

Issue: Group II Written Notice (failure to follow a supervisor's instructions) and Group III Written Notice with termination (leaving a security post without permission); Hearing Date: 04/22/04; Decision Issued: 04/26/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 678



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 678

Hearing Date: April 22, 2004
Decision Issued: April 26, 2004

PROCEDURAL HISTORY

On January 21, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to follow Supervisor's Instructions or Otherwise Comply with Applicable Established Written Policy: On January 12, 2004 you were scheduled for work to attend the range recertification training, and did not attend. You failed to call in to the facility to report as scheduled. You were provided with more than adequate advance notice of your responsibility to receive training on that date, and you had been made intimately aware of the proper mechanism required of employees to report work absences. Your failure to attend the mandated training and your failure to properly notify supervision of your absence constitute clear disregard for supervisory instructions and policy mandates.

Grievant also received a Group III Written Notice with removal effective January 24, 2004 for:

Leaving a Security Post Without Permission During Working Hours: On 1/19/04, you were questioned by [Lt. M] and [Lt. N] regarding your failure to report for firearm recertification on 1/13/04. When [Lt. M] asked you to

be quiet so that he could hear what [Lt. N] had to say, you replied "be quiet" in a very high and angry tone. You then took off your employee identification and weapons cards and threw them violently on the office desk. In response to [Lt. M's] question of whether you were quitting, you stated "I am through with this sh-t," walking out of the office without permission rather than go to your assigned post. You proceeded to the administration building where you took off your jacket, shirt, and hat, threw them on the search area desk, and exited the facility. As the security items you discarded are essential to your fulfilling your post assignment obligations, and your leaving the facility without authorization during working hours rendered impossible the fulfillment of your essential security job responsibilities, you are responsible and accountable for your actions as a Group III Offense.

On January 29, 2004, 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 April 1, 10024, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 22, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions.
2. Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for leaving a security post without permission.

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 Corrections employed Grievant as a Corrections Officer Senior until his removal on January 24, 2004. The purpose of his position was:

Maintains security, custody and control over inmates at the institution and while in transport, by observing and initiating corrective and disciplinary actions for inappropriate behavior. Supervise inmates' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement. Ensure participation in mandated Treatment Programs in support of the Facility's Mission Statement.¹

On January 29, 2002, Grievant was issued a Group I Written Notice for unsatisfactory attendance or excessive tardiness.²

Grievant was scheduled to take mandatory weapons training on January 13, 2004. A day or two before the training was to take place, Grievant called Lt. M and said he might have to leave the training early and wanted to know if that would be all right. Lt. M indicated Grievant could leave early if necessary. On the day of the scheduled training, Grievant did not appear as scheduled. He did not call at least two hours³ in advance of the scheduled training and inform a supervisor that he would be unable to appear. Lt. M called Grievant later and asked why he was not at the training. Grievant explained he was not present due to a family emergency.

On January 19, 2004, shortly after Grievant assumed his post in the Housing Unit, Grievant was called to the Watch Commander's office. Lt. N was the range supervisor and was in the Watch Commander's office. Lt. N began talking to Grievant about his failure to attend the scheduled training. Grievant became angry and raised his voice at Lt. N. Lt. N called for Lt. M to enter the office. As Lt. M entered the office, Lt. N began speaking with Lt. M and Grievant began loudly interrupting Lt. N. Since Lt. M. could not understand both employees at the same time, Lt. M raised his arm, turned his palm towards Grievant, and instructed Grievant to "be quiet." Grievant became offended at being told to be quiet.⁴ He responded loudly "be quiet?!" Lt. M responded,

¹ Agency Exhibit 4.

² Agency Exhibit 6.

³ Grievant's Conditions of Employment require, "Corrections Officers must notify the Officer-in-Charge or the Shift Commander at least two hours before the beginning of their shift if they will be absent due to illness or other unanticipated reasons." Agency Exhibit 7.

⁴ Grievant over-reacted to Lt. M's gesture and comment. Lt. M's gesture was in a manner indicating his desire that Grievant "hold on" while Lt. M listened to Lt. N.

Yes, be quiet, and let me hear what the Lt. has to say.” Grievant then removed from his uniform his identification card and weapons card and threw them on a table. He then walked out of the office and ignored Lt. M’s questions of “are you quitting.” Grievant walked out of the building and down a long walkway inside the prison campus. He then walked to the Administration building. Once inside the Administration building, Grievant removed his hat, jacket, and shirt and slammed them down on a desk. He walked out the front door into the parking lot but not outside the boundaries of the parking lot. A few minutes later, he re-entered the Administration building and began using a telephone. At the direction of Facility managers, the Sergeant walked up to Grievant and instructed him to leave the Facility.

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).⁵ 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).

Group II Written Notice

Agency witnesses testified that Grievant was called to the Watch Commander’s office in order to receive a verbal counseling regarding his failure to appear as scheduled for range training. Had Grievant not abruptly left the meeting, he would not have received a written notice. Based on this testimony, the Hearing Officer concludes that the Group II Written Notice was not issued because Grievant failed to follow a supervisor’s instruction to attend training on January 13, 2004, but because of his improper behavior on January 19, 2004. Accordingly, the Group II Written Notice must be rescinded.

Group III Written Notice

“[L]eaving a security post without permission during working hours” is a Group III offense.⁶ Grievant abandoned his housing unit post when he left the Watch Commander’s office without permission and with the intent not to immediately return to his housing unit post. Grievant’s actions were without permission and during his work hours. Accordingly, the Group III Written Notice must be upheld. The Agency’s

⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁶ DOCPM § 5-10.17(B)(14).

decision to remove Grievant from employment is consistent with its Standards of Conduct.

Grievant contends he could not have abandoned his post since his post was at the housing unit and he was in the Watch Commander's office when he decided to leave the Facility. Grievant's argument fails because although Grievant was not physically present in the housing unit, he was expected to return to the housing unit after speaking with the Lieutenant in the Watch Commander's office. Grievant was granted permission to be away from his post only for the period of time necessary to speak with the Lieutenant. He was not granted permission to leave the Watch Commander's office, walk to the Administration building and walk into the parking lot. He also was not granted permission to remove parts of his uniform. Once he removed his uniform, he was not longer able to carry out his post duties since being in uniform was one of those duties.

Grievant contends he was taking his break and, thus, it was appropriate for him to be away from his post. The evidence, however, showed that Grievant did not take any actions consistent with taking a break such as letting his supervisor know that he wished to take a break. Grievant was not on his break when he left the Watch Commander's office. His actions reflected insubordination. He was not free to take a break during the middle of meeting with Lt. N and Lt. M. Grievant was not free to exit the Administration building without the Watch Commander's permission.

Grievant contends the Agency disciplined him because of his prior rebellious actions. The evidence showed that the Agency disciplined Grievant because of his behavior on January 19, 2004.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions is **rescinded**. For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal for leaving a security position without permission **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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.