

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions); Hearing Date: 09/08/03; Decision Issued: 09/11/03; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 5789;
Administrative Review: HO Reconsideration Request received 09/16/03; Reconsideration Decision issued 10/08/03; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5789

Hearing Date: September 8, 2003
Decision Issued: September 11, 2003

PROCEDURAL HISTORY

On June 17, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow supervisor's instructions.

On July 7, 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 he requested a hearing. On August 13, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 8, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Ten Witnesses

ISSUE

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

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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Transportation Operator at one of its facilities. On September 26, 2001, Grievant received a Group I Written Notice for failure to follow supervisor's instructions and failure to perform assigned work.¹ On March 11, 2002, Grievant received a Group II Written Notice with suspension for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.²

Grievant was one of two Transportation Operators on his shift. One of Grievant's regular duties included driving a vehicle containing meal trays from the area where the food was prepared to the patients living in buildings located across the facility campus. Grievant's supervisor instructed him to help out another work unit also involved in food services when that unit consisted of four workers and one supervisor. The unit usually had five workers and one supervisor but because of budget and staffing problems, the unit occasionally had to operate with four workers and a supervisor. In June 2002 and again sometime in 2003, Transportation Operators for all shifts were informed that they had to help out their respective work units when those units were short staffed.

On May 23, 2003, the work unit was short staffed but Grievant did not assist the unit. On May 24, 2003, the Supervisor spoke with Grievant and instructed him that he should have assisted the work unit. On May 28, 2003, the work unit was short staffed but Grievant did not assist the unit. The Supervisor spoke with Grievant about his failure to assist. On June 2, 2003, the unit was again short staffed and Grievant failed to assist the unit.

¹ Agency Exhibit 1.

² Agency Exhibit 2.

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).³ 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.⁴ Grievant failed to follow his supervisor’s instructions because he did not provide assistance to the work unit while knowing the unit had only four workers and a supervisor. The Agency has established a basis to issue a Group II Written Notice.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”⁵ With the Written Notice under appeal, Grievant has two active Group II Written Notices and an active Group I Written Notice. Based on the accumulation of disciplinary action, the Agency has established a basis to justify Grievant’s removal.

Mitigating circumstances do not exist to justify reduction in the disciplinary action or removal.⁶ Grievant was repeatedly informed and counseled of his obligation to provide assistance yet he refused to comply with that instruction.

Grievant contends he should not be disciplined because other Transportation Operators were not disciplined for failing to provide assistance. The Facility feeds its patients every day of the year. To accomplish this, the Agency operates several shifts, with each shift having at least two Transportation Operators and a supervisor. Grievant has established that Transportation Operators on other shifts did not always help out the work unit when it was short staffed. This fact alone is insufficient to justify a reduction in the disciplinary action taken against Grievant. What Grievant has shown is that supervisors on other shifts were not as strict as was Grievant’s supervisor. When other supervisors fail to apply rules consistently it reflects inadequate supervision but it does not mean Grievant can disregard a clear instruction from his supervisor. Grievant

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

⁴ DHRM § 1.60(V)(B)(2)(a).

⁵ DHRM § 1.60(VII)(D)(2)(b).

⁶ Grievant suggested that his stomach problems, on occasion, may have prevented him from completing his work. The evidence is insufficient for the Hearing Officer to conclude that Grievant’s stomach problems prevented him from complying with his supervisor’s instructions.

has not established that another Transportation Operator disregarded a specific instruction from Grievant's supervisor and then was not disciplined. All Grievant has established is that different supervisors supervise differently. What he has not established is that he was disciplined inconsistently from other employees.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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.⁷

⁷ 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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5789-R

Reconsideration Decision Issued: October 8, 2003

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends that he bussed carts on occasion and that another Agency witness refused to bus carts but was not disciplined. Grievant's argument fails because the fact that he may bus carts on occasion does not excuse his failure to comply on May 23, 2003, May 28, 2003, and June 2, 2003 with his supervisor's instructions to bus carts. In addition, no evidence was presented suggesting that the Agency's witness who testified he would not bus carts had been asked by any supervisor to bus carts. Although the Agency's witness may have expressed displeasure with the requirement to bus carts, he never actually had been asked to bus carts and then refused that request. Grievant, however, had been asked to bus carts, but refused to do so thereby justifying issuance of disciplinary action against him.

Grievant argues he has a stomach problem and that should justify his refusal to follow a supervisor's instructions. This argument fails because no evidence was presented establishing that the Grievant refused to follow his supervisor's instruction because of stomach problems. No evidence was presented suggesting Grievant had stomach problems on each of the three days he refused to follow his supervisor's instructions.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer