

Issues: Group II Written Notice (failure to follow instructions), Group I Written Notice (unsatisfactory performance), and Management Actions (misapplication of policies); Hearing Date: 02/22/12; Decision Issued: 03/23/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9761, 9762, 9763, 9764, 9765; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9761/9762/9763/9764/9765**

Hearing Date: February 22, 2012  
Decision Issued: March 23, 2012

**PROCEDURAL HISTORY**

On May 23, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy. On May 23, 2011, Grievant was issued a Group I Written Notice of disciplinary action for inadequate or unsatisfactory job performance.

On May 27, 2011, Grievant timely filed a grievance to challenge the Agency's disciplinary actions. He filed additional grievances as well. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. On January 9, 2012, the EDR Director issued Ruling Numbers 2012-3206, 2012-3207, 2012-3208, 2012-3209, 2012-3210 consolidating these grievances for hearing. On January 23, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 22, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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?

## **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 employs Grievant as a Food Service Manager II at one of its Facilities. He has been employed by the Agency for over 14 years and has been working at the Facility since 2008. The purpose of his position is:

Serves as assistant manager of a food service department. Maintains adequate inventory of food and supplies. Make changes to master menu as circumstances necessitate, and maintains associated documentation. Conducts monthly staff meetings to suggest improvements and monthly progression.

One of Grievant's Core Responsibilities is:

Ensure all areas of food operations are within compliance with DOC regulations. Provide daily sanitation inspections to ensure safe and quality food production. Interview and orient new hires. Compose bi-weekly schedules for supervisors.

In November 2011, Grievant received an annual performance evaluation with an overall rating of "Contributor."

Grievant had significant responsibilities with respect to managing the Facility's food service division. This division was responsible for feeding approximately 900 inmates per meal. The Agency's Central Office staff established the menu items for each inmate meal. Grievant was responsible for ensuring that the food costs per inmate were within the Agency's expectations. If Grievant prepared too much food for inmates to eat, the result would be higher costs per meal.

The Agency expected facilities to provide inmate meals at a cost not exceeding \$2.10. This amount had been in place for several years. Grievant was aware of the Agency's standard.

How well Grievant managed the food divisions operations determined whether the division's food costs were below the Agency's \$2.10 standard. For example, Grievant was responsible for estimating how many inmates would choose a food item and then "pulling" that item from the kitchen's inventory room and preparing it to be served. If Grievant pulled too many cases of a food item and it was not eaten by inmates, then the cost of providing food to inmates would be higher than it should otherwise be.

Food costs at the Facility were:

<b>Month, Year</b>	<b>Food Costs Per Meal</b>
September 2010	\$2.17
October 2010	\$2.15
November 2010	\$2.09
December 2010	\$2.29
January 2011	\$2.25
February 2011	\$2.15
March 2011	\$2.19

In January 2011, a Food Service Support Team visited the Facility and made numerous recommendations regarding how Grievant could improve food operations and reduce food costs. Sometime in the first few months of 2011, Mr. E also visited the Facility and provided recommendations to Grievant regarding how to lower his food costs. Grievant was informed of a different "pull system" to help better manage inventory. Grievant was given information about checking the "carryover figures" from the beginning of the fiscal year and the figures for each month. Grievant was told he should use only reusable trays and lids for lock downs.<sup>1</sup>

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<sup>1</sup> It is not clear that any of the people in the food service team were in Grievant's chain of command.

On March 5, 2011, the regional sanitation inspector visited the Facility and “flunked” the Facility’s food operations because food costs remained excessive.

## 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.”<sup>2</sup> 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.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

“[I]nadequate or unsatisfactory job performance” is a Group I offense.<sup>5</sup> In order to prove inadequate or unsatisfactory job 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.

In December 2010, food costs at the Facility exceeded \$2.10. Grievant knew the Agency’s expectations that food costs not exceed \$2.10 per inmate meal. Food costs remained excessive in January 2011. Grievant’s work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice with an offense date of February 1, 2011.

In March 2011, food costs remained in excess of \$2.10 per inmate meal. The Agency had provided Grievant with information regarding how to decrease food costs, but he failed to implement those changes. Grievant’s work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice with an offense date of March 5, 2011.

The Agency argued that the first Written Notice should be a Group II instead of a Group I because Grievant failed to comply with a supervisor’s instructions. The Agency’s evidence in this case often was not clear. To the extent Grievant failed to comply with the recommendations of the Food Service Support Team, his failure was a Group I offense because none of the team members were within his chain of command. The Agency disciplined Grievant for the same behavior (failing to reduce food costs) at two different time periods. The Agency presented evidence that Grievant may have failed to comply with a supervisor’s instructions but did not establish the approximate

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

dates the instructions were given. Although it is possible the supervisor's instructions were given in a time frame relating to the first Written Notice, it is equally likely that the instructions were given with respect to the second Written Notice. If the instructions were given within the time period relevant to the second Written Notice, a Group II is not justified because the Agency only issued a Group I with an offense date of March 5, 2011.

Grievant argued that because no other employee was responsible for pest control, he had to assume those duties<sup>6</sup> which distracted him from his regular duties. He argued that mice at the Facility were destroying hundreds of dollars in food and commissary supplies. This argument fails. Although Grievant established that he assumed some of the tasks that should have been performed by other employees, Grievant did not establish the amount of time he spent on those duties. He did not establish that his additional tasks would otherwise have prevented him from performing his regular duties. Grievant did not establish that the food supplies destroyed by rodents were so significant as to materially affect the Facility's daily food costs.

Grievant argued that the Facility's farm stopped providing free food crops to the Facility for a short period of time. Because the Facility had to replace these crops, it incurred higher expenses. This argument fails. The \$2.10 amount was calculated based on the purchases by other State facilities and most of those facilities do not have a farm providing free crops. Grievant should have been able to meet the \$2.10 standard without receiving free crops from the work farm.

Grievant argued that security staff were issuing food to inmates in the evenings when food service employees were not at the Facility. Although Grievant established that security staff were issuing food to inmates, he did not establish that the amount of food offered was material or that other facilities that met the \$2.10 standard did not have the same problem.

Grievant argued that the number of inmate lockdowns (when inmates were locked in their cells) affected food costs because the number of inmate meals increased. No evidence was presented showing that the number of lockdowns at the Facility was excessive when compared to other facilities. No evidence was presented regarding how many additional meals were necessary because of specific lockdowns.

Grievant argued that he received disciplinary action because he was not allowed to order and receive new "hot boxes." The evidence showed that Grievant was not disciplined as a result of his inability to obtain new hot boxes. Grievant was disciplined for failing to properly control inventory which resulted in higher food costs than other Agency facilities. No credible evidence was presented to show that if Grievant had been provided with hot boxes food costs, would have dropped materially.

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<sup>6</sup> Grievant received a Pesticides Applicator Certificate in June 2010.

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....”<sup>7</sup> 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the two disciplinary actions.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with an offense date of February 1, 2011 is **reduced** to a Group I Written Notice. The Agency’s issuance to the Grievant of a Group I Written Notice with an offense date of March 5, 2011 is **upheld**. Grievant’s request for relief with respect to his additional grievances 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>7</sup> Va. Code § 2.2-3005.

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  
600 East Main St. STE 301  
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.<sup>8</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.