

Issue: Group II Written Notice with 5-day suspension (failure to report to work without proper notification to supervisor and failure to follow applicable established written policy); Hearing Date: 07/24/03; Decision Issued: 07/25/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5765



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5765

Hearing Date: July 24, 2003
Decision Issued: July 25, 2003

PROCEDURAL HISTORY

On April 3, 2003, Grievant was issued a Group II Written Notice of disciplinary action with five workday suspension for:

Failure to report to work as scheduled without proper notice to supervision, and failure to follow supervisor's instructions and to comply with applicable established written policy.

On April 9, 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 July 2, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 24, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Two witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with five workday suspension 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 Nurse at one of its Institutions. Grievant has an active Group I Written Notice for "Use of obscene or abusive language" issued on October 10, 2002.

Agency employees working in Grievant's units have been instructed to "Report any illness or injury to your supervisor that will keep you from reporting for duty at least 2 hours before the beginning of the shift. If the Supervisor is not available, contact the Head Nurse."¹ The Agency posts a monthly calendar listing the name of an on-call supervisor for each day of the month. To determine which supervisor to call, the employee must identify the appropriate supervisor listed on the calendar and then contact that supervisor. Supervisor contact changes at 8 a.m. each day. For example, if an employee is ill at 4 a.m. on March 10, 2003, the employee should contact the supervisor listed for March 9, 2003 and not the supervisor listed for March 10, 2003.

On March 10, 2003, Grievant was scheduled to begin her shift at 7 a.m. She woke up at approximately 5 a.m. She had an ongoing problem with her toe for which she had been receiving medical treatment and medication. Once she began walking on her foot, her toe became so painful that she felt she was unable to go to work. At 5:14 a.m., Grievant called the nursing working at the nursing station in the Institution and asked for the pager number of Ms. W. No supervisor was working at the Institution so early in the morning. Grievant asked for the pager number of Ms. W because Grievant believed Ms. W was the supervisor who was on-call. Ms. W's name appears on the March 2003 Supervisor On-Call Duty Roster as a supervisor to contact on March 10, 2003. Ms. T was the on-call supervisor for March 9, 2003. Grievant did not inform the

¹ See Agency Exhibit 4, Post Orders, General Duties, item 3.

nurse working at the nursing station that Grievant was ill and would not be coming to work because Grievant had been instructed not to leave a message with the employee working at the nursing station.

At 5:17 a.m. Grievant paged Ms. W. Ms. W did not receive Grievant's page because Ms. W had turned off her pager. Since Ms. W was not the supervisor until 8 a.m., Ms. W did not turn on her pager until 8 a.m. Ms. W received a telephone call at her home very early in the morning but did not recognize the caller using her caller id.

Grievant did not arrive to work at 7 a.m. as scheduled. At 7:48 a.m., Ms. T called Grievant and inquired as to why Grievant was not at work.

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.

"[I]nadequate or unsatisfactory job performance" is a Group I offense.² Grievant's behavior was unsatisfactory job performance because she failed to take action once she should have realized that the supervisor did not respond to her page. Grievant should have contacted the nursing station a second time to verify the correct supervisor or contacted the Head Nurse.

The Agency contends Grievant failed to comply with Agency policy or supervisor's instructions. Although Grievant failed to comply with the policy in a technical sense, her behavior best represents inadequate job performance because she made a good faith and substantial attempt to comply with the Agency's policy. Grievant was unable to fully comply with the policy in part because she did not realize that Ms. W was not the supervisor to contact. Grievant's confusion is understandable because the supervisor calendar does not identify at what time Ms. W became the on-call supervisor on March 10, 2003. Moreover, minutes of staff meetings do not indicate that on-call supervisor duties change at 8 a.m. The Agency did not establish that Grievant knew or should have known that the on-call supervisor duties changed at 8 a.m. In light of this evidence, the Hearing Officer finds mitigating circumstances to reduce a technical violation of the Agency's policy to a Group I Written Notice.

² DOCPM § 5-10.15(B)(4).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. Because the normal disciplinary action for a Group I Written Notice does not include suspension, the five workday suspension is **rescinded**. The Agency is directed to provide Grievant with **back pay** for the period of suspension less any interim earnings the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue.

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.³

³ 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