

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions); Hearing Date: 06/03/05; Decision Issued: 06/16/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8074



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8074

Hearing Date: June 3, 2005
Decision Issued: June 16, 2005

PROCEDURAL HISTORY

On February 26, 2005, Grievant was issued a Group II Written Notice of disciplinary action with two work day suspension for:

On November 16, 2004, you were instructed by [Lieutenant] to meet with him to resolve a performance issue. At that time you told the Lieutenant "Do what you have to do, I'm going home." [Lieutenant] asked you a second time to sit and wait as he wanted to meet with you. Again you refused to meet with [Lieutenant] and you left the facility. Your actions constitute "Failure to follow supervisors instructions, perform assigned work or otherwise comply with established policy."

On March 24, 2005, 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 May 9, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 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 suspension 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 Department of Corrections employs Grievant as a Corrections Officer Senior at one of its Facilities. Grievant did not testify during the hearing.

Grievant was working in the lower control booth of Housing Unit One on November 16, 2004. In order for employees to enter or exit the building, Grievant had to observe the employees and push an icon on a computer screen to open the security door. At approximately 6 a.m., corrections officers working the day shift wished to enter the building to assume their posts. Several officers began beating on the control booth window in order to get Grievant's attention so that he would let them inside the building. They were also pushing a button that would cause a sound to be heard inside the control booth so that the control booth operator would know someone wished to enter the building. As the Lieutenant approached the building he observed the officers beating on the window and pushing the button. He became concerned regarding the reason they could not get into the building. The Lieutenant looked inside the window and observed Grievant seated in front of the computer screen of the computer that must be used to permit entry into the building. Grievant was approximately 15 yards away from the window. The Lieutenant could see Grievant's right side. Grievant was motionless with his head tilted back and his arms hanging straight down. The Lieutenant did not observe Grievant move for several minutes. Grievant did not respond to the noise created by the officers banging on the window or the sound from

the button being activated repeatedly. The Lieutenant contacted another employee and instructed that employee to call Grievant on the telephone located near Grievant. The employee called Grievant and Grievant finally responded to the telephone call. The employee told Grievant that staff wished to enter the building and to let them in. Grievant pushed the icon on the computer and let the employees inside the building.

As Grievant left the control booth to end his shift at approximately 6:15 a.m., he had to pass through the supervisor's office where the Lieutenant was working. The Lieutenant suspected Grievant was sleeping or not alert and wanted to ask Grievant for an explanation of what had happened. As Grievant came out of the control booth, the Lieutenant asked Grievant if he was alert. Grievant said "Do what you have to do, I am going home." The Lieutenant told Grievant "come back over here to me and let me and you discuss this and get it straightened out." Grievant again responded, "Do what you have to do, I'm going home." Grievant left the building. The Lieutenant reported the matter to his superior.

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.

The Department of Corrections is a para-military organization where security staff wear uniforms and hold rank. Employees with lower rank are trained and expected to comply with the instructions of employees with higher rank even if a higher ranking employee is not in a lower ranking employee's direct chain of command on a particular day.

"Failure to follow a supervisor's instructions" is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant was obligated to follow the instruction of the Lieutenant because the Lieutenant was a higher ranking employee in a supervisory position. The Lieutenant instructed Grievant to remain with the Lieutenant so that they could discuss what the Lieutenant observed. Grievant refused to remain thereby failing to follow a supervisor's instruction. The Agency has presented sufficient evidence to support its conclusion that Grievant failed to follow a supervisor's instruction thereby justifying issuance of a Group II Written Notice. A two workday suspension is within the number of days permitted under a Group II Written Notice.¹

¹ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Grievant contends he complied with the Lieutenant's instruction because an employee in the upper control booth walked down to the supervisor's office and observed Grievant and the Lieutenant seated and talking. This evidence is insufficient to refute the Agency's evidence that Grievant disregarded the Lieutenant's instruction to remain. When the employee observed Grievant and the Lieutenant, the employee could not hear their discussion. The employee suspected Grievant was "getting his behind chewed" because of what had happened earlier in the morning so the employee quickly left. The Agency's evidence showed that Grievant and the Lieutenant spoke briefly. Assuming they were seated briefly, this does not refute the Agency's evidence that Grievant refused to remain as long as the Lieutenant wished for him to remain.

DECISION

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

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
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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.