

Issue: Group III Written Notice with termination (theft and sale of State property);
Hearing Date: 04/13/04; Decision Issued: 04/14/04; Agency: DMHMRSAS; AHO:
Carl Wilson Schmidt, Esq.; Case No. 656



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 656

Hearing Date: April 13, 2004
Decision Issued: April 14, 2004

PROCEDURAL HISTORY

On February 25, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for "theft and sale of State property." On February 25, 2004, Grievant timely filed in a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 29, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for theft and sale of State property.

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. 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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a housekeeper at one of its facilities until his removal on February 25, 2004. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

On December 21, 2003, two Agency employees went to a local department store to purchase various clothing, toys, and 13 bottles of cologne and 13 bottles of body deodorant for residents of a living unit at the Facility. The cologne and deodorant were placed in a closet where clients' clothing is stored. The closet was located in a room accessible through a door opening to the dayroom and a door opening to the shower area. These doors were usually locked but sometimes remained open during the day. Grievant had keys enabling him to access the room where the closet was located.

On December 23, 2003, Grievant and Ms. A drove Grievant's vehicle to pick up lunches for other employees working on their unit. After obtaining the lunches and returning to Grievant's vehicle, Grievant reached into the back seat and pulled out one bottle of deodorant body spray and a gift pack containing three bottles of cologne. Grievant offered to sell the items to Ms. A for \$3. Ms. A observed that the gift pack had a price tag in the amount of \$5.99 or \$7.99. She asked Grievant where he obtained the items. Grievant told her not to worry about it. Ms. A took the items with her. Later that evening, the Grievant spoke with Ms. A by telephone and told her that if anyone asked her where she had obtained the cologne and deodorant she should say that she bought them at Wal-Mart. She informed Grievant that she would not tell anyone she purchased the items at Wal-Mart when she had not done so.

Sometime during the day of December 23, 2003, housekeeping staff noticed that the cologne and deodorant were missing. Ms. A heard a rumor that she had stolen the items. She became angry and confronted Grievant in front of a housekeeping supervisor. Grievant could not establish that he purchased the items.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).¹ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Theft or unauthorized removal of ... state property” is a Group III offense.² The Agency has presented sufficient evidence to establish that Grievant removed bottles of cologne and deodorant from the Facility for several reasons: (1) Grievant had regular access to the area where the items were located, (2) he possessed the items on the day they were stolen, (3) he sold them to Ms. A for a price below the retail price, (4) he contacted Ms. A and asked her to misstate the how she obtained the items if asked, and (5) he could not establish how or when he purchased the items. When an employee receives a Group III Written Notice, the first occurrence normally should warrant removal. There are no mitigating circumstances justifying a reduction in the disciplinary action.

Grievant contends he did not take the cologne and deodorant and that many other employees had access to the items. Grievant testified that he obtained the items from an unknown woman he met in a parking lot of a convenience store. Although there were no witnesses who observed Grievant take the items, there is sufficient evidence to prove by a preponderance of the evidence that Grievant took the items. Grievant's assertion of how he obtained the items is unusual and difficult to believe under the facts of this case.

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

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

² DHRM Policy 1.60(V)(B)(3)(d).

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.³

[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].

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer