

Issue: Group III Written Notice with demotion and salary deduction (violation of workplace violence policy); Hearing Date: 11/08/17; Decision Issued: 12/07/17; Agency: ABC; AHO: Ternon Galloway Lee, Esq.; Case No. 11089; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 11089**

**Hearing Date: November 8, 2017**

**Case/Record Closed on November 17, 2017**

**Decision Issued: December 7, 2017**

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### **SUMMARY OF DECISION**

The Agency had found Grievant violated the “Workplace Violence Policy” by possessing a handgun in the store where the Agency had employed him as a manager. It then issued Grievant a Group III Written Notice and demoted him with a salary reduction of 11.0077%. The Hearing Officer found Grievant engaged in the conduct alleged in the group notice and the discipline was consistent with policy and reasonable. The Hearing Officer then upheld the group III written notice, demotion, and salary reduction.

### **HISTORY**

On June 27, 2017, the Agency issued Grievant a Group III Written Notice for violating the “Workplace Violence Policy.” In lieu of terminating Grievant, the Agency demoted him which resulted in a salary reduction. On July 26, 2017, Grievant timely filed his grievance challenging the Agency’s discipline. The Office of Equal Employment Dispute Resolution (EEDR) assigned the undersigned as the hearing officer to this grievance on September 18, 2017.

The Hearing Officer held a telephonic prehearing conference (PHC) on September 29, 2017.<sup>1</sup> Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was November 8, 2017. Accordingly, by agreement of the parties, the hearing was set for that date. On October 9, 2017, the Hearing Officer issued a scheduling order addressing those matters discussed and ruled on during the PHC

On the date of the hearing and prior to the parties presenting their opening statements, they were given an opportunity to present matters of concern to the Hearing Office. Grievant objected to the Agency’s exhibits 22 and 23 and argued they were not relevant. In its response the Agency contends the exhibits were related to the proceedings. After consideration of each party’s position, the Hearing Officer sustained Grievant’s objection to the two exhibits. Specifically, the Hearing Officer determined that the offense that was the subject of Agency Exhibit 22 postdates the offense which is the subject of the grievance before the Hearing Officer. Regarding Exhibit 23, the Hearing Officer determined the revelation in Exhibit 23 that Grievant received a formal disciplinary notice is repetitive. The Grievant also objected to Agency Exhibit 18 on three grounds – hearsay, non-business record, and unreliability. After considering Grievant’s argument and the Agency’s response, the Hearing Officer found the exhibit relevant and overruled Grievant’s objection. The Hearing Officer then admitted Agency’s exhibits 1 through 21 and 24.<sup>2</sup> There were no objections to Grievant’s exhibits. Hence, the Hearing

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<sup>1</sup> This was the parties’ first date available for the PHC.

<sup>2</sup> Grievant previously objected to Agency Exhibit 13. On the day of the hearing, he withdrew this objection.

Officer admitted Grievant's Exhibits 1 through 35. In addition, the Hearing Officer's email to the parties dated November 6, 2017, with the attached Scheduling Order was made a part of the record.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. The parties jointly moved to submit written closing arguments in lieu of presenting them at the hearing. The Hearing Officer granted the motion and set November 17, 2017, as the deadline to submit those arguments. Also, during the hearing each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, each party was represented by an advocate.

### **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (2 witnesses)  
Grievant's Advocate  
Witnesses for Grievant (1, Grievant)  
Joint witness (3)

### **ISSUE PRESENTED**

Was the written notice, demotion, and salary reduction warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Agency, among other functions, sells alcoholic beverages at its retail stores. Grievant has been employed by the Agency for over 25 years. Prior to Grievant's current discipline before this Hearing Officer, Grievant was serving as manager of one of the Agency's retail stores. He had held that position for at least 10 years. (A Exh. 1/3; G Exh. 12/2; Testimony of Grievant).
2. At the time Grievant was a store manager, his immediate supervisor was the regional manager. (Testimonies of Grievant and Regional Manager).

3. Grievant holds a permit to carry a gun and is a gun owner. In addition to Grievant working for the Agency, he is a security guard. Further, he attends a gun range. (Testimony of Grievant; A Exh. 2/14).

4. From August 2016, to April 10, 2017, Assistant Manager worked as the assistant manager of the store managed by Grievant. Assistant Manager requested a transfer from this store because he held the belief that Grievant was not giving him enough responsibility, and therefore he had no opportunity to grow professionally. Assistant Manager's transfer request was granted, and on or about April 11, 2017, he began working as an assistant manager in another Agency retail store. (Testimony of Assistant Manager; A Exh. 11/1).

5. During the time Assistant Manager worked under Grievant, he observed Grievant with a gun in the store on three separate occasions. Assistant Manager described Grievant as bringing the gun in the store in a holster fastened to his waistline, removing it from the holster, and placing the gun in Grievant's back pack. Assistant Manager noted the gun was black. He was unable to remember the specific dates that he observed Grievant with the gun. (Testimony of Assistant Manager; A Exh. 11/1).

6. Assistant Manager did not immediately report his observations of guns in the store. This is so, because Assistant Manager was a subordinate of Grievant and he was intimidated by the presence of Grievant's gun. Also, Assistant Manager feared that if he reported his observations, Grievant would retaliate against him. (Testimony of Assistant Manager).

Retaliation feared by Assistant Manager included unfair scheduling. Moreover, Assistant Manager felt unsafe due to Grievant having brought a gun in the store. (Testimonies of Regional Manager and Assistant Manager).

7. Approximately two months after Assistant Manager was transferred to another store, he informed the regional manager about his seeing guns in the store Grievant managed. Specifically, Assistant Manager told Regional Manager that he had observed Grievant with a gun in the store on three occasions. (Testimonies of Assistant Manager and Regional Manager; A Exh. 11/1).

8. During the time Assistant Manager worked in the store managed by Grievant, Assistant Manager also observed one of the sales' associates, who is a subordinate of the Assistant Manager and Grievant, with a gun in the store. When Assistant Manager asked said sales' associate about the gun, he informed Assistant Manager that he had purchased the gun from Grievant. Assistant Manager instructed the subordinate to return the gun to his vehicle. The employee did so. (Testimony of Assistant Manager).

9. Assistant Manager did not report the incident to upper management. This was the case because the sales' associate was also supervised by Grievant and had purchased the gun from Grievant. Because of this scenario, Assistant Manager was intimidated and feared retaliation.

(Testimony of Assistant Manager; A Exh. 11; G Exh. 7).

10. Grievant and Assistant Manager had supervisor/subordinate issues. Grievant felt his assistant manager was not growing on his job skills. Assistant Manager felt Grievant was not giving him the opportunity to grow. Assistant Manager also felt Grievant was not always fair. (Testimonies of Grievant and Assistant Manager).

11. On June 6, 2017, Regional Manager made an unannounced visit to the store to which Assistant Manager had been transferred. The stated purpose of this unexpected visit was to audit the store. It was at this time, Assistant Manager voluntarily approached Regional Manager and informed her that Grievant had been bringing a gun in the store he managed. (Testimonies of Assistant Manager and Regional Manager; G Exh. 3/1-2).

12. The information provided to Regional Manager on June 6, 2017, was not solicited by Regional Manager. (Testimonies of Assistant Manager and Regional Manager).

### **THE INVESTIGATION**

13. Once Assistant Manager reported on June 6, 2017, that he saw Grievant with a gun in the store, Regional Manager, per policy and direction from her superiors, launched an investigation. As a component of this inquiry, Regional Manager interviewed Grievant the next day, June 7, 2017. During the interview, Grievant admitted that he had brought a gun in the store on one occasion by accident. He also stated that upon realizing that he possessed a gun in the store, he took it back out to his car. (A Exh. 14 and Exh. 12/3; G Exh. 6; Testimonies of Regional Manager and Grievant).

14. Additionally, during the course of the investigation, Regional Manager obtained statements from Grievant and from Assistant Manager consistent with their responses to interview questions. (G Exhs. 6 and 7; A Exhs. 11 and 14).

15. Other employees in the store that were managed by Grievant were interviewed as part of the investigation as well. These other employees stated they had not seen Grievant with a gun in the store. (Testimony of Regional Manager; G Exh. 9).

### **GROUP NOTICE**

16. After Regional Manager concluded her investigation, an upper management team, consisting of the Human Resource Director, the Director of Retail Operations, and the Assistant Director of Retail Operations decided to formally discipline Grievant. Accordingly, upper management caused Regional Manager to issue Grievant a Group III Written Notice with demotion on June 27, 2017, asserting that Grievant had violated the Agency's Workplace Violence Policy. The notice specifically describes the nature of the offense as follows:

Violation of the [Agency] workplace Violence Policy- Possession of hand gun in [Agency Store]. [Grievant acknowledged that on 6/7/17 that he possessed a handgun in [Agency Store]. An email statement [Assistant Manager] provided

6/7//17 asserted that on 3 separate occasions [Grievant] carried a hand gun into [Agency Store]. Firearms are not permitted in [Agency] stores

(A Exh. 1, p. 1).

## POLICIES

17. Agency's Workplace Violence Policy (Policy 1.80) defines "workplace violence" as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

(A Exh. 6, p. 1).

18. In addition, Policy 1.80 prohibits certain actions that included, but are not limited to the following:

- ✓ Injuring another person physically;
- ✓ Engaging in behavior that creates a reasonable fear of injury to another person;
- ✓ Engaging in behavior that subjects another individual to extreme emotional distress;
- ✓ **Possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;**
- ✓ Intentionally damaging property;
- ✓ Threatening to injure an individual or to damage property;
- ✓ Committing injurious acts motivated by, or related to domestic violence or sexual harassment; and
- ✓ Retaliating against any employee who, in good faith, reports a violation of this policy.

(A Exh. 6, p. 2 (emphasis added)).

19. Employees violating Policy 1.80 are subject to disciplinary action under Policy 1.60 Standards of Conduct. (A Exh. 6, p. 2).

20. Policy 1.60, Standards of Conduct (Policy 1.60), "Attachment A" states that the "unauthorized possession of a weapon" constitutes an offense in the workplace considered the most serious of violations. Such an offense is identified as a Group III Written Offense. Moreover, under Policy 1.60, even a first Group III offense may warrant a written notice and termination. In place of termination, an employee, management may suspend the employee for up to 30 days without pay and or demote the employee with a disciplinary salary action. (A Exh. 3, p. 22).

21. Grievant had knowledge of the Workplace Violence policy. (A Exh. 21, p. 4; G Exh. 35).

22. Under Agency policy, if an employee observes a violation of Agency policy, the employee is required to inform his/her supervisor. If the violation involves the employee's immediate supervisor, the employee is required to inform the next level supervisor of the violation. Also, under Agency policy, if the employee observing the violation fails to follow the reporting policy reference here, disciplinary action can and probably will be taken against the employee. (Testimony of Assistant Manager; G Exh. 9/5).

23. Assistant Manager received verbal counseling for not immediately reporting the gun violations he observed while working in the store under Grievant. (Testimony of Regional Manager).

### **OTHER PERTINENT FACTS**

24. Employees of the Agency's retail stores are not authorized to bring guns in the stores. Bringing a firearm on Agency property is a serious matter implicating significant safety concerns. This is of particular concern considering that some clientele served by the Agency's retail stores have been drinking when they enter the store. (Testimonies of Regional Manager and Director of Retail Operations).

25. As manager of the store, Grievant had entered the store many times. In plain view on the glass door that provides the entrance to the store Grievant managed is a visible sign indicating that guns are not allowed in the store. (A Exh. 16; Testimony of Regional Manager).

26. Prior to Grievant possessing a gun in the store, Grievant had successfully completed training regarding the Agency's workplace violence policy. (A Exh. 21/4; Testimony of Regional Manager; G Exh. 35/4).

27. Assistant Manager received verbal counseling because he delayed informing the regional manager about seeing guns in the store Grievant managed. Upper management deemed the verbal counseling appropriate discipline because in effect, Assistant Manager was a whistleblower on an employee committing a serious offense in the workplace. Also the Agency does not desire to discourage whistleblowing. Harsh discipline given to a whistleblower would discourage employee from coming forward when a fellow employee is engaged in misconduct. In addition, upper management determined that Assistant Manager reasonably feared retaliation and was reasonably intimidated. (Testimony of Director of Retail Operations and Regional Manager).

It is the view of upper management that an employee should be able to blow the whistle on wrong doing without retaliation. (Testimony of Director of Retail Operations).

28. As previously mentioned, on June 7, 2017, Grievant admitted he carried a gun into the store he managed. (Testimonies of Assistant Director of Retail Operations and Grievant; A Exh. 14).

29. Before entering the store with his gun on his person, Grievant knew or reasonably should

have known he possessed a gun and that it was in violation of Agency policy. (A Exh. 16, pp. 1-2; A Exh. 21; Testimonies of Director and Assistant Director of Retail Operations and Assistant Manager).

## **RETALIATION:**

30. Grievant expressed to Regional Manager that he had concerns about Regional Manager's management style. He felt she did not trust her subordinates and Regional Manager micro-managed. Also, Grievant spoke to the Director of Retail Operations to discuss concerns he had about Regional Manager. (Testimony of Regional Manager; G Exh. 2).

Grievant also described Regional Manager as not listening to him and some of her other subordinates. In addition, Grievant described Regional Manager as attempting to threaten her subordinates by stating "I will write it." This phrase was interpreted to mean that Regional Manager may initiate disciplinary action against the subordinate to which she made the statement. (Testimonies of Regional Manager and Grievant).

31. Regional Manager was aware that Grievant had asked to speak to her supervisor about Regional Manager. She also recalls Grievant indicating that he would go to the EEOC on Regional Manager. (Testimony of Regional Manager).

32. Grievant authored an undated letter that was addressed to Regional Manager. The letter, among other things, asserts that Regional Manager is an oppressive manager and fails to treat her subordinates, including Grievant, fairly. The letter indicates that an EEOC complaint will be filed against Regional Manager. The evidence is insufficient to show that this undated letter was received by Regional Manager. (G Exh. 1; Testimony of Regional Manager).

33. Once Assistant Manager reported to Regional Manager that she had seen Grievant with a gun in the store he managed, Regional Manager was required to report it to her superiors. (G Exh. 9/5 and Exh. 31;

34. The ultimate decision regarding what if any discipline Grievant should receive was not made by Regional Manager, but by the Director and Assistant Director of Retail Operations. (Testimonies of Director and Assistant Director of Retail Operations and Regional Manager; G Exh. 21/1-2).

## **MITIGATION**

### **Mitigation**

35. The evidence establishes that Grievant had not committed a group III offense before. Further, he had no group offenses that were active at the time of the June 6, 2017 conduct. Upper management also viewed Grievant as a longtime public servant. (Stipulation of the parties; A Exh. 1; Testimony of Assistant Director of Retail Operations).

36. On Grievant's last annual performance evaluation, he was rated "a contributor." (A Exh.



4).

37. Evidence demonstrates that prior to Grievant's misconduct coming to the upper management team's knowledge, there were two other incidents of employees possessing a weapon on Agency property. Both employees were discharged. Agency did elect to mitigate Grievant's discipline. Hence, management demoted Grievant in lieu of firing him. This was the case because management considered Grievant's long service and his having gone for over a decade without receiving a formal group notice. Grievant's punishment is not inconsistent with others that possessed weapons on Agency policy. (Testimonies of Director and Assistant Director for retail Operations; G Exh. 31).

38. Human Resource recommended the firing of Grievant. However, the Director of Retail Operations decided to demote Grievant instead. If Grievant is not successful in his demoted position, the Director of Retail Operations may face adverse consequences since he and his assistant advocated for Grievant to receive discipline less harsh than termination. (Testimony of Director of Retail).

#### **OTHER FOR FACTS**

39. Grievant opines that his offense should be no more than a Group II offense as according to Grievant it was a failure to follow policy. Moreover, Grievant states that the offense was his first misconduct of that nature. (Testimony of Grievant).

40. On February 16, 2017, and March 24, 2017, Regional Manager did not inform Grievant that she was verbally counseling him. (Testimony of Grievant; G Exh. 12/1-3).

Regional Manager failed to follow Agency policy 1.60 regarding issuing a verbal warning. Thus, the Hearing Officer finds the evidence insufficient to show Grievant received a verbal warning contemplated by Policy 1.60. (Testimony of Grievant; Policy 1.60).

41. Grievant made a Freedom of Information Act request for documents relating to the grievance. The evidence is not sufficient to show the Agency withheld documents requested. (Testimonies of Regional Manager and Director of Retail Operations).

42. Grievant's incident and circumstances surrounding the misconduct was not similarly situation to Assistant Manager or sales' associate. (Testimony of Assistant Manager and Director/Assistant Director of Retail Operations).

43. Agency properly considered Grievant's prior and formal group one notice for mitigation.

44. Regardless of Special Agent's testimony or written statement, the evidence is sufficient to establish Grievant possessed a firearm on Agency Policy on three occasions. (Testimonies of Grievant and Assistant Manager; A Exhs. 11 and 14).

## **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Also, generally, the misbehaviors significantly impact agency operations. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. If management deems mitigation is appropriate for a Group III offense, the employee may be suspended without pay for up to 30 days and/or demoted. *See* Standards of Conduct Policy 1.60.

As noted in the previous section, on June 27, 2017, management issued Grievant a Group III Written Notice. Management also determined mitigation was appropriate. Accordingly, in lieu of terminating Grievant's employment, management demoted him. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

### **I. Analysis of Issue(s) before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the**

circumstances?

**A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?**

The Agency contends that Grievant violated its Workplace Violence Policy (Policy 1.80) by possessing a handgun in the store. The evidence clearly shows that this policy defines “workplace violence” as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

What is more, Policy 1.80 explicitly prohibits certain actions, to include, but not limited to **possessing, brandishing, or using a weapon that is not required by the individual’s position while on state premises or engaged in state business.** (emphasis added). Additionally, employees violating Policy 1.80 are subject to disciplinary action under Policy 1.60 Standards of Conduct. A review of the evidence demonstrates that Grievant was aware of Policy 1.80.

The evidence also shows that after Grievant’s supervisor – the regional manager – received an unsolicited report that Grievant had possessed a gun in the Agency’s store, an investigation ensued. As part of that inquiry, on June 7, 2017, Regional Manager questioned Grievant about the information she had received. Grievant then admitted he had possessed a gun in the store. Further, Grievant stated that his action occurred by accident and once he realized he had a gun with him in the store, he returned it to his vehicle.

After careful consideration of the evidence, the Hearing Officer finds that Grievant knew or reasonably should have known before he entered the Agency’s store that he was in possession of his gun. To this point, the evidence demonstrates that a visible sticker affixed to the entrance door of the store indicates that guns are not allowed in the store. The Hearing Officer finds that Grievant was the manager of this store and was well aware of this sign prohibiting a gun in the store. Equally important, other employees of the Agency testified during the hearing that they have permits to carry a concealed weapon. Each further stated that they are very conscious of where they can carry their gun and where they cannot. The Hearing Officer had an opportunity to observe these witnesses demeanor as they testified and found them credible. Grievant also holds a permit to carry a concealed gun. The Hearing Officer finds it is reasonable to conclude that Grievant also is conscious of where he can permissibly carry his gun. And in this case he was aware or reasonably should have been aware that even prior to entering the store that he was in possession of his gun. Accordingly, the Hearing Officer does not find persuasive Grievant’s claim that he accidentally entered the store with his gun. Also, even if Grievant accidentally entered the store with his gun, by his own admission he possessed a gun on Agency property which is a violation of the workplace violence policy.

Additionally, Assistant Manager testified that on three occasions he observed Grievant with a gun in the store. The Hearing Officer had an opportunity to observe the demeanor of this witness. She finds his testimony credible. First, Assistant Manager was consistent in his reports of observing Grievant with a gun in the store on multiple occasions. Second, Assistant Manager was able to describe the gun and the actions of Grievant each time Assistant Manager saw him with the gun. In addition, the Hearing Officer finds that Assistant Manager was not encouraged or solicited to make a misconduct report concerning Grievant.

Moreover, the Hearing Officer finds that Assistant manager waiting two months to report his observations and not being able to recall the exact dates he saw the weapon does not weaken his testimony. Of note, the evidence establishes that Assistant Manager was afraid to report the event when he first observed them because Grievant was his immediate supervisor and he feared retaliation and was intimidated by knowing Grievant possessed guns. The Hearing officer finds Assistant Manager's sentiments reasonable under the circumstances. Further, the fear of retaliation and feeling of not being safe knowing Grievant owned a gun in effect precluded him from immediately reporting what he had observed.

Accordingly, the Hearing Officer finds Grievant by his own admission, he violated the Agency's policy against workplace violence. Moreover, additional evidence of record substantiates that he violated the policy at least three times.

**B. Was the discipline consistent with policy and law?**

As mentioned above, Grievant violated the work place violence policy.

Regarding the Group III Written Notice, Grievant contends that he is in management and should have received no more than a Group II offense for failure to follow policy. The evidence demonstrates that the offense was more than A Group II offense. The severity of the offense is noted in Attachment A of 1.60. Possession of a weapon is specifically noted as a group III offense. While Agency has the prerogative to reduce the level of the offense when it disciplines an employee, it chose not to do so in this case. Management's election is not inconsistent with policy or law. Further, the evidence shows that others who possessed a weapon on Agency property received Group III notices and were terminated. In Grievant's favor, upper management determined his case ripe for mitigation due to Grievant's long service and time without getting a formal disciplinary notice. Accordingly, it elected to issue the Group III Written Notice , but in lieu of termination, it demoted Grievant. Nothing about management's action was inconsistent with policy.

Having made this finding, the Hearing Officer is cognizant that the evidence shows Assistant Manager knew that at least on three occasions, Grievant possessed a gun on Agency property, and another employee possessed a gun one time on Agency property. Further, the evidence shows Assistant Manager was counseled but was not demoted. That said, the evidence established that the circumstances were different from those of Grievant's. For one, Assistant Manager was a subordinate of Grievant. In addition, the other employee that Assistant Manager saw with a gun on Agency property, was a subordinate of Grievant and purchased the gun from

Grievant. Also, the evidence establishes that Assistant Manager feared retaliation from his boss, Grievant, if he had reported the incidents immediately upon his learning of them. Further, Assistant Manager was deemed a whistle blower by the Agency. And the Agency does not desire to discourage whistle blowers from reporting misconduct. For these reasons, the Hearing Officer finds Assistant Manager was not similarly situated as Grievant. Further, the evidence is not sufficient to show disparate treatment of Grievant. Accordingly, the evidence fails to establish that the Agency's discipline was inconsistent with policy or law.

The Standards of Conduct, Policy 1.60, Attachment A, indicates that the unauthorized possession of a weapon on Agency property is a Group III offense. Policy 1.60 also states that a Group III offense, even if a first occurrence, warrants dismissal. Alternatively, the Agency may demote the employee with a disciplinary salary action. The evidence establishes that the Agency chose to take the latter more lenient action in this case. Accordingly, the Hearing Officer also finds the Group III Written Notice with a demotion and salary reduction is consistent with policy and law.

Moreover, the Hearing Officer is mindful of Grievant's retaliation claim. After careful review of the evidence she finds this argument unpersuasive.

## **II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Equal Employment Dispute Resolution [“EEDR”].”<sup>3</sup> EEDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>4</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>5</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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<sup>3</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>4</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>5</sup> *Rules for Conducting Grievance Hearings* VI(B)

The Hearing Officer has found that Grievant engaged in the conduct described in the Group III Written Notice and the behavior was misconduct. Moreover as discussed above, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

In his plea for mitigation Grievant makes, among other assertions, a claim that he is being disciplined too harshly. He implies some form of disparate treatment in that Assistant Manager was not harshly disciplined for his failure to immediately report his observations of guns in the workplace. Grievant contends retaliation by the Agency. As discussed above, the evidence is insufficient to establish such unequal treatment or retaliation by the Agency. Grievant also points to his lengthy employment with the Agency and the length of time he had gone without any disciplinary action being taken against him. He denies receiving verbal warnings included in the Notice of Disciplinary Action or that his supervisor ever mentioned she was giving him verbal warnings. He further contends the Agency withheld documents he requested related to the grievance.

The Hearing Officer has considered Grievant's request for mitigation and the reasons he provides in support of that request. In addition, the Hearing Officer has weighed evidence showing that the Agency has already mitigated Grievant's discipline. Particularly, the offense is identified as serious and Group III misconduct. Accordingly, Grievant could have been terminated. Instead, upper manager decided to demote Grievant with a salary reduction. The Hearing Officer also finds the offense aggravated by the fact that he was a manager and his behavior sets an example for his subordinates. What is more, Grievant action(s) compromised the safety of the employees and customers in the store he managed.

Having considered all Grievant's arguments and all evidence whether specifically mentioned or not, the Hearing Officer finds the Agency's discipline is reasonable.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer upholds the Agency's issuance of the Group III Written Notice with demotion and salary disciplinary action.

### **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>6</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].

Entered this \_\_\_\_\_ day of \_December, 2017.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate  
Agency Representative  
Grievant's Advocate  
Grievant  
EEDR's Director of Hearings

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<sup>6</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.