

Issue: Group II Written Notice (failure to follow supervisor's instructions); Hearing
Date: 07/27/04; Decision Issued: 07/29/04; Agency: DJJ; AHO: Carl Wilson
Schmidt, Esq.; Case No. 771



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 771

Hearing Date: July 27, 2004
Decision Issued: July 29, 2004

PROCEDURAL HISTORY

On January 8, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

Failure to follow supervisor's instructions – January 2004 – Instruction by Shift Commander to fax documentation for call out. You did not comply with the instructions or memorandum dated December 10, 2003, signed by the Superintendent.

On January 14, 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 June 30, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 27, 2004, 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 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 Juvenile Justice employs Grievant as a Juvenile Correctional Officer at one of its facilities. He has been employed by the Agency for over four years and has received favorable evaluations.¹ During the grievance step process, both the Superintendent and the Regional Director indicated that they would be willing to reduce the offense to a Group I Written Notice for unsatisfactory job performance based on Grievant's good work performance and absence of prior disciplinary action.

On December 10, 2003, the Superintendent sent a memorandum to his staff stating:

Any staff who calls out during the period beginning 12:00 noon on December 24, 2003 through 8:00 a.m. on January 5, 2004 **will be required to submit documentation for the absence. Any staff calling out sick will be required to submit a physician's certification for the time taken. The physician's certificate must state that you were unable to work and the certification faxed to [Facility name] to the attention of myself, [Mr. H, Dr. S.] or Acting [Captain S.]** The fax number is [number]. I would also like to restate that any call out requires that you notify the Shift Commander not less than 3 hours in advance of the assigned shift.²

¹ Grievant Exhibit 1.

² Agency Exhibit 1.

Grievant and the other staff signed the memorandum acknowledging their receipt of the document.

On Thursday January 1, 2004 at 6:10 p.m., Grievant called the Lieutenant and indicated he would not be coming to work for his scheduled shift. The Lieutenant instructed Grievant to fax documentation of the reason for his absence to the Facility. Grievant indicated he would bring it in when he returned to work. The Lieutenant replied that she would note his statement.

Grievant did not go to work because his daughter suddenly became ill with cramps and headaches, but her condition did not require emergency medical treatment. Grievant did not wish to leave her. By the time a physician's office was open, the daughter's medical condition had returned to normal. There was no medical need to take the daughter to a physician.

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).³ 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).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet. The Agency has presented sufficient evidence to show that Grievant's work performance was unsatisfactory.

The objective of the Superintendent's memorandum was to prevent unreasonable, unnecessary, or disingenuous employee absences from work. Based on the credibility of the witnesses, Grievant's daughter was ill and Grievant believed he needed to remain with her. State employees are entitled to take family sick leave when necessary and leave balances are available. No credible evidence was presented suggesting Grievant was attempting to avoid work because of the holiday time period. Although the memorandum stated Grievant was to immediately fax documentation to

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

the facility, the Agency ultimately did not discipline Grievant for failing to do so. It was not possible for Grievant to fax in documentation at the same time his daughter was sick because physician's offices were closed on January 1, 2004. The Agency recognized this impossibility.

What distinguishes a Group I Written Notice for unsatisfactory work performance and a Group II Written Notice for failure to follow a supervisor's instructions is the employee's intent, the importance of the task, and the employee's ability to perform the task. In order to avoid disciplinary action, the Agency expected Grievant to obtain a note from a physician stating that his daughter was ill. Since no physician had treated the daughter at the time of her illness, no medical records would have been generated for the illness. Any note from a physician would have said words to the effect that the father or daughter reported to the physician that the daughter was ill in the evening of January 1, 2004. An Agency is free to require its employees to perform a task of limited value in determining whether someone is ill (i.e. having a doctor write a note repeating what an employee has already told the Agency), but when an employee fails to comply with that task, the offense rises no higher than a Group I Written Notice for unsatisfactory work performance. This conclusion is aligned with the Agency step respondents who indicated they were willing to reduce the Group II to a Group I based on Grievant's work performance.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice and shall remain active for two years from the date of issuance.

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. 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 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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.