

Issue: Group II Written Notice with suspension (failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy); Hearing Date: 08/25/04; Decision Issued: 09/14/04; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 826



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 826**

Hearing Date: August 25, 2004  
Decision Issued: September 14, 2004

**PROCEDURAL HISTORY**

On February 26, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from February 27, 2004 to March 4, 2004 for:

'Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.' You informed [your] supervisor that you would be returning to work following a court appearance 2/25/04 and you failed to return to work and failed to contact supervision to obtain approval for your absence. You failed to meet with supervision on 02/25/04, as instructed and failed to reschedule the meeting. A review of your case files indicates significant deficiencies exist. Previously, you were instructed by supervision to maintain your case files according to established procedure and you have failed to comply with this instruction.

On March 25, 2004, 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 4, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 25, 2004, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with 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 Juvenile Justice employs Grievant as a Counselor II at one of its facilities. He has been employed by the Commonwealth for approximately 22 years. His position objective is:

Plans, implements, and monitors rehabilitation services. Performs case management function for assigned wards.<sup>1</sup>

Grievant is responsible for managing the case work for wards. He develops comprehensive service plans, writes progress reports, documents service plan updates, and maintains running records. He is expected to document any contacts between families and internal and external agencies. An important function for Grievant to perform is closing out a ward's file, once the ward is no longer Grievant's responsibility. Grievant provides individual counseling to wards and participates in treatment assessments and therapeutic team meetings.

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

On July 15, 2003, Grievant received a Group I Written Notice for unsatisfactory job performance. Grievant failed to bring his case files up to date after being instructed to do so.<sup>2</sup>

Grievant's Former Supervisor supervised Grievant from mid October 2003 to mid January 2004. She noticed that Grievant's case files were not adequately and timely documented. She brought her concerns to Grievant's attention and asked him to begin improving his performance. She set out goals and deadlines to assist Grievant in getting caught up, but Grievant was unable to comply.

The current Supervisor began supervising Grievant in the first week of February 2004. On February 11, 2004, Grievant and the Supervisor met regarding Grievant's work performance. The Supervisor was concerned because Grievant was not in compliance with his case management requirements. Grievant had not timely submitted ward reclassification sheets. He was several months behind. The Supervisor wanted Grievant to eliminate the work backlog regarding ward reclassification sheets. The Supervisor expected it would take Grievant approximately two weeks in order to complete the work. The Supervisor asked Grievant how long it would take for Grievant to finish. Grievant responded that he would have the work done two days later, on February 13, 2004. The Supervisor did not contest Grievant's timetable but told Grievant it was acceptable. Grievant did not complete the task by February 13, 2004.<sup>3</sup>

On February 19, 2004, Grievant had a caseload of 50. Grievant's running records were not up to date. His service plans were not up to date. He had progress reports not completed for at least one quarter. Grievant had a number of inactive files for wards who were no longer within his responsibility, yet he had not closed out their files. Other employees' in Grievant's position at the Facility had caseloads of between 23 and 26. As of July 2004, Grievant was responsible for 20 wards, but he had an additional 30 wards (a total caseload of 50) under his control because he had not completed the required entries to enable him to close out those 30 files.

On February 24, 2004, Grievant, the Supervisor and several Facility Managers met to inform Grievant that the Agency intended to take disciplinary action against him. Grievant was told he had 24 hours to provide the Supervisor with an explanation as to why the disciplinary action should not be taken. Grievant did not come to the Facility on February 25, 2004 because Grievant had a scheduled court appearance in the morning

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<sup>2</sup> Agency Exhibit 18.

<sup>3</sup> Grievant later completed the task but the Supervisor did not recall the date. Grievant testified the task was completed on February 23, 2004 after he had returned to work. He was out of work in the prior week due to an unexpected medical illness of his child.

and a dental appointment in the afternoon.<sup>4</sup> The Supervisor was also not at work on February 25, 2004. He was away on leave.

### 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).<sup>5</sup> 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).

Grievant did not fail to follow a supervisor’s instruction to have ward reclassification sheets completed by February 13, 2004. No instruction was given. Instead, an agreement was reached based on Grievant’s claim that he could complete the work by February 13, 2004. Grievant failed to live up to his agreement after causing the Supervisor to expect that the work would be completed by February 13, 2004. Grievant’s behavior amounts to unsatisfactory job performance.

Grievant did not fail to follow a supervisor’s instruction to respond to the Supervisor within 24 hours of reasons why Grievant should not be disciplined. The Supervisor was not at work on February 25, 2004 and, thus, Grievant could not have presented his reasons to the Supervisor. The Agency did not create an expectation that Grievant was supposed meet with the Supervisor outside of the facility to present his reasons why disciplinary action should not be taken. The Agency did not create an expectation that Grievant should have contacted the Supervisor’s superior and present his reasons.<sup>6</sup> When an employee cannot comply with a supervisor’s instruction because of an agency’s actions, the employee has not acted contrary to the supervisor’s instructions.

Grievant has failed to perform his assigned work. Grievant was repeatedly advised of his need to properly document and process his case files. Grievant failed to process the case files assigned to him and maintained a caseload of approximately 50

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<sup>4</sup> On February 24, 2004, Grievant advised the Supervisor of the court appearance, but did not advise him of the dental appointment. Grievant later submitted documentation supporting the dental appointment.

<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> Grievant had been instructed who to contact in the event the Supervisor was absent on those occasions when Grievant was sick and could not work. Grievant did not contact that person prior to taking sick leave on February 25, 2004.

wards over a several month period. Grievant's peers had approximately half of Grievant's caseload. Grievant's persistent failure to perform his assigned work adversely affected the Agency's daily operations.

When an Agency issues a Written Notice but does not establish all of the facts supporting that notice, the Hearing Officer has some discretion regarding the appropriate level of disciplinary action. In this case, Grievant has not performed his assigned work to a level justifying the issuance of a Group II Written Notice. In light of the degree of non-performance and the existence of prior active disciplinary action, some suspension is appropriate. Accordingly, Grievant should received a Group II Written Notice with a two workday suspension.

### DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with five work day suspension is **reduced** to a Group II Written Notice with a two workday suspension. The Agency is directed to provide the Grievant with **back pay** for three workdays less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

### 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. 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 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.<sup>7</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.