

Issue: Group II Written Notice with Suspension (failure to follow instructions);
Hearing Date: 10/27/10; Decision Issued: 11/24/10; Agency: DOC; AHO:
Sondra K. Alan, Esq.; Case No. 9401; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 9401
HEARING DATE: October 27, 2010
DECISION ISSUED: November 24, 2010

PROCEDURAL HISTORY

On May 30, 2010, Grievant was given a Group II Written Notice for Grievant's failure to follow a written memo as evidenced by Grievant's decision to "place a K-9 participant in the training house". Grievant also received a five day (40 hours) suspension without pay. On June 21, 2010, Grievant filed a grievance to challenge the Agency's action. The Grievant was not satisfied with the outcome of the First Step and Second Step Resolutions and requested an expedited hearing. In a letter dated August 27, 2010, the Hearing Officer received appointment from the Department of Employment Dispute Resolution (EDR) effective August 31, 2010. The matter was scheduled for hearing during a pre-hearing telephone conference on September 29, 2010 at 11:00 am during which time the case was set for October 27, 2010 at 9:30 am at the HR office of the facility.

APPEARANCES

Grievant, pro se
Agency Advocate
Agency Representative
4 Agency Witnesses

ISSUES

1. Did Grievant engage in the conduct of failing to follow the instructions of a superior?
2. Did the behavior constitute misconduct?
3. Was the Agency's discipline consistent with the law?
4. Had mitigation been considered and properly applied?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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. It is incumbent on Grievant to show that the relief sought by Grievant is applicable to Grievant's case. GPM § 5.9(a). Also, Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §4.1(b).

APPLICABLE LAW

The Agency relied on Virginia Department of Corrections Operating Procedure, Standards of Conduct, Section XI, Group II, B1 "Failure to follow a superior's instructions".¹

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant, a lieutenant shift manager at a state prison was described as a valuable employee by his superiors. On the evening of April 4, 2010, Grievant's crew was short staffed in the prison facility. In order to increase staffing, Grievant approved pulling an employee from a position in the dormitory facility to add to his staff. Grievant had earlier received a memo from his superior stating no staff was to be taken from the

¹ Agency Exhibit D

dormitory facility at any time during the day and at night only if there were no occupants housed there.²

This prison facility houses a state training center on its campus. There are overnight accommodations for students and a separate overnight facility for instructors. The learning center is not always in use. Except for being on the prison campus, it is not a part of the prison facility. The employees who staff the dorm building are local persons, previously employed by the prison but now employed by the state agency that is responsible for employee education.

On the evening of April 4, 2010, there was one student scheduled to stay overnight in the student facility. With Grievant's permission, the student was moved to the instructor's facility, thus making the student facility "unoccupied". Grievant believed causing the dorm to be empty was therefore permitting him to be free to move the staff member onto Grievant's crew. The following morning, the state scheduled a full staff of instructors to stay in the instructor's facility but the student from the previous night was already using one of the needed rooms.

Grievant brought to light that he had earlier spoken to his captain about the expected staff shortage and received no direction. Agency testified Grievant should have checked with an available supervisor before deciding how to remedy the shortage on that particular evening. While these are interesting facts, the issue is the written memo and its disregard.

CONCLUSION OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

² Agency Exhibit A

disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."³

All parties agree that Grievant did not intend any complications or willfully disobey the spirit of the previously mentioned memo. However, all parties agree Grievant did disobey the letter of the memo and that Grievant had no independent authority to create the "unoccupied" status in the student dorm. The offense is clearly a Group II offense, "failure to follow instructions of a superior".

MITIGATION

The Agency may consider mitigation to reduce the disciplinary action.⁴ Considering mitigation, the Agency reviewed Grievant's record as a valuable and dedicated employee. The Agency also considered that Grievant had a presently active Group III Discipline. All this was taken into consideration before issuing a Group II Discipline for the present problem. Normally, a Group II following a Group III would result in termination. Grievant however, was only given release from work without pay.

OPINION

The Hearing Officer is impressed with the testimony of all parties and the cordial interaction between Grievant and his superiors. The warden described discipline as a "learning opportunity" and respected Grievant's good intentions. However, orders made

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

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by Grievant's superiors are to be strictly obeyed. The Agency clearly considered Grievant's status with the Agency and mitigated Grievant's possible discipline.

DECISION

For the above reasons, the finding is that Grievant did fail to follow an order. The discipline was clearly a Group II misconduct. Considering the misconduct was not willful or malicious, the Agency mitigated the punishment appropriately. The Group II Disciplinary Action and Grievant's forty (40) hour work suspension without pay is **upheld.**

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.⁵ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

⁵ 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 and EDR Consultant.

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

Director, Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided, and if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within **thirty days** of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which grievance

arose.⁶ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

⁶ An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).