

Issues: Two Group II Written Notices with termination (failure to follow supervisor's instructions; leaving work site without permission); Hearing Date: January 22, 2002; Decision Date: January 23, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5351



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5351

Hearing Date: January 22, 2002
Decision Issued: January 23, 2002

PROCEDURAL ISSUE

Due to availability of the participants, the hearing could not be docketed until the 33rd day following appointment of the hearing officer.¹ The agency then requested an eight-day postponement because of witness unavailability on the docketed hearing date.

APPEARANCES

Grievant
Attorney for Grievant
Warden
Legal Representative for Agency
Three witnesses for Agency

¹ § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the grievant's actions on August 11, 2001 and August 16, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from two Group II Written Notices issued on August 24, 2001 because he failed to follow a supervisor's instructions on August 11, 2001 and, because he left the work site during work hours without permission on August 16, 2001. The grievant's employment was terminated on August 24, 2001. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant as a food supervisor for one year. The grievant has three active written notices. A Group II Written Notice was issued on April 11, 2001 for failure to follow a supervisor's instructions; the grievant did not file a grievance of this disciplinary action. A Group II Written Notice was issued on June 15, 2001 for failure to follow established policy; the grievant filed a grievance but was found to be out of compliance because he filed after the time limit had expired.² A Group I Written Notice was issued on June 21, 2001 for unsatisfactory job performance; a grievance has been filed and is currently at the third resolution step in the grievance process.

August 11, 2001

As a food supervisor, grievant oversees the work of 35-40 inmates who work in the facility's kitchen preparing food for 1200 inmates. The noon meal is also served to approximately 150 employees; employees are served double portions. Thus, for a noon meal, the kitchen prepares 1500 portions. Central office in Richmond prepares menus well in advance to assure that sufficient quantities of food are on hand. On August 11, 2001, the main course for the noon meal was oven-fried fish. The menu card for oven-fried fish specifies that 30 lbs. of thawed fish fillets are to be used per 100 portions.³ This would have required the preparation of 30 lbs. x 15 (100 portions) = 450 lbs. of fish.

Normally, previously prepared breaded fillets would be used for this menu. However, the Food Manager decided to use 624 lbs. of frozen fresh fish that had been on hand for several weeks.⁴ This type of substitution is not unusual.

² Compliance Ruling 2001-212, issued by Director, Department of Employment Dispute Resolution, December 7, 2001.

³ Exhibit 6. Menu Card for oven fried fish.

⁴ Exhibit 14. Sales Order for croaker/trout, May 22, 2001.

Substitutions of menu items are allowed only when certain foods are unavailable, when there is equipment failure, when there is a lockdown, and to take advantage of the availability of seasonal farm products and/or donated commodities. The Food Operations Director/Manager/Service Supervisor shall approve such substitutions.⁵ The frozen fresh fish was pulled out of the deep freeze on August 8, 2001 and placed in a walk-in cooler to thaw in preparation for use on August 11, 2001. Shortening is used to brush-coat the top of the fish before placing it in the oven. A smaller quantity of shortening was used in this meal to grease cake pans. Grievant averred that, prior to meal preparation, he had only half a container (approximately 25 lbs.) of shortening. The Food Service Director has since calculated that 28 lbs. was needed for 1200 portions.⁶ Preparation for the noon meal generally begins at about 9:30 a.m.

At about 11:00 a.m., grievant called his supervisor (Food Manager) at her home to advise that he had insufficient shortening to complete the meal. She advised him to go to the warehouse (located just outside the prison compound) to get more shortening. Grievant did go to the warehouse but could not locate more shortening. When there had been a shortage of an item in the past, grievant had gone to the adjoining prison facility located a few hundred yards away. On this occasion grievant did not call or go to the adjoining prison facility. Instead he substituted some previously prepared fish squares and completed preparation of the meal. He fed approximately 1000 inmates using fresh fish; the remaining meals were prepared with fish squares.

On August 11, 2001, the prison facility was on "lockdown" restricting inmates to their cells. As a consequence grievant had fewer inmates than usual in the kitchen. Additionally, instead of feeding inmates from a serving line, food had to be sent to each of the housing units. This required extra work from the kitchen staff and added pressure to the staff.

When the Food Manager came to work on August 13, 2001, she found a large quantity of fresh fish in the walk-in cooler.⁷ By this time, the fish had spoiled and had to be destroyed. Nothing was said to grievant about this incident until after the incident of August 16, 2001.

Grievant's supervisor and grievant both agree that grievant sometimes gets confused about schedules and instructions he receives.

⁵ Exhibit 13. Excerpt from Food Service Manual, pages 12-13.

⁶ Exhibit 6. E-mail from Food Service Director to Assistant Warden, August 23, 2001.

⁷ Estimates of the amount of spoiled fish vary from 150 to 300 lbs. No inventory was taken but all agree that the amount was "a lot."

August 16, 2001

The agency policy regarding unanticipated absence states, in pertinent part:

D. Notice of Unanticipated Absence. In the event of illness, injury or other emergency, the employee shall be required to provide notice to the supervisor and request approval for leave.

1. An employee who must be absent because of illness or other unanticipated reasons shall notify the supervisor no later than one-half hour after the beginning of the normal work hours.
2. Shift workers shall notify the officer in charge, or the shift commander, at least two hours before the beginning of their shift, if they will be absent.
3. Notification does not mean leave will be approved.

E. Leaving the worksite during work hours without permission or notification may be considered absence without leave and treated as a violation of the Standards of Conduct and Performance.⁸

The work schedule for kitchen staff is prepared for one-month periods and posted on the bulletin board three days prior to the beginning of the month.⁹ In addition, a copy of the work schedule is placed in each employee's individual mailbox. Grievant was on annual leave from July 29 through August 10, 2001. He was scheduled to start work at 2:30 a.m. on August 11, 2001 and did work this shift. He also worked his scheduled shift starting at 5:00 a.m. on August 15, 2001. On that date, the Food Manager discussed with grievant the menu for August 16th and concluded from the discussion that grievant was aware that he was to come in at 2:30 a.m. the next day. Grievant was scheduled to work at 2:30 a.m. on August 16, 2001 but did not arrive until 5:00 a.m.;¹⁰ he mistakenly believed that he was on the 5:00 a.m. shift that day.

Grievant pulled a muscle in his lower right back while at home on the evening of August 15, 2001. The next morning it still bothered him. He wanted to call the food manager or the food service director to advise that he had a pulled muscle but had misplaced their telephone numbers. After a prior similar incident, grievant had been told that he should call the watch commander if he was unable to reach either the food manager or the food service director. Grievant did not call the watch commander on August 16, 2001. He decided to go to work until such time as the food manager or food service director arrived

⁸ Exhibit 12. DOC Procedure Number 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

⁹ Exhibits 3 & 11. Work Schedule for the months of August 2001 and July 2001, respectively.

¹⁰ Exhibit 3. Incident Report from corrections officer, August 16, 2001.

(generally between 7:30 a.m. and 8:00 a.m.) Grievant was the only employee scheduled to work the early morning shift.

Unknown to grievant, the corrections officer who opened the kitchen at 2:30 a.m. had reported grievant's absence to his superior. When grievant had not arrived by 4:00 a.m., the watch commander called the food service director. The food service director, who lives some distance away, arrived at the facility at about 6:15 a.m. He asked grievant why he was late; grievant responded that he was confused about the schedule. Grievant complained that it was unfair that he was working the early morning shift alone. After a lengthy discussion, grievant told the food service director that he wasn't feeling well and that he was going home. The food service director told grievant that he was not the grievant's relief and that he could not authorize him to leave at that time. Grievant told the director that he couldn't prevent grievant from leaving, and he then left the facility.¹¹ He did not go the medical unit before leaving.¹² Grievant never specified why he wasn't feeling well.

Prior to this time, grievant never mentioned to anyone else that he was not feeling well. He did not tell the watch commander or any other corrections officer that he was ill. Grievant went home at about 6:45 a.m. and took aspirin. At about 9:00 a.m., he called a physician who prescribed a pain reliever. Grievant obtained the medication late that morning. He called the Food Manager and told her was going to see his physician that day (August 16th). In fact, he did not see the physician for this problem until August 22, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2.3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

¹¹ Exhibit 2. E-mail from Food Service Director to Assistant Warden, August 16, 2001.

¹² Employees are authorized to go to the medical personnel on site for medication and other medical emergencies.

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹³

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹⁴ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 defines Group II offenses to include acts and behavior more severe in nature are such that an additional Group II offense should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Section 5-10.16.B of the DOC Standards cites the following examples of Group II offenses:

- 1) Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.
- 3) Leaving the work site without permission during work hours.¹⁵

August 11, 2001

Based on the documents and testimony of the agency, one must conclude that even if grievant had used only fresh fish, and if he had an adequate amount of shortening, he would have needed and used only 450 lbs. of fresh fish. Since the food manager had pulled out 624 lbs. of fish to thaw, there would have been

¹³ § 5.8 Grievance Procedure Manual, Department of Employment Dispute Resolution.

¹⁴ Now known as the Department of Human Resource Management (DHRM).

¹⁵ Exhibit 10. Department of Corrections Policy Number 5-10, *Standards of Conduct*, June 1, 1999.

at least 174 lbs. left over. The actual amount left over was somewhat greater because grievant substituted fish squares after cooking enough fresh fish for about 1000 inmates. Nonetheless, the bulk of the spoiled fish was attributable to having thawed approximately 33 percent more than was needed for the noon meal. The grievant was not responsible for having thawed more fish than was required for the meal.

The agency contends that grievant failed to follow instructions when he substituted fish squares for fresh fish. After grievant had prepared about 70 percent of the fresh fish needed for the meal, he realized he would not have enough shortening to finish the job. He appropriately called his supervisor for guidance and followed her instruction to check with the warehouse. He then made a decision, given the lateness of the hour, to substitute fish squares for fresh fish so that the meal could be completed within a reasonable time frame. Given the situation he faced (lockdown and the fact that it was nearly noontime), grievant's decision was not totally unreasonable.

It is correct that grievant did not check with the adjoining prison facility to determine whether it could have loaned him more shortening. However, no evidence has been proffered by the agency to show that the other facility had any shortening available. If, in fact, there had been no more shortening available, grievant would have had no choice but to take the course of action that he did.

The grievant is certainly obligated to follow the instructions of his supervisor. In this case, grievant did seek guidance from his supervisor and followed her instruction. Once he complied with the instruction, he was then left with a decision on how best to handle the situation. He made a judgement call to use fish squares and that seemed the best alternative to him at the time. One is obligated to follow instructions when the instructions are not totally unreasonable and when they are capable of being followed. Here, the instructions were reasonable but they could not be followed because the grievant could not procure the necessary ingredient – shortening. Therefore, it is concluded that grievant's failure to follow instructions was attributable to a situation beyond his control.

On the other hand, grievant's performance in this situation does constitute unsatisfactory job performance. He could have checked with the adjoining prison facility but failed to do so. He knew from past experience that this was an available option. The agency also points out that the amount of shortening he had on hand should have been enough for the meal if used according to the recipe. Grievant argues that inmates working in the kitchen sometimes use more shortening than is necessary and that he is unable to look over their shoulders at all times. Both the agency and the grievant may be correct in their assertions but, at worst, any dereliction by grievant with regard to this issue would constitute unsatisfactory job performance, not a failure to follow instructions.

The agency maintains, and grievant acknowledges, that he sometimes gets confused about instructions. However, knowing this, the agency nonetheless allowed grievant to be in charge of the kitchen on this occasion. If an agency allows a person to be in charge, it must anticipate that the person will sometimes exercise his judgement. It must further anticipate that sometimes such judgements may not be perfect. The agency cannot have it both ways. If grievant could not be entrusted to make this type of decision, the agency should not have placed him in this position. But if the agency is willing to put him in this position, it must recognize that errors in judgement may sometimes occur. Accordingly, it is concluded that what occurred on August 11, 2001 was unsatisfactory job performance – a Group I offense.

August 16, 2001

When grievant came to work on August 16, 2001, he knew that he would be working alone until about 8:00 a.m. when other employees began to arrive. Notwithstanding the discomfort he was experiencing from a pulled muscle, he was prepared to work through this discomfort for at least three hours. The Food Service Director's unexpected early arrival at 6:15 a.m. should have had no impact on grievant's situation. After the Director had questioned grievant about his tardiness, grievant said he intended to leave. However, grievant did not explain to the Director what his physical problem was. Grievant could also have gone to the medical personnel on site to obtain pain relievers but failed to do so. The Director explained to grievant that he could not authorize his leaving at that time because he was not the relief person for grievant. The implication is that the Director could relieve grievant as soon as a relief person could be obtained. The grievant could have asked the Director to allow him to work some form of light duty until a relief person could be located.

However, grievant was adamant about leaving notwithstanding the lack of authorization. Grievant was unhappy about working alone and dismayed at being counseled about his tardiness that morning. However, it must be concluded that his insistence on leaving immediately was not warranted under the circumstances. Grievant was well enough to drive to the facility and work for an hour. He has not shown that he could not have continued to work for the three hours he had initially planned to work. He was also well enough to drive home alone when he left the facility.

Obviously, if one were in need of emergency medical treatment, it would be inappropriate for an employer to refuse permission to leave the work site. In this case, no such need has been demonstrated. It would also be unreasonable for an employer to refuse permission if the employee showed signs of obvious physical distress (for example, nausea or fever). Again, in this case, grievant showed no signs of discomfort or distress. Pulled lower back muscles can be very uncomfortable but they do not require an immediate trip to the emergency

room. Here, grievant did not actually see his physician until August 22, 2001 – six days after he left work.

The totality of the circumstances lead to the conclusion that grievant left work because he was unhappy about working alone and because of the Director's counseling. While grievant also had a pulled back muscle, that was not sufficient justification to leave immediately after being told that permission could not be granted at that time. Because grievant had available to him the reasonable alternatives of going to on-site medical personnel, or working until a relief employee could be obtained (as he had originally planned to do), it is concluded that his decision to immediately leave was a willful failure to follow instructions and constituted leaving the work site without permission during work hours - a Group II offense.

Mitigation

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.¹⁶

In this case, the grievant has been employed for just over one year. During that time he has incurred two other Group II Written Notices, both of which are active and are for failure to follow instructions. One of the Written Notices was never grieved and the other is no longer grievable because grievant failed to comply with the timeliness requirements of the grievance process. Grievant has one other disciplinary action – a Group I Written Notice – that is currently at the third resolution step of the grievance process. However, even if that action were to be reversed, it would have no impact on this decision.

The Standards of Conduct provide that two Group II Written Notices are sufficient to warrant removal from employment. As a result of this decision, grievant has a total of three Group II Written Notices and one Group I Written Notice - more than enough to warrant removal.

¹⁶ Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

DECISION

The disciplinary action of the agency is modified.

The Group II Written Notice issued on August 24, 2001 for failure to follow instructions is hereby reduced to a Group I Written Notice for unsatisfactory work performance. A revised Written Notice to this effect shall be prepared by the agency.

The Group II Written Notice issued on August 24, 2001 for leaving the work site without permission on August 16, 2001 is hereby AFFIRMED.

The grievant's removal from employment on August 24, 2001 is hereby AFFIRMED.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three 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 is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state 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.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of 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.

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 **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the

decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). 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 an administrative review, when:

1. The 10 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 HRM, 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 the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer