

Issue: Group II Written Notice with 2-day suspension (refusal to work required overtime); Hearing Date: 06/11/03; Decision Issued: 06/12/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5732



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5732

Hearing Date: June 11, 2003
Decision Issued: June 12, 2003

PROCEDURAL HISTORY

On February 18, 2003, Grievant was issued a Group II Written Notice of disciplinary action with two day suspension for:

Refusal to work required overtime. On February 11, 2003, you were instructed to stay and work the draft for the 6-2 shift. You refused to work because you needed to go home because your daughter was sick. You were excused from the draft the previous day for this reason. No medical documentation was provided substantiating your daughter's illness and that you took her to the doctor.

On March 18, 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 13, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency's Representative
Two witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for refusal to work when drafted for a second shift.

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. Grievant has active Group II and Group III Written Notices.

Corrections facilities operate 24 hours per day, seven days per week. When a work shift is short of staff, it is sometimes necessary to "draft" employees from another shift. Employee names are rotated onto a draft list. If a supervisor from one shift believes it is necessary to draft an employee, the supervisor uses the draft list to select an employee from another shift. When an employee is drafted, he or she is expected to work the additional shift. Under Institutional Operating Procedure 206, when an employee is drafted to work a second shift, it is the same as an order to work a second shift.

Grievant's regular shift began at approximately 9:45 p.m. and ended at approximately 6:15 a.m. On February 10, 2003, Grievant was notified that she would be drafted to work a second shift. Grievant asked the Lieutenant not to be drafted because her child was sick and she wanted to go home and care for her child. The Lieutenant agreed but informed her that she would be drafted the following day. On February 11, 2003, Grievant was drafted to work a second shift beginning at approximately 6:15 a.m. and ending at approximately 2:15 p.m. She refused to be drafted for a second shift. Her daughter had a doctor's appointment at approximately 9 a.m. on February 11, 2003 and Grievant wished to take her daughter to that appointment.

When Grievant returned to work for her regularly scheduled shift, the Lieutenant asked her for documentation of the reason justifying her refusal to be drafted on February 11, 2003. Grievant did not produce any documentation.

During the hearing, Grievant submitted documents from a hospital and medical doctor. The hospital document shows Grievant's child went to the hospital on February 8, 2003. The hospital instructed that the child have a follow up appointment with a doctor. The doctor's note states that the child may return to school on February 11, 2003 and that the doctor's office was closed on February 17, 2003 so that Grievant could not pick the note until February 18, 2003.

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." 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, perform assigned work, or otherwise comply with established written policy" is a Group II offense.¹ "[R]efusal to work overtime hours as required" is also a Group II offense.² Grievant was ordered to work a second shift following her regular shift. Working a second shift when necessary is a condition of employment. Grievant failed to follow her supervisor's instruction as specified in established written policy. By failing to fulfill her draft responsibilities without excuse, Grievant engaged in behavior justifying issuance of a Group II Written Notice.

An employee receiving a Group II Written Notice may be suspended without pay for up to ten workdays.³ Grievant's suspension is upheld.

Grievant argues that the hospital and doctor's notes she submitted at the hearing should justify her refusal to work a second shift. Grievant's argument fails. IOP 206 requires "The sick certificate must verify that the employee was unable to work the period he/she failed to report for work." The doctor's note indicates that the child can return to school on February 11, 2003 and does not mention the doctor's appointment on February 11, 2003. Even if Grievant had timely submitted the documents to the

¹ DOCPM § 5-10.16(B)(1).

² DOCPM § 5-10.16(B)(6).

³ DOCPM § 5-10.16(C)(1).

Lieutenant on her first day back to work, the documentation would not have been sufficient. In any event, Grievant was obligated to submit adequate documentation to the Lieutenant when she first returned to work. Her failure to do so prevents her absence from being excused.

DECISION

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

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.⁴

⁴ 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