

Issue: Group I Written Notice (inadequate or unsatisfactory job performance);
Hearing Date: 02/23/04; Decision Issued: 02/25/04; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 562; **Administrative Review: HO
Reconsideration Request received 03/10/04; Reconsideration Decision
issued 03/11/04; Outcome: Request untimely. HO's decision became final
on 03/08/04**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 562

Hearing Date: February 23, 2004
Decision Issued: February 25, 2004

PROCEDURAL ISSUES

In the prehearing notice, the Hearing Officer directed the parties to exchange with each other all documents and witness lists not later than 5:00 p.m. on February 17, 2004. The agency timely complied with this requirement. Grievant failed to comply; he delivered his documents to the agency late in the afternoon of February 20, 2004 – the last working day prior to the hearing. At the beginning of the hearing, the agency objected to the late delivery arguing that it had not had time to analyze grievant's documents and prepare appropriate responses. At the agency's request, the Hearing Officer recessed the hearing and gave the agency three hours to evaluate grievant's documents. The agency returned to the hearing within one hour. The agency representative affirmatively stated that she had taken sufficient time to analyze the documents and was ready to proceed with the hearing.

Grievant requested that lost time and benefits be restored. However, the only action being adjudicated herein is a Group I Written Notice; grievant was not

suspended as part of the disciplinary action. Therefore, grievant did not lose any time or benefits as a consequence of the disciplinary action.

APPEARANCES

Grievant
Three witnesses for Grievant
Assistant Warden
Assistant Warden (Representative)
One witness for Agency

ISSUES

Did grievant's conduct 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 a Group I Written Notice issued for inadequate or unsatisfactory job performance.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for seven years. He is the Food Service Director and reports to the Assistant Warden. Grievant supervises approximately nine employees, who in turn supervise up to 50 inmates. He is responsible for management of the entire food service department at the correctional facility. In addition to supervision, he plans and directs a comprehensive food service program, directs staff in food preparation and serving and, directs operations to ensure compliance with health and safety standards and security regulations.³

The agency's regional health and safety inspector conducts unannounced inspections of corrections facilities. He normally makes such inspections on a quarterly basis. In 2002, the agency realigned its regions and a different inspector began conducting inspections at grievant's facility. Prior to June 2003, grievant had always achieved passing scores on the food service portion of the inspection. A score of 90 or better is required to pass the inspection. During the

¹ Agency Exhibit 3. Written Notice, issued August 19, 2003.

² Agency Exhibit 3. Grievance Form A, filed August 25, 2003.

³ Agency Exhibit 8. Grievant's *Employee Work Profile Work Description*, signed October 15, 2002.

first three inspections by this inspector, food service operations received a passing score of 95 or better (out of 100) on each of the inspections. On June 9, 2003, the inspector inspected grievant's food service operations and found eight unsatisfactory areas resulting in a score of 81.⁴

On June 10, 2003, the warden met with grievant and verbally counseled him that another failed inspection would result in disciplinary action. In response to the inspection report, grievant wrote a lengthy explanation regarding the problems cited in the inspection report.⁵ The warden reviewed grievant's explanation and characterized it as "just an excuse."⁶ He sent a copy of the report with his comments to the assistant warden and grievant, advising grievant that failing the next inspection would result in disciplinary action. The assistant warden spoke with grievant on June 10, 2003 and counseled him to make the changes necessary to achieve a passing score on the next inspection; grievant was receptive to making those changes. The assistant warden thereafter sent a memorandum to grievant directing him to take corrective action.⁷ He also directed grievant to provide him with a status update if all corrective action was not completed by July 3, 2003. Grievant failed to complete all corrective action by the deadline or to provide a status report to the assistant warden. In a July 9, 2003 staff meeting, grievant said he had not received the assistant warden's June 24th memorandum; another copy was given to him at that time.

A re-inspection was conducted on July 23, 2003 resulting in a failing score of 77.⁸ During the June 9th and July 23rd inspections, the warden, assistant warden, and grievant accompanied the inspector as he walked through the kitchen facilities. A partial inmate lockdown (about 50 percent) was in effect on July 23rd resulting in a reduced number of inmates available to work in food service operations. As a result of this second consecutive failed inspection, a Group I Written Notice was issued to grievant citing inadequate or unsatisfactory job performance.

Subsequent inspections, by the same inspector, resulted in passing scores of 95 on both occasions.⁹ The agency has recognized grievant when he has performed well by noting his extraordinary contribution in September 2003 and by the comments on his annual performance evaluation.¹⁰

⁴ Agency Exhibit 4. *Food Service Establishment Inspection Report*, June 9, 2003.

⁵ Grievant Exhibit 2. Letter to Food Sanitarian from grievant, June 9, 2003.

⁶ Agency Exhibit 4. *Ibid.* See handwritten note, p.1.

⁷ Agency Exhibit 9. Memorandum to grievant from assistant warden, June 24, 2003.

⁸ Agency Exhibit 5. *Food Service Establishment Inspection Report*, July 23, 2003.

⁹ Agency Exhibits 6 & 7. *Food Service Establishment Inspection Reports*, August 20, 2003 and October 7, 2003, respectively.

¹⁰ Agency Exhibit 8. Grievant's performance evaluation, signed October 6, 2003 and, Acknowledgement of Extraordinary Contribution, signed October 6, 2003.

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:

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.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that 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.¹² The Department of Corrections (DOC) has promulgated its own Standards of Conduct

¹¹ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.15 of the DOC Standards of Conduct addresses Group I offenses, which are defined identically to the DHRM Standards of Conduct.¹³ Among the examples of Group I offenses is inadequate or unsatisfactory job performance.

Grievant alleged that the inspector had incorrectly scored the inspections. He claimed that the inspector had inappropriately taken points off for multiple errors of the same type but that the scoring rules prohibit taking points off more than once for the same type of error.¹⁴ However, grievant failed to present any evidence to support this allegation. Grievant could have provided the written scoring scheme for such inspections but failed to do so. Grievant could also have requested an Order for the inspector to testify about his scoring but failed to request an Order or to request the inspector to appear. The inspection score sheets include an asterisk next to certain items; the legend states that these items are considered critical. Both parties agreed that critical items are worth more points than non-critical items. In the June 9th inspection, eight items (two critical and six non-critical) were scored unsatisfactory. In the July 23rd inspection, eight items (three critical and five non-critical) were unsatisfactory. Four of the items were scored unsatisfactory in both inspections. Because there was insufficient evidence regarding the scoring, it cannot be concluded that any errors were made in the scoring.

In grievant's favor, it is apparent that he had effected some improvements between the two failed inspections. Four of the areas cited as unsatisfactory in the June 9th inspection were found satisfactory during the July 23rd inspection. However, four other areas that had passed the first inspection were deemed unsatisfactory during the second inspection. During the July 23rd inspection, points were deducted in eight areas:

[NOTE: Asterisks before a number (example - *01) indicate critical items]

1. Food - *01: Cracked eggs were found in the walk-in cooler. Cracked eggs should be disposed of promptly to avoid contamination of other eggs and food. Grievant suggested that the eggs had been delivered in a cracked condition and that the warehouse was at fault. However, even if the eggs were damaged before delivery, they should have been promptly disposed of upon receipt from the warehouse.
2. Food Protection - *03: Cheese was found sitting outside of a cooler. Grievant asserts that the cheese had been taken out of the cooler less

¹³ Agency Exhibit 1. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹⁴ This does not appear likely. While the notes on the June 9th report identify 14 specific violations and the July 23rd notes identify 15 violations, only eight areas were scored unsatisfactory on each report. It appears that the notes appended to the report identified all areas in which violations were found, but points were deducted only once for all violations in a particular category.

than one hour prior to the inspection and was being used to prepare sandwiches. The regulations provide that this type of perishable food must be maintained in temperature control, *except* during preparation, cooking, or cooling.¹⁵ If the food is not temperature controlled for more than four hours, it must be destroyed. The agency has not rebutted grievant's assertion that the cheese had been out of the cooler for less than one hour.

3. Food Protection – 10: Scoop improperly stored in flour container. Grievant did not dispute this citation.
4. Food Equipment & Utensils – 15: The inspection noted four areas requiring door or lid repair (bakery ovens, and in the food prep area, yellow holding unit, Garland oven, and steam kettles). Grievant did not dispute these citations.¹⁶ The bakery ovens and steam kettles had been cited for the same violation during the June 9th inspection.
5. Plumbing – 29: The inspection report cited water source problems in two areas – the break out room and the dishwashing area. In both cases, drain lines required repair. Grievant did not dispute that these problems existed. Although grievant asserted that the Maintenance Department is responsible for repairs, grievant is responsible for submitting a Work Order to initiate the repair process. Grievant did not submit a Work Order for repair of the ice machine drain line until after the second failed inspection.¹⁷
6. Plumbing - *30: In the dishwashing area, the inspector cited the pre-wash hose as out of compliance because the spring that normally held the hose well above the sink was weak and allowed the hose nozzle to dip into the sink water. Grievant thought the problem was lack of a backflow device and apparently did not understand the inspector's citation. This item had been found in violation during the June 9th inspection.
7. Toilet & Handwashing Facilities – 32: The female restroom is required to have a covered receptacle for disposal of sanitary napkins. The inspector found one wastebasket stacked on top of another serving as a cover. Grievant testified during the hearing that there was a covered receptacle in the corner of the single-seat restroom but believes the inspector did not see it. However, neither the grievant, the warden, nor the assistant warden disputed the inspector's citation when they walked with him through the inspection. Moreover, grievant's sworn testimony contradicts

¹⁵ Grievant Exhibit 6. 12 VAC 5-421-820, 12 VAC 5-421-850, *Food Regulations, Virginia Department of Health*.

¹⁶ While not disputing the individual citations, grievant claimed multiple points were deducted. However, as noted in Footnote 14, this does not appear likely. NOTE: Grievant had submitted a work order for oven door repair on June 19, 2003 (See Grievant Exhibit 4).

¹⁷ Grievant Exhibit 5. *Maintenance Repair Work Order*, July 25, 2003.

his written response to the assistant warden in which he stated that the trash can was on order during the inspection but “had not been received.”¹⁸

8. Floors, Walls, Ceilings – 37: Two problems were identified. The food prep area required high level cleaning, and an electrical unit in the bakery unit should have been removed. Grievant claimed that the electrical unit had just not been noticed because it was behind a sink.

Viewing the evidence in the light most favorable to grievant, it appears that the inspector may have erred in citing a violation for cheese being out of the cooler. However, even if this citation was removed, the overall score would have still been well below the passing score of 90.¹⁹

Grievant contends that the inspector does his job poorly and is inconsistent. However, the warden has observed the inspector on repeated occasions over several years at three different facilities and finds him to be professional and consistent.²⁰

Grievant suggests that the partial lockdown in effect on July 23, 2003 was responsible for the failed inspection. However, an analysis of the eight cited violations reveals that almost all were problems that had existed well before the lockdown. Thus, the failure to obtain repairs to equipment, purchase equipment, and perform periodic cleaning were not problems attributable to the shortage of staff on the day of the inspection. Rather, they were longer-term problems that could have been corrected well before the temporary partial lockdown.

Summary

The evidence supports a conclusion that grievant did make an effort to correct some deficiencies after the June 9th inspection. Half of the areas found to be unsatisfactory in the first inspection were found satisfactory in the July 23rd inspection. Grievant did submit work orders for repairs of some equipment.

However, the fact remains that half of the unsatisfactory problems cited in the first inspection were still unsatisfactory in the second inspection. Moreover, four additional areas were cited as unsatisfactory. A careful review of all the evidence reveals that one of the eight items cited in the inspection as unsatisfactory might have been erroneous.²¹ But adding back the points deducted for that item would nonetheless result in a failing score. It must be

¹⁸ Grievant Exhibit 3. *Response to Noncompliance*, Staff Restroom, August 4, 2003.

¹⁹ From an analysis of the inspection reports, it appears that four points were deducted for each critical violation. Thus, the elimination of this error would have resulted in a revision of the overall score from 77 to 81 – still a failing score.

²⁰ Agency Exhibit 3. Second resolution step response of warden, November 11, 2003.

²¹ Of course, it is also possible that the inspector missed items that should have been cited as unsatisfactory. Most inspections are not so thorough that every unsatisfactory area is found.

concluded that although grievant made an effort to correct some problems, his job performance was inadequate because the re-inspection resulted in a failing score. Grievant had been verbally counseled after the June 9th inspection. Accordingly, the agency's decision to take disciplinary action after the verbal counseling did not produce the desired result was reasonable and appropriate.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on August 19, 2003 for inadequate or unsatisfactory job performance is UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.²² 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.²³

[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]

David J. Latham, Esq.
Hearing Officer

²² An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 562

Hearing Date:	February 23, 2004
Decision Issued:	February 25, 2004
Reconsideration Request Received:	March 10, 2004
Response to Reconsideration:	March 11, 2004

ISSUE

Has the grievant submitted a timely request for reconsideration pursuant to Section 7.2 of the Grievance Procedure Manual?

FINDINGS OF FACT

On March 10, 2004, the grievant hand-delivered to the hearing officer a request for reconsideration of a Decision of Hearing Officer issued on February 25, 2004.

APPLICABLE POLICY

A hearing officer's original decision is subject to administrative review. The Grievance Procedure Manual addresses administrative review of Hearing Decisions and states, in pertinent part:

However, 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. A copy of the requests must be provided to the other party. A request to reconsider a decision 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.²⁴

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of 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.²⁵

OPINION

In order to be a timely request, a request for reconsideration must be received by the Hearing Officer within 10 calendar days of the date of the original hearing decision. The date of the original hearing decision was February 25, 2004. The final date by which a request for reconsideration must be received was March 8, 2004.²⁶ Grievant delivered his request for reconsideration to the Hearing Division of the Department of Employment Dispute Resolution on March 10, 2004. Therefore, grievant's request for reconsideration was not timely received. Further, grievant failed to note on his request that he provided a copy of the request to the other party (agency).

The grievance procedure does not provide for exceptions to the timeliness requirement. Here, grievant avers that his request was late because he was ill on March 4 & 5, 2004 and, because an electrical storm caused loss of power at his residence on March 7, 2004. Even if the grievance procedure contained a provision to consider good cause for untimely appeals, grievant's reasons for his untimely appeal would not satisfy such a provision. Grievant could have prepared his appeal earlier instead of waiting until the evening of the 11th day. Moreover, grievant could have utilized administrative leave to deliver his request on the final day for appeal.²⁷ Parenthetically, it must be noted that grievant's late appeal coupled with an unsatisfactory explanation is consistent with the pattern of work performance for which he was disciplined in this case. The Decision of Hearing Officer became final on March 8, 2004 when the 10-day calendar period expired.

²⁴ § 7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

²⁵ § 7.2(d) *Ibid*.

²⁶ In this case, the tenth day following the date of the decision fell on Saturday, March 6, 2004. However, when the final date for appeal falls on a weekend or holiday, it has been EDR's policy and practice to extend the final date for appeal to the next work day. Therefore, the final date of appeal in this case was extended to Monday, March 8, 2004.

²⁷ § 8.6, EDR *Grievance Procedure Manual*, effective July 1, 2001, provides that employees are to be granted administrative leave to participate in the steps of the grievance process.

DECISION

The grievant's request for reconsideration was not filed within the period specified in the Grievance Procedure Manual. Therefore, the Hearing Officer's original decision has become **final** pursuant to § 7.2(d) of the Grievance Procedure Manual.

APPEAL RIGHTS

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.²⁸

David J. Latham, Esq.
Hearing Officer

²⁸ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).