

Issue: Group II Written Notice with transfer (failure to follow supervisor's instructions);  
Hearing Date: 12/06/04; Decision Issued: 12/07/04; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 7916



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7916**

Hearing Date: December 6, 2004  
Decision Issued: December 7, 2004

**PROCEDURAL HISTORY**

On March 17, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

*On February 23, 2004, you failed to respond to an emergency situation (possible suicide in HU-4-B). At the time you became aware of the emergency, you were not assigned to any post yet you failed to respond or report to the Watch Commander's Office to assist. Your actions constitute "Failure to follow supervisors instructions, perform assigned work or otherwise comply with applicable establish policy."*

On April 9, 2004, Grievant timely filed a grievance to challenge the Agency's action. On June 28, 2004, the Regional Director reduced the Written Notice to a Group I offense. He added that he was upholding Grievant's transfer. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 8, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action with transfer for failure to follow a 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 Corrections employs Grievant as a Corrections Lieutenant and one of its facilities. She has been employed by the Department for approximately 27 years. On November 1, 2003, Grievant received a Group II Written Notice for failure to exhibit improvement in her interpersonal communications with staff. This Group II Written Notice was later reduced by a Hearing Officer to a Group I offense.<sup>1</sup>

On February 24, 2004, an inmate at Grievant's Former Facility committed suicide in his cell at approximately 3:45 a.m. Facility staff attempted to notify the Warden but were unable to reach him until he arrived at the Facility at approximately 5 a.m. He checked his voicemail and learned of the emergency. He did not know the status of the emergency or whether it was ongoing or had been resolved. The Warden left his office walked down the hall and to the entrance sallyport where he observed Grievant. Grievant had just arrived at the facility to begin her shift. While standing a few feet from Grievant, the Warden looked at her and said "We have an emergency in housing unit 4B." Grievant was looking at the Warden when he made his statement. The Warden then walked immediately to housing unit 4B. Many other supervisors at the Facility had also gone to housing unit 4B in response to the emergency.

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<sup>1</sup> Agency Exhibit 4.

When the Warden told Grievant an emergency existed in housing unit 4B, the Warden expected Grievant to walk immediately to the location of the emergency as was required by Post Orders governing supervisors.<sup>2</sup> Grievant did not respond immediately. Only after many minutes passed did Grievant begin walking towards housing unit 4B. She ultimately went to pod A of housing unit 4, but she did not respond to pod B.

### **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.<sup>3</sup> Grievant failed to follow a supervisor's instruction to immediately respond to the emergency in housing unit 4B. Grievant's behavior rises to the level of a Group II offense but the Regional Director reduced the discipline to a Group I offense. The Hearing Officer lacks the authority to increase disciplinary action. Accordingly, the Group I Written Notice is upheld.

Grievant argues that she did not hear the Warden and that is why she did not respond. The evidence is sufficient for the Hearing Officer to find that the Warden spoke directly to Grievant and that Grievant did in fact or should have heard him announce that an emergency existed. Based on the evidence presented, the agency has met its burden of proof.

Grievant contends that there was no ongoing emergency because the inmate had committed suicide and hour and 15 minutes earlier. Although the emergency may have been over at 5 a.m., neither Grievant nor the Warden knew this. When the Warden gave his instruction, he believed the emergency may have been active. He expected Grievant to respond based on information known at that time.

February 23, 2004 was Grievant's first day back from absence due to lengthy illness. She contends that had she responded immediately to housing unit 4B, her physical condition would have prevented her from being of any value to the Warden. Grievant's argument fails because at the time the Warden instructed her to respond to

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<sup>2</sup> Agency Exhibit 6.

<sup>3</sup> DOCPM § 5-10.16(B)(1).

the emergency, all he expected her to do was walk to housing unit 4B. Grievant's physical limitations did not prevent her from walking to housing unit 4B.

The Agency argues that the matter before the Hearing Officer is a Group II rather than a Group I offense because Grievant failed to accept the Agency's decision at the Third Step and then proceeded to hearing. Although an agency may reduce disciplinary action at the Third Step with a condition that the Grievant not advance to a hearing, the Agency did not establish such a condition in this grievance. The Third Step Respondent reduced Grievant's disciplinary action to a Group I offense but did not attach any conditions regarding her decision to advance to hearing.

Disciplinary action may include transfer in lieu of termination.<sup>4</sup> With this Group I Written Notice, Grievant has two active Group I Written Notices. Having two active Group I Written Notices does not provide a basis for termination under the Agency's Standards of Conduct. Since Grievant cannot be terminated from employment, she also cannot be transferred in lieu of termination. Grievant's transfer to another Facility is not supported and cannot be upheld. Thus, Grievant must be returned to her prior facility.

The Agency contends that is free to transfer employees at any time for any reason. Although this is true for the most part, when an agency transfers an employee because of disciplinary action, the outcome of the transfer depends on the outcome of the disciplinary action. Grievant has not received adequate disciplinary action to justify the Agency's decision to transfer. The Hearing Officer finds that the transfer was disciplinary in nature because the Section IV Written Notice states the Warden's recommendation that Grievant be transferred, Grievant was transferred eight days after the Written Notice was issued, and the Third Step Respondent stated, "I am upholding your transfer to [another Facility]. Be advised that your actions relative to this situation initiated your removal from [the current Facility]."<sup>5</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's disciplinary transfer of Grievant is rescinded. The Agency is ordered to reinstate Grievant to her former position or, if occupied, to an objectively similar position at her former facility.

## APPEAL RIGHTS

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<sup>4</sup> DOCPM § 5-10.6.

<sup>5</sup> Agency Exhibit 1.

You may file an administrative review request within **15 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.<sup>6</sup>

[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].

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer