

Issue: Group II Written Notice (misuse of State property) and Group III Written Notice with termination (theft of State records); Hearing Date: 11/05/02; Decision Date: 11/06/02; Agency: Dept. of ABC; AHO: David J. Latham, Esq.; Case No.: 5558



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5558

Hearing Date: November 5, 2002  
Decision Issued: November 6, 2002

**PROCEDURAL ISSUES**

Grievant failed to provide a working home telephone number when he requested a grievance hearing. The hearing officer mailed a notice of hearing to grievant on October 9, 2002 requesting that grievant call the hearing officer regarding instructions for the hearing. Grievant failed to call the hearing officer until the afternoon of November 4, 2002 but then terminated his call without making any requests of the hearing officer. At the hearing, grievant requested a postponement of the hearing but failed to articulate any reasons that would constitute just cause for a postponement.

In his request for relief, grievant asked for punitive damages equal to one month's salary. A hearing officer may uphold, modify or rescind disciplinary actions and reinstate lost back pay; however, a hearing officer does not have authority to award damages.<sup>1</sup>

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<sup>1</sup> Section 5.9(b)1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

## APPEARANCES

Grievant  
Regional Manager for Agency  
Assistant Attorney General for Agency  
Six witnesses for Agency

## ISSUES

Did the grievant's actions on July 22, 2002 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Did the agency discriminate against grievant on the basis of race?

## FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice issued for the misuse of state property, and from a Group III Written Notice issued for the theft of state records.<sup>2</sup> As part of the disciplinary action, grievant was removed from employment on August 6, 2002. Following failure to resolve the matter during the grievance process, grievant requested a hearing.<sup>3</sup>

The Virginia Department of Alcoholic Beverage Control (ABC) (hereinafter referred to as agency) has employed the grievant for 12 years. He was an assistant manager at the time of his dismissal. Grievant has two other active disciplinary actions – a Group III Written Notice for an unauthorized absence in excess of three days,<sup>4</sup> and a Group I Written Notice for unsatisfactory job performance, failing to follow a supervisor's instructions, and unsatisfactory attendance.<sup>5</sup>

The agency has a cooperative arrangement with the Virginia Lottery to sell and redeem scratch-off tickets and lottery tickets at the store location where grievant has been employed. The Virginia Lottery requires that its retailers physically invalidate scratch-off tickets at the time of redemption. When a customer proffers a scratch-off ticket for redemption, the retailer first authenticates the ticket by scanning it through a Sciscan machine. After paying the customer, the clerk is supposed to double-punch holes through the bar code in order to prevent the ticket from being cashed again later. Clerks sometimes

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<sup>2</sup> Exhibits 2 & 3. Written Notices issued August 6, 2002.

<sup>3</sup> Exhibit 1. Grievance Form A, filed August 19, 2002.

<sup>4</sup> Exhibit 4. Written Notice, issued September 9, 1999.

<sup>5</sup> Exhibit 6. Written Notice, issued November 15, 2000.

forget to punch tickets, or punch them improperly resulting in hanging chads that can be glued back in place. The agency's policy is to store redeemed tickets for six months in the event they are needed for audit purposes. Grievant, as assistant manager, had been assigned responsibility to destroy all tickets at the end of six months by cutting them up and disposing of them.

The Lottery routinely generates from its computer system various printouts in order to detect potential fraud. In July 2002, an information security assistant for the Lottery reviewed the printouts and noted that certain tickets were being cashed at more than one retailer. She notified a Lottery investigator and he initiated an investigation on July 23, 2002. Computer printouts revealed that 11 tickets initially cashed at grievant's store were subsequently redeemed at two other locations. Seven tickets had been initially redeemed in 2001, and four had been redeemed between July 19 and 21, 2002. One location is a convenience store approximately 30 miles from grievant's store, in the same small community where grievant resides. The other location is a convenience store in a community not far from grievant's store. When a lottery ticket is redeemed at two different retailers, only the most recent retailer is reimbursed by the Lottery.

The investigator went to both convenience stores and obtained security videotapes of the time periods when the tickets had been redeemed. In both cases, grievant entered the two convenience stores during the time the tickets had been cashed.<sup>6</sup> He conducted transactions with the clerk and, in both cases, it appears that the clerk scanned tickets given him by the grievant.<sup>7</sup> The investigator interviewed grievant on July 23, 2002 and noted that grievant had a full head of hair, a full beard, an earring and was wearing a baseball cap. During this first interview, grievant denied having been in the nearby convenience store. When grievant gets off work each night, he drinks a pint of rum on the way home and claims that sometimes he doesn't know where he goes. Although the resolution of the videotapes is not high quality, grievant now admits that he is the person shown on the tapes.<sup>8</sup> Grievant acknowledges that he often goes to both convenience stores.

The investigator conducted a follow-up interview with grievant two days later on July 25, 2002. On this occasion, grievant had shaved his head completely bald, had shaved off his beard, and was not wearing either an earring or a baseball cap. Grievant avers that he made all these changes on July 24,

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<sup>6</sup> The times recorded on the videotapes vary slightly from the times of the ticket transactions because the computers are not synchronized with the security camera equipment.

<sup>7</sup> Because the security videotapes are not high quality, and because they record images only every few seconds, the evidence is insufficient to determine with one hundred percent certainty the precise actions taken by grievant during the transactions. However, the tapes strongly suggest that grievant was cashing tickets because the clerks went to the Sciscan machines immediately after greeting grievant at the counter.

<sup>8</sup> Several of grievant's coworkers have subsequently viewed the videotapes and corroborated that grievant is the person on the tapes.

2002 because, "I just decided I wanted a new look." The investigator sent copies of his completed report both to his own superiors and to ABC's regional manager. The regional manager reviewed the matter, and after consultation with a human resource manager (who is black), issued two written notices to grievant and terminated his employment on August 6, 2002. The investigation results have been referred to the Commonwealth's Attorney to decide whether to pursue criminal prosecution of the grievant.

During his career, grievant had at one time been demoted from store manager to clerk. In 2001 grievant applied for an opening of assistant store manager. The regional manager believed grievant had overcome the problems that resulted in his earlier demotion and felt that grievant was ready for assistant manager responsibilities. Although the central office had reservations about promoting grievant, the regional manager spoke on behalf of grievant and convinced central office to promote grievant on July 10, 2001.<sup>9</sup>

### APPLICABLE LAW 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 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).

Code § 2.2-3000 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 the 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 Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training<sup>10</sup> promulgated

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<sup>9</sup> Exhibit 7. Promotion letter from employment manager to grievant, June 26, 2001.

<sup>10</sup> Now known as the Department of Human Resource Management (DHRM).

Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>11</sup> Examples of Group III offenses include theft or unauthorized removal of state records. Group II offenses include unauthorized use or misuse of state property or records.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the grievant must prove his case by a preponderance of the evidence.<sup>12</sup>

The agency has shown that it is more likely than not that grievant: 1) removed from agency premises previously redeemed lottery tickets without authorization to do so, and 2) redeemed the same lottery tickets at convenience stores, thereby depriving the agency of revenue to which it was entitled. While the agency has not provided any direct evidence of grievant's actions, it has proffered substantial circumstantial evidence. First, grievant was the person responsible for destroying and disposing of all tickets redeemed in his store. Therefore, he was the person who had access to the seven tickets that had been redeemed in 2001. Second, the 11 tickets cashed at two convenience stores were all initially redeemed in grievant's store. Third, grievant admits to being in both convenience stores on the dates and at the times when the tickets were redeemed the second time. While grievant attributes his presence in the two stores at those times to coincidence, the chances of two such coincidences are so infinitesimally small as to be virtually nil. Fourth, grievant's decision to completely shave his head and beard the day after he learned that he had been videotaped on a surveillance camera is also highly unlikely to be coincidental. It is concluded that grievant attempted to alter his appearance in an attempt to make it appear that he was not the person on the videotapes.

For these reasons, the agency has borne the burden of proving, by a preponderance of evidence, that grievant committed the offenses for which he has been disciplined. Grievant denies cashing the tickets. Due to the preponderant weight of the circumstantial evidence, the hearing officer concludes that grievant's denial is self-serving and not credible.

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<sup>11</sup> Exhibit 8. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>12</sup> § 5.8, *Grievance Procedure Manual, Rules for the Hearing*, Effective July 1, 2001.

Grievant also objected to a situation in 1999 where, for a period of time, a wage employee was supervising grievant. Grievant didn't feel that a wage employee should be supervising a classified employee. Grievant started calling in sick frequently and developed a negative attitude. He was then absent without authorization for more than three days and received a Group III Written Notice.

### Racial discrimination

To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group; (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's race.<sup>13</sup> In this case, grievant meets the first three prongs of the test because he is a member of a minority racial group, received disciplinary action, and was apparently performing at an acceptable performance level.<sup>14</sup> An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact.

Grievant focused on an incident that occurred in 1998. Grievant's manager at that time walked up to grievant and said, "Hey Sambo, do you want to go to lunch?" Grievant (whose first name is Samuel) took offense to the Sambo reference. The manager immediately realized that grievant had misinterpreted his intent and apologized to grievant. Grievant reported the matter and it was formally investigated.<sup>15</sup> It was concluded that the manager had not intended the word to be racially derogatory; he was only using it in the same manner that Jimbo is sometimes used with people named Jim. Grievant also objected to the same manager calling employees "roach." The manager uses this term with both black and white employees. Grievant did not demonstrate that the word roach is a pejorative term for his or any race.

Grievant did not proffer any statistical evidence to support his allegation, however, he offered anecdotal evidence to suggest that non-white employees are removed from employment more often than white employees for similar offenses. A black employee was discharged for falsification of time sheets while two white employees were disciplined but not discharged for essentially the same offense. However, the agency notes that the black employee's abuse of time was more egregious and that he had just finished his probationary period with the agency. In contrast, the white employees' time abuse was relatively minor and both had very long service with the agency; therefore, mitigation was applied and they were retained in service.

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<sup>13</sup> Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4<sup>th</sup> Cir.1998) (unpub).

<sup>14</sup> No evidence of grievant's performance was proffered by either party; it is therefore presumed that grievant's performance was acceptable.

<sup>15</sup> Exhibit 10. Letter to grievant from Law Enforcement Bureau Director, August 20, 1999.

Grievant claims that his punishment is severe when compared with that of a white male manager who received a Group III Written Notice and was transferred when an audit disclosed an inventory shortage of \$1,800 over a six-month period. In that case, it was not shown that the manager was personally responsible for the inventory shortage. Rather, he was disciplined because of bookkeeping discrepancies discovered in connection with the audit. Grievant also alleged that a former manager was discriminating against him in 1998 by placing him on temporary administrative leave for making an obscene gesture at a customer.<sup>16</sup>

The agency noted that a white male who was found to have stolen money was discharged and criminally prosecuted. Similarly, a white female was discharged for taking merchandise without paying for it. Another white employee was discharged for using the word “nigger” in the workplace. The manager of grievant’s store is black and not experienced or seen any racial discrimination in his seven years with the agency. The manager of a location where grievant previously worked is black; he has not experienced or seen any racial discrimination in his eleven years with the agency. The manager who issued the Group I Written Notice to grievant is black.

### Conclusion

The grievant has not presented sufficient evidence to support his allegation of racial discrimination. Rather, the totality of the evidence supports that grievant was discharged for commission of a Group III offense and a Group II offense. Based on the seriousness of the offenses, and his previous disciplinary history, there is insufficient basis to mitigate the discipline issued.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and the Group II Written Notice issued to grievant on August 6, 2002, and his termination from employment on the same date are UPHELD. The disciplinary actions shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

### APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

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<sup>16</sup> The customer had given grievant the middle finger as he walked out of the store and grievant then gave the middle finger to the customer.



1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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>17</sup>

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

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David J. Latham, Esq.  
Hearing Officer

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<sup>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.