

Issue: Group I Written Notice (failure to follow store security policy); Hearing Date: 06/02/05; 06/21/05; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8068



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8068

Hearing Date: June 2, 2005
Decision Issued: June 21, 2005

PROCEDURAL HISTORY

On February 11, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

Store security practices were not followed. [Grievant] admits to hearing the store's stockroom bell chime but did not respond to the incident. Further, [Grievant] admits to leaving the safe on day lock on a regular basis in violation of WIR policy. Both of these incidents were confirmed during the investigation in which store funds were lost.

On February 22, 2005, Grievant timely filed 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 May 5, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee

Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for leaving the store's safe unlocked contrary to policy.

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 Alcoholic Beverage Control employs Grievant as a manager at one of its stores. He has been employed by the Agency since January 2, 2001. He possesses a B.A. and an M.B.A. The purpose of his position is:

Manages and operates an ABC store in compliance with the requirements of the policies and operational Procedures of the Department of Alcoholic Beverage Control. Plans, organizes, and directs a store's operation and participates in all activities that are essential to the operation of an ABC Store.¹

Grievant received an overall rating of "Contributor" as part of his October 2004 evaluation.²

Grievant's store has a safe with a dial lock. To open the lock, one must spin the dial to the appropriate combination and then pull a handle and open the safe door. If the safe is unlocked and the door pulled open and then closed, the safe does not automatically relock. This is referred to as day-lock even though the safe is not locked. One must spin the dial again to lock the safe.

¹ Agency Exhibit 7.

² Grievant Exhibit 14.

On February 14, 2003, an Agency employee audited Grievant's store and concluded:

The location was keeping the safe on day lock during the day. The type of safe that the location has is one that only has a combination lock with no inner compartment and must remain locked at all times.³

Grievant was advised of the audit findings. He responded, "I was under the impression that we have to keep [the safe] on day lock. We have been keeping the safe locked, since I have been informed by the internal audit."⁴

On March 18, 2003, Grievant's Supervisor performed an evaluation Grievant's store. The Supervisor found that the safe was not secured according to guidelines.⁵ The Supervisor commented that the "Safe [was] on day lock and should not have been." Grievant responded to the evaluation by saying, "I was getting ready for the bank deposit when you [Supervisor] walked in the store. I will make sure to keep it locked."⁶

On April 17, 2004, someone entered the area of the stock room where the safe is located. Grievant heard the chime ring indicating someone had entered the stock room. He was too busy with customers to immediately go to the stock room to determine why the chime had sounded. By the time Grievant had finished assisting customers, he had forgotten about the chime sounding and did not go to the stock room. Grievant later noticed that the money from the safe was missing. Grievant reported the theft to his Supervisor. Grievant and the Supervisor counted the money and concluded \$902 was missing. The Agency began an investigation.

During the course of the investigation, Grievant spoke with an Internal Auditor. Grievant stated to the Internal Auditor that on several occasions in the past, he left the safe on day lock. Those times occurred when he was next to the safe counting money or making change. These times occurred Grievant had been instructed by the Supervisor to refrain from placing the safe in day lock.

Investigators did not determine who removed the money from the safe. The Agency has no reason to believe Grievant removed the money.

CONCLUSIONS OF POLICY

³ Agency Exhibit 6.

⁴ Agency Exhibit 12.

⁵ The Supervisor pulled on the handle to the safe door and it opened because it was not locked.

⁶ Grievant Exhibit 7.

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).⁷ 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).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense⁸, but the Agency issued Grievant a Group I Written Notice. Grievant was advised by the Supervisor to keep the safe locked and not in day-lock. He was also advised of this requirement by an Agency audit. He acknowledged that he would keep the safe locked. Grievant failed to follow his supervisor’s instructions to refrain from having the safe on day-lock. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.⁹

Grievant argues that the only time he had the safe on day lock was when he was sitting in front of the safe and, thus, his presence served as the additional security protecting the contents of the safe. Although Grievant’s presence in front of the safe added security, this did not permit him to disregard the Supervisor’s instructions. When the Supervisor evaluated Grievant’s store on March 18, 2003, Grievant was standing next to the safe “getting ready for the bank deposit” with the safe on day lock. Grievant was instructed by the Supervisor not to permit the safe to be on day lock. Grievant’s argument fails.

Grievant argues that Agency policy, *SOP Guidelines for the Management and Security of Store Funds*, which provides, “All safes equipped with a keyed lock may remain on ‘Day Lock.’”¹⁰ Grievant’s argument fails because the safe in his store is not equipped with a “keyed lock”. Having a keyed lock inside the safe would permit money to be secured in the chamber locked by a key even though the outer door the safe was unlocked in day-lock. When Grievant’s safe is in day lock, the door may be opened and fund removed by anyone at anytime.

Grievant questions why the Agency took so long to issue disciplinary action. DHRM Policy 1.60(VI)(A) requires corrective action be taken as “soon as a supervisor

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ DHRM § 1.60(V)(B)(2)(a).

⁹ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

¹⁰ Agency Exhibit 8.

becomes aware of an employee's unsatisfactory behavior or performance."¹¹ The Agency finished its investigations in August 2004 and, thus, should have issued the disciplinary action then, according to Grievant.

Grievant is correct that the Agency should have taken disciplinary action sooner than February 11, 2005. The Agency's delay was not due to improper motive or neglect such that it would justify reversal of the disciplinary action. Grievant and the Supervisor were involved in discussions regarding Grievant's work performance. They had reached some resolution of these concerns in August 2004. The Supervisor did not wish to take disciplinary action in August 2004 for fear of being perceived as having retaliated against Grievant and jeopardize the success Grievant and the Supervisor had in resolving their conflicts. In addition, the Agency accounted for the delay by reducing the disciplinary action from a Group II Written Notice to a Group I Written Notice. Accordingly, the Agency's delay in this case is not sufficient to justify removal of the disciplinary action.

Grievant contends the Supervisor has a poor management style. Grievant offered examples of difficulties he has had working under the Supervisor. No credible evidence was presented, however, showing that the Supervisor issued disciplinary action because of an improper motive or poor management.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **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. Please address your request to:

Director
Department of Human Resource Management

¹¹ Agency Exhibit 3.

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 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. 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.¹²

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.