

Issues: Group II Written Notice (failure to follow supervisor's instructions) and Group II Written Notice (failure to perform assigned work); Hearing Date: 05/29/03; Decision Issued: 05/30/03; Agency: Christopher Newport University; AHO: Carl Wilson Schmidt, Esq.; Case No. 5725/5726



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5725 / 5726**

Hearing Date: May 29, 2003  
Decision Issued: May 30, 2003

**PROCEDURAL HISTORY**

On January 29, 2003, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow supervisor's instructions and a Group II Written Notice of disciplinary action for failure to perform assigned work.

On February 26, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 6, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
One witness

**ISSUE**

Whether Grievant should receive two Group II Written Notices of disciplinary action.

### **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 Christopher Newport University employs Grievant as a Cleaning Tech. Her responsibilities include cleaning the second and third floors of one of the University's office buildings. She has been employed by the University since 1997 and has no prior disciplinary action.

Keys are necessary to enter the building and to enter the various office suites within the office building. Keys are kept at Plant Operations. During most of the year, housekeeping staff who wish to enter buildings, must go to Plant Operations and obtain keys and then return those keys at the end of the day. During the period December 23, 2002 to January 2, 2003, Plant Operations was closed for the holiday break. Grievant's Supervisor instructed Grievant to take office building keys home with her during the break.<sup>1</sup> Instead, she placed the keys on a desk to which the Supervisor had access.

Grievant's Supervisor instructed Grievant to work on December 23<sup>rd</sup>, 24<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 30<sup>th</sup>, and 31<sup>st</sup> for not more than 4 hours and arrive at the worksite no sooner than 6 a.m. Grievant did not work on December 23, 2002. She worked on December 24<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, and 30<sup>th</sup>. She began working at about 6 a.m. each day and worked for 3.5 to 4 hours. She gained access to the building by calling the University police department and having a police officer bring keys to open the building entrance. The University police department has six full sets of keys with keys to the main entrance and to each of the office suites within the building. Grievant cleaned portions of the second and third floor but did not clean an office suite of a University unit that was open for business during that period of time. Normal business hours for the employees working in the

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<sup>1</sup> Grievant is one of two employees responsible for cleaning the office building. The other employee complied with the Supervisor's instruction and retained her keys from December 23, 2002 to January 2, 2003. She was able to complete her duties in the building.

office suite begin at 8 a.m.<sup>2</sup> Grievant did not clean that office suite because she did not have a key to the suite.

## 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).<sup>3</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.” 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, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>4</sup> Grievant was instructed to work six days from December 23, 2002 to December 31, 2002. She did not report for work on December 23, 2002. She only worked four days thereby acting contrary to her supervisor’s instructions. The University has met its burden of proof to justify issuance of a Group II Written Notice with an offense date of December 23, 2002.

Grievant was assigned responsibility for cleaning the office suite on the third floor of the building. She did not clean the suite thereby failing to perform her assigned duties. The University has met its burden of proof to justify issuance of a Group II Written Notice with an offense date of December 23, 2002 to December 31, 2002.

Grievant contends she did not work on December 23, 2002 because she did not have keys to enter the building. This argument fails because she also did not have keys on December 24<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, and 30<sup>th</sup>, yet she worked between 3.5 and 4 hours during those days. Grievant could have asked the police to let her into the building on December 23<sup>rd</sup> so that she could work.

Grievant argues she should not be disciplined for failing to work on December 23<sup>rd</sup> because she is the one who informed the Supervisor that she did not work on that date. How the University learned that Grievant did not work on December 23 does not affect whether Grievant engaged in behavior giving rise to disciplinary action.

Grievant contends she could not clean the office suite because she did not have a key. This argument fails because Grievant could have obtained a key to the office

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<sup>2</sup> One manager regularly arrived at the office suite at 9 a.m.

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM § 1.60(V)(B)(2)(a).

suite from the police. In addition, employees working in the office suite began working at 8 a.m. The office rarely opened later than 9 a.m. If Grievant worked 3.5 hrs and began at 6 a.m., she would have been inside the building when the employees of the office suite began working. Grievant could have entered the office suite to clean while the employees were working.

Grievant contends the University is retaliating against her. No credible evidence was presented supporting this claim. Although Grievant's supervisor took disciplinary action against Grievant, the taking of disciplinary action is not retaliation when the disciplinary action is supported by the employee's behavior.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action 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.<sup>5</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.