

Issue: Group II Written Notice with demotion and salary reduction (failure to follow supervisory instructions, perform assigned work, or otherwise comply with established written policy, failure to report to work as scheduled, and failure to receive proper prior approval to adjust work schedule); Hearing Date: 04/19/05; Decision Issued: 04/26/05; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8029



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8029

Hearing Date: April 19, 2005
Decision Issued: April 26, 2005

PROCEDURAL HISTORY

On October 21, 2005, Grievant was issued a Group II Written Notice of disciplinary action with demotion and salary reduction for:

Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy, failure to report to work as scheduled, and failure to receive proper prior approval to adjust your work schedule. You have been informed repeatedly, verbally and in writing, to comply with time recordation and work schedule adjustment procedures. You were issued a Written Notice, effective 12Aug04, for similar unacceptable behavior requiring immediate correction in your performance. During the work cycle noted above you did not sign in and out at the shift commander's office in an acceptable manner, and you failed to obtain approval for schedule adjustments prior to taking such action as required of uninformed personnel. Infraction dates/actions have been reviewed with you.

To resolve other issues of your job performance and for treatment/security reasons, you were directed in writing by the Superintendent in June, 2004 to not enter specific housing units except under specific conditions. You violated those instructions on several occasions, causing disruption and

potentially interfering with the Department's ability to accomplish its stated mission. You participated in canteen distribution in a unit not your own necessitating undue administrative action to correct errors committed as a result, and twice on one shift you entered units at your own initiative in direct violation of the Superintendent's instructions.

You have displayed behavior toward your immediate supervisor contrary to expectations of all state employees to attempt to resolve workplace disputes, provide essential information in the conduct of normal business activity, and to create and maintain an effective working relationship with good bearing toward a superior officer. Your behavior has been interpreted to be insubordinate, is creating an unacceptable work environment for others, and the evidence supports that on at least one shift you refused to accept direct orders from the institution's Shift Commander to assume security duties that fall well within the purview of your position description and job expectations.

You have displayed a pattern of insubordinate behavior, refused to follow clear and direct instructions, failed to cooperate with and treat a superior officer with respect and good bearing. Your actions have interfered with the good order and operation of the facility.

On November 3, 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 she requested a hearing. On March 22, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with demotion and salary reduction 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:

The Department of Juvenile Justice employed Grievant as a Juvenile Corrections Sergeant until her demotion with ten percent salary reduction effective October 21, 2004. On August 12, 2004, Grievant received a Group I Written Notice for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy and failure to report to work as scheduled.¹

Leave Reporting

Prior to taking leave, Grievant must have her leave approved first by her supervisor and then reviewed by the master schedule coordinator. Grievant must submit a request form to her supervisor to obtain written approval and the request form is then sent to the master schedule coordinator. This form has a space for Grievant to write the dates of requested leave and a space for her supervisor to sign indicating her approval and for the master schedule coordinator to sign.² If the leave is approved, the master schedule coordinator highlights in yellow the approved leave dates on a schedule which is sent back to Grievant and posted in a central location of the Facility. Leave for all employees is posted in the central location to assist with staffing for the Facility. Several supervisor's had informed and advised Grievant of this procedure.

Grievant took leave on August 12, 2004 without having that leave first approved by her supervisor.³

Log Book

Employees entering the Facility must sign in a log book immediately upon beginning their shifts.⁴ Employees must also sign out in the same log book immediately

¹ Agency Exhibit 21.

² Agency Exhibit 2.

³ Agency Exhibit 3.

⁴ Grievant's post order informs her of this requirement. See, Section III of Post Order 3. Agency Exhibit 10.

upon ending their shifts. There is a clock in the office near the log book. All security staff are required to follow this procedure.

Grievant was aware of the log book documentation requirement. On August 17, 2004, Grievant's Supervisor, the Lieutenant, met with Grievant to remind her of the requirement. The Lieutenant instructed Grievant to use the log book to sign in upon arrive and sign out upon departure from the Facility. On August 31, 2004, the Lieutenant sent Grievant an email stating, in part, "Please be advised that you need to sign in on arrival to work and out when you depart. *** Failure to comply with the above may result in additional disciplinary actions."⁵

On August 18, 2004, Grievant was observed arriving at work at 8:15 a.m. but she signed the log book as if having arrived at 7:45 a.m.⁶ On August 19, 2004, Grievant was observed arriving to work at 8:01 a.m., but she signed the log book as having arrived at 7:45 a.m.⁷ On September 1, 2004, Grievant signed in the log book but failed to sign out.⁸ On September 13, 2004, Grievant did not sign in when she first arrived to begin her shift. She later made an entry into the log book to reflect the time she began her shift.⁹ On October 6, 2004 at 11:20 a.m., the Lieutenant observed Grievant at the Facility talking to a ward. Grievant then went to cottage 28 where she worked. At approximately 11:27 a.m., Grievant signed in the log book. She listed her time as 11:00 a.m. instead of the time shown on the clock in the office.

Oral Supervisor's Instruction

On September 17, 2004, the Lieutenant told Grievant to "cover #28 from 9am – 10 am as staff was scheduled to attend SIB training." Grievant responded "No, I am working on evaluations." Later that day, the Lieutenant instructed Grievant to go and work in cottage #28. Grievant responded, "No Mam, I am taking care of these two new cadets and I have an appointment at the country store at 5:15 p.m." Grievant added, "I am following [the Captain's] instructions."¹⁰

Superintendent's Instruction

⁵ Agency Exhibit 14.

⁶ Agency Exhibit 18.

⁷ Agency Exhibit 7.

⁸ Agency Exhibit 6.

⁹ Agency Exhibit 9.

¹⁰ The Agency presented testimony revealing that if an employee receives conflicting orders from two supervisor's the employee should follow the most recent order. Thus, Grievant should have followed the Lieutenant's instruction.

Grievant was assigned to work in cottage #28. On June 1, 2004, the Facility Superintendent gave Grievant an order as follows:

You will refrain from entering any cottage not your own without invitation except in response to [emergency calls] on the radio.¹¹

On September 18, 2004, Grievant was observed entering cottages #40 and #27. She did not have an invitation or the permission of her supervisor. She was looking for a pillow.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 failed to follow supervisors’ instructions because she (1) took unapproved leave, (2) failed to properly sign the log book upon entry or departure from the Facility, (3) disregarded the Lieutenant’s instructions given on September 17, 2004, and (4) entered cottages #27 and #40 without invitation or permission contrary to the Superintendent’s instruction. The instructions given to Grievant were lawful and ethical. Grievant should have complied with those instructions. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

“Disciplinary action also may include demotion or transfer in lieu of termination.”¹⁵ This means that as an alternative to discharging an employee, an Agency may demote the employee. Absent circumstances justifying removal from employment, an Agency may not demote an employee.

¹¹ Agency Exhibit 17.

¹² Agency Exhibit 16.

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)(C)(2).

An employee with an active Group I Written Notice and an active Group II Written Notice does not have sufficient active disciplinary action to justify removal from employment.¹⁶ Therefore, Grievant was demoted without the Agency having issued sufficient disciplinary action against her to justify demotion.¹⁷ Grievant's demotion and salary reduction must be reversed.

Grievant did not present any credible testimony to rebut the Agency's allegations against her. No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Grievant asks that she be given a new supervisor. The Hearing Officer lacks the authority to grant such a request. The Agency granted her request prior to the matter qualifying for hearing.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency is ordered to reinstate Grievant to her former position of Juvenile Corrections Sergeant and restore her back pay from October 21, 2004.

APPEAL RIGHTS

You may file an administrative review request within **15 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

¹⁶ The employee must have at least four Group I Written Notices, two Group II Written Notices, or a Group III Written Notice to justify removal from employment. See, DHRM § 1.60(VII).

¹⁷ The Agency issued one Group II Written Notice for all of Grievant's actions. The Hearing Officer lacks the authority to increase the level of disciplinary action taken by an Agency.

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 15 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 15-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.¹⁸

[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

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.