

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy); Hearing Date: 01/27/04; Decision Issued: 02/11/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 517



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 517**

Hearing Date: January 27, 2003  
Decision Issued: February 11, 2004

**PROCEDURAL HISTORY**

On November 14, 2003, Grievant was issued a Group II Written Notice of disciplinary action with suspension from November 17, 2003 to November 21, 2003 for:

*Failure to follow a Supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.*

On November 15, 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 January 6, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 27, 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 II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instruction.

## **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:

Grievant was responsible for overseeing treatment programs at the Facility. He supervised four counselors. Grievant reported to the Major. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

When employees suffer injuries compensable under workers' compensation, benefits are coordinated by the Third Party Administrator, a private organization. Ms. LP worked for the Third Party Administrator.

On September 23, 2003, Grievant was walking at his place of work when he fell on a concrete floor. He recovered from his fall, but was experiencing persistent pain, especially in his lower back, right arm, and left knee. He notified Facility staff but he refused immediate medical treatment.<sup>1</sup> Later in the day, the Superintendent informed Grievant that Agency policy<sup>2</sup> required employees to take a drug test following an accident and she instructed him to go to the hospital to obtain the test. Grievant complied with the instruction and went to the hospital. While he was at the hospital, Grievant decided he would like to have medical treatment. Grievant was informed that he had to go to the emergency room to receive treatment. Grievant did not wish to visit the emergency room so he left the hospital after taking the test.

On September 24, 2003, Grievant spoke with the Office Services Specialist regarding medical treatment. Grievant said he had an appointment with his personal

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<sup>1</sup> Grievant spoke with the Major about the accident. He informed the Major that he did not wish to see a doctor for his injuries.

<sup>2</sup> See DOCPM § 5-55.

physician, Dr. S. The Office Services Specialist informed Grievant that in order for him to be paid for missing work, he should proceed under workers' compensation. Grievant agreed that doing so would be the best course of action for him to take. The Office Services Specialist told Grievant to call Dr. C and gave Grievant Dr. C's telephone number. She did not provide Grievant with a panel of three physicians and permit Grievant to choose one of the three doctors. Grievant complied with the Office Services Specialist's instructions and arranged for an appointment with Dr. C.

On Friday, September 26, 2003, Grievant was examined by Dr. C. Dr. C drafted a report that day and faxed it to the Agency. He indicated that Grievant could return to work with restricted duty from September 26, 2003 until September 30, 2003 with a follow-up visit on September 30, 2003. Grievant's physical limitations included "No prolonged standing or sitting", "No repetitive bending or twisting", "Changed positions/rotate activities", other restrictions.<sup>3</sup>

On Monday, September 29, 2003, Grievant called the Office Services Specialist from his home to ask if she had received a statement from Dr. C's office putting Grievant out of work. The Office Services Specialist replied that she had received a statement from Dr. C placing him on light duty work. Grievant then spoke with the Superintendent. She informed Grievant that the Agency had light duty work involving answering the telephone at a Regional Director's office.<sup>4</sup> Grievant said he was in too much pain to answer telephones. Grievant asked to take Monday off since he was going to the doctor on Tuesday, September 30, 2003. The Superintendent approved Grievant's request for annual leave on Monday, September 29, 2003. The Superintendent told Grievant to call her after he visited the doctor to inform her of the doctor's comments about his injuries. Grievant did not return the Superintendent's call because he did not understand or attach significance to the Superintendent's instruction because of the pain he was experiencing and the medication he was taking. Not until the middle of October, did the Superintendent follow up to find out why he had not reported to work.

Dr. C examined Grievant again on September 30, 2003. He authorized Grievant to return to work with restricted duty from September 30, 2003 to October 7, 2003 with a follow-up visit scheduled for October 7, 2003. Once again, Grievant's physical limitations included "No prolonged standing or sitting", "No repetitive bending or twisting", "Changed positions/rotate activities", other restrictions.<sup>5</sup> Grievant told Dr. C that he had not been back to work since no modified duty was available.<sup>6</sup>

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<sup>3</sup> Agency Exhibit 8.

<sup>4</sup> No light duty work was available at the Facility where Grievant worked. To perform light duty work, Grievant would have to travel to a regional office.

<sup>5</sup> Agency Exhibit 8.

<sup>6</sup> Dr. C notes in Grievant's medical record that Grievant "was released to modified duty but states that he has not been back to work since apparently no modified duty is available." Agency Exhibit 7.

Some questions arose regarding the extent of Grievant's restrictions.<sup>7</sup> On October 3, 2003, Dr. C sent the Agency a report stating:

[Grievant] may work his normal number of hours in a days shift. He is able to stand or sit for 30 minute periods of time and then change positions for five minutes. He is able to sit for 30 minutes, walk around for 5 minutes, then return to sitting. Same rules apply to standing. He is allowed to bend and twist but not with an activity that requires this repeatedly. He is able to lift up to 10 lbs.<sup>8</sup>

Grievant did not like seeing Dr. C because of Dr. C's appointment policy. He and Dr. C decided that Grievant should see another workers' compensation physician. Grievant called the Office Services Specialist and indicated he needed to change physicians. The Office Services Specialist told Grievant to contact Dr. D. She did not provide Grievant with a three physician panel and permit Grievant to chose among the three physicians. At some point, the Third Party Administrator realized Grievant had not been presented with a panel of physicians and presented him with a panel. Grievant wanted to see Dr. D. Under normal circumstances, the Third Party Administrator would not have permitted Grievant to see Dr. D since Dr. D was not on its list of workers compensation doctors. Because of Dr. D's reputation for being a straightforward doctor, the Third Party Administrator permitted Dr D's name to be included on the panel. Grievant chose Dr. D. An appointment was made for Grievant to see Dr. D on October 20, 2003. Grievant last visited Dr. C on October 7, 2003.

On October 16, 2003, the Superintendent called the Major and asked why Grievant was not at work. The Major responded that she believed he was absent due to workers' compensation leave. The Major contacted Grievant and informed him that the Superintendent believed he was supposed to be back at work and that he should contact the Office Service Specialist to resolve the matter. Grievant indicated he was waiting for another doctor's appointment. He informed the Major that Ms. LP of the Third Party Administrator told Grievant to stay out of work until Grievant saw another doctor. Ms. LP had not told Grievant he could stay out of work.

Grievant was examined by Dr. D on October 20, 2003. Dr. D gave Grievant a "Certification Slip" authorizing Grievant to resume light work on October 23, 2003 for six hours per day. Dr. D indicated Grievant should not lift anything weighing more than ten pounds or engage in activities requiring bending. Grievant was to be re-evaluated in two weeks.<sup>9</sup> When Grievant returned to work on October 23, 2003, he provided the

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<sup>7</sup> Ms. LP, an employee of the Third Party Administrator, contacted Dr. C's office and asked for clarification of Grievant's restrictions.

<sup>8</sup> Agency Exhibit 6.

<sup>9</sup> Agency Exhibit 9.

Agency with the Certification Slip. Without that Certification Slip, the Agency would not have permitted Grievant to return to work at the Facility.

When an employee is to be absent from work due to illness, the Facility practice is for employees to notify their supervisors that they will be absent. If the absence is lengthy, then the employee is expected to bring in a doctor's excuse.

Evaluations for Grievant's employees became due while he was absent. The Major instructed an employee to deliver evaluation forms to Grievant at his home so that he could complete the evaluations within the deadline for employees to receive pay increases. Grievant signed evaluations for his subordinates on October 4 and 8, 2003.

After the Agency notified Grievant of possible disciplinary actions and asked him to respond to the charges, Grievant presented a note from Dr. S stating:

[Grievant] injured his back at work on 9-23-03. He was out of work on 9-23-03 until 10-21-03. He returned to work for six hours per day on 10-22-03 until 11-09-03. On 11-10-03 he returned to work full time. He was unable to work from 09-23 to 10-21. He was under my care this entire period. He was seen in the office on 9-25, 10-06, 10-14 and 10-31-03.<sup>10</sup>

### **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. DOCPM § 5-10.16(B)(1). The Superintendent instructed Grievant to call her back after his doctor's visit on September 30, 2003. During their conversation on September 29, 2003, Grievant was in pain and taking medication. He did not understand that he was expected to call the Superintendent following his doctor's visits. He did not intentionally refuse to call the Superintendent.

The significance of Grievant's failure to call the Superintendent is overstated. The Agency contends that if Grievant had timely called the Superintendent, she would have been able to clarify Grievant's assignment for light duty after knowing what Dr. C

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<sup>10</sup> Agency Exhibit 2.

concluded. Agency staff, however, were informed on September 30, 2003 of Dr. C's opinion regarding Grievant's medical condition. If Grievant had called the Superintendent, he would not have been able to provide the Agency with any more medical information than it had already received from Dr. C. Grievant called the Office Services Specialist to confirm that she had Dr. C's medical report. The Office Service Specialist, however, did not provide that information to the Superintendent. When a question arose regarding what light duties Grievant could perform, the Third Party Administrator asked Dr. C to provide clarification. Dr. C provided clarification on October 3, 2003 and the Office Services Specialist learned of that clarification on that day. Once again, the Office Services Specialist did not provide that information to the Superintendent. Decisions regarding Grievant's light duty assignment could have been made as soon as September 30, 2003 or as late as October 3, 2003 had the Agency acted on the information in its possession. The Agency could have notified Grievant of his light duty assignment but failed to do so.

The Agency has not established that Grievant intentionally failed to follow a supervisor's instructions. At most, Grievant's behavior rises to the level of a counseling.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. Grievant's suspension from November 17, 2003 to November 21, 2003 is **rescinded**. GPM § 5.9(a)(2). The Agency is directed to provide the Grievant with **back pay** for the period of suspension, 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). The Agency is directed to remove the Written Notice from Grievant's personnel file and placed in a grievance or separate confidential file.

### **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>11</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>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.