

Issue: Group II Written Notice with 10-day suspension (failure to follow supervisor's instructions and falsification of records); Hearing Date: 01/29/03; Decision Issued: 01/31/03; Agency: DRS; AHO: Carl Wilson Schmidt, Esq.; Case No. 5617



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5617

Hearing Date: January 29, 2003
Decision Issued: January 31, 2003

PROCEDURAL HISTORY

On October 3, 2002¹, Grievant was issued a Group II Written Notice of disciplinary action with ten workday suspension for:

*Failure to follow supervisor's instructions and falsification of records.
Failure to follow supervisor's instructions regarding submission of leave records and procedures regarding reporting arrival to his office.
Falsification of records for submitting leave forms which did not accurately reflect hours away from work.*

On October 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 January 7, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

¹ The Written Notice incorrectly states the date of issuance as October 3, 2001.

Grievant
Agency Party Designee
Agency Representative
HR Consultant
Administrative Support
Computer Systems Engineer
Rehabilitation Engineer
Executive Secretary

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with ten workday 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 Rehabilitative Services employed Grievant as a Computer Systems Engineer. His work performance usually met or exceeded the Agency’s expectations. He received a Group II Written Notice on April 2, 2001 for “Failure to follow supervisor’s instructions, failure to perform assigned work and failure to report to work without proper notice to supervisor.”²

The Agency established a “Phone Call Check In Policy” to verify at what time staff arrived to work at their respective offices. Staff were expected to call from their assigned telephones to a voice mail system that recorded onto a database the time and date of the call and the telephone number from which the call was made. This system permitted Agency managers to monitor at what time Agency staff first arrived to their offices. A five minute grace period was permitted. Employees more than five but fewer than fifteen minutes late to work had to use leave to make up the unapproved absence from work. Staff arriving to work later than thirty minutes were required to submit a

² Agency Exhibit 18.

written explanation of the reason for their tardiness.³ The policy was distributed to all staff including Grievant.

Grievant figured out a way to circumvent the check in procedure so that he did not have to be at his desk and office telephone when calling into the voice mail system. Grievant's work schedule began at 8:30 a.m. On August 27, 2002, Grievant was not in his office or at work, but he called the computer system at 8:30 a.m. and this information was recorded in the database. A co-worker was looking at the computer database when she observed an entry showing that Grievant had called from his office telephone. She immediately went to Grievant's office to give him some documents. She noticed that his office door was locked and Grievant was not present. She noticed Grievant arrive at 8:37 a.m. She notified the Director.

On August 28, 2002, the Director went to Grievant's office before 8:30 a.m. She observed the office locked and Grievant not present. At 8:31 a.m., Grievant called the computer system from a remote location and the time of his call was recorded on the database. The Director was looking at the database when Grievant's call was recorded. She immediately went to Grievant's office and noticed the door was locked. She unlocked the door and looked inside to make sure Grievant was not present. The office lights were off and there were no signs Grievant had entered his office that morning. The Director observed Grievant arrive at his office at 8:44 a.m.

CONCLUSIONS OF 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).⁴ 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).

The Agency issued its Written Notice to Grievant based on three separate fact scenarios: (1) Grievant failed to submit leave records, (2) Grievant submitted incorrect leave records, and (3) Grievant failed to follow the Agency's telephone call in procedure. When a group notice is based on several different fact scenarios, the Hearing Officer evaluates each set of facts separately and together to determine whether sufficient evidence exists to support the disciplinary action. Grievant contends he complied with the Agency's leave procedures because when errors were pointed out to him he

³ Agency Exhibit 4A.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

corrected them as he had done so in the past. It is not necessary for the Hearing Officer to determine whether Grievant failed to submit leave records or submitted incorrect leave records because this appeal can be resolved based on whether Grievant complied with the Agency's telephone call in procedure.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.⁵ Grievant intentionally circumvented the Agency's call in policy in order to make Agency records reflect that he was at the worksite on time when he was not arriving on time. Grievant knew the purpose of the policy was to verify when employees arrived at work. By circumventing the Agency's policy, Grievant engaged in behavior giving rise to a Group II Written Notice.

Accumulation of a second Group II Written Notice can be a basis for removal.⁶ Instead of removal, the Agency suspended Grievant for ten workdays. That suspension must be upheld because (1) Grievant's behavior would otherwise have justified issuance of a Group III Written Notice for falsification of records⁷ and (2) he had a prior active Group II Written Notice.

Grievant contends the Agency issued its disciplinary action against him as a result of budget reductions. This argument is unfounded. If the Agency wished to reduce its budget expenditures, it could have removed Grievant from employment.

Grievant contends the Agency has inconsistently and capriciously applied its policies towards him. With respect to the telephone call in policy, the Agency demonstrated that it applied to most employees and that employees were informed of the policy requirements. Grievant was not treated differently from his co-workers under the telephone call in policy. No basis exists to reverse the Agency's disciplinary action.

DECISION

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

⁵ DHRM § 1.60(V)(B)(2)(a).

⁶ DHRM § 1.60(VII)(B)(2)(D)(2)(b)(1).

⁷ DHRM § 1.60(V)(B)(3)(b).

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.