

Issue: Group II Written Notice with termination (failure to follow supervisor's instruction and failure to report to work as scheduled); Hearing Date: 09/30/02; Decision Date: 10/02/02; Agency: Virginia Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5522



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5522

Hearing Date: September 30, 2002
Decision Issued: October 2, 2002

PROCEDURAL HISTORY

On June 17, 2002, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

- 1) *Failure to follow supervisors instructions.*
- 2) *Failure to report to work as scheduled without proper notice to supervisors.*

On July 3, 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 he requested a hearing. On August 27, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Resident Engineer

Maintenance Operations Manager
Tech III
Administrative Program Specialist
Administrative and Program Specialist
Transportation Construction Inspector
Fiscal Tech
Transportation Engineer Senior

ISSUE

Whether Grievant should receive a Group II Written Notice 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 Virginia Department of Transportation employed Grievant as a Contract Administrator until his removal on June 17, 2002. He worked for the Agency for approximately 12 years. On May 4, 2001, Grievant was issued a Group II Written Notice with five workday suspension for failure to complete assigned work and unsatisfactory job performance. On June 21, 2001, Grievant was issued a Group II Written Notice for failure to follow supervisor’s instructions.

Agency managers had concerns about whether Grievant was away from his work site for excessive periods of time and was properly absent from work. Grievant’s Supervisor established certain procedures for Grievant and the other employees working for the Supervisor to follow.

On November 14, 2001, Grievant’s Supervisor sent Grievant an email¹ stating:

¹ Agency Exhibit C.

I would like to bring to your attention recent unexpected absences/tardiness. The most recent events were Nov. 13th, arrived after lunch and Nov. 14th you were signed out until 9:30 a.m. I am aware that you did call in and talked to one of the office service specialists; however, I would encourage you to follow the below *standards of conduct*.

A. Attendance

1. Employees should report to work as scheduled.
2. If employees cannot report as scheduled
 - a. Employees should arrange planned absences, including reporting to work late or leaving work early, in advance with supervisors.
 - b. Employees should report unexpected absences, including reporting to work late or having to leave early, to supervisors as promptly as possible.

If you foresee any additional absence(s), please arrange these planned absences with me. In addition. When reporting to work late, I would encourage you to touch base with me first in lieu of having office personnel signing you out. The main reason is I will usually have questions regarding status of assigned work to meet the Residency's objectives/deadlines within your area of responsibility.

I would appreciate your cooperation and would like to discuss this matter with you today to prevent further disciplinary actions.

Grievant responded to the Supervisor's email as follows:

There should not be problems following your guidelines. Prior supervisors allowed us to call the office in the manner as I did this week. There should be no problem notifying you should you be available.

Grievant's Supervisor received a cell phone in April 2002. The phone number had been assigned to the prior Assistant Resident Engineer.² On April 18, 2002, the Supervisor sent the employees reporting to him an email³ stating:

My new cell number is [number]. If you need to get in touch with me 24/7 – you have my number. It will be glued to my hip. Please update your emergency list.

² The former Assistant Resident Engineer left the Residency on September 9, 2001.

³ Agency Exhibit H. Grievant Exhibit 10.

On April 23, 2002, the Supervisor sent the employees reporting to him an email⁴ stating:

Effective immediately, if you have any unplanned leave absence (personal, sick, vac, etc.) instead of calling the Residency number, please call me on my cell phone at [number]. If I don't answer, leave a voice message and I will call you back.

Grievant responded to the email, "O.K."

On June 11, 2002, Grievant was counseled regarding unplanned trips away from the office. He was reminded to notify the Supervisor before leaving the office. He was also reminded that the Supervisor wears a cell phone and that Grievant should call that cell phone number if Grievant could not personally speak with the Supervisor.

On June 14, 2002, Grievant was unexpectedly late for work. He had difficulty sleeping the night before and had taken medication causing his drowsiness. He called a secretary at his office and asked her to notify the Supervisor that he would be coming to work late. Grievant did not call his Supervisor's cell phone and inform the Supervisor that he would be late. He arrived at work at approximately 10 a.m.

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." DHRM § 1.60(V)(B).⁵ 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." DHRM § 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." DHRM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions ..." is a Group II offense. DHRM § 1.60(V)(B)(2)(a). Grievant was instructed to call his supervisor's cell phone number and state that he would be absent and if the supervisor did not answer to leave a message. Grievant was informed of this instruction and he knew of the instruction. Grievant repeatedly failed to comply with the instruction. The instruction was lawful and ethical and within the Supervisor's authority. Because Grievant failed to follow his supervisor's instruction, Grievant's absence from work was without proper notice⁶ to supervisors, a

⁴ Agency Exhibit H.

⁵ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁶ Grievant argues that DHRM § 1.60(V)(B)(2)(d) does not specify the method by which an employee must notify his supervisor and, thus, his failure to call his supervisor is not contrary to policy. Grievant's

Group II offense. DHRM § 1.60(V)(B)(2)(d). The Agency was justified to issue Grievant a Group II Written Notice.

An employee may be removed from his position based on the accumulation of active written notices. Accumulation of a second active Group II Written Notice “normally should result in discharge.”⁷ Before the Agency issued the Group II Written Notice giving rise to this grievance, Grievant had two active Group II Written Notices. He now has three active Group II Written Notices and his removal is appropriate based on his accumulation of disciplinary actions.

Grievant contends he did not call the supervisor’s cell phone number because he feared he would call the supervisor, but the supervisor would later intentionally deny having received the call. Grievant preferred to contact someone else and have that person email the Supervisor or call the Supervisor so that there would be some documentation of Grievant’s call. Grievant’s suspicion is not a sufficient basis for him to disregard the Supervisor’s instructions. An agency has the right to establish notification procedures for employees who may be absent.

Grievant argues he should not have been obligated to call the Supervisor’s cell phone number because the Supervisor was sometimes not available to answer the call. Grievant’s argument fails because Grievant could satisfy the Supervisor’s instruction by leaving a message on the cell phone voice mail.

Grievant points out that none of his leave requests were denied by the Agency, thus, speaking directly with his supervisor would not have made any difference. Even if Grievant’s sick leave was approved,⁸ the decision to permit an employee to take leave remains with the Agency’s managers and cannot be circumvented by an employee who chooses to disregard a supervisor’s instruction.

Grievant argues he was treated differently from other employees reporting to the Supervisor because they were excused from personally notifying the Supervisor of their unplanned absences. No evidence was presented to support this conclusion. Indeed, the evidence showed that other employees reporting to the Supervisor knew to contact him directly and knew to call him on his cell phone and leave a message if the Supervisor did not answer.

Grievant contends he should have been demoted and transferred instead of removed from employment. The Agency is not obligated to demote and transfer when

argument is untenable because the Supervisor is entitled to designate the method of notification and after having done so that method becomes the method of “proper notice.”

⁷ DHRM § 1.60(VII)(D)(2)(b).

⁸ Grievant was often late or absent from work due to his caring for his ill parents and operating their farm.

no available position exists within the Agency. No evidence was presented of any available position to which Grievant could have been transferred.

Grievant contends the Agency has retaliated against him. No credible evidence was presented supporting this allegation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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.

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

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

[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