

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions, perform assigned work or comply with established written policy); Hearing Date: 10/03/05; Decision Issued: 10/05/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8172



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8172

Hearing Date: October 3, 2005
Decision Issued: October 5, 2005

PROCEDURAL HISTORY

On May 26, 2005, Grievant was issued a Group II Written Notice of disciplinary action with 36 hour suspension for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. On May 19, 2005, you refused to answer questions asked by [Major]. I instructed the Major to conduct an inquiry regarding a complaint made by another employee alleging a hostile work environment.

On June 13, 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 she requested a hearing. On September 1, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative

Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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. No evidence of prior active disciplinary action against Grievant was presented during the hearing.

An employee working at the Facility filed a grievance alleging she was working in a hostile work environment. Grievant was identified as someone who may have had information relating to that grievance. Upon receiving that employee's grievance, the Warden determined the matter needed to be investigated. Since he would not be at work for the next few days, the Warden assigned the Major and the Assistant Warden with the responsibility of finding the facts that occurred and reporting those facts to the Warden when the Warden returned to work.

The Major drafted several questions and scheduled interviews with three employees including Grievant who were named in the grievance and with three employees who were believed to know facts about the employees named in the grievance. On May 19, 2005, the Major met with Grievant to ask her questions. The Major brought his administrative assistant with him because she had supervised the employees being interviewed. The Assistant Warden was present because he had been instructed by the Warden to participate in the investigation. A Human Resource Officer was present in order to observe and provide advice to Grievant if she had questions about human resources.

The Major informed Grievant the purpose of the meeting was to respond to another employee's grievance. He began reading the questions. Grievant answered a few of the questions and then said did not have to answer his questions. She said she wanted a representative with her at the meeting. The Major said that his administrative assistant or the HRO could provide Grievant with any assistance she needed. Grievant said that she did not trust anyone else and that she would not answer the Major's questions without a representative present. The Major told Grievant that the interview was confidential and of a sensitive nature and that no one else could attend the meeting. He told her that she must answer his questions and that she did not have the authority to refuse to answer his questions. The Major continued to ask Grievant questions. Grievant said she would not answer the question. The Major asked Grievant if she intended to answer any of his questions and Grievant said "no." The Major then ended the interview with Grievant.

The Major interviewed two other employees on May 19, 2005. During those interviews the Major's administrative assistant, the Assistant Warden, and the HRO were also present. These employees agreed to answer the Major's questions. The Major also interviewed three employees on May 24, 2005 and those employees agreed to answer his questions.

When the Warden returned to work, he met with Grievant. The Major, his administrative assistant and a different person from human resources were present during the meeting. The Warden asked Grievant why she had not answered the Major's questions. Grievant said because she did not know the purpose of the questions and she wanted a representative present. The Warden told Grievant that her request was not a requirement and that if she continued to refuse to answer the questions, then he would have to turn the matter over to internal affairs. He then asked her if she would answer the questions and Grievant again refused to do so.

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.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). The Major instructed Grievant to answer questions as part of an Agency investigation. Grievant was obligated to follow the instructions of a higher ranking employee. The

Major's instruction was lawful, ethical, and on behalf of the Agency's business. Grievant was obligated to comply with his instruction and answer the questions presented. Grievant clearly refused to answer the questions thereby failing to follow a supervisor's instructions. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. A suspension of up to ten workdays is permitted by the Agency's Standards of Conduct upon the issuance of a Group II Written Notice.¹

Grievant contends she did not refuse to answer the questions and would have answered them had her request to have an observer present been granted. Grievant's argument fails because after raising her request, she was told she was not entitled to have a representative present during the questioning. Grievant has not presented any policy showing that she cannot be questioned without permitting her to obtain a representative during an administrative investigation.

Grievant argues she should not have been removed as a Field Training Officer as part of the disciplinary action.² A Field Training Officer is a Corrections Officer Senior whose duties include providing on the job training to new corrections officers. Grievant's argument fails because her service as a Field Training Officer was not removed to punish her but was removed because the Warden lacked confidence that she would be a good role model for new corrections officers, given her refusal to follow a supervisor's instruction.

Grievant argues the Agency has inconsistently disciplined its employees. She presented copies of written notices issued to other employees at the Facility. The notices were Group II Written Notices but with suspension ranging from none to four workdays. Agency managers are supposed to evaluate each disciplinary action based on many factors including the nature of the offense as well as the employee's work performance and length of service. Thus, similar offenses may not have identical discipline. Based on the evidence presented in this hearing, the Hearing Officer cannot conclude that the Agency has disciplined employees so materially different that the Agency has engaged in the inconsistent application of disciplinary action. Accordingly, there is no basis to mitigate the Group II Written Notice with suspension issued to Grievant.

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**.

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

² Grievant was also moved from the night shift to the day shift. She did not raise this matter in her grievance and the issue is not before the Hearing Officer.

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.³

[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].

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer