

Issue: Group III Written Notice with termination (theft or unauthorized removal of state property, falsification of state documents); Hearing Date: 01/06/03; Decision Date: 02/24/03; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esquire; Case No. 5607



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5607**

Hearing Date: January 6, 2003  
Decision Issued: February 24, 2003

**PROCEDURAL HISTORY**

On September 10, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*On or about June 20, 2002 [Grievant] did knowingly approve the receipt of ten cases of rib eye steaks, relocated the steaks from one freezer to another, submitted documents for a credit from the vendor for non-receipt of the steaks, authorized the \$782.49 payment of the steaks, and then disavowed any knowledge of receiving the steaks when it was discovered that the steaks were no longer in the facility. Vendor and facility documents as well [as] individual testimony to the receipt of the steaks are evidence of the above charges.*

On October 11, 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 December 12, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2003, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Accounts Payable Technician  
Storeroom Helper  
Fiscal Technician  
Food Service Director  
Assistant Director  
Traffic Supervisor  
Purchasing Officer  
HVAC Engineer  
Food Operations Manager  
Buyer  
Director of Safety and Security

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

## **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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Storekeeper Supervisor at one of its Facilities. Grievant's position was responsible for, "receiving, shipping, issuing, selecting, ordering, and storing supplies equipment and merchandise in the [Facility] Storeroom area which include food and perishables, medical/hospital/office supplies and surplus property."<sup>1</sup>

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<sup>1</sup> Agency Exhibit 12.

He was employed by the Agency for approximately ten years before his removal effective September 10, 2002. On September 12, 2000, he received a Group I Written Notice for unauthorized use/misuse of Workers' Compensation Leave.<sup>2</sup>

On June 7, 2002, the Facility's Buyer mistakenly ordered ten boxes of rib eye steaks having a value of \$782.49. The steaks were delivered to the Facility on June 20, 2002. Grievant's assistant, the Storeroom Helper, signed a receipt acknowledging that the Agency received the steaks.<sup>3</sup> The Storeroom Helper knew he had received rib eye steaks because he had to take the boxes out of special packaging to put them into a large freezer in the storeroom. He read the markings on the side of the box and concluded that steaks were inside the box. Within an hour of the steaks arriving and being placed in the large freezer, the steaks were moved to a smaller freezer in the storeroom. Grievant is the most likely person to have moved the steaks. On the following Thursday, the Storeroom Helper went to the freezer to clean it and noticed that the steaks remained in the smaller freezer.

Eleven days after the delivery, the vendor conducted a full inventory of its warehouse in accordance with its customary business practices. The vendor's physical inventory agreed with the perpetual inventory confirming that the vendor had shipped the boxes of steaks. The vendor's records showed the steaks had been delivered to and accepted by the Facility. Although the vendor's delivery route on June 20, 2002 included other customers, none of them reported any discrepancies for that day.

At some point in time, the steaks were removed from the Facility without authorization from Facility managers. On August 22, 2002, the Facility Director learned of the missing steaks. During the investigation, Grievant stated that he was not working on the day of the shipment and that the Storeroom Helper had must have received beef patties instead of rib eye steaks. In fact, Grievant worked on June 20, 2002.

Only five people have keys<sup>4</sup> permitting them access to the storeroom. One of those included the Director of Nursing who did not realize she had a key to the storeroom. According to the Director for Safety and Security, the Facility has had very few instances of theft.

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<sup>2</sup> Agency Exhibit 13.

<sup>3</sup> When the vendor sent the Facility an invoice for the steaks, the Accounts Payable Technician sent a copy of the invoice to the person receiving the merchandise to have that person verify that the Facility actually received the items. Grievant told the Accounts Payable Technician in early July 2002 not to pay the invoice for the steaks because the Facility would be getting a credit memo from the vendor. The Accounts Payable Technician asked Grievant about the invoice in August and September and was told again that the Facility was waiting for a credit memorandum from the vendor. Eventually, Grievant told the Accounts Payable Technician to pay the invoice less the amount due for the steaks. Grievant later changes his instructions and tells the Accounts Payable Technician to pay the entire invoice including the steaks.

<sup>4</sup> Only four keys exist, but two people have access to one key.

Food items in the storeroom are inventoried at the end of each month. All items must be accounted for during the inventory. The Facility has a spoilage procedure to account for food that can no longer be served. The steaks were not removed from the Facility because of spoilage.

## CONCLUSIONS OF 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.” DHRM § 1.60(V)(B).<sup>5</sup> 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.” DHRM § 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.” DHRM § 1.60(V)(B)(3).

“Theft or unauthorized removal of ... state property” is a Group III offense.<sup>6</sup> The evidence is sufficient to support the Agency’s conclusion that Grievant removed the steaks from the Facility without authorization. The steaks were State property under Grievant’s control. No credible evidence was presented suggesting someone with access to the steaks other than Grievant was likely to have removed them. The Agency’s inference that Grievant must have removed the steaks is a reasonable one under evidence presented in this grievance.

Grievant is the person most likely to have taken the steaks.<sup>7</sup> Grievant did not testify. The Agency presented evidence supporting its contention that Grievant’s denial was not credible. Thus, the Hearing Officer is left with the Agency’s assessment of Grievant’s credibility. Agency staff concluded Grievant answered their questions in a deceptive manner. For example, Grievant initially stated that he was not at work on the day the steaks arrived, but later admitted he was working that day. If a discrepancy existed in the inventory, Grievant was responsible for timely resolving that discrepancy. Instead, Grievant delayed resolving the discrepancy for approximately two months<sup>8</sup> and gave conflicting information regarding whether or not he had sought a credit from the vendor. During the Agency’s investigation, Grievant first stated that the items received were hamburger patties and not steaks, yet there was no basis for this conclusion and the Agency actually received the steaks.

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<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> DHRM § 1.60(V)(B)(3)(d).

<sup>7</sup> Neither Grievant nor anyone else has alleged that the Storeroom Helper may have taken the steaks.

<sup>8</sup> Although Grievant contends he was on vacation from July 3 to July 22, he had ample opportunity to begin investigating the discrepancy sooner than he did.

Grievant contends the Facility did not receive steaks and that the Storeroom Helper was mistaken when he concluded steaks were delivered.<sup>9</sup> The evidence showed that the Storeroom Helper was certain the Facility received steaks because he had to remove them from special packaging. As he received the steaks, he checked off having received them.

Grievant contends that he discarded 12 boxes of bean burritos a few days after the steaks were delivered and it is possible the steaks were thrown out at that time. Grievant contends the bean burritos were discarded because they were not in the inventory and storage space was limited. The evidence is insufficient for the Hearing Officer to conclude this happened. Indeed, the evidence presented suggests that bean burritos were not disposed of by anyone at the Facility. The Facility did not have 10 cases of burritos in stock for several months and there were no purchases of burritos in May or June 2002. The Food Service Director would have had to approve disposal of ten boxes of bean burritos and the disposal would have been documented.<sup>10</sup> These are procedures Grievant knew or should have known.

## **DECISION**

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

## **APPEAL RIGHTS**

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

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<sup>9</sup> Grievant Exhibit 1 shows that certain boxes are similar in appearance. Since the contents of boxes are written on the side and the Storeroom Helper indicated he read the side of the box containing steaks, there is a reasonable basis to support the Storeroom Helper's conclusion that he received boxes of steaks.

<sup>10</sup> For example, when a freezer malfunctioned on September 12, 2001, the Facility disposed of eight cases of burritos. The Food Service Director prepared a memorandum identifying the items to be removed from inventory. Grievant was copied on the memorandum. Agency Exhibit 10.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.<sup>11</sup>

[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 an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.