

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions); Hearing Date: 11/10/03; Decision Issued: 11/24/03; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5839



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5839

Hearing Date: November 10, 2003
Decision Issued: November 24, 2003

PROCEDURAL HISTORY

On August 27, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions. On September 10, 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 October 14, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
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:

The Virginia Employment Commission employed Grievant as a Deputy Hearing Officer for approximately nine years until her removal from employment on August 27, 2003. Grievant was responsible for determining whether individuals who are no longer employed are entitled to unemployment benefits. On December 6, 2002, Grievant received a Group II Written Notice with five workday suspension for failure to follow a supervisor's instructions. Grievant appealed the Written Notice and the parties reached a settlement modifying the Group II Written Notice to remove the suspension.¹ On July 1, 2002, Grievant received a Group I Written Notice for being verbally abusive and insubordinate.²

Grievant has microscopic lymphocytic colitis. On February 15, 2002, Grievant's physician wrote a note stating that Grievant could not work over 40 hours per week due to her medical condition.³ Grievant's doctor wrote another note on September 5, 2002, stating that Grievant may work more than 40 hours per week if her medical condition permits.⁴ On July 16, 2003, Grievant's physician provided information in response to a request for Family and Medical Leave. Grievant's physician responded "Yes" when asked, "Is the employee able to perform work of any kind?" He added, "Position description not included but I see no immediate need to limit activities."⁵

¹ Agency Exhibit 6.

² Agency Exhibit 7.

³ Agency Exhibit 23.

⁴ Agency Exhibit 24.

⁵ Agency Exhibit 25.

On May 2, 2003, Grievant and the Supervisor met to discuss Grievant's backlog of cases. As of April 17, 2003, Grievant had a backlog of 24 cases and had been given until April 29, 2003 to complete that backlog. The Supervisor granted an extension until May 9, 2003 to complete those cases. The Supervisor informed Grievant that the Supervisor "would stay as late as the system is available on Mondays and Thursdays and until 6[p.m. on] other days of the week."⁶ She added that if another supervisor was available, Grievant could work late on days the Supervisor could not stay late.

Beginning July 15, 2003, the Supervisor required Grievant to turn in her work on a daily basis. The Supervisor had not received Grievant's work since the week of June 16, 2003.⁷ To accommodate Grievant's late arrivals, the Agency changed Grievant's starting time from 8 a.m. to 8:30 a.m. with a half hour lunch break.⁸

On July 11, 2003, Grievant conducted an interview for a claimant, Mr. JB. Mr. JB expected to receive his determination within seven to ten business days. After several weeks passed, Mr. JB sent the Agency an email inquiring regarding the status of his determination.⁹ The email was forwarded to the Supervisor. On August 5, 2003 at 5:21 p.m., the Supervisor sent Grievant an email regarding Mr. JB's claim stating, "please take care of this Wed 8/06/03." On August 6, 2003, Grievant emailed the Supervisor:

As stated to the claimant on 7/11/03: 7 to 10 business days from date of hearing is the normal time frame a determination takes for the adjudication process; this would place his determination time frame due during the period of 7/22 – 7/25/03. As you are aware, I was absent due to illness on 7/15, 7/16, 7/17, 7/18, 7/23 and 7/24/03. I will do this decision and the others in turn and asap.

The Supervisor replied at 11:32 a.m. on August 6, 2003, "I need it done today."¹⁰ Grievant did not write the determination until August 12, 2003 and it was issued on August 13, 2003.

On July 16, 2003, another Deputy Hearing Officer conducted an interview for a claimant, Ms. NF. Ms. NF's claim had been assigned to Grievant and the other Deputy Hearing Officer was assisting Grievant because Grievant was ill on the day of the scheduled interview. Deputy Hearing Officers sometimes assist one another with their duties. On August 6, 2003 at 1:49 p. m. the Supervisor was notified that Ms. NF had inquired regarding the status of her determination. On August 7, 2003, the Supervisor

⁶ Agency Exhibit 9.

⁷ Agency Exhibit 11.

⁸ Agency Exhibit 13.

⁹ Agency Exhibit 15.

¹⁰ Agency Exhibit 17.

sent Grievant an email regarding Ms. NF's determination stating, "Please write the determination today 8/7/03."¹¹ Grievant wrote the determination on August 15, 2003 and it was issued on August 18, 2003.

Grievant worked all day on August 6th, 5.5 hours on August 7th, and 6.8 hours on August 8th.

A Deputy Hearing Officer usually requires approximately one hour to complete a determination from conducting the interview to writing the determination. Many parts of the written determination decision consist of "boilerplate" language. Grievant wrote nine sentences in order to qualify Mr. JB for benefits. Grievant wrote six sentences in order to qualify Ms. NF for benefits.¹²

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).¹³ 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.¹⁴ Grievant was instructed to immediately write two claimant determinations. She worked a sufficient number of hours on the days she was instructed to write the determinations. There was nothing unusual or unique about the determinations that would have prevented her from timely completing the tasks. Grievant failed to timely write the two determinations and acted contrary to her Supervisor's instructions. Accordingly, the Agency has established a basis to support issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in discharge."¹⁵ Grievant received a Group II Written Notice on December 6, 2002 and

¹¹ Agency Exhibit 19.

¹² Agency Exhibits 21, 22.

¹³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

¹⁴ DHRM § 1.60(V)(B)(2)(a).

¹⁵ DHRM § 1.60(VII)(D)(2)(b).

a Group I Written Notice on July 1, 2002. The Written Notice issued on August 27, 2003 represents a second group notice. The Agency has established a basis to uphold Grievant's removal from employment.

Grievant contends the Supervisor's inflexible schedule prevented Grievant from working beyond customary work hours to complete her work. The evidence showed, however, that the Supervisor's availability was sufficient to enable Grievant to complete her assignments if she had requested the Supervisor to work late.

Grievant believes she would have completed the work on time if the Agency had permitted her to work overtime. Completing determinations for Mr. JB and Ms. NF, however, did not require Grievant to work overtime. Grievant could have completed these determinations in the normal course of her workday. The amount of work Grievant had to complete in order to comply with the Supervisor's directive was not significant.

Grievant contends she suffers from a disability protected under the American's With Disability Act. The evidence presented, however, is insufficient for the Hearing Officer to conclude that Grievant is a qualified individual with a disability requiring reasonable accommodation by the Agency. On July 16, 2003, Grievant's physician wrote that he did not see any reason to limit Grievant's activities due to her medical condition.

Grievant argues other Deputy Hearing Officers were behind in their caseloads yet they were not terminated. Grievant was not terminated because of a backlog of cases. She was disciplined for failing to comply with her Supervisor's instruction. Although complying with the Supervisor's instruction may have delayed other cases by up to an hour, Grievant should have complied with her Supervisor's instruction as directed.

Grievant contends the Agency retaliated against her because of her race. No credible evidence was presented suggesting the Agency retaliated against Grievant because of her race or for any other reason. To the extent the Supervisor focused on Grievant, it was because of Grievant's ongoing performance and not because of some improper reason.

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.

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.¹⁶

[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

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.