

Issues: Two Group II Written Notices (both for inadequate job performance) and a Group III Written Notice with termination (sleeping during work hours); Hearing Date: 05/28/03; Decision Issued: 05/30/03; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 5702/5703/5704; **Administrative Review: EDR Ruling request received 06/25/03; EDR Ruling No. 2003-125 issued 07/31/03; Outcome: Request untimely. HO's decision has become final.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5702 / 5703 / 5704

Hearing Date: May 28, 2003
Decision Issued: May 30, 2003

PROCEDURAL HISTORY

On November 19, 2002, Grievant was issued a Group I Written Notice of disciplinary action for inadequate job performance. On January 23, 2003, Grievant was issued another Group I Written Notice for inadequate job performance. On January 23, 2003, Grievant was issued a Group III Written Notice with removal for sleeping during work hours.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step for each grievance was not satisfactory to the Grievant and he requested a hearing. On April 30, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 28, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Two witnesses

ISSUE

Whether Grievant should receive two Group I Written Notices of disciplinary action for inadequate job performance and a Group III Written Notice with removal for sleeping during work hours.

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 Food Service Aide. The purpose of his position was:

Performs semi-skilled tasks such as meal assembly for individual diets, follows basic recipes, assembles snacks, pantry items, and driving/delivering; performs unskilled tasks such as sweeping, mopping, cleaning walls, windows, refrigerators, and operates food service equipment.¹

He was employed by the Agency for approximately three years until his removal on January 23, 2003. He received a Group I Written Notice on January 23, 2003 for inappropriate and disruptive behavior. He did not appeal that written notice to a hearing.

On November 5, 2002, Grievant was responsible for mopping the main kitchen floor. His supervisor checked the floor and noticed the work had not been completed. The floor was supposed to be mopped with appropriate mopping techniques before break time. Grievant and other staff had been advised of this requirement in staff meetings. The Supervisor directed Grievant to mop the main kitchen floor. Grievant responded "I'll take care of it when I get up, but I'm going to finish my break." After he finished his break, he mopped the floor but was unable to perform tasks that were scheduled to begin after his break. The Supervisor had to fill Grievant's position to perform these other tasks while Grievant mopped the floor.

¹ Agency Exhibit 6.

On May 22, 2002, Grievant had been counseled regarding placing discarded boxes into the wrong garbage bin. Grievant was advised to place boxes in the recycling dumpster. On November 5, 2002, Grievant places boxes in the garbage dumpster and not in the recycling bin.

Agency staff fill trays with food and then deliver those trays to their clients. Some clients are allergic to certain foods. Since some clients may be unable to recognize foods that are harmful to them, the Agency places a piece of paper on a tray intended for a client indicating items that should not be placed on the tray. An employee working as a server places food on the tray and an employee called a checker has the final decision as to whether the tray should be presented to a client.

On December 12, 2002, Grievant was acting as a server. He disregarded the print out on a tray intended for a client who was allergic to strawberries and placed strawberries on that tray. The checker also disregarded the print out. The tray was presented to the client but other staff caught the error before the client ate the strawberries.

Food items must be taken from the storage area in one building to various resident buildings. To determine what types and quantities of food items to take to the resident buildings, Agency staff take an inventory of food in each resident building. If the inventory shows food in quantities lower than desired, food items are then taken to the resident building. This process is captured on a document called a Transfer Requisition Worksheet.

On December 11, 2002, Grievant was responsible for determining the quantities of food items to be sent to various resident buildings. He reviewed the Transfer Requisition Worksheet for several buildings. He compared the desired quantities with the actual inventory and determined how many additional units of food items to be delivered to the resident buildings. He made several errors. For example, Unit 8C Pantry was supposed to have four boxes of Cheerios but had none in inventory. Grievant sent the unit one box instead of four boxes.

On December 22, 2002, employees on Grievant's shift went on lunch break at 3 p.m. and returned at 3:30 p.m. Grievant's did not return with his shift. Two of Grievant's co-workers observed Grievant sleeping and reported him to the Supervisor at approximately 4:20 p.m. Grievant slept for 50 minutes into his work hours. On January 14, 2003, employees on Grievant's shift went to lunch at 3:30 p.m. and returned to work at 4 p.m. Grievant returned to work approximately 25 to 30 minutes later.

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).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.” 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).

When more than one factual scenario is presented supporting a Written Notice, the Hearing Officer must evaluate each scenario separately and together in order to determine whether a sufficient basis exists to support disciplinary action.

Group I Written Notice – Issued November 19, 2002

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency contends Grievant should have mopped the floor before going on break and should have ended his break immediately in order to comply with his Supervisor’s request that the floor be mopped. When Grievant mopped the floor following his break, another employee had to perform some of Grievant’s duties. State employees are entitled to take breaks during the workday. No evidence was presented suggesting Grievant was unable to mop the floor before his break due to some fault on his part. No evidence was presented suggesting Grievant would have been permitted to finish his break at a later time if he had complied immediately with the Supervisor’s instruction. In the absence of this information, the Hearing Officer can only conclude that Grievant would have been denied a break permitted by DHRM policy if he had complied with his Supervisor’s instructions. Grievant’s failure to stop his break and begin mopping is not a sufficient basis to discipline Grievant.

Grievant assumed responsibility for discarding boxes and placed boxes in the garbage dumpster and not the re-cycling dumpster contrary to previous instructions. Grievant knew or should have known not to put the boxes in the wrong dumpster. His failure to comply with the Agency’s instruction amounts to inadequate job performance and is, in itself, a sufficient basis to support disciplinary action. The Agency’s issuance of a Group I Written Notice with a date of office of November 5, 2002 is supported by the evidence.

Grievant contends he should not be disciplined for his actions on November 5, 2002. He argues another employee should have taken responsibility for discarding boxes. Grievant’s argument fails because he assumed the duties and he had been

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

previously counseled regarding how to properly perform his job and he disregarded those counselings.

Group I Written Notice – Issued January 23, 2003³

The Agency contends Grievant's job performance was inadequate because he failed to complete the Transfer Requisition Worksheet properly. The Hearing Officer is unable to put the number of Grievant's errors into perspective. The evidence is incomplete regarding the total number of buildings and inventory items for which Grievant was responsible for filling. The handwriting of other staff also appears on the sheets and it is difficult to determine which handwriting belongs to Grievant. The number of errors easily attributed to Grievant do not appear to be significant. Thus, the Agency's allegation that Grievant failed to properly complete the inventory process does not provide a basis to discipline him.

Grievant was responsible for checking the print out on client trays to make sure the proper food was placed on each tray. Grievant failed to review the print out for the tray of an allergic client and placed food on that tray that would be harmful to the client. When Grievant did so, his job performance was inadequate. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant argues he should not be disciplined for placing strawberries on a tray intended for a client allergic to strawberries because the checker should have caught the error. Grievant's argument fails because he was also responsible for catching the error. His failure to do so justifies issuance of a Group I Written notice.

Group III Written Notice – Issued January 23, 2003

"Sleeping during work hours" is a Group III offense.⁴ On two occasions, Grievant was sleeping during work hours without excuse. A supervisor and two other employees observed his actions. The Agency has met its burden of proof to establish that Grievant should be issued a Group III Written Notice with removal.

Grievant contends he was sleeping only during his break from work. He contends the Agency's witnesses incorrectly believed that he began his break at the same time that they began their breaks when he actually began his break later. Since he began his break later than did the other employees, those employees believed Grievant was sleeping after his time for break had passed when in fact he had additional time remaining before his break ended. The evidence showed, however, that the Agency's practice was for staff to begin their breaks at the same time. On those occasions when Grievant may have been late beginning his break because he was occupied with other duties, the amount of time necessary for Grievant to finish his other

³ The Agency's written notice alleges Grievant gathered up cold line items on the wrong day. No evidence was presented supporting this allegation.

⁴ DHRM § 1.60(V)(B)(3)(h).

duties was not a lengthy period of time. Nevertheless, on one occasion, Grievant slept for 50 minutes. His break was only 30 minutes. Even if Grievant slept during his break, he would have slept 20 minutes over that break time. In light of Grievant's prior instances of sleeping for which Grievant was not disciplined, it is clear Grievant's actions were not an isolated incident.

Grievant points out that he did not call to testify at the hearing several witnesses who were currently employed by the Agency. He did so to protect them from consequences in their employment. A Hearing Officer must base his decision on the evidence presented and not on what could have been presented during the hearing. To the extent Grievant has not fully presented all of the evidence supporting his position, his defense suffered. Agencies are prohibited from retaliating against employees testifying as witnesses in grievance hearings.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of two Group I Written Notices of disciplinary action and one 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.
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.⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.