

Issues: Two Group II Written Notices with demotion and salary reduction (failure to follow supervisor's instructions and failure to follow written policy); Hearing Date: 04/28/05; Decision Issued: 05/03/05; Agency: ABC; AHO: David J. Latham, Esq.; Case No. 8034



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8034

Hearing Date: April 28, 2005
Decision Issued: May 3, 2005

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Five witnesses for Agency
Observer for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from two Group I Written Notices - one for failure to follow a supervisor's instructions¹ and, one for failure to follow written policy.² Because the grievant had an active Group III Written Notice,³ the agency could have removed grievant from employment. However, the agency elected to consider the mitigating circumstance of grievant's long years of service and instead demoted him to assistant store manager with a salary reduction of five percent. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴ The Department of Alcoholic Beverage Control (Hereinafter referred to as "agency") has employed grievant for 26 years. He was a retail store manager at the time of the disciplinary action and has received an overall rating of "Contributor" on his three most recent performance evaluations.⁵

The agency has a cooperative arrangement with the Virginia Lottery whereby the agency sells Lotto scratch-off tickets in its retail sales locations. As store manager, grievant is responsible for maintaining ticket security and accountable for receipts from sold tickets. In 2001, the grievant's supervisor issued a written memorandum to all store managers requiring that lottery tickets be inventoried at the end of each day.⁶ The Regional Manager found grievant's lottery ticket inventory to be "perfect" in June 2004.⁷ Grievant conducted a lottery ticket inventory at the end of July 2004 and all tickets were accounted for. The agency disseminates new policies and policy changes via its internal e-mail system. In early August 2004, the agency issued a written policy requiring that Lottery Scratch Tickets be balanced on a daily basis.⁸ The policy requires, *inter alia*, that an inventory report be prepared in the computer system and that a printed report be generated. Grievant does not recall seeing this policy. However, grievant avers that he was performing the required inventory procedure on a random basis but was not printing a hard copy report.

Grievant was on annual leave during the last two weeks of August 2004. When he returned from vacation on September 1, 2004, he conducted an inventory of Lotto scratch-off tickets and discovered that 85 tickets (worth \$160.) were missing. He was dismayed about the missing tickets and mentioned it to the two employees who worked in his store. One of the employees told him that,

¹ Agency Exhibit 2, p.1. Group I Written Notice, issued February 1, 2005.

² Agency Exhibit 2, p.12. Group I Written Notice, issued February 1, 2005.

³ Agency Exhibit 2, p.27. Group III Written Notice, issued August 13, 2004 for selling alcohol to a person not of legal age to purchase alcoholic beverages.

⁴ Agency Exhibit 1. Grievance Form A, filed February 1, 2005.

⁵ Grievant Exhibits 3, 4, & 5. Performance evaluations for 2004, 2003 & 2002, respectively.

⁶ Agency Exhibit 2. Memorandum from Regional Manager to store managers, December 20, 2001.

⁷ Grievant Exhibit 2. Regional Manager's Store Evaluation, June 3, 2004.

⁸ Agency Exhibit 5. SOP 403-0001, *Administrative Functions of the Triversity POS System*, August 4, 2004. NOTE: On September 22, 2004, the agency issued policy SOP 403-0005, *Lottery Procedures*, (Grievant Exhibit 1) that contains virtually the same daily inventory procedure but states that the guideline is to be used at the discretion of the store or Regional Manager.

because she had been the senior employee during his vacation, she felt responsible for the loss and she gave grievant \$160 for the tickets.⁹ She did not admit to taking the missing tickets. Grievant promptly called his supervisor and reported what had occurred. Soon thereafter, the supervisor called grievant and told him to return the money to the employee.

During September and October, the Regional Manager and grievant carefully scrutinized ticket inventory on a daily basis to determine whether any more tickets would turn up missing. A covert camera was installed to record any further ticket losses and determine who was responsible. No further tickets were taken during this time.

Early on the morning of October 26, 2004, grievant met with his immediate supervisor (Regional Manager) and the Assistant Director of Stores. Grievant's superiors advised him that the missing tickets issue was going to be turned over to the agency's Law Enforcement Division for criminal investigation. Pursuant to agency policy requiring that all investigatory actions shall be kept strictly confidential,¹⁰ they instructed grievant to take no further action unless instructed to do so. Grievant said he wanted to confront the employee suspect but was told not to do so. A short time after the meeting ended, grievant telephoned the Regional Manager and said he wanted to confront the suspect; the Regional Manager told him not to do so. Half an hour later, grievant called the Regional Manager, said he had spoken with the female suspect, and that she had confessed to taking the tickets.¹¹ Grievant subsequently acknowledged that he had not followed supervision's instructions because he "made a rash decision out of fear of possible job termination."¹²

During the same time period, another store experienced a significantly larger loss of tickets. That store manager had not been conducting a daily inventory of tickets and was disciplined with a Group I Written Notice.¹³ Because the female suspect in grievant's store had also worked at the other store, she was a suspect in the loss of tickets at the other store. When grievant confronted her and she confessed to taking tickets at grievant's store, the investigation at the other store was "blown" according to the investigator.

The Regional Manager discussed grievant's offenses with the Human Resources department and they decided in mid-November that discipline was necessary. However, because of the length of grievant's state service, they wanted to retain him in employment rather than discharge him. Accordingly, the issuance of discipline was delayed until February 2005 when a vacancy for an assistant store manager occurred. In lieu of termination, the agency issued two

⁹ The redemption value of the tickets is unknown. Undoubtedly some of the tickets were cashed for amounts in excess of the \$1.00 purchase price.

¹⁰ Agency Exhibit 4. Policy *Office of Internal Audit*, revised October 2002.

¹¹ The employee who admitted to taking the tickets was removed from state employment and criminally prosecuted for petty larceny.

¹² Agency Exhibit 2. Memorandum from grievant to supervisor, January 27, 2005.

¹³ Agency Exhibit 7. Written Notice, February 2, 2005.

Group I Written Notices, demoted grievant from store manager to assistant manager, and reduced his salary by five percent.¹⁴

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.

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 employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 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

¹⁴ When disciplinary demotion occurs, the employee's salary must be reduced by *at least* five percent. See Section II.C, DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁵ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions and, failure to follow applicable established written policy are two examples of a Group II offense.¹⁶

Failure to comply with supervisor's instructions

Grievant acknowledges that he confronted the female suspect after his supervisor twice told him not to do so. It is understandable that grievant was motivated by his fear of being held accountable for the ticket loss and possibly being in jeopardy of losing his job. Nonetheless, grievant's supervisor told him at least twice that he was not to confront the suspect employee. His decision to ignore his supervisor's unambiguous instruction was a Group II offense.

Grievant points out that he was not aware that the investigation had been extended to another store. However, it is typical that criminal investigators disclose information only on a need-to-know basis. Because grievant had no need to know about the other store being investigated, he was not told about that aspect of the investigation. One can speculate that, had he been told, he might not have confronted the suspect employee. However, such speculation serves no purpose. Most importantly, it does not excuse grievant's willful disregard of his supervisor's direct instruction.

Failure to follow written policy

In 2001, within months after grievant had become a store manager, the Regional Manager issued a written directive requiring store managers to inventory lottery tickets at the end of each day. Grievant acknowledged that he had not been following this procedure although he did inventory tickets at the end of each month and on a random basis. In early August 2004, all store managers were directed that *daily* balancing of Lottery scratch tickets "must be performed after Close of Business or prior to Store Opening."¹⁷ Grievant avers that he does not recall seeing the August 2004 policy. Even if that is correct, grievant had been directed in writing in 2001 to inventory tickets at the end of each day. His failure to comply with applicable established written policy is a Group II offense.

The agency asserts that grievant's failure to inventory Lottery tickets on a daily basis resulted in a loss to the agency. Since grievant was on vacation during the period when the tickets were taken, he cannot be held accountable for the ticket loss during this time. During grievant's absence, the Regional Manager

¹⁶ Agency Exhibit 3. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁷ Agency Exhibit 5. *Ibid.*

assigned personnel from other locations to oversee grievant's store. It would appear that those person(s) would have been responsible for conducting daily inventory during grievant's absence. Nonetheless, grievant's admission that he had only been performing random checks was not in compliance with written policy.

Summary

Grievant considers it unfair that he did not have any warnings prior to the issuance of disciplinary action. The *Standards of Conduct* provides that supervision can counsel employees or issue disciplinary action. If an offense is sufficiently serious, there is no requirement that counseling occur prior to disciplinary action.

Grievant acknowledged that he had committed both offenses cited in the Written Notices. Both offenses were Group II offenses. The agency could have removed grievant from employment for *either* offense because he already had an active prior Group III offense. In view of his long service, the agency applied mitigation by reducing each offense to Group I and, by only demoting him in lieu of removing him from state employment. The agency has been particularly lenient in retaining grievant in state employment in order to not adversely affect his ability to retire in the future.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for failing to follow a supervisor's instructions, the Group I Written Notice for failing to comply with applicable established written policy, and grievant's demotion with salary reduction effective February 10, 2005 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 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 15-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.¹⁸ 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.¹⁹

[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]

David J. Latham, Esq.
Hearing Officer

¹⁸ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.