

Issues: Group I Written Notice (unsatisfactory performance), Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 11/02/09; Decision Issued: 11/03/09; Agency: ABC; AHO: Cecil H. Creasey, Jr. Esq.; Case No. 9209; Outcome: Full Relief.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 9209

Hearing Date: November 2, 2009  
Decision Issued: November 3, 2009

**PROCEDURAL HISTORY**

On July 24, 2009, Grievant, a clerk senior for the Department of Alcoholic Beverage Control (“Agency”) was issued two Group Notices and terminated from employment based on the accumulation of active Written Notices. On July 24, 2009, a Group I Written Notice was given for failure to enter an ID into the POS system on June 13, 2009, when presented by 4 customers and for failure to cooperate fully during an investigation by providing misleading information. The second Written Notice, a Group II, was issued for failure to follow instructions and/or policy by failing to enter customer ID in to the POS system on June 13, 2009, and, again, on July 3, 2009. Prior to issuance of these two written notices, the Grievant had an active Group III Written Notice issued July 29, 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 October 5, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution (“EDR”). A pre-hearing conference was held by telephone on October 13, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, Monday, November 2, 2009, on which date the grievance hearing was held, at the Agency’s headquarters facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency’s Exhibits. The Grievant did not submit any additional documentation. All evidence presented has been carefully considered by the hearing officer.

**APPEARANCES**

Grievant  
Counsel for Grievant  
Representative/Advocate for Agency  
Witnesses

## ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests rescission of the Group I and II Written Notices, reinstatement, back pay, and attorney's fees.

## BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

## 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.

The Agency's SOP No. 403-1011, Legal Sales Requirements, contains the following policy statement:

WHOLESALE/RETAIL OPERATIONS DIVISION POLICY FOR RETAIL EMPLOYEES IS THAT IF A PRUDENT PERSON WOULD JUDGE A PERSON ATTEMPTING TO MAKE A PURCHASE OR A RETURN IN OUR STORES TO BE UNDER 30 YEARS OF AGE, AN ACCEPTABLE FORM OF IDENTIFICATION MUST BE CHECKED AND THE POS ID CHALLENGE MUST BE PERFORMED.

The policy also states that “[u]pon requesting the customer to furnish I.D., the POS ID Challenge **MUST** be performed . . .” (emphasis in original). Agency Exh. 3.

The Agency also, by policy, requires cooperation with internal investigations:

An employee may be directed to answer questions for administrative purposes. The failure to answer a question after being administratively ordered to may result in disciplinary action. In addition, giving an answer that is proven false or misleading may result in disciplinary action up to and including termination. The Division Director of the employee or their assigned designee shall determine disciplinary action in all cases.

Agency Exh. 4.

The applicable Standards of Conduct defines Group II offenses to include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Group I offenses include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. Agency Exh. 2, DHRM Policy 1.60.

### The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a clerk senior, with approximately 22 years of service. Aside from the prior Group III Written Notice, the Agency produced no evidence of other disciplinary measures or deficient work history.

The Agency's store manager testified that he observed the Grievant fail to enter the customer's ID into the POS system on June 13, 2009, and the event was recorded by the store's cameras. Agency Video Disc #1.

The Agency's regional manager testified that an investigation was conducted as a result of the Grievant's assertion that her store manager actually failed to follow the POS system policy. On July 3, 2009, the store's video camera captured what the regional manager considered the store manager's failure to follow the policy, and he issued discipline to the store manager. From the same investigation, the regional manager viewed what he deemed to be another incident of the Grievant failing to follow the policy of entering ID information into the POS system, leading to the second Group Notice. Agency Video Disc #2.

The Grievant asserts that the store manager was intent on terminating her employment, to the point of "setting her up" on June 13, 2009. The Grievant testified that the customer in question that day told her that his group was told to show their IDs to the cashier. Consistent with that story, all four of the group presented their IDs to her, even though only one was making a purchase. The video shows a brief interaction by the store manager with the group of four in the back of the store. The store manager testified that his only contact was to tell the female in the group to stop eating a snack she was holding. Witnesses, including the store manager, testified that there is no Agency policy against eating while in the stores.

The Agency's assistant director testified that he considered the Grievant's response to the June 13, 2009, incident to be misleading because she indicated that the purchaser presented his ID to her not because she asked for it, but, rather, because it was a credit sale over \$100. Although no written policy was presented, the Grievant testified that credit sales of \$100 or more require a valid ID. The Written Notice for the June 13, 2009, incident, charges the Grievant with failing to comply with the ID challenge rule for four customers, although only one of the four was an actual purchaser.

Throughout the grievance process, the Grievant indicated that she was familiar with the June 13, 2009, purchaser as a previous customer, so requesting his proof of age ID was not required by policy.

The Grievant testified that her criminal charge resulting from the Group III Written Notice in 2005 (selling to a minor) was dismissed, and that she understood from the Agency personnel involved in the criminal matter that the dismissal resolved everything, including her disciplinary write up. However, the Group III Written Notice was never administratively rescinded.

A former store manager/assistant store manager, who was ultimately discharged by the Agency, testified that upon her assignment to the Grievant's store she was specifically told by the Grievant's store manager and the regional manager to get rid of the Grievant. This former employee also testified that the store manager made derogatory comments to and about the Grievant. Another retired employee testified that the store manager was disrespectful to the store employees.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant and witnesses supporting her version of events on June 13, 2009, to be credible. The Grievant testified that she was familiar with the customer on June 13, 2009, and she did not ask for the customer's ID. The fact that the three other persons with the purchaser all presented their IDs while clearly not making any purchases corroborates the Grievant's testimony that the customer told her a man in the store directed them to show their IDs to the cashier. The Grievant testified that only the one man (of the group of four), who she recognized as a regular customer, was a purchaser, and the video of the transaction is consistent with the Grievant's version. The hearing officer's review of the video confirms that there was no other logical explanation for the three others to present their IDs. Although he ultimately paid with cash, when the purchaser presented his ID to the Grievant, it was reasonable for the Grievant to conclude the ID presentation was in anticipation of a credit purchase. Nevertheless, the Grievant credibly testified that she did not request the purchaser's ID. The evidence does not preponderate in showing a violation of the mandatory ID challenge procedure or failure to cooperate in the investigation.

Because of the finding regarding the June 13, 2009, incident, the hearing officer is similarly unimpressed with the evidence of the alleged July 3, 2009, incident. In the July 3, 2009, incident, the Grievant had complained to the regional manager of the store manager's failure to follow the policy of entering requested IDs into the POS system. The regional manager viewed video of a transaction on July 3, 2009, in which the store manager was found to have failed to follow the policy and for which the store manager was subsequently disciplined. From the same investigation, the regional manager viewed what he deemed to be another incident of the Grievant failing to follow the policy of entering ID information into the POS system. However, there is no evidence presented by the Agency to show that the Grievant requested the ID from the July 3, 2009, purchaser (a policy prerequisite to mandating entry of the ID into the POS system). (The Grievant could not recall this event and questioned whether the customer in question was actually presenting her an ID.) As to whether the Grievant should have requested the customer's proof of age ID, the evidence is insufficient to demonstrate a violation of the discretionary standard. Thus, the requirement to enter the ID into the POS system may not

have applied. From the evidence presented, the hearing officer finds insufficient evidence presented to find that the Agency has met its burden of proof regarding either of the alleged incidents.

Accordingly, because the Agency has failed to meet its required burden of proof, the two Written Notices and associated termination from employment must be reversed. Consideration of mitigating circumstances is rendered moot.

### DECISION

For the reasons stated herein, the Agency's issuance on July 24, 2009, of the two Written Notices of disciplinary action and termination is **reversed**. The Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position.<sup>1</sup> She is awarded full back pay from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable attorney's fee, which cost shall be borne by the agency.<sup>2</sup> The hearing officer recommends that the Grievant not be assigned to a store with the same store manager.

### APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance

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<sup>1</sup> See *Virginia Department of Taxation v. Daughtry*, 250 Va. 542, 463 S.E.2d 847 (1995).

<sup>2</sup> Va. Code § 2.2-3005.1.A & B.

procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.  
Hearing Officer