

Issue: Group III Written Notice with Termination (unethical conduct); Hearing Date: 10/05/17; Decision Issued: 10/06/17; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11084; 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: 11084

Hearing Date: October 5, 2017
Decision Issued: October 6, 2017

PROCEDURAL HISTORY

On July 10, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for unethical conduct.

On August 8, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 28, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 5, 2017, a hearing was held at the Agency's office. Grievant was notified of the hearing date and time but did not appear at the hearing.

APPEARANCES

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. 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 Alcohol and Beverage Control employed Grievant as a Store Manager at one of its facilities. He began working for the Agency in 2005. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency was subject to criminals using fraudulent credit cards to purchase alcohol from ABC stores. These individuals would purchase several bottles of alcohol and give one or more store employees a bottle of alcohol as a reward for not disclosing their fraud.

In March 2017, a customer purchased alcohol from Grievant's store. Grievant was "almost certain" the customer was a credit card thief and was using a fraudulent credit card.¹ The customer successfully used a credit card to obtain alcohol from the Store. The customer left a bottle of alcohol with a value of approximately \$50 in the store. The bottle was left likely as a reward to Grievant for allowing the transaction to be completed. Grievant took the bottle and placed it on his desk. He opened the seal. He removed some of the bottle contents. Grievant did not notify the Regional Manager or attempt to return the bottle to inventory as required by Agency policy. Grievant did not notify the Regional Manager that a customer had used a fraudulent credit card to purchase alcohol at his Store.

¹ Grievant did not prevent the sale because "it wasn't procedure."

The Agency received an allegation that Grievant improperly received a bottle of alcohol. The Agency began an investigation. When the Agency's Investigator asked Grievant why he opened the seal, he claimed he poured out some of the bottle contents, squirted a cleaning solution into the bottle, and put shredded paper into the bottle so that no one would touch it. The bottle contents did not smell of cleaning solution and did not appear to have shredded paper inside according to an Agency witness. The bottle was found in a small trash can placed in the loft area above a restroom in the Store where Grievant had placed it.

The Agency removed other employees who engaged in similar behavior.

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."

Standard Operating Procedure 403-7043 governs Acceptance of Gifts, and Items of Value, and Promotional Material. This policy provides:

Retail Operations division employees are prohibited from soliciting, offering, accepting or keeping any gift, gratuity, favor, or reward or other item of value from a vendor, distiller, representative or customer (retail or licensee) or accept any invitation for a vendor sponsored event except with the prior written approval of the Board.

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

Grievant received and retained a bottle of alcohol intended as a gift from a customer who has purchased the bottle with a fraudulent credit card. Grievant did not contact the Regional Manager or otherwise inform the Agency he had received the bottle. Because the seal had been broken, the bottle could not be returned to inventory. Agency policy prohibited Grievant from accepting gifts but he received the gift and kept

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

it from the Agency. In the Agency's judgment, Grievant's behavior was a Group III offense. The Agency has presented sufficient to support its judgment that Grievant should receive a Group III Written Notice. Receiving a gift from a customer who purchased alcohol using a fraudulent credit card is similar to theft or falsifying records which are Group III offenses. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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 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.

³ Va. Code § 2.2-3005.

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.^[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.