

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 09/27/12;
Decision Issued: 10/08/12; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case
No. 9895; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9895

Hearing Officer Appointment: September 4, 2012

Hearing Date: September 27, 2012

Decision Issued: October 8, 2012

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice for the Grievant's alleged unsatisfactory work performance by the Virginia Department of Behavioral Health and Development Services (the "Department" or the "Agency") , as described in the Grievance Form A dated June 15, 2012. The Grievant maintains she did not engage in unsatisfactory performance.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on September 11, 2012 at 4:45 p.m. The Grievant, the Agency's advocate and the hearing officer participated in the call. Following the first pre-hearing conference call, the hearing officer entered a Scheduling Order on September 13, 2012, which is incorporated herein by this reference. During the call, the Grievant confirmed that she is challenging the issuance of the Group I Written Notice for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including total removal of Group I notice.

The hearing was scheduled for and was duly held on September 27, 2012. At the hearing, the Agency was represented by its advocate, and the Grievant represented herself. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all documents in the hearing officer's appointment letter/file (GE 1) and Agency Exhibits 1 through 5.¹

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is employed by the Department as a Direct Support Supervisor ("DSS"). The Grievant's duties include ensuring that her area runs smoothly, supervising her staff and keeping the individuals under care on task.
2. The Assistant Program Manager ("APM") supervises the Grievant and the Unit Director supervises the APM.
3. The written notice states that the incident occurred on the past Memorial Day (May 28, 2012) but, in fact, during the hearing the parties clarified that the Memorial Day activities planned for the individuals and the staff at the facility were not held on Memorial Day but on May 30, 2012.
4. The activities which should have been held outside were further complicated when they were moved indoors into the different areas of the subject building due to rain.
5. Activities such as bingo, music and move, popcorn, nachos and cheese, etc. were held in each of the areas, including the subject area 4, comprising the building.
6. Staff and individuals were still scheduled to go to their assigned lunch breaks. Lunch is not paid time for the staff and each staff person is allocated 48 minutes for lunch each day.
7. The DSS is the person responsible for scheduling the lunch breaks for the staff under her supervision subject to assuring suitable coverage for individuals.
8. The APM admitted that the DSS can change lunch arrangements if coverage so allows or requires. On occasion, lunches for staff are even eliminated because of coverage needs.
9. On May 30, 2012, the DSS and her staff in Area 4 were required to provide coverage for their Area 4 assigned individuals for the whole day and also for the Area 2 individuals from approximately 11:30 a.m. until after 1:00 p.m. while the Area 2 staff had lunch together in a conference room.

10. Because of extraneous factors, including the activities, the complicating rain and extra management assigned coverage of the Area 2 individuals, none of the Area 4 staff were able to take a 48 minute lunch break like the Area 2 staff but instead ate some food over 15/20 minute intervals which the Grievant went to pick up for her staff at about 10:40 a.m. The Area 4 individuals did have lunch in addition to the snacks provided as a component of the activities.

11. At approximately 11:30 a.m., the APM informed the Area 4 staff, in the absence of the Grievant, that at least one of the scheduled lunch breaks for Area 4 was pushed back.

12. Subsequently, the Unit Director came into Area 4 and after observing the area stated "Looking good" once or twice. The Unit Director asked who was providing coverage for the two (2) individuals who required 1:1 coverage and the two (2) staff, not eating at all at the time, on Area 4 providing such coverage were identified to the Unit Director's satisfaction. At this time, the Grievant was providing coverage for the other individuals in Area 4 and was not eating at all nor sitting at the table where some staff and individuals were eating.

13. The Grievant and her staff did not claim additional remuneration for not receiving their lunch breaks on May 30, 2012. The Agency did not prove that the staff on Area 4 ate lunch at the same time to the detriment of their coverage obligations on May 30, 2012.

14. The APM admitted on cross-examination that there is no policy prohibiting staff from eating in front of individuals and that this practice occurs regularly at restaurants, etc.

15. The staff in Area 4 clearly took the individuals subject to their care to the various activities throughout the different areas in the building, as they should have done.

16. The Agency has not proven the elements which were cited in the Written Notice for unsatisfactory performance: namely, the staff eating lunch at the same time in front of the individuals and the staff not taking the individuals to the special activities in the building.

17. The testimony of the Grievant and the five (5) staff members who testified on her behalf was credible, compelling and consistent on the major issues before the hearing officer. By contrast, the Unit Director was not credible when she testified on cross-examination that she normally corrects the Grievant immediately when she observes a problem but was so shocked and disturbed on May 30, 2012 that she could not correct the alleged coverage issues at the time she allegedly observed them. Furthermore, the Grievant would not have said "Looking god" if the performance of the Unit 4 staff was so shocking and disturbing at the time the Unit Director observed it.

18. The demeanor of each of the Grievant and her five (5) witnesses was open, frank and forthright.

19. The Department issued a Group I written notice to the Grievant for:

Unsatisfactory work performance. On 5/28/12 (Memorial Day), your supervision of Area 4 was unsatisfactory. Staff should not have eaten lunch at the same time, in front of the individuals. Staff should have taken the individuals to the special activities planned for Building [#].

AE 1.

20. The Grievant's version of events that she acted in a professional and appropriate manner concerning the items cited by management in the written notice is credible and the hearing officer so finds.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8. The Agency has failed to sustain its burden of proving the alleged disciplinary infractions by the Grievant.

DECISION

For the reasons stated herein, the disciplinary action is reversed. The Agency is directed to rescind and remove the Group I Written Notice issued to the Grievant on June 12, 2012.

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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **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 refer 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 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

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 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 EDR before filing a notice of appeal.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).