

Issue: Group II Written Notice with demotion, transfer and pay reduction (failure to follow supervisor's instructions); Hearing Date: 06/22/05; Decision Issued: 07/11/05; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8094; **Administrative Review**: **HO Reconsideration Request received 07/25/05; HO Reconsideration Decision issued 07/29/05; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied. Administrative Review: DHRM Ruling request received 07/25/05; Outcome: pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8094

Hearing Date: June 22, 2005
Decision Issued: July 11, 2005

PROCEDURAL HISTORY

On February 8, 2005, Grievant was issued a Group II Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for failure to follow a supervisor's directive.

On March 3, 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 she requested a hearing. On May 31, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 22, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with demotion, transfer, and pay reduction for failure to follow a supervisor's instructions.

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 an Assistant Store Manager at one of its stores. Prior to her demotion and transfer she was a Store Manager at another store. No evidence of prior disciplinary action involving Grievant was introduced during the hearing.

Grievant received an overall rating of "Below Contributor" on her October 2004 work performance evaluations.¹ On November 5, 2004, the Supervisor and Grievant met to discuss Grievant's duties under a Performance Plan drafted by the Supervisor. Grievant was instructed to improve her work performance by:

Communications issues related to store with assistant manager daily.

Discuss issues to be decided regarding operations with all management.

Rotate management duties:

- Schedule
- Month end inventory
- Bank deposits
- Lottery orders
- Daily paperwork
- Shipments

[Ensure] all fraudulent actions reported to management; management notify proper authorities

¹ Agency Exhibit 3.

Ensure employees are using mini safes

Using POS challenges

Signing timesheets as instructed

Continue to be flexible to accept changes

Ensure Dress Code and use of cell phones are enforced

Explain policies to employees as issues regarding them arise.²

The Supervisor conducted a store audit of Grievant's store on December 10, 2004. The Supervisor observed problems with the consolidation of lottery tickets for November 2004 and that "there was a large discrepancy in which [Grievant] made no attempt to investigate or account for the shortage." Grievant had not drafted schedules, replenishment, approved timesheets, performed inventory, or ensured that the store had adequate staffing.

The Supervisor and Grievant met on December 14, 2004 regarding Grievant's work performance. The Supervisor reminded Grievant she was to, "ensure all reports are submitted and accurate and account for all store inventory including merchandise and lottery with minimal discrepancy." Grievant was also reminded of her obligation to properly schedule employees to ensure proper staffing at the store.³

The Supervisor audited Grievant's store on January 13, 2005 and noted several problems. Consolidated inventory reports for Grievant's store did not balance for November 30, 2004, December 30, 2004, and January 3, 2005. Lottery figures did not balance because Grievant had left out a required form. When the Supervisor questioned Grievant about these problems, Grievant's response was to blame other store employees rather than taking responsibility.⁴

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

² Agency Exhibit 4.

³ Agency Exhibit 6.

⁴ Grievant did not testify during the hearing but submitted documents denying the Supervisor's assertions.

force.” DHRM § 1.60(V)(B).⁵ 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 offense.⁶ Grievant’s work performance did not improve in November and December 2004, and in January 2005. She continued to have account discrepancies and shortages in her store’s records, including lottery accounting. Grievant continued to abruptly change employee work schedules generating complaints from store employees. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.⁷

The Agency contends Grievant should be demoted with a role change and pay reduction based on her failure to comply with her Performance Plan. Performance demotions with pay decrease is permitted pursuant to DHRM Policy 1.40. In this instance, however, the Agency did not demote Grievant as part of a performance demotion. The Agency demoted Grievant based on a Group II Written Notice. In other words, the Agency took action against Grievant as part of a **disciplinary** demotion and not as part of a **performance** demotion. An agency may demote an employee for disciplinary reasons only if the agency can present sufficient evidence to support a disciplinary demotion. Evidence supporting a Group II Written Notice is not sufficient to support a disciplinary demotion under DHRM Policy 1.60. Although the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice, that notice does not support demotion, transfer, and pay reduction.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency’s demotion, transfer, and pay reduction is **rescinded**. The Agency is ordered to reinstate Grievant to her former position prior to transfer or, if occupied, to an objectively similar position. The Agency is ordered to pay Grievant full back pay from which interim earnings must be deducted from the time of her demotion and pay reduction.

⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁶ DHRM § 1.60(V)(B)(2)(a).

⁷ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

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
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.⁸

[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].

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8094-R

Reconsideration Decision Issued: July 29, 2005

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

The Department of ABC seeks reconsideration of the Hearing Decision on the grounds that it presented sufficient evidence to demote Grievant pursuant to DHRM Policy 1.40.

DHRM Policy distinguishes between a performance demotion and a disciplinary demotion.⁹ A performance demotion occurs pursuant to DHRM Policy 1.40, Performance Planning and Evaluation:

An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee’s performance level. A demotion or reassignment to another position will end the re-evaluation period.

When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the re-evaluation period, the action is considered a Performance Demotion and the agency must reduce the employee’s salary at least 5%. (See Policy 3.05, Compensation.)

⁹ See, DHRM Policy 3.05, Demotion, page 2 of 22.

A disciplinary demotion occurs pursuant to DHRM Policy 1.60, Standards of Conduct:

Disciplinary action should be used in response to the commission of offenses, and may consist of a Written Notice and ... transfer or demotion along with a disciplinary salary action (see section II.C)¹⁰

The Agency has not presented any document showing that it demoted Grievant pursuant to DHRM Policy 1.40. The hearing record shows the Agency has taken no action to demote pursuant to DHRM Policy 1.40.

The Agency has presented a document showing that Grievant received a disciplinary demotion pursuant to DHRM Policy 1.60. The Agency issued Grievant a Group II Written Notice with "Role change to lower pay band with 5% **disciplinary** pay reduction effective 2/10/05." (Emphasis added). In the absence of prior disciplinary action, the maximum discipline appropriate pursuant to a Group II Written Notice is a ten work day suspension.¹¹ Accordingly, there is no basis in policy to make a disciplinary demotion of Grievant.

The Agency may very well have intended to issue a Group II Written Notice pursuant to DHRM Policy 1.60 but to provide Grievant with a performance demotion pursuant to DHRM Policy 1.40.¹² The record as presented shows that the mechanism used by the Agency to demote Grievant was the Written Notice. Nothing in the record shows the Agency actually demoted Grievant as a performance demotion pursuant to DHRM Policy 1.40. The distinction in this case is not ministerial or *de minimus*. DHRM Policy 1.60 and Policy 1.40 are significantly different policies. Procedural due process considerations require the Agency to make a proper distinction and to properly notify Grievant of the mechanics it wishes to use to demote her. Whether Grievant received a disciplinary demotion or a performance demotion affects the burden of proof in the grievance and affects how Grievant may wish to defend the action taken against her. The Hearing Officer lacks the authority to correct mistakes made by the Agency that are material and affect procedural due process.

The Agency offers as a new exhibit a 1/25/05 Interim Evaluation obtained by the HR Director from her files and after the hearing. Newly discovered evidence does not include evidence which existed at the time of the hearing and could have been presented during the hearing. The Interim Evaluation was in the Agency's files and could have been presented to the Hearing Officer during the hearing. Accordingly, the Interim Evaluation is not newly discovered evidence and does not form a basis to reopen the hearing.

¹⁰ DHRM Policy 1.60(VII)(A).

¹¹ The Agency did not suspend Grievant.

¹² There are many good reasons for managers to take action pursuant to DHRM Policy 1.40 and also to issue disciplinary action under the Standards of Conduct.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer