

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 07/28/14;  
Decision Issued: 07/29/14; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.;  
Case No. 10405; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH of VIRGINIA**  
*Department of Human Resources Management*  
*Office of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION**

In the matter of: Case No. 10405

Hearing Date: July 28, 2014  
Decision Issued: July 29, 2014

PROCEDURAL HISTORY

Grievant is a food service supervisor for the Department of Corrections (“the Agency”), with three years of service with the Agency as of the offense date. On September 27, 2013, the Grievant was charged with a Group I Written Notice for unsatisfactory job performance. The Grievant had no prior, active disciplinary group notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On July 8, 2014, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, July 28, 2014, on which date the grievance hearing was held at the Agency’s facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency’s Exhibits, accordingly.

APPEARANCES

Grievant  
Representative/witness for Agency  
Counsel 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?

Through his grievance filings, the Grievant requests rescission of the Group I 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 relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group I offenses to include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force. Agency Exh. 6. An example of a Group I offense is inadequate or unsatisfactory job performance. Agency Exh. 6.

### 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 a food service supervisor, with three years tenure, and he had no prior active Written Notices. The Written Notice charged:

On August 21, 2013, an inspection was conducted by the [State dietician] and 3 critical violations were found in your area. This is an unsatisfactory job performance; your current supervisory folder contains two Notices of Improvement.

The Agency's witnesses, the assistant food operations director, food service director, and assistant warden, testified consistently with the charge in the Written Notice. They testified to five Notices of Improvement Needed issued to the Grievant between July 2012 and August 21, 2013 (the latter of which being issued following this same offense). Agency Exhs. 4-A, -B, -C, -D and -E. The assist food operations director and the food service director both testified that the Grievant, while making some improvement, has not consistently maintained the performance level expected. The food service director and the assistant warden testified that other employees are similarly disciplined for unsatisfactory job performance, and that this Grievant has not been singled out in any way. The assistant warden testified that the seriousness of the offense, which could lead to an outbreak of food borne illness, could justify a Group II Written Notice because of the severe consequences of such an event.

The dietician's inspection on August 21, 2013, identified deficiencies in three areas, including proper stock rotation and food temperatures. While the inspection noted partial compliance in these areas, the food service director testified that the dietician was lenient because the violations could have been designated as noncompliance. Agency witnesses testified to the seriousness of maintaining food temperatures and documentation to prevent the introduction and spread of food borne illnesses. Such an event as an outbreak of food borne illness presents serious security threat to the operations of the facility.

The Grievant testified that he accepted the Notices of Improvement needed and changed his performance to comply with the expectations of management. The Grievant, however, did not challenge the substance of the deficiencies noted and did not deny responsibility for them.

Based on the evidence and Grievant's testimony, not challenging the factual bases of the Written Notice, I find the Agency has proved the offense and level: Group I Written Notice. The analysis moves to mitigation.

### Mitigation

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address

employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, *even if he would levy lesser discipline*, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* A hearing officer does not have the same discretion for applying mitigation as management does.

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 Human Resource Management . . .” Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management.” 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. The Grievant produced no such mitigating evidence.

As previously stated, the agency’s burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The hearing officer accepts, recognizes, and upholds the Agency’s important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency’s action regarding the Group I Written Notice as outside the bounds of reasonableness.

### DECISION

For the reasons stated herein, the Agency’s issuance of the Group I Written Notice is **upheld**.

## 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>1</sup>

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<sup>1</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written in a cursive style.

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Cecil H. Creasey, Jr.  
Hearing Officer