

Issues: Group II Written Notice (failure to follow policy) and Suspension, Group II Written Notice (failure to follow instructions) and Demotion, Group II Written Notice (failure to follow policy) and Transfer, and Arbitrary/Capricious Performance Evaluation; Hearing Date: 05/01/08; Decision Issued: 05/19/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8801, 8802, 8803, 8825; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8801 / 8802 / 8803 / 8825

Hearing Date: May 1, 2008
Decision Issued: May 19, 2008

PROCEDURAL HISTORY

On October 9, 2007, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow established written policy regarding switching scheduled meals. On October 9, 2007, Grievant was issued a Group II Written Notice of disciplinary action with a role change into a lower pay band and disciplinary pay reduction effective October 17, 2007 for failure to follow a supervisor's instructions and failure to follow established written policy. On October 9, 2007 Grievant was issued a Group II Written Notice of disciplinary action with a role change to a lower pay band and disciplinary pay reduction effective October 17, 2007 for failure to follow established written policy by failing to have work production worksheets at the sandwich shop. Grievant was also transferred to another facility as a result of the disciplinary actions. On November 16, 2007, Grievant filed a grievance to challenge his performance evaluation describing his overall work performance as Below Contributor issued on October 12, 2007.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step of those grievances was not satisfactory to the Grievant and he requested a hearing. On March 12, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 1, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency issued Grievant an arbitrary or capricious evaluation?

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. The burden of proof is on Grievant to show that the Agency's evaluation of his performance was arbitrary or capricious. 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 Services Manager III at one of its Facilities until his demotion and transfer effective October 17, 2007. The purpose of this position was to, "provide management of the food service department at

[the Facility]."¹ Grievant had prior active disciplinary action. On August 21, 2007, Grievant received a Group I Written Notice for inadequate or unsatisfactory job performance.²

One of Grievant's conditions of employment was:

All employees are responsible for familiarizing themselves as soon as possible with the Department Policies, Division Guidelines, and Institutional Operating Procedures.³

The Department of Corrections Food Service Manual, "applies to all Food Service operations and personnel of correctional institutions within the Department of Corrections." "Food Operations Directors will manage and supervise all Food Service Manager B's and inmates assigned to institutional food service operations, and assure that all food service and sanitation procedures are followed. Responsibilities include the ordering and reception of food products, equipment and other needed supplies; maintenance of adequate inventories; development of preventive maintenance, cleaning and sanitation schedules, related recordkeeping and reports, development and supervision of work schedules and performance, monitoring of Food Service expenses, compliance with ACA standards and provision of on-site training to staff and inmates."⁴

The Agency employs a Dietitian to prepare a master menu setting forth the menus for each meal for every day on a quarterly basis. The Dietitian created menus that account for the necessary daily total caloric intake and meal cost. Attached to the master menus were DOC Food Production Worksheets already prepared for each day. The Dietitian's master menu and Food Production Worksheets were distributed to Grievant by email. Prior to the Dietitian's practice of creating DOC Food Production Worksheets⁵, Grievant would take the master menu and create his own Food Production Worksheets. Grievant was expected to implement the master menu at his Facility. Although the Dietitian began providing Grievant with ready-made DOC Food Production Worksheets, Grievant continued to create his own Food Production Worksheets.

The Facility's kitchen experienced a problem with pests. It was necessary for the kitchen to close early on August 24, 2007 so that the Agency could spray insecticide at 6 p.m. Grievant spoke with the Assistant Warden and indicated, in general, that he

¹ Agency Exhibit 4.

² Agency Exhibit 10.

³ Agency Exhibit 10.

⁴ Hearing Officer Exhibit 1.

⁵ The Agency began distributing finalized DOC Food Production Worksheets in July 2006. This change was announced in several meetings beginning on April 12, 2006.

intended to switch meals scheduled for August 22, 2007 with the meals scheduled for August 24, 2007. The Assistant Warden agreed.

On August 22, 2007, Grievant had his staff prepare the breakfast originally scheduled for August 22, 2007 along with the lunch and dinner originally scheduled for August 24, 2007. On August 24, 2007, Grievant had his staff prepare the breakfast originally scheduled for August 24, 2007 along with the lunch and dinner originally scheduled for August 22, 2007.

On September 11, 2007, the Assistant Warden met with Grievant and instructed Grievant to begin using the DOC Food Production Worksheets as provided by the Dietitian. The Assistant Warden was responding to a finding by a peer review committee that had reviewed kitchen operations at the Facility. Grievant did not begin using those worksheets as directed. Had Grievant implemented the Dietitian's worksheets, he would have been able to more accurately and with less effort track the various types of meals served inmates.

Although Grievant mostly worked in the Facility's main kitchen, he was also responsible for overseeing the Facility's sandwich shop. On September 19, 2007, the Regional Food Operations Director visited the sandwich shop to make copies of the daily food production worksheets for the shop. There were no sheets available on site.

On October 12, 2007, Grievant received an evaluation describing his overall rating as "Below Contributor". With respect to his Core Responsibility for "Plans and directs a comprehensive food service program", Grievant received a Below Contributor rating. The evaluation states:

Food costs for the performance year were unacceptable despite improvement late in the performance year. A written notice was issued for costs exceeding budget allocations for the fiscal year ending 6/30/07. Appropriate inventory was maintained and consistently as evidenced by the need to borrow food supplies from other facilities. Appropriate records are filed timely and accurately.

With respect to the Core Responsibility of "Directs food service staff and/or inmates in food preparation and serving", Grievant received a Below Contributor rating. The evaluation states:

Menu planning varied from established Master Menu requirements. There was inattention to detail in the documentation required for Food Production Worksheets. Late year, improvements in food cost did not prevent exceeding food budgetary allocations for fiscal year 07. Three written notices were issued late in the performance year regarding meal planning, service, and documentation.⁶

⁶ Agency Exhibit 4.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”⁷ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁸ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁹

Changed Menus

The Agency contends Grievant failed to comply with the Food Service Manual, Chapter 3 (I) (D) which states:

Lunch and dinner menus of the same day may be rotated if necessary. Menus should not be rotated from one day to another. However, temporary adjustments to the menus may be made to accommodate special meals on holidays, picnics, cookouts, etc.

Grievant did not violate this section of the Food Service Manual. He rotated meals scheduled for August 22, 2007 with meals scheduled for August 24, 2007. He did so to accommodate the Agency’s need to spray insecticide in the kitchen and he did so with the knowledge and consent of the Assistant Warden.

The Agency’s concern regarding Grievant’s behavior is not artfully drawn.¹⁰ The Assistant Warden testified that if Grievant had switched all three meals on August 22, 2007 with all three meals on August 24, 2007, the Agency would not have taken disciplinary action against Grievant. By switching only lunch and dinner, but not breakfast, Grievant altered the total caloric intake for each day. This is contrary to the Agency’s overall planning objective for meeting certain caloric intake requirements on a daily basis. In short, the Agency took disciplinary action against Grievant because he switched two of the three meals scheduled for August 22, 2007 with two of the three meals scheduled for August 24, 2007 instead of switching all three meals. The Food Service Manual section above does not address Grievant’s behavior and, thus, Grievant could not have acted contrary to that Manual.

⁷ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁹ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

¹⁰ Although the Agency could have better expressed its concern regarding Grievant's behavior, the Written Notice and accompanying documents adequately informed Grievant of the allegations against him and enabled him to present his defenses during the hearing.

Grievant's behavior amounts to inadequate or unsatisfactory job performance. Grievant should have known not to switch two of the three meals scheduled for a particular day because doing so would alter an inmate's total caloric intake for that day.¹¹ Grievant contends he did not know he was obligated to switch all three meals in a given day. The evidence showed, however, that Grievant should have known this expectation. For example, Grievant's subordinate testified, without hesitation, that she knew the Agency's expectation that all three meals should be switched when menus scheduled for particular days are switched. The Group II Written Notice with a five workday suspension issued to Grievant regarding meals served on August 22, 2007 and August 24, 2007 must be reduced to a Group I Written Notice for unsatisfactory job performance. The five workday suspension must be reversed.

Food Production Worksheets

"[F]ailure to follow a supervisor's instructions" ...is a Group II offense.¹² On September 11, 2007, Grievant met with his supervisor, the Assistant Warden. The Assistant Warden instructed Grievant to begin using the DOC Food Production Worksheets as recommended by the peer review committee. Grievant failed to do so. He continued using the Food Production Worksheets he drafted. Grievant failed to comply with a supervisor's instructions thereby justifying the issuance of a Group II Written Notice.¹³

Grievant contends he did not attend all of the staff meetings in which implementing the DOC Food Production Worksheets prepared by the Dietitian were discussed. This fact is not significant. When Grievant could not attend the meetings, he sent an employee in his place. Grievant was expected to obtain the information provided at those meetings from the person he sent to represent him. In addition, Grievant should have understood the Agency's expectation of him when the Assistant Warden specifically referenced the DOC Food Production Worksheets prepared by the Dietitian and instructed Grievant to begin using those worksheets.

¹¹ Grievant did not inform the Assistant Warden that he intended to switch only lunch and dinner but not breakfast on August 22, 2007 and August 24, 2007.

¹² Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

¹³ The Agency argued that Grievant failed to follow procedures that resulted in numerous errors such as the complete omission of weekend diabetic early breakfast, etc. Grievant supervised other employees. The evidence is insufficient to determine whether Grievant had direct responsibility with respect to these tasks or whether they were delegated to his employees. If the tasks were the responsibility of his employees, Grievant's failure would have been for poor management not failure to establish written policy. Accordingly, Grievant's poor management would have justified a Group I Written Notice. Since the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions, whether Grievant's supervision with respect to the listed errors in the written notice was inadequate is of lesser significance in this case.

Daily Food Production Worksheets in the Sandwich Shop

The Agency contends Grievant acted contrary to established written policy because on September 19, 2007, the Regional Food Operations Director discovered that there were no daily food production worksheets at the Facility's sandwich shop. The Agency contends Grievant acted contrary to the DOC Food Service Manual, Chapter 5, Food Preparation and Service of Meals, Section I (B) which provides:

Cook's Worksheets, which provide food preparation instructions for cooks and Food Service personnel, should be posted daily in the kitchen. This is to ensure that sufficient quantities of food are prepared, and correspond with menu portions and the number of meals served.¹⁴

The Agency has not established that Grievant was directly responsible for posting the daily food production worksheets in the Facility's sandwich shop and maintaining those worksheets. Thus, the Agency has not established that Grievant acted contrary to the DOC Food Service Manual. Grievant was responsible for supervising the employees working in the sandwich shop. He failed to properly oversee those employees to ensure that they were complying with the DOC Food Service Manual requiring the posting of daily food production worksheets in the sandwich shop. Grievance's failure to supervise those employees is inadequate or unsatisfactory job performance, a Group I offense. The Group II Written Notice given to Grievant must be reduced to a Group I Written Notice.

Accumulation of Written Notices

Upon the accumulation of four active Group I Written Notices, the employee may be removed from employment. In lieu of removal, the Agency may demote or transfer an employee.¹⁵ Grievant has now accumulated three Group I Written Notices and one Group II Written Notice. Accordingly, the Agency's demotion with disciplinary salary action¹⁶ and transfer must be upheld.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."¹⁷ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds

¹⁴ Hearing Officer Exhibit 1.

¹⁵ DOC Operating Procedure 135.1(X)(C)(2).

¹⁶ See Grievant Exhibit 7.

¹⁷ *Va. Code § 2.2-3005.*

the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

Performance Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

The Agency has presented sufficient evidence to support its evaluation of Grievant. In light of the number of written notices Grievant received during the performance cycle, his performance is not likely to be at a Contributor level.

Grievant argued that he could not receive a Below Contributor evaluation because he did not receive a Notice of Improvement Needed/Substandard Performance. Under DHRM Policy 1.40, a Written Notice serves the same purpose as a Notice of Improvement Needed/Substandard Performance to support an overall rating of Below Contributor.

DECISION

The Group II Written Notice with a five workday suspension issued to Grievant regarding meals served on August 22, 2007 and August 24, 2007 is **reduced** to a Group I Written Notice for unsatisfactory job performance. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the five workday suspension and credit for leave and seniority that the employee did not otherwise accrue.

The Group II Written Notice for failure to follow a supervisor's instructions is **upheld**.

The Group II Written notice for failure to comply with established written policy regarding posting daily food production worksheets and the sandwich shop is **reduced** to a Group I Written Notice.

Based on the accumulation of disciplinary action, Grievant's demotion, disciplinary salary action, and transfer are **upheld**.

Grievant's request for relief regarding his performance evaluation is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 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 14th St., 12th 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 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.¹⁸

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.