

Issue: Group II Written Notice with termination (due to accumulation) (failure to report to work without permission or proper notice to supervisor); Hearing Date: 10/22/03; Decision Issued: 10/27/03; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 5828



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5828**

Hearing Date: October 22, 2003  
Decision Issued: October 27, 2003

**PROCEDURAL HISTORY**

On August 6, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

*Failure to report to work without permission or proper notice to supervisor.  
Refused to sign leave form and used profanity towards his supervisor.*

On August 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 October 1, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 2003, 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 removal 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:

Old Dominion University employed Grievant in its Housing Services division until his removal on August 6, 2003. On July 2, 2003, Grievant received a Group II Written Notice<sup>1</sup> for:

Leaving the work site during work hours on May 12, 2003 without permission, a violation of the Commonwealth of Virginia's Standards of Conduct, Policy 1.06, Section V(B)(2)(c), failure to report to work as scheduled on May 13, 14, 15, June 17, 18, 19, and 20, 2003 without permission or proper notice to supervisor which is a violation of Policy 1.06, Section V(B)2) and unsatisfactory work performance, a violation of Policy 1.06, Section V(B)(1)(d).

Grievant's Supervisor had been concerned about Grievant's attendance for some time. He had counseled Grievant regarding the importance of improving his attendance. The Supervisor instructed Grievant that on those days when Grievant would be absent from work, Grievant was required to call the Supervisor and speak directly with the Supervisor. Grievant was further instructed that if the Supervisor was not available at the time Grievant called, Grievant was to call the Housing Director.

On July 7 and July 8, 2003, Grievant was absent from work due to illness. He attempted to call the Supervisor but was unable to reach the Supervisor. Grievant left a message with another employee and asked that employee to contact the Supervisor. That employee did not contact the Supervisor. Grievant made no attempt to contact the Housing Director.

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

Grievant received an Employee Handbook stating:

It is important to the successful operations of Housing Services that you avoid missing work whenever possible. You are responsible for performing certain tasks and duties. When you are absent or tardy it disrupts the work schedule, reduces productivity, creates unnecessary costs, causes an extra burden for those employees who do report to work, and impacts customer service.

An unscheduled absence is defined as any absence from work which is not requested and approved prior to the leave day question. You are expected to contact your supervisor no later than 30 minutes after the beginning of your shift.<sup>2</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.” DHRM § 1.60(V)(B).<sup>3</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).

“Failure to follow a supervisor’s instructions” is a Group II offense.<sup>4</sup> Grievant was instructed to speak directly with the Supervisor or with the Housing Director if the Supervisor was unavailable. On July 7 and 8, 2003, Grievant was absent due to illness but did not contact the Supervisor or the Housing Director. Grievant failed to follow the Supervisor’s instructions thereby justifying issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”<sup>5</sup> When the Group II Written Notice issued on July 2, 2003 is considered

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<sup>2</sup> Agency Exhibits 3 and 4.

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>5</sup> DHRM § 1.60(VII)(D)(2)(b).

along with the Written Notice giving rise to this grievance, there exists a sufficient basis for removal. Accordingly, Grievant's removal must be upheld.<sup>6</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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.
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.

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.

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<sup>6</sup> The Agency also alleged that the Written Notice should be upheld based on Grievant's failure to sign leave slips and use of profanity. The evidence showed that Grievant was willing to sign the leave slips within a few minutes after he had been instructed to do so, but that the Supervisor refused to give Grievant the leave slips. The evidence showed that Grievant's statement "give me the G-d, D-mn slips" reflected an expression of anger that did not intimidate the Supervisor. Using curse words in the workplace is not itself a violation of the Standards of Conduct. The context of the use governs whether disciplinary action is appropriate. Even though the Agency has not established that Grievant should be disciplined for failing to sign leave slips and use of profanity, it has established that Grievant failed to follow a clear instruction regarding notifying his Supervisor in the event of his absence from work. A sufficient basis remains to support issuance of the Group II Written Notice.

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.