

Issue: Group III Written Notice with Demotion and Pay Reduction (theft or unauthorized removal of State Property); Hearing Date: June 19, 2002; Decision Date: June 20, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5448



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5448

Hearing Date: June 19, 2002
Decision Issued: June 20, 2002

PROCEDURAL HISTORY

On March 18, 2002, Grievant was issued a Group III Written Notice of disciplinary action for:

Theft or Unauthorized Removal of State records, state property, or other person's property (to include employees, supervisors, patients, inmates, visitors, students, etc.)

In lieu of termination, Grievant was demoted with a five percent pay reduction.

On April 10, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 16, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 19, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee

Legal Assistant Advocate
Clinical Social Worker
Therapeutic Community Director
Corrections Warden Senior

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion and pay reduction.

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 employed Grievant as a Clinical Social Work Supervisor until his demotion. On November 6, 2001, he received a Group I Written Notice for misuse of state equipment.

Grievant supervised the Clinical Social Worker. On December 27, 2001, the Clinical Social Worker purchased a coffeemaker from Kmart. After obtaining permission from the Chief of Security, the Clinical Social Worker brought the coffeemaker into her office. She was off from work for a few days and when she returned, she noticed that her coffeemaker was missing. Initially, she believed someone had removed it as a joke. Since her office is usually locked, only a co-worker with access to keys could have removed the coffeemaker. After looking around for the coffeemaker and asking co-workers if they had seen it, the Clinical Social Worker realized it had been stolen. She notified Grievant. He said he did not know where the coffeemaker was located but would begin looking for it. Several days passed and the Clinical Social Worker again asked Grievant if he had found the coffeemaker. He said "no" but that he was "working on it."

For the next several months, the Clinical Social Worker continued asking Grievant if he had found her coffeemaker. Grievant responded with several different stories. First, he told her that an employee had been stealing things and that the matter

was under investigation. Second, Grievant told the Clinical Social Worker that he was “handling it” and that she should “just let it go before the coffeemaker disappeared off the grounds.”

During a meeting, Grievant wrote a note indicating that her coffeemaker was missing and passed it to the Major, Assistant Warden, and the Therapeutic Community Director. Grievant was upset with the Clinical Social Worker for having notified the others because he was “handling it.” At the Major’s request, the Clinical Social Worker drafted an incident report and gave it to Grievant.

In the last week in February 2002, the Clinical Social Worker walked into a different building to speak with a co-worker. She saw her coffeemaker in the co-worker’s office and immediately knew Grievant must have given it to the co-worker. She made several attempt to enable Grievant to confess, but he continued to express ignorance. This continued to upset the Clinical Social Worker.

On March 6, 2002, the Clinical Social Worker entered her office and noticed the coffeemaker had been returned. It was dirty and in poor condition. This also upset the Clinical Social Worker. The Clinical Social Worker confronted the co-worker who had the coffeemaker and she admitted that Grievant had given it to her. Grievant also supervised the co-worker.

The Clinical Social Worker told the Therapeutic Community Director what she knew and the Therapeutic Community Director called a meeting with Grievant and the Clinical Social Worker. Grievant initially denied taking the coffeemaker but after being asked numerous questions, he admitted to taking it from the Clinical Social Worker and returning it to her office.

CONCLUSIONS OF LAW

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.

“Theft or unauthorized removal of state records, state property or other persons’ property (to include employees, supervisors, inmates, and visitors, etc.)” is a Group III offense.¹ Grievant removed the coffeemaker without the owner’s permission and

¹ DOCPM § 5-10.17(B)(4).

without the intent to return it. Grievant's behavior rises to the level of a Group III offense.

Grievant contends that the punishment is too harsh. He believes he should not have been demoted. He argues that he continues to perform some supervisory duties and that other employees in the unit would like for him to return as a supervisor. None of those employees testified.

Theft or removal of another employee's property is a basis for termination. The Agency reduced Grievant's termination to a demotion. There is no basis for further mitigation. The Hearing Officer agrees with testimony of the Agency's witnesses that Grievant breached his trust with his co-workers and disrupted the Agency's operations. The Agency has given Grievant a second chance by not terminating his employment. Hopefully, Grievant will take the initiative to rebuild his relationship with his co-workers and begin the long-term process of developing a reputation for excellent performance.

When an employee is involuntarily demoted, an adverse salary action must be taken to reduce the employee's compensation by at least five percent.² Grievant's reduction in compensation was appropriate.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion and pay reduction is **upheld**.

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 Resource Management. This request must cite to a particular mandate in state or agency policy. The

² DHRM Policy 3.05.

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

Carl Wilson Schmidt, Esq.
Hearing Officer