

Issue: Group III Written Notice with Termination (theft); Hearing Date: 04/20/17;
Decision Issued: 07/05/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 10970; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10970

Hearing Date: April 20, 2017

Decision Issued: July 5, 2017

PROCEDURAL HISTORY

On November 18, 2016, Grievant was issued a Group III Written Notice of disciplinary action with a three workday suspension for theft.

On December 13, 2016, 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 6, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 20, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Behavioral Health and Developmental Services employs Grievant as a Food Service Tech at one of its facilities. She began working for the Agency in 1995. The purpose of her position was:

Functions as a food service lead worker and provides oversight of food production when Food Service Manager is not on duty. Make recommendations to Food Service Manager and Director on all food service issues. Train new employees in food preparation, cafeteria service, cleaning and sanitation. Continuously monitors safety practices in the kitchen. Assist in food preparation, cafeteria service, cleaning, and sanitation on a daily basis.¹

No evidence of prior active disciplinary action was introduced during the hearing.

Prior to the arrival of a new supervisor, Ms. P, kitchen staff were permitted to eat food from the kitchen. Ms. P met with kitchen staff including Grievant and informed them they could no longer eat or drink from the kitchen. Ms. P told staff that they could no longer store their food in the Food Service Department. Several staff changed their practices. Grievant was aware that Ms. P had changed the Facility's expectations for kitchen staff.

¹ Agency Exhibit H.

On September 19, 2016, Grievant walked into the kitchen and placed a white plastic bag² on the kitchen work table. She pulled out a second white plastic bag from the first plastic bag. She placed some items from one of the first bags into the second bag. She obtained some type of bag or storage container from below the kitchen table and walked to an upright container. She opened the container and removed some items that she placed in the bag. She placed the bag in one of the white plastic bags on the kitchen work table.

Grievant walked to a container while holding a brown paper bag. She grabbed a handful of items appearing to be white plastic eating utensils. She placed the items into the paper bag. She grabbed another handful of utensils and placed them into the paper bag.

Grievant re-entered the kitchen with the paper bag held against her side by her left arm. She used her right hand to reach for a disposable drink cup. She put the cup down on a metal table next near the refrigerator. Grievant opened the refrigerator and removed a white plastic bag containing items. She placed the white plastic bag on the metal table.

She opened the refrigerator and removed a jug of what appeared to be juice. She poured the juice into the cup and returned the jug to the refrigerator. She removed what appeared to be two eggs from the refrigerator. She grabbed the cup with juice and drank the juice. She picked up a small white container that was on top of a microwave and took it to the three white bags on the kitchen table. She placed the white container in one of the three bags.

She then put the paper bag in one of the white plastic bags.

Grievant stepped to a container and removed two handfuls of white napkins. She stepped back to the kitchen table and placed the napkins in one of the white bags.

Grievant picked up all of the three white bags from the kitchen table and walked back to her cup of juice. She drank some of the juice and began walking out of the kitchen holding the cup in her right hand and the three bags on left arm. She took the three bags out of the Facility.

CONCLUSIONS 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 The Facility did not own white plastic bags like the one Grievant held. Thus, the white plastic bags most likely belonged to Grievant.

disciplinary action.”³ 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.”

The Facility’s Security and Key Control policy provides:

No Food Service employee may remove any item (i.e. boxes, food, discarded equipment) from the premises without prior knowledge and approval of the Food Service Director.

The Facility’s Food Handling – Preparation policy establishes procedures including:

21. Leftovers must be dated, labeled, covered, rapidly cooled and stored in a refrigerator. Prior to re-serving, leftover foods shall be reheated to a minimum internal temperature of 165 degrees F for a minimum of 15 seconds.

22. No personal food items shall be stored or prepared in the food preparation area of the department.⁴

Theft is a Group III offense. The Agency has established that Grievant removed State property from the Facility. Grievant removed plastic utensils, napkins, a container on top of the microwave, two eggs from the refrigerator, as well as a paper bag from the Facility. She did not have permission to remove items from the Facility. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays in lieu of removal. Accordingly, Grievant’s three workday suspension must be upheld.

Grievant asserted that she was taking leftovers and, thus, her action was insignificant. This argument is not persuasive because under the Facility’s policy, leftovers were to be dated, labeled, covered, rapidly cooled, and stored in the refrigerator for later use.

Grievant argued that the items she removed belonged to her because she went shopping on her break earlier that day. Grievant removed a bag from the kitchen refrigerator. This would be consistent with Grievant having purchased items from the grocery store and then placing the bag in the kitchen refrigerator for safe keeping until the end of her shift. The Director of Support Services, however, testified that staff were

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

⁴ Agency Exhibit E.

informed during “in-service” training that they were not permitted to leave the Facility during the day without permission and not permitted to cook their own food using State equipment and on State time. In addition, the Facility provides employees with areas to take breaks. Refrigerators were located in the break areas in which Grievant could have stored the food she purchased. The container on top of the microwave was not likely purchased by Grievant. The plastic utensils and napkins were the property of the Agency. There is sufficient evidence for the Hearing Officer to conclude that Grievant removed State property.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

⁵ Va. Code § 2.2-3005.

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.