

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisors instructions); Hearing Date: 07/16/04; Decision Issued: 07/28/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 764



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 764**

Hearing Date: July 16, 2004  
Decision Issued: July 28, 2004

**PROCEDURAL HISTORY**

On April 12, 2004, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for:

*Second Group II issued in last 5 months; failure to follow supervisor's instructions and failure to adequately address performance issues of Group II issued on 12/1/03; employee admitted to poor performance as discussed concerning employees' timesheets, sanitation schedule, and work schedule to effectively supervise staff; employee also has been issued a total of 6 Group Notices in his career in the Department that included one demotion and one suspension.*

On May 12, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 24, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 16, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions.

## **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 Food Operations Manager A at one of its Facilities. Grievant reported to the Supervisor. Several employees reported to Grievant.

The purpose of Grievant's position was:

Directs the activities of Manager A and of inmates in the preparation, serving, and clean up of meals for inmates and employees. Ensures that food is prepared and served properly and in accordance with sanitation guidelines.<sup>1</sup>

On a weekly basis, Grievant's subordinates filled out time sheets recording their time worked. Grievant was supposed to review those time sheets for accuracy and forward them to the Human Resource Department. Grievant was expected to complete his review each week.

On January 27, 2004, the Supervisor presented Grievant with a performance counseling memorandum stating:

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<sup>1</sup> Agency Exhibit 6.

[Grievant] your poor interaction with [subordinates] with little/no instruction training being provided to those you supervise. Your failure to effectively monitor and/or supervise food service cleaning schedules. Failure to monitor the proper use and storage of chemicals (which are scattered throughout the food service department). A pattern of arriving for duty between the hours of 9:30 a.m. and 10:00 a.m., does not permit you to monitor the quality and quantity of any breakfast meals being served. Due to your negligence in meeting deadlines, you have failed to maintain time records for all of your subordinate staff. Your attitude toward this institution displays a lack of work ethics.

To improve your interaction with your subordinate staff, you are to report to duty by 5:00 a.m. and depart at 1:30 p.m. or until your work and operations task are satisfactory. This schedule should be implemented two or three times a week. You also need to provide me with daily updates on sanitation and the storage of chemicals. Walk-through will be performed regularly to monitor your progress. You ... have been scheduled for a management training on the 26<sup>th</sup> of February 2004 to afford you opportunity to enhance your management skills. In addition, you are to seek other training opportunities in the area of effective management and supervision of staff. It is suggested that you contact the Employee Assistance Program [to] seek assistance in the other area that we discussed in May 2003 which appear to be having [an] impact on your job performance. I am also giving you a two weeks notice to make other arrangements for your child care on Thursdays. It has been too long for your current schedule adjustment to be continued with regard to your personal childcare needs, and continuation of the schedule adjustment appears to have negative impact on food service operations and your supervisory performance.<sup>2</sup>

The Supervisor made periodic inspections of Grievant's work area. The Supervisor noticed that the majority of equipment was dirty. He observed dirt behind grills, pots, and pans, as well as water sitting in pans and dust on top of ice machines. The Supervisor mentioned these concerns to Grievant but several days later the conditions remained. The Supervisor concluded that Grievant was not properly utilizing his subordinates to keep the kitchen clean.

On April 13, 2004, the Supervisor realized that Grievant failed to turn in time sheets for a subordinate, Ms. G, for the weeks of March 30, 2004 and April 5, 2004. Ms. G had worked two hours of overtime during that period but her pay check did not include payment for those two hours because Grievant had not timely submitted Ms. G's time sheet to the Supervisor.<sup>3</sup>

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<sup>2</sup> Agency Exhibit 3.

<sup>3</sup> See email dated April 13, 2004 from Food Operations Director A to the Warden. Agency Exhibit 3.

Grievant received an overall rating of “Contributor” in his 2003 performance evaluation.<sup>4</sup> On December 16, 2003, Grievant received a Group II Written Notice for failure to follow a supervisor’s instruction, perform assigned work or otherwise comply with applicable established policy.<sup>5</sup>

## 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.” 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.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant failed to follow his supervisor’s instructions because Grievant did not adequately utilize and monitor his staff to ensure that his work area was clean on a regular basis. Grievant also failed to timely submit the time sheets of his subordinates. The Agency adequately informed Grievant of his obligations and warned him of the consequences for failing to meet his Supervisor’s instructions. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice “should normally result in removal.”<sup>6</sup> Grievant argues the disciplinary action against him should be mitigated given his length of service and prior work performance. *Va. Code § 2.2-1001* requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer’s authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law

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<sup>4</sup> Agency Exhibit 6.

<sup>5</sup> Agency Exhibit 5. According to the narrative attached to the Written Notice, Grievant had not submitted food service time sheets for his subordinate staff since July 15, 2003.

<sup>6</sup> DOCPM § 5-10.16(C)(2).

and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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. 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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.