

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instructions and insubordinate behavior); Hearing Date: 12/11/03; Decision Issued: 12/12/03; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 449



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 449

Hearing Date: December 11, 2003
Decision Issued: December 12, 2003

PROCEDURAL HISTORY

On September 3, 2003, Grievant was issued a Group II Written Notice of disciplinary action with suspension from August 26, 2003 to September 2, 2003¹ for:

Coercing a supervisor. Failing to follow a supervisor's instructions and comply with established written policy. Unprofessional and disruptive behavior with supervisor.

On September 19, 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 November 19, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 11, 2003, a hearing was held at the Agency's regional office. Grievant received notice of the hearing date but did not appear at the hearing.

APPEARANCES

¹ In lieu of imposing a suspension after the date of the Written Notice, the Agency used Grievant's period of administrative suspension as the only suspension against Grievant.

Agency Representative
Supervisor

ISSUE

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

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 at one of its Facilities. She had been employed by the Agency for approximately 14 months prior to the disciplinary action.

Grievant was responsible for working at a Facility caring for individuals with severe or profound mental retardation, associated with sensory and physical disabilities and/or extreme maladaptive behaviors. Since the Facility operates 24 hours per day and there are minimum staffing requirements, Grievant was obligated to be "on call" approximately 3 to 4 times per month. When an employee is on call, that employee must call a shift supervisor to determine whether the shift is fully staffed. If one of the employees scheduled to work the shift is not able to work as scheduled, the on call employee must come to the Facility and work in place of the absent worker.

On August 26, 2003, the Supervisor drafted a schedule for August 30, 2003 and August 31, 2003 for those employees, including Grievant, who reported to the Supervisor. The Supervisor established the schedule based on instruction from her supervisor, the Chief of Residential Services. The Supervisor listed Grievant as the employee on call for those two days. Once Grievant learned of the dates she was scheduled to be on call, she became displeased and asked to speak with the Supervisor. The Supervisor met with Grievant in one of the living areas. Grievant became angry and said to the Supervisor, "I am not going to be on call, you are going to

take the damn on call, if not I am not going to call to check coverage.” Grievant expanded her complaint to say, “I am getting tired of you going to your superiors taking about me; I am no damn spokesperson for the unit.” Grievant began accusing the Supervisor of making references to Facility managers that Grievant was the spokesperson for the unit. At this point, the Supervisor realized Grievant was becoming “out of control”, and the Supervisor attempted to remove herself from the conflict. As the Supervisor started to briskly walk away, Grievant followed the Supervisor. Grievant was yelling and pointing her finger at the Supervisor and saying, “Don’t walk away from me when I’m talking to you, you’re going to listen to me, don’t play with me” The Supervisor was upset and unsure of what to do. She decided to call the program manager to report Grievant’s behavior. As the Supervisor picked up the telephone and began calling, Grievant said “you can call anybody you damn well please, it will be your word against mine, and I will just deny it.”

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).² 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.³ Grievant made it clear she did not intend to comply with the instruction to be on call on August 30, 2003 and August 31, 2003. Her comments to the Supervisor were offensive, disruptive, and caused the Supervisor to fear harm by Grievant. Grievant’s behavior was so threatening and insubordinate that the Agency was justified in issuing a Group II Written Notice with suspension.

Grievant contends the Agency took action against her because of her nationality and that the Agency failed to provide her with procedural due process. No credible evidence was presented to support Grievant’s allegations.

DECISION

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ DHRM § 1.60(V)(B)(2)(a).

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th 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.⁴

⁴ 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