

Issue: Group II Written Notice with Suspension (unsatisfactory performance); Hearing Date: 12/14/16; Decision Issued: 12/15/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10890; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10890

Hearing Date: December 14, 2016
Decision Issued: December 15, 2016

PROCEDURAL HISTORY

On August 15, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a two work day suspension for unsatisfactory performance.

On August 25, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 1, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 14, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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?

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 Behavioral Health and Developmental Services employs Grievant as a Food Service Technician I at one of its facilities. Grievant had prior active disciplinary action. On December 30, 2014, Grievant received a Group I Written Notice for unsatisfactory performance.

The Facility uses a cook-chill process to prepare food for residents. Once food is cooked, it is immediately chilled and placed in a refrigerator to remain cold. The Facility has "tray lines" in which food is removed from refrigerators and placed in pans in a "cold well". As trays are passed from one employee to the next, employees remove an item from each pan and place it on the tray. The trays are placed in a refrigerator on a truck and sent to resident housing units to be reheated and served.

Grievant worked on the tray line. She had been taught to place ice in the bottom of the cold well in the morning and then after each meal as pans were removed and replaced with new pans for the next meal. The level of ice was supposed to be high enough to touch the bottom of the pan containing the food. The ice helped keep the food temperature below the danger zone.

On July 18, 2016, two buckets of ice were placed in the cold well of the tray line. Grievant finished two meals but did not place ice in the cold well after each of the two meals. At approximately 12:30 p.m., the level of ice in the cold well was about six inches below the bottom of the pans in the tray line. The Patient Services Manager removed the pans in the tray line and observed the low level of ice in the cold well. He

measured food temperatures. The hamburgers were 54.7 degrees and the potatoes were 45.7 degrees. These amounts were higher than a safe temperature.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[U]nsatisfactory work performance” is a Group I offense.² In order to prove unsatisfactory work 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.

Grievant received training and understood her obligation to place ice in the cold well after each meal was assembled. On July 18, 2016, Grievant did not place ice in the cold well and the temperature of the food for which she was responsible entered the danger zone. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. In this case, Grievant has a prior active Group I Written Notice for unsatisfactory performance. Accordingly, the Agency’s decision to elevate the discipline from a Group I Written Notice to a Group II Written Notice must be upheld. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, the Agency’s decision to suspend Grievant for two work days must be upheld.

Grievant argued that she put enough ice into the cold well in the morning and that she did not need to add additional ice. The evidence showed that on July 18, 2016, the level of ice was approximately six inches below the pan containing the food. Although it may be the case that typically two buckets of ice placed in the cold well in the morning lasts the entire day, on July 18, 2016 that did not happen. If Grievant had followed her training to attempt to put ice in the cold well after each meal, she would have realized that the ice melted that day and additional ice was needed.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

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”³ 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 the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a two work day suspension 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 14th St., 12th 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:

³ Va. Code § 2.2-3005.

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

or, send by e-mail to 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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.