

Issues: Group II Written Notice (failure to follow policy) and termination due to accumulation; Hearing Date: 07/26/18; Decision Issued: 07/27/19; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11221; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11221**

Hearing Date: July 26, 2018

Decision Issued: July 27, 2018

**PROCEDURAL HISTORY**

On May 15, 2018, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy.

On May 28, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 26, 2018, a hearing was held at the Agency's office. Grievant was notified of the hearing date, time, and location, but did not appear.

**APPEARANCES**

Agency Party Designee  
Agency Counsel  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 had prior active disciplinary action. On December 14, 2017, Grievant received a Group I Written Notice for unsatisfactory job performance. On March 30, 2018, Grievant received a Group I Written Notice for unsatisfactory work performance. On March 30, 2018, Grievant received a Group II Written Notice for failure to follow instructions/policy.

The Agency has bottles of alcohol that it sells to customers who are selected by lottery. The Agency refers to these bottles as specialty products or lottery items. Customers are restricted to one lottery item.

Mr. 1 created several email accounts purportedly in the name of people who did not actually exist. He requested to purchase a bottle of W Alcohol for each name. The Agency’s Store Stocking Unit approved the purchases because staff did not know one person had created several fake email accounts. Grievant was notified she could sell W Alcohol bottles to seven people.

When Mr. 1 appeared at the Store, he purported to be purchasing the alcohol for the other people who sent emails seeking to purchase W Alcohol. Grievant sold seven bottles of W Alcohol to Mr. 1.

### **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.”<sup>1</sup> 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.”

Agency Policy 403-0011 provides:

Customer must show their Virginia photo id, which must match the name provided by Store Stocking, in order to purchase this lottery bottle.

Only the customer whose name appears on the email from Store Stocking may purchase the product. NO EXCEPTIONS.<sup>2</sup>

Failure to follow policy is a Group II offense. Grievant sold seven bottles of W Alcohol to one person. She should have sold only one bottle to Mr. 1 because she did not obtain photo ids from the other persons named by the Store Stocking Unit. Grievant failed to follow policy thereby justifying the issuance of a Group II Written Notice.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

*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 ....”<sup>3</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 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 removal is **upheld**.

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

<sup>2</sup> Agency Exhibit 6.

<sup>3</sup> Va. Code § 2.2-3005.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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