

Issue: Group II Written Notice (failure to perform assigned work or comply with established written policy); Hearing Date: 07/19/02; Decision Date: 07/26/02; Agency: Department of Education; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5478



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5478

Hearing Date: July 19, 2002
Decision Issued: July 26, 2002

PROCEDURAL HISTORY

On March 11, 2002, Grievant was issued a Group II Written Notice of disciplinary action for failing to monitor the daily work activities for quality and quantity of the Food Service Department.

On March 19, 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 June 25, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 19, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Superintendent
Director of Security
Human Resource Director

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action.

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 Education employs Grievant as the Food Service Manager at a Facility providing services to children.

The Facility is subject to inspections in order to maintain its license to operate. The Superintendent and other Facility staff were disappointed that the Facility received only a one-year certification in the prior inspection. The Superintendent hoped the 2002 inspection would result in a three-year certification. During staff meetings, she informed Department Heads of the tentative inspections dates and of the importance of making sure their departments were in order. She asked Department Heads to review prior inspections reports to make sure problems previously identified had been corrected.¹

The Facility was scheduled to be inspected from February 26 to February 28, 2002. Grievant's area was scheduled to be inspected on February 28, 2002 but the inspector came to Grievant's area a day early.

The inspector noticed several problems. A fruit display case contained cobwebs along with a few pieces of rotten fruit. Students often ate fruit from the display. Cakes in the refrigerator were not wrapped. Numerous chairs in the cafeteria were sticky and needed to be cleaned. A bathroom adjacent to the cafeteria was extremely dirty and needed cleaning. A toilet was out of order and a paper dispenser was broken.

Grievant was responsible for the problems with the fruit and dirty chairs. The cakes were uncovered so that the icing would dry. No evidence was presented suggesting Grievant was responsible for maintaining the dirty bathroom. All of the problems identified by the inspector were corrected immediately.

¹ Agency Exhibits 1 and 2.

Following the inspection, the Facility was awarded a three-year license subject to certain contingencies.

CONCLUSIONS OF LAW AND 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.” P&PM § 1.60(V)(B).² 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.” P&PM § 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.” P&PM § 1.60(V)(B)(3).

“Failure to ... perform assigned work, or otherwise comply with established written policy” is a Group II offense. P&PM § 1.60(V)(B)(2)(a). Grievant was informed of the importance of making sure his area passed inspection. The inspector identified certain items under Grievant’s control that required correction thereby suggesting that Grievant’s area might not pass inspection if the items were not corrected. Grievant failed to perform his assigned duties of maintaining a clean work area.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee’s long service with a history of otherwise satisfactory work performance. P&PM § 1.60(VII)(C)(1).

The disciplinary action taken against Grievant must be mitigated for several reasons: (1) the second step and third step respondents concluded that the Group II Written Notice should be withdrawn and that a written letter of reprimand³ be given to Grievant; (2) the inspection took place on the day before originally scheduled and before the chairs were normally scheduled to be cleaned; (3) the disciplinary action was based in part on “restrooms that were dirty and toilet paper rolls on the floor”, yet it is not clear Grievant had responsibility for maintaining restrooms; and (4) the disciplinary action was based in part on “cakes in the refrigerators with no Saran Wrap on them”, yet the wrapping had been properly removed to let the icing dry.

² The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM”) setting forth Standards of Conduct for State employees.

³ Although the Hearing Officer is removing the disciplinary action, the Agency has the discretion to issue a written reprimand given that the Hearing Officer upholds some of the factual basis upon which the original disciplinary action was taken.

Grievant contends he was singled out for disciplinary action because the inspection team found problems in other Facility departments, yet he was the only Department Head disciplined. The evidence is insufficient for the Hearing Officer to conclude that Grievant is being treated differently from other similarly situated employees. The inspection report reflected praise, recommendations, and concerns. Since the inspection was designed to determine substantial compliance with regulatory requirements, the Hearing Officer lacks sufficient evidence of the responsibilities of other Department Heads to assess whether any problems noted would rise to the level requiring disciplinary action.

Grievant asks the Hearing Officer (1) to require a written agreement by the Agency ensuring all policies and procedures will be updated and applied equitably and fairly in the future and (2) to require the Superintendent to apologize for disrespectful⁴ treatment of him. If the Hearing Officer assumes for the sake of argument that Grievant's request were appropriate under the circumstances, the Hearing Officer lacks the authority to grant such requests. Thus, Grievant's request this relief must be denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

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

⁴ Among other things, Grievant contends it was disrespectful of the Superintendent to reprimand him in front of students and his staff. The Superintendent states, "I do not feel I was disrespectful to [Grievant] and do not feel an apology is warranted."

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