

Issue: Group II Written Notice (insubordination and failure to follow written instructions);
Hearing Date: 01/21/04; Decision Issued: 02/05/04; Agency: DCR; AHO: Carl
Wilson Schmidt, Esq.; Case No. 492



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 492

Hearing Date: January 21, 2004
Decision Issued: February 5, 2004

PROCEDURAL HISTORY

On October 14, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

The nature of the offense is outlined on the attached counseling memorandum dated October 14, 2003 and occurred on October 9, 2003. This specific notice is being given for insubordinate behavior concerning the failure to respond appropriately to a supervisor's request for information related to a meeting attended by the employee and for failure to properly request leave for absence from the office, failure to adequately respond to supervisor's questions regarding your expected absence, and absence from the office without approved leave.

On October 28, 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 December 18, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. Upon motion of a party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of the conflicting schedules of the parties. On January 21, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for insubordination and failure to follow 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 Conservation and Recreation employs Grievant as an Environmental Specialist II. The purpose of his position is:

Provides lead management for the development and implementation of the erosion and sediment control program affecting state agencies, local governments, land developers and private citizens to ensure that the erosion and sediment control law and regulation are effectively implemented. Oversees the erosion and sediment control training and certification programs in accordance with the law and regulations. Continually strives to improve the program to improve consistency with the law and regulations and develops regulatory and legislative initiatives to improve the implementation of the erosion and sediment control program.

Grievant is well-respected for his technical knowledge in his field. He has been employed by the Agency for approximately four years. Grievant reports to the Supervisor who, in turn, reports to Mr. JF.

Grievant raised questions about how the Agency was handling a complaint made by one of his subordinates about him. He viewed the Supervisor as creating a hostile work environment. The Agency did not create a hostile work environment, but Grievant's perception of a hostile department was genuinely felt.

On October 9, 2003, Grievant returned to his office following an Agency "public stakeholder meeting." The Supervisor entered Grievant's office and asked for an update on the meeting. Grievant responded that [Mr. JH] took minutes of the meeting and the Supervisor should check with him. The Supervisor replied that Grievant's answer was not appropriate since the Supervisor was asking Grievant and not Mr. JH for a brief update. The Supervisor asked how many localities attended the meeting and Grievant responded that he did not know. Grievant could not estimate the number of localities represented at the meeting, but Grievant did not volunteer the reasons he could not provide an estimate. Earlier in the day, Grievant had informed the Supervisor that he would be going home after the stakeholder meeting. The Supervisor asked Grievant if he was going to submit a leave request for the rest of the day. Grievant responded by saying that he was leaving. Grievant stated that he was tired of responding to the Supervisor's harassment and questions. At that point, the Supervisor left Grievant's office.

At 2:15 p.m. on October 9, 2003, Grievant sent Mr. JF an email stating, in part:

I am heading home this afternoon to avoid the ongoing hostile work environment and the negative health impacts associated with the hostile work environment. I will slide an administrative leave slip below your door. I'd like to work from home/telecommute till resolution is found. Please let me know if I can help with anything. My home phone number is [number].
Thanks.¹

At approximately 2:45 p.m. October 9, 2003, Grievant left work for the day. Before leaving, he placed a leave reporting form under the door of Mr. JF. The leave reporting form sought an undetermined amount of leave. Grievant believed he was subject to a hostile work environment and was seeking leave approval from Mr. JF. Grievant did not present the leave reporting form to the Supervisor because Grievant believed the Supervisor was creating the hostile work environment. After Mr. JF returned to his office and read Grievant's email and leave documents, he spoke with the Supervisor. Mr. JF then called Grievant and left him a voice message instructing Grievant to come to work on Tuesday, October 14, 2003 so that they could discuss Grievant's request. Grievant came to work on October 14, 2003 as instructed. After the meeting, Grievant left for the rest of the day and claimed sick leave. The Supervisor authorized Grievant's claim of sick leave for that day.

¹ Agency Exhibit 5.

On October 15, 2003 through October 17, 2003, Grievant called the Supervisor early in the morning and left a voice message on the Supervisor's answering service indicating that he would be absent from work due to illness.² On October 15, 2003, the Supervisor sent Grievant a letter indicating Grievant must present an excuse for his absence due to illness. Grievant presented a doctor's note dated October 17, 2003 stating, "Please excuse [Grievant] from work 10/14 to 10/17 due to acute illness."

Agency Employees are not expected to obtain formal approval and acknowledgment from their supervisors before taking leave. Employees are expected to let their supervisors know when they will be absent from work and then ensure that the necessary paperwork is submitted so that their leave balances accurately reflect leave taken. It is the exception for a supervisor to deny an employee's request for leave after being notified by the employee that he or she intends to take leave. The Agency, in essence, follows an honor system of leave taking and recording.

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).

Insubordinate Behavior. Insubordinate behavior can be a Group I, Group II, or Group III offense depending on the severity of the insubordination. Blacks Law Dictionary (7th Ed.) defines insubordination as:

State of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer.

Webster's New Universal Unabridged Dictionary, defines insubordination as:

1. not submitting to authority; disobedient; *an insubordinate soldier*. 2. not lower – *n*. 3. a person who is insubordinate.

² Agency Exhibit 14.

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

Grievant knew that the Supervisor wanted a detailed description of the stakeholder meeting. Rather than providing a complete discussion, Grievant showed disrespect to the supervisor by providing limited answers and pretending to be distracted by other business and ignoring the Supervisor. Grievant's insubordinate behavior rises to the level of a Group I offense because it amounts to inadequate or unsatisfactory job performance. His behavior does not rise to a Group II offense because he made some attempt to respond to his supervisor and his actions were not blatantly confrontational.

Grievant contends his actions were appropriate because the Supervisor placed him in a hostile work environment. Grievant's assertion is unfounded. The Agency did not create a hostile work environment for Grievant. Although Grievant genuinely perceived he was in a hostile environment, his perception was unsupported by the circumstances presented.

Failure to comply with leave policies. The Agency contends that Grievant should have submitted his leave activity reporting form directly to the Supervisor instead of Mr. JF and Grievant's failure to do so gives rise to disciplinary action.

DHRM Policy 1.60(III) states:

A. Attendance

1. Employees should report to work as scheduled.
2. If employees cannot report as scheduled
 - a. Employees should arrange planned absences, including reporting to work late or leaving work early, in advance with supervisors.
 - b. Employees should report unexpected absences, including reporting to work late or having to leave early, to supervisors as promptly as possible.

Some agencies in the Commonwealth construe "arrange planned absences" to require approval by a supervisor before an employee may take any leave.⁴ The Department of Conservation and Recreation did not require Grievant to obtain his Supervisor's approval before taking leave; but rather expected him to provide the Supervisor with notice that he would be taking leave.⁵ In some instances, for example, the Supervisor approved Grievant's leave after he had already taken it.⁶

⁴ This interpretation is consistent with DHRM Policy 4.30(III)(A) which states, "Before taking a leave of absence from work, whether with or without pay, employees should request and receive their agencies' approval of the desired leave"; and consistent with DHRM Policy 4.10, *Annual Leave*, which states, "An employee who wants to use his or her annual leave must receive approval for the desired time. The request for leave should be made as far in advance as possible."

⁵ Notice would permit the Supervisor to schedule Agency work activities and possibly prevent Grievant from taking leave if necessary.

⁶ Grievant Exhibit 3.

Grievant did not violated DHRM Policy 1.60(III)(A) as applied by the Agency because he attempted to notify one of his supervisors (namely Mr. JF) that he would be absent for an extended period of time. He had previously notified his immediate Supervisor that he would be leaving work early on Thursday, October 9, 2003. The Supervisor had previously approved Grievant's annual leave for Friday, October 10, 2003. Grievant obtained approval for his absence on October 14, 2003 after he came into the office for a meeting that morning. He called the Supervisor before work hours on October 15, 2003 through October 17, 2003 and notified the Supervisor that he would not be coming to work. Grievant presented the necessary doctor's excuse for his days of absence. Grievant met the requirement to notify his Supervisor before taking leave. No basis for disciplinary action against Grievant exists for failing to obtain a supervisor's prior approval to take leave, since the Agency did not enforce that standard – it enforced a notice standard.

The Agency contends Grievant should have notified the Supervisor on October 9, 2003 that he would be absent from work on the following Tuesday⁷ and days thereafter rather than notifying Mr. JF. Grievant's failure to notify his immediate supervisor of his request for extended leave ignores the fact that for each day he was absent from work he independently notified the Supervisor of his expected absence. When Grievant notified Mr. JF that he wanted to take extended leave, Grievant knew Mr. JF would talk with the Supervisor about Grievant's request for extended leave. Given Grievant's actual notice of specific days of absence, Grievant's failure to submit his request for extended leave to the Supervisor amounts only to a failure to extend the Supervisor a courtesy. Grievant's action does not rise to the level of disciplinary action. Written or oral counseling would be more appropriate.

Other arguments. Grievant contends the Agency did not provide him with sufficient opportunity to respond to the charges against him before being issued a Written Notice. This issue is moot. Grievant has had the opportunity to provide to the Hearing Officer any information that he was denied the opportunity to present to Agency employees during the step process.

Grievant contends the Agency retaliated against him because he filed a complaint about the Supervisor with the Agency's Human Resource division. The evidence showed that the Agency did not take any action against Grievant because he complained about the Supervisor. The Agency's action against Grievant was taken because of Grievant's behavior.

Grievant asserts that the Agency failed to follow progressive discipline because it presented him with a counseling memorandum and immediately thereafter presented him with a Written Notice. DHRM Policy 1.60(VI)(C)(2)(a) provides, "While it is hoped that most performance and behavior problems can be resolved through informal

⁷ Monday, October 13, 2003 was a holiday.

counseling, counseling is not a prerequisite to formal disciplinary action.” Thus, Grievant’s argument is untenable.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice for inadequate or unsatisfactory job performance.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.