

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 04/14/10;
Decision Issued: 04/16/10; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case
No. 9295; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9295

Hearing Date: April 14, 2010
Decision Issued: April 16, 2010

PROCEDURAL HISTORY

On September 29, 2010, Grievant, an office services assistant for the Department of Corrections (“Agency”) was issued a Group II Written Notice of disciplinary action for unauthorized contraband (food items) inside the secure perimeter of an Agency facility.

Grievant timely filed a grievance to challenge the Agency’s action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On March 29, 2010, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on March 31, 2010. The hearing was scheduled at the first date available between the parties and the hearing officer, Wednesday, April 14, 2010, on which date the grievance hearing was held, at the Agency’s regional facility.

The Agency and Grievant submitted documents for exhibits that were, without objection from the parties, admitted into the grievance record, and will be referred to as Agency’s or Grievant’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative/Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group II Written Notice.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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.

The Agency’s Front Gate Entry and Search Procedures, dated June 1, 2006, provides, in relevant part:

III. Items Allowed to Enter

A. FOOD ITEMS

Absloutely no food, snacks, or drinks (including water) will [be] permitted inside of the perimeter. Staff assigned to the work center will not be permitted to bring

any food, snacks, or drinks (including water) inside the work center. All food and drinks must be purchased from the inside vending machines and eaten in the Staff Dining Hall or the Break Room. Those items may also be taken back to the assign [sic] work area to eat.

The exceptions to this are the staff who have been approved to bring in their meals for medical reasons.

VI. Food Items Allowed

All staff are furnished a meal during their assign [sic] shift. Therefore, NO food items are allowed inside the secure compound except those mentioned in Section III above. Vending machines are also available in all support buildings.

Those staff having special dietary needs may submit a request for approval to the Associate Warden of Public Safety and Internal Control for review and upon a negative response will have immediate access to appeal to the Chief Warden. For the purpose of this procedure, the Associate Warden of Public Safety and Internal Control shall serve as the designated approving authority.

If you are approved to bring in food, your manifest covers you to bring in food for ONLY YOURSELF, ONE MEAL PER PERSON. Meals must be of reasonable size. It is not intended for said manifest to be used to bring in food to share with other staff. The meal must be in the container it was purchased. No home made meals.

If you are approved to bring in food, your manifest is approved to on the contingency of your medical requirements, which states that you could not consume the food offered in the Dining Hall. Therefore, you are not approved to eat the food prepared for staff in the Dining Hall. Failure to follow these rules and instructions will be grounds for the termination of your approved manifest.

Agency Exh. 3.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group II offenses to include types of act and behavior that are more severe in nature (compared to Group I) and are such that an accumulation of two Group II offenses normally should warrant removal. Agency Exh. 7. One such example stated in the policy is failure to comply with applicable established written policy. Agency Exh. 7 at p. 8. Discipline for a Group II offense shall normally take the form of the notice and up to 10 workdays suspension without pay. Agency Exh. 7 at p. 9.

The Agency's Operating Procedure No. 802.1, Offender Property, pertains to prohibition of contraband and the proper disposition thereof. Agency Exh. 4. The policy provides for the confiscation of and disposition of non-conforming property found in an inmate's possession. Section VII.E. of the policy provides that confiscation is the conversion of an offender's personal property to state ownership, after completion of certain notification and administrative appeal processes.

Agency Exh. 5.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as an office services assistant for over six years, with no other active disciplinary actions indicated.

The facts of the offense are largely not in dispute. A collateral internal investigation led Agency investigators to search the Grievant's workdesk. The Grievant had in her locked desk drawers the unauthorized food items of several instant oatmeal packages and tea bags. The items were neither sold on premises nor authorized to be within the secured perimeter. Thus, the items were contraband under Agency policy.

The Grievant's explanation for her possession of the contraband is that the items were confiscated from an inmate by a corrections officer who left the items in the Grievant's work area. The Grievant placed the items in a manila envelope to secure them until the corrections officer returned for them. This occurrence was perhaps two or three years prior, and the Grievant could not identify the corrections officer or the inmate involved.

The Grievant was well aware of the policies for bringing and having outside food items within the secure perimeter, and she had, in fact, used and complied with the policy for bringing food items inside the facility on multiple occasions.

The Agency witnesses testified to the security basis and rationale for prohibiting contraband within the secure perimeter of its facilities. The Agency did not accept the Grievant's explanation because it ran contrary to Agency policy regarding the confiscation of any property from offenders, and because the Grievant could provide no corroborating evidence or identification of the source. Failure to comply with applicable established written policy is within the Group II offenses. The assistant warden testified that in meting out the discipline, the Agency considered mitigation and elected not to levy any unpaid suspension with the Group II.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions

occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.”

As referenced above, this offense falls squarely within the Group II category of offenses. The Agency, however, has discretion on severity of the discipline. Here, the Agency treated it as a Group II and applied less than the maximum discipline for Group II.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Grievant was aware of the policy prohibiting contraband. The Grievant’s explanation of how she came to possess the contraband would not excuse the offense, but could provide mitigation. The Agency did not accept the Grievant’s explanation, yet still meted out less than the maximum penalty.

While the Grievant presented a sincere belief that the discipline was not justified, the fact remains that her mistake was a serious one. The Agency could have exercised a lesser sanction within its permitted discretion, but its action falls well within its discretionary management function and obligation to promote a secure facility and well-managed workforce. As referenced above, the Hearing Officer is not a “super personnel officer” who can substitute his opinion as to when an agency should use progressive discipline.

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....” Va. Code § 2.2-3005. 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 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.

I find that the Grievant had adequate notice of the policy, the Agency consistently applied discipline in this circumstance, and that there was no improper motive in levying the discipline. Further, while otherwise satisfactory work performance is grounds for mitigation by agency management, the hearing officer can only mitigate if the agency’s discipline exceeded the limits of reasonableness. Thus, while it cannot be said that otherwise satisfactory work performance is *never* relevant to a hearing officer’s decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer’s finding that an agency’s disciplinary action exceeded the limits of reasonableness. The weight of an employee’s past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee’s service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charge, the less significant otherwise satisfactory work performance becomes. While the contraband at issue may be among the more benign forms, possession of contraband is a security breach and, thus, serious.

Therefore, the Grievant's otherwise positive work record during her tenure should be afforded minimal weight. *See* EDR Ruling #2010-2368 (October 27, 2009).

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the claimant engaged in the described conduct that the Agency appropriately characterized as misconduct. The Agency's discipline was consistent with law and policy, and no mitigating circumstances exist to reduce the disciplinary action. Accordingly, the Agency's discipline of the Group II Written Notice is upheld.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** 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.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day

following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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 DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer