

Issue: Group II Written Notice (failure to follow established policy); Hearing Date: 06/09/03; Decision Issued: 06/10/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5740; **Administrative Review: HO Reconsideration Request received 06/19/03; Reconsideration Decision issued 06/23/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied. Administrative Review: EDR Ruling request received 06/19/03; EDR Ruling dated 07/09/03; Outcome: HO neither abused his discretion nor exceeded his authority [Ruling No. 2003-122].**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5740

Hearing Date: June 9, 2003
Decision Issued: June 10, 2003

PROCEDURAL HISTORY

On February 28, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to follow established policy: [Grievant] signed the draft list on January 03, 2003. She was responsible to provide documentation to verify her absence. Upon return to duty [Grievant] had no documentation to verify her absence.

On March 21, 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 20, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 9, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee

Agency Representative
Sergeant

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow established written policy.

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 began working for the Agency approximately 20 years ago and has received no prior disciplinary action.

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.

On January 30, 2003, the Sergeant prepared a draft list containing the names of six employees including Grievant. The list showed that Grievant could be drafted on February 1, 2003. The draft list stated, in part:

You are being drafted to call [Unit] and speak with a supervisor no later than [or] earlier than 1700 hours and no later than 1800 hours to verify whether you are required to report for duty on the specified dates. If you are unable to work on the specified date, then you must call the Security Care unit Supervisor no later than 1630 hours on the specified date, and appropriate documentation will be required to verify the absence.

Failure to comply with the above may result in disciplinary action.

Your initials certify that you understand the above instructions.

Grievant initiated the sheet acknowledging she may be obligated to work on February 1, 2003.

On February 1, 2003 Grievant was drafted to work an additional shift. She called the supervisor for that shift and told the supervisor that she would not report to work due to illness. Grievant had diarrhea and did not wish to work until she felt better. When Grievant returned to work, the Sergeant asked her for her medical excuse. She did not present the Sergeant with a doctor's excuse because she did not believe one was necessary.

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 Grievant was instructed to provide proper documentation of her reason for failing to work on February 1, 2003.² Grievant failed to do so thereby justifying issuance of a Group II Written Notice.

Grievant argues she would have gotten a doctor's excuse if she had known she would be given a written notice. This argument fails because the draft list specifically states that "appropriate document will be required to verify this absence" and that disciplinary action may result if she failed to do so.

Grievant argues the disciplinary action should be reduced because she has worked for the Agency for 20 years without any prior disciplinary action. The evidence

¹ DOCPM § 5-10.16(B)(1).

² Although not stated as part of the draft list, by requiring employees to verify their absences with written excuses, the Agency is informing employees that certain excuses are not acceptable reasons for being absent from work. In other words, if the illness is not one for which the employee can obtain a doctor's excuse, then the employee should come to work even if the employee does not feel well and does not feel able to work.

showed that Grievant is a good and valuable employee.³ For a Hearing Officer to mitigate disciplinary action there must be some evidence explaining and excusing the employee's behavior. Although Grievant has many years of successful service to the Commonwealth, that evidence is not sufficient to mitigate the disciplinary action against Grievant.

Grievant presented substantial evidence suggesting that she should not have been placed on leave restriction because her absences from work over a series of years resulted from injuries she sustained that placed her on workers' compensation leave.⁴ Grievant's argument misses the point. Grievant was not disciplined for excessive absences. She was disciplined for failure to bring in a doctor's note for her absence on one day, February 1, 2003. Whether or not she should be placed on leave restriction has no bearing on whether she should receive a Group II Written Notice for failing to present the Agency with a doctor's excuse.

DECISION

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

³ For example, she was Employee of the Month for December 2002. She was also honorably discharged after a prestigious career in the United States Army Reserves.

⁴ In the Grievance Form A, Grievant raises as an issue whether the Agency has misapplied policy, but did not present evidence regarding what leave restriction policy was violated. The relief she seeks is removal of the disciplinary action.

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.⁵

[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

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