

Issues: Group II (failure to follow policy, making false statement), Group I (unsatisfactory performance), Group II (failure to follow policy), Group II (unsatisfactory performance), and Termination; Hearing Date: 05/31/17; Decision Issued: 06/02/17; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10995; 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: 10995

Hearing Date: May 31, 2017
Decision Issued: June 2, 2017

PROCEDURAL HISTORY

On February 17, 2017, Grievant was issued a Group II Written Notice of disciplinary action for falsely claiming a licensee purchased a Specialty Product. On February 17, 2017, Grievant was issued a Group I Written Notice for failing to verify lottery tickets on a daily basis. On February 17, 2017, Grievant was issued a second Group II Written Notice for failure to immediately report missing lottery tickets. On February 17, 2017, Grievant was issued a third Group II Written Notice for unacceptable audit performance. Grievant was removed from employment based on the accumulation of Written Notices.

On March 14, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 4, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 31, 2017, 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 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 Alcoholic Beverage Control employed Grievant as a Store Manager. She began working for the Agency in 2007. Grievant had prior active disciplinary action. She received a Group I Written Notice on July 18, 2016 for unsatisfactory performance. She received a Group II Written Notice on December 19, 2016 for failure to follow policy.

Grievant supervised the operations of one of the Agency's stores. She supervised employees including two Assistant Managers.

The Agency has Specialty Products in limited supply that must be ordered. Customers including Licensees and Agency employees may order Specialty Products. Names of people requesting these products are placed on a list at the store and on a central list at the Central Office Store Stocking. Under the Agency's policy, "[o]nly the customer whose name appears on the email from Store Stocking may purchase the product. NO EXCEPTIONS."¹

¹ Agency Exhibit 8.

A Licensee ordered 3 bottles of a Specialty Product. The bottles were shipped from the warehouse to Grievant's store. The Licensee declined to buy the three bottles. An employee of the Licensee told Assistant Manager B that the Licensee was under new management and no longer wanted the three bottles. Grievant should have returned the three bottles to the warehouse. Instead, Grievant bought one of the bottles on December 24, 2016. On January 21, 2017, Grievant sent an email to Ms. D stating:

There was originally 3 for [Licensee] but they changed management and only took 1 (If I don't HAVE to send them back, I can sell them just let me know.)

Her statement was untrue because the Licensee did not purchase one bottle.

Grievant was required to verify lottery tickets on a daily basis. Either she was to perform the verification or she could assign the duty to her subordinates. The Agency conducted an audit in February 2017 and discovered that lottery tickets had been verified only five times in January 2017. Of the seven days considered in February 2017, lottery tickets had been verified on three days.

The Internal Auditor visits Agency stores to determine if store employees have complied with Agency policies. The Internal Auditor typically finds no more than two items requiring immediate action by store managers.

On January 5, 2017, the Internal Auditor audited Grievant's store. The Internal Auditor identified 9 items that required immediate action by store managers. Several of the 9 items had also been listed as immediate action items in the 2016 audit of Grievant's store that gave rise to the issuance of a Group I Written Notice. For example, Grievant failed to have certain important records password protected.

On January 16, 2017, Assistant Manager B reconciled the lottery ticket inventory and noticed that two books of tickets were missing. She called Grievant and said that the lottery tickets were not accounted for in the ticket machine. Grievant said she would look into the matter when she returned to work.

Assistant Manager G told Grievant on January 23, 2017 that lottery tickets were missing. Later, he asked Grievant if she had reported the missing tickets to the Supervisor. Grievant said no because she was investigating other possible explanations for the missing tickets.

On January 27, 2017, Grievant called the Supervisor to report the missing tickets.

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.”² 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.”

Group II Written Notice – 3 Bottles

Grievant falsely stated that the Licensee “only took 1”. Grievant purchased the bottle, not a licensee. Grievant was aware of the policy that she was obligated to return the bottles.

Grievant argued that she purchased the bottle to sell it to the employee who formerly worked for the Licensee and who ordered the bottle. If this true, it does not affect the outcome of this case. Grievant’s statement was that the License purchased the bottle and her statement was untrue.

Group I Written Notice – Verification of Lottery Tickets

“[U]nsatisfactory work performance” is a Group I offense.³ 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 was obligated to ensure that lottery tickets were verified on a daily basis. Lottery tickets were verified only for only five days in January 2017 thereby justifying the issuance of a Group I Written Notice for unsatisfactory work performance.

Group II Written Notice – Failure to Report Missing Lottery Tickets

Agency policy 403-1032 provides:

It shall be the responsibility of all ABC store employees to immediately report any perceived fraudulent activity as well as criminal and administrative violations to the store manager who must then notify the Regional Manager. If the manager is the person involved, the employee must contact the Regional Manager directly.⁴

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

⁴ Agency Exhibit 9.

After two employees notified Grievant that lottery tickets were missing, Grievant should have recognized that a criminal violation may have occurred. Grievant should have reported the matter to the Regional Manager at least by January 23, 2017. Instead, she reported the matter on January 27, 2017. Grievant did not immediately report the lottery ticket loss thereby justifying the issuance of a Group II Written Notice.

Grievant argued she reported the matter as soon as she confirmed the tickets were stolen which was on January 27, 2017. The evidence showed that Grievant should have realized on or before January 23, 2017 that lottery tickets may have been stolen.

Group II Written Notice – Unacceptable Audit Performance

A January 5, 2017 audit of Grievant's store resulted in nine findings requiring immediate action. In a typical audit, the auditor would find no more than two matters requiring immediate action. Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice. Because Grievant had a prior active Group I Written Notice for unsatisfactory work performance, the Agency was authorized to elevate the Group I offense to a Group II offense. Accordingly, the Agency's issuance to Grievant of a Group II Written Notice is upheld.

Accumulation

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated four Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

Mitigation

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"⁵ 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.

⁵ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for making a false statement is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for failing to validate lottery tickets is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to immediately report criminal activity is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for unsatisfactory performance is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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:

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.