviction. Grievant failed to comply with this provision of the policy.

⁸ DOCPM § 5-10.16(C)(1).

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.