

Issues: Group II Written Notice (unsatisfactory performance), Group II Written Notice (failure to follow instructions/policy), and Termination due to accumulation; Hearing Date: 10/18/18; Decision Issued: 11/08/18; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11263; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11263

Hearing Date: October 18, 2018
Decision Issued: November 8, 2018

PROCEDURAL HISTORY

On July 12, 2018, Grievant was issued a Group II Written Notice of disciplinary action for kissing a sales associate during store hours. On July 12, 2018, Grievant was issued a Group II Written Notice of disciplinary action for failing to open a store on time. Grievant was removed from employment based on the accumulation of disciplinary action.

On August 8, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 4, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

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. 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 began working for the Agency in October 2009.

On August 18, 2017, Grievant received a written counseling for failing to open his store on July 22, 2017. Grievant was advised that failure to open the store was unsatisfactory and opening the store was an essential part of his job.

Grievant had prior active disciplinary action. Grievant received a Group I Written Notice on July 7, 2017 for inappropriate comments to another employee. He received a Group II Written Notice on December 29, 2017 for failure to report to work as scheduled due to his arrest. Grievant did not open his store on time. His girlfriend brought the store keys to the clerk on duty. Grievant's work performance was unsatisfactory to the Agency.

On April 19, 2018, Grievant and the Lead Sales Associate were working in the store. They faced each other on the showroom floor, stood close together, and held hands. They smiled as they spoke. Grievant and the Lead Sales Associate kissed and then Grievant pulled his hands backwards as he held the Lead Sales Associate's hands thereby pulling her even closer towards him. An employee observed Grievant kissing

the Lead Sales Associate and became concerned that Grievant might show favoritism towards the Lead Sales Associate. The employee complained to the Regional Manager. The Lead Sales Associate received a written counseling regarding her behavior.

As a store manager, Grievant held keys and alarm codes necessary to open his store. Other employees relied on him to open the store on schedule. Grievant was supposed to arrive at work by 9:30 a.m. and have his store open for business by 10 a.m. On June 12, 2018, Grievant lost power at his home and his clocks lost power. He did not report to work on time. He opened the store late at 10:30 a.m.

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.”¹ 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 Regarding Lead Sales Associate

“[U]nsatisfactory work performance” is a Group I offense.² 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.

On April 19, 2018, Grievant was responsible for performing work duties and properly managing his store. Kissing a subordinate while working was not appropriate behavior in the workplace. Grievant’s behavior was observed by another employee who became concerned Grievant might show favoritism towards the Lead Sales Associate. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency argued Grievant should receive a Group II Written Notice for his behavior on April 19, 2018. The Agency did not present any policy or other basis to support elevating Grievant’s offense from a Group I to a Group II offense. The Agency did not establish any impact on the Agency other than raising the concern of another employee.

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

² See Attachment A, DHRM Policy 1.60.

Group II Written Notice Regarding Late Store Opening

Grievant knew he was obligated to open his store at 10 a.m. on June 12, 2018. He failed to do so and, thus, committed a Group I offense for unsatisfactory performance.

Under the Standards of Conduct, an agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had a prior active Group I Written Notice with the offense code of unsatisfactory performance issued July 7, 2017. Grievant had a prior active Group II Written Notice with the offense code of unsatisfactory performance. Accordingly, the Agency has presented sufficient evidence to elevate a Group I offense into a Group II Written Notice.

Grievant argued the disciplinary action should be reduced because a power failure was beyond his control. Although a power failure was beyond his control, this does not present a basis to reduce the disciplinary action. On prior occasions, Grievant had not opened his store on time and the Agency counseled him regarding the importance of opening his store on time. Grievant could have used a clock with a battery or made sure his cell phone was charged and used that as his clock. It is within the Agency's discretion to expect an employee to make sure a store is open on time regardless of a power outage.

Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices. The Agency's decision to remove him from employment is supported by the record.

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"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

³ *Va. Code § 2.2-3005.*

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 regarding his behavior towards the Lead Sales Associate is **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group II Written Notice for failure to open his store on time is **upheld**. Grievant's removal is **upheld** based on the accumulation of 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 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 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]

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

[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