

Issue: Group III Written Notice with Termination for falsifying records and failure to follow policy Hearing Date: 08/03/18; Decision Issued: 08/20/18; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11225; Outcome: No Relief – Agency Upheld; **Administrative Review Request received 08/31/18; EDR Ruling No. 2019-4774 issued 10/19/18; Outcome: AHO’s decision affirmed; Request to Reconsider received 11/06/18; EDR Ruling No. 2019-4808 issued 12/06/18; Outcome: Request denied.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11225

Hearing Date: August 3, 2018
Decision Issued: August 20, 2018

PROCEDURAL HISTORY

On June 4, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records and failure to follow policy.

On June 4, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 18, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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. He had been employed by the Agency for approximately nine years but only served as Store Manager for approximately eight months.

Grievant had prior disciplinary action. On March 3, 2017, Grievant received a Group I Written Notice for unsatisfactory performance and disruptive behavior. May 16, 2017, Grievant received a Group II Written Notice for failure to follow policy.

The LSA and Assistant Store Manager reported to Grievant.

When a customer returns a bottle of alcohol to a store, the Agency receives the product and returns the purchase price to the customer. If the product costs more than \$100, however, the Agency charges the customer a 15% restocking fee on the amount over \$100. For example, if a customer returned a bottle that cost \$149.99, the Agency would charge the customer a restocking fee of \$7.50.

Grievant was responsible for conducting and reconciling the Store's inventory. This process involved counting the number and type of alcohol bottles and comparing that physical count to the number of bottles shown in the Store's electronic inventory. To complete this process, Grievant had to print out an Inventory Worksheet when the Store first opened for business. During the day, Grievant and other employees would

count the number and type of bottles of alcohol located on Store's shelves and enter that information on the Inventory Worksheet. After the Store closed for the day, Grievant was to update the Store's Point Of Sale (POS) Inventory. He then printed out the POS Inventory worksheet. Grievant was to take the Inventory Worksheet showing the physical count of Store inventory and compare it to the POS Inventory.

Each brand and type of alcohol had an assigned code number. Worksheets consisted of many pages with columns showing the names of the alcohol products and the code for those products. To reconcile the physical inventory count with the POS inventory count, Grievant had to take a sheet from the physical inventory and compare it to a matching sheet from the POS inventory. The preprinted portion of each sheet should match. In other words, the column of codes shown in the physical inventory worksheet was supposed to be identical to the column of codes shown in the POS inventory worksheet. If the two columns of codes were not identical, reconciliation could not be completed. The Hearing Officer will refer to this as a code conflict.

The Agency did not have any policy informing employees what to do if the column of codes for the physical inventory worksheet did not match the column of codes for the POS inventory worksheet. For example, the code 643 might appear on one worksheet, but not the other. No policy explained how put code 643 on a worksheet when only one worksheet had a code.

Before becoming a Store Manager, Grievant worked as an Assistant Store Manager. He reported to Store Manager K. Store Manager K encountered a code conflict when she was attempting to complete and reconcile her store's inventory. She showed Grievant and another employee how to log into a cash register, create a "sale and return" or a "sale and post void" transaction. For example, if code 400 was missing from the POS Inventory sheet, Store Manager K would key into a cash register that a customer had returned a product with code 400 and a second customer immediately purchased that product. Neither customer existed. As a result of the transaction, the POS Inventory would show code 400 but with zero change inventory. Store Manager K described this "an unspoken but common practice."

On April 24, 2018, Grievant and the LSA were working at the Store. Grievant attempted to reconcile the physical inventory sheets with the POS inventory sheets.

Grievant had an employee assisting him counting store inventory. The employee was using a pen instead of a pencil to file in his count. When Grievant realized the employee was using a pen, Grievant had to print new sheets for the employee to enter the information in pencil. While doing this, Grievant realized that three products were "not on the older sheets nor were they items that have been on our other inventory sheets in the past." The three bottles of alcohol were not in the store. Grievant realized he had a code conflict for codes 643, 10862, and 62807.

Grievant wanted to train the LSA regarding how to resolve the code conflict. He went to the LSA's cash register and explained to the LSA how to resolve the conflict.

Grievant used the LSA's cash register number because Grievant intended to train the LSA. If Grievant had logged out the LSA and entered his own employee number into the register, it could have resulted in delays to customers wanting service.

Grievant entered a transaction that was a Return Without Receipt for three items for a total of \$182.24. He aborted the entry and decided to have separate transactions for each product code. Grievant entered a transaction that was a Return Without Receipt for product code 10862 in the amount of \$149.99 plus \$7.66 tax for a total of \$160.04. The cash register system reduced the amount refunded by \$7.50 to account for a 15% restocking fee. Grievant entered a transaction that was a Return Without Receipt for product code 62809 in the amount of \$6.08 plus \$0.27 for a total of \$6.36. Grievant entered a transaction that was a Return Without Receipt for product code 643 in the amount of \$17.99 plus \$0.98 tax for a total of \$18.94.

Grievant entered these transactions into the cash register system even though there was no actual customer returning products.

After Grievant finished the transactions, Grievant left the receipts next to the LSA's cash register. The LSA cleared his area and took the receipts away from the register. The LSA and Assistant Manager wrote on the receipts. They wrote the names of fictitious customers. The LSA testified that Grievant instructed him to enter false names on the receipts. Grievant did not write on the printed receipts. Grievant denied instructing the LSA or Assistant Manager to enter false information on the receipts. Grievant's denial was credible. It is also consistent with the reasoning that Grievant would not have instructed the LSA or Assistant Manager to create fictitious names for the first aborted transaction.¹

Grievant failed to account for the \$7.50 restocking fee in the process. As a result, the LSA's cash register balance was short \$7.50. This meant the LSA had to pay the shortage from his own funds. After he complained to the Agency, the Agency began an investigation.

On May 2, 2018, the Regional Manager sent Grievant an email stating:

I received a call this morning concerning a 15% restocking fee, it appears to be for a return without receipt done on 04/24/18 for Item number 10862 completed by cashier [the LSA]. This return was for a return without a receipt yet the customer was given cash back instead of a gift card. Please email me complete details on this transaction today.

Grievant replied approximately 14 minutes later:

There was no actual customer as we were in the middle of inventory we had to reprint some sheets because a clerk was using a pen. When we

¹ Neither party called the Assistant Manager as a witness.

did this we realized the sheets were not lining up correctly. So my thought process was in order to get the sheets to line up and match to do a return on the bottle and a repurchase of the bottle. In the [midst] of this we overlooked the restocking and forgot to waive it. I thought this was the best course of action.²

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.”³ 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 – 0007 governs Store Funds. This policy addresses Daily Sales Cash Management and Employee Responsibilities:

Employees reporting to work are provided with a change fund and a mini drop safe key. The employee should place the mini drop safe key in their assigned cash register till. Each employee must verify and immediately place the change fund in their assigned cash register drawer. The mini drop safe must be locked at this time. The employee then becomes responsible for their change fund, sales cash, and mini drop safe key until surrendered to store management. All sales cash shortages in excess of 25 cents are the responsibility of the employee and all sales cash overages become the property of the Commonwealth.

Each employee will be assigned to an individual register drawer and mini drop safe which other employees are forbidden to enter. In certain emergency situations (i.e., employees not returning from break, severe illness, family emergencies, injury, death, etc.), it may be necessary for management to enter another employee’s register drawer and/or mini drop safe to perform a cashier’s checkout in order to close for the business day. The Regional Manager must be contacted for approval. The content should be removed and verified by two employees whenever possible.⁴

The Hearing Officer construes this policy to prohibit employees from opening the cash register drawer of another employee in the absence of emergency circumstances.

² Agency Exhibit 15.

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ Agency Exhibit 3.

Grievant opened the register drawer at least five times thereby entering the LSA's register drawer and providing a basis for disciplinary action.

Falsifying records is a Group III offense.⁵ The Agency's cash register system allows for the creation of electronic records based on customer transactions. Grievant created "fictitious transactions" because the three Return Without Receipt transactions were not for actual customers. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

The Agency alleged Grievant should be disciplined for, "[i]nstructing subordinate to falsify customer name and signature on return receipts for fictitious returns at inventory." Grievant did not instruct the LSA and Assistant Manager to write fictitious names on the receipts. The Agency has not established this allegation.

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"⁶ 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.

There are several factors which could be considered as mitigating. First, the Agency did not have any policy governing how Grievant was to respond when faced with a code conflict. Second, the Regional Manager seemed skeptical that a code conflict could occur even though one clearly occurred in this case. Third, when pressed to explain how Grievant should have responded to correct the code conflict, the Agency was unable to present any viable alternative to the procedure Grievant followed. Fourth, employees are expected to comply with the instructions and training offered by their supervisors. Store Manager K explained to Grievant how to correct a code conflict. Grievant did not create the code conflict resolution procedure on his own. Grievant's

⁵ See, Attachment A, DHRM Policy 1.60. The Agency alleged Grievant violated its code of ethics. Codes of ethics are aspirational in nature and do not serve as a substitute for the Standards of Conduct upon which discipline can be based.

⁶ *Va. Code § 2.2-3005.*

behavior was focused solely on complying with the training he received from Store Manager K. Fifth, Grievant did not believe and did not have reason to believe he was engaged in behavior that would give rise to disciplinary action. He was honest throughout the Agency's investigation. Sixth, Grievant received no personal gain or other benefit beyond accomplishing his job duties as required.

Although these factors could otherwise have been sufficient for the Agency to mitigate the disciplinary action, the mitigation standard for an agency differs from the standard afforded to Hearing Officers. EEDR determines the standard for mitigation. The Hearing Officer does not believe EEDR would consider the above factors sufficient to mitigate the disciplinary action.⁷ EEDR has removed the Hearing Officer's discretion to reinstate an employee who was attempting to comply with the training he received.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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 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 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

⁷ The Hearing Officer believes it is inappropriate to remove Grievant under the circumstances of this case. He was attempting to resolve a problem using the training he received. The inflexibility of the EEDR mitigation standard as applied currently by DHRM, however, prohibits the Hearing Officer from reducing the disciplinary action. The Hearing Officer recommends the Agency reinstate Grievant to his former position.

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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.