

Issue: Group II Written Notice with 3-day suspension (failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy); Hearing Date: 07/30/03; Decision Issued: 08/01/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq; Case No: 5768



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5768

Hearing Date: July 30, 2003
Decision Issued: August 1, 2003

PROCEDURAL HISTORY

On April 21, 2003, Grievant was issued a Group II Written Notice of disciplinary action with three workday suspension for:

Failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On April 13, 2003, you were assigned to work in Housing Unit 1 Lower¹ Control and again you refused report to your post. On April 14, 2003 you failed to report work or call in your absence. These are repeated violations of the Standards of Conduct.

On May 16, 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 10, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 30, 2003, a hearing was held at the Agency's regional office.

¹ The Written Notice incorrectly refers to Lower Control when in fact Grievant was assigned to Upper Control.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Eight Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instruction.

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 at one of its Institutions. Her duties include supervision of inmates. Grievant had not engaged in behavior giving rise to disciplinary action prior to this grievance.

Housing Unit 1 consists of two levels. On each level are two pods (living quarters). A control booth is located on each level. A control booth is located between two pods so that the control booth officer can look into both pods. A control booth is effectively a small fortress. It is protected by metal bars. Plexiglas windows can be raised to prevent someone from throwing into the control booth liquids or other items that might pass through the bars. A corrections officer determines who gains entry to the control booth. The camera is positioned so that the control booth officer can determine the location of anyone near the control booth including anyone standing on the stairway.

Managers within the Department of Corrections suspected certain employees and inmates within the Institution's Housing Unit 1 may have been engaging in illegal or improper behavior. Inmate H was placed within Housing Unit 1 in order to provide information to agency managers and the Institution's investigator. Inmate H was

required to report information in accordance with a specific chain of command. Inmate H mistakenly reported information to a sergeant who was outside of the specific chain of command. That sergeant filed an incident report which caused others working inside Housing Unit 1 to realize that Inmate H was collecting information and may be serving as an informant.

Inmate H resided in Delta pod on the upper level of Housing Unit 1. Because he was a detail worker, he was free to walk throughout the housing unit including the stairs providing access to the control booths.

Sometime after March 14, 2003 and before April 1, 2003 and anonymous note was presented by an inmate to Agency staff. The note's author claim to be an inmate who worked with Inmate H. The note stated in part,

I was told by [Inmate H] ... he was going to get [Grievant] on the stairway steps. He was going to beat her with the broom or throw some stripper in her face when she went on break. He said, he could get away with it cause he could get thru any back door because a sergeant, a lieutenant, and a captain told all the corrections officers to let him go anywhere he wanted to in the building.

The note's author realized that Inmate H was serving as an informant for the Department so the author drafted the note in an attempt to have Inmate H removed from Housing Unit 1. Grievant was randomly selected as a target.

On April 13, 2003, Grievant was assigned to work in the Upper Control Booth of Housing Unit 1. She did not wish to work that post because she feared she would be attacked by Inmate H. She informed Lieutenant W that she did not wish to work that post. Lieutenant W called Lieutenant F to confirm that Grievant was assigned to the post in the Upper Control Booth of Housing Unit 1. Lieutenant F informed Lieutenant W that Grievant was expected to work the Upper Control Booth. Lieutenant W instructed Grievant to take her post in the Upper Control Booth of Housing Unit 1. Grievant refused to take her post. She said she could not take her post because of the letter referring to a threat against her by Inmate H. Lieutenant W told Grievant she should either assume her post as instructed or go home. Grievant understood the Lieutenant's instruction to go home to mean that if she chose to go home, she should not return to work until instructed to do so. Grievant left the facility. On April 14, 2003, Grievant did not come in to work as scheduled and did not notify the agency that she was ill or was unable to come in as scheduled.

On April 21, 2003, Inmate H was moved to another housing unit to accommodate Grievant's concerns and because Inmate H was of no further value as an informant.

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. DOCPM § 5-10.16(B)(1). Grievant was instructed to assume her post on April 13, 2003. She refused to do so thereby acting contrary to her supervisor’s instructions.²

Grievant feared that Inmate H would harm her. Her fear was reasonable and rational under the circumstances known to her. She contends the Agency should have removed her or Inmate H from the Housing Unit. Based on the evidence presented, the Agency had taken all necessary steps to protect Grievant from injury even if the Hearing Officer assumes that Inmate H actually intended to follow through with the allegations specified in the note.³ Because Grievant was working in a secure control booth with full control over the entry and access persons into the control booth, Grievant was not placed unnecessarily in danger. Grievant contends Inmate H could have harmed her while she exited the control booth to go on break. This argument fails because the control booth had cameras positioned in a manner sufficient to enable Grievant to determine whether she was at risk of injury from any inmate.

Grievant argues that she should have been treated the same way as was another corrections officer who was exposed to an inmate’s death threat. The evidence showed that Corrections Officer OW received a death threat from an inmate in a housing unit where he was working. The Agency removed him from working alongside the inmate and placed him in a control booth for approximately one or two weeks. After investigating the threat, the agency removed Corrections Officer OW from the housing unit. Grievant was not treated materially different from the way Corrections Officer OW was treated. Since she was already assigned to a control booth position, it was unnecessary to move her into a control booth position. Working in a control booth is the

² The Agency contends Grievant failed to follow established written policy because she failed to notify her supervisor at least two hours before her shift started on April 14, 2003 that she would not be coming in to work. The Hearing Officer finds that this portion of the Written Notice is not substantiated. The evidence showed that Grievant understood Lieutenant W’s instruction to be to go home and not return until notified to the contrary. Grievant’s interpretation of the events is supported by the evidence. The Agency’s failure to establish that Grievant failed to follow established written policy does not affect the outcome of this case because the Agency has established that Grievant failed to follow a supervisor’s instructions.

³ For example, Agency staff spoke with Inmate H to confirm that he did not plan on attacking Grievant.

same remedy afforded Corrections Officer OW. Consequently, Grievant was treated in the same manner as was Corrections Officer OW.

Grievant contends she was instructed to either assume her post or go home. Since she went home, Grievant contends she was acting in accordance with her supervisor's instruction. This argument fails because the context of the instruction showed that the supervisor was ordering Grievant to assume her post. Only if she failed to follow his instruction was she to go home. Thus, Grievant was not given the opportunity to select among equal choices – she was instructed to assume her post.

DECISION

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

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.