

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 11/18/09; Decision Issued: 11/23/09; Agency: DMV; AHO: William S. Davidson, Esq.; Case No. 9214; Outcome: Partial Relief; **Administrative Review**: EDR Ruling Request received 12/08/09; EDR Ruling #2010-2483 issued 03/02/10; Outcome: Remanded to AHO; Remand Decision issued 03/03/10; Outcome: Decision Reversed; **Administrative Review**: DHRM Ruling Request received 12/08/09; DHRM Ruling issued 03/09/10; Outcome: No Ruling – decision reversed by AHO.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9214

Hearing Date: November 18, 2009
Decision Issued: November 23, 2009

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on July 9, 2009 for:

You did not require teller to follow CSCOM 205.3 when brought to your attention. And you did not notify CSC (Customer Service Center) manager of overage at the time it was found. You also allowed teller to store money in the CSC lockers until he returned to work on April 8, 2009 in case the customer returned and you knew of additional money left in locker to cover overages and shortages which is against policy or otherwise referred to as a slush fund.¹

Pursuant to the Group II Written Notice, and a prior active Group I Written Notice and a prior active Group II Written Notice, the Grievant was terminated on July 9, 2009.² On August 5, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.³ On October 5, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 18, 2009, a hearing was held at the Agency's location. Due to scheduling difficulties, the Grievant and the Agency agreed that the Hearing Officer's Decision would not be issued within thirty-five (35) days of his appointment.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Counsel for Grievant
Witnesses

¹ Agency Exhibit 1, Tab 2, Page 1

² Agency Exhibit 1, Tab 2, Page 1

³ Agency Exhibit 1, Tab 1, Page 1

ISSUE

1. Did the Grievant fail to require a teller to comply with CSCOM 205.3?
2. Did the Grievant fail to notify her manager of an overage at the time it was found?
3. Did the Grievant allow the teller to store the overage in his locker over night?
4. Did the Grievant know of any additional money left in the teller's locker that operated as a slush fund?
5. Did the Agency properly take into account mitigating factors in this matter?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 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 termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 Agency provided the Hearing Officer with a notebook containing twenty-three (23) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1, with one (1) exception. An objection was made to the contents at Tab 8, regarding the conclusions that could be drawn from that exhibit. The Agency advocate indicated that exhibit was offered only for purposes of establishing times and dates and not for purposes of any legal or factual conclusions drawn therein. Accordingly, Agency Exhibit 1, Tab 8 was accepted by the Hearing Officer for the sole purpose of establishing times and dates and not for any other factual or legal conclusions contained in that Tab.

The Grievant provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.

A Customer Service Representative ("CSR") for this Agency on a regular basis will receive checks, credit cards and/or cash from the public. In the course of so doing, particularly with cash, the CSR may need to make change. As used in the Written Notice, the word "teller" is the same as a CSR. At the end of the day, each CSR is responsible for seeing to it that his or her cash drawer properly balances with regards to the initial balance at the beginning of the day and all receipts that may have come in during the course of the day. To the extent that there may be an overage or a shortage, the CSR must follow the provisions of the Customer Service Center Operations Manual ("CSCOM"). CSCOM 205.3, Customer Service Representative (CSR) Responsibilities, states in part as follows:

1. Count and verify that assigned petty bag contains the correct teller cash allocation. Complete and sign (initials not allowed) the Receipts Verification form (FS 54) according to guidelines in CSCOM-701.
2. Post revenue collections to the system accurately so cash drawer totals verify against CSC Net totals. When revenue entry errors are discovered, corrections must be made as soon as possible to bring the cash drawer in balance.
3. Collect revenue for each transaction correctly.
4. Reconcile cash, checks, and charges with system totals regularly throughout the day. CSR cash drawers are required to balance as consistently as possible.
5. Safeguard all state assets and revenues collected.
6. Properly record any overages and shortages on CSC Net and the Accountability worksheets (refer to CSCOM-208) and report to management.

7. At the end of the business day, verify cash, coin, check, charge, and pickup totals and record on the appropriate fields on the FS 54 (refer to CSCOM-706).⁴

At the end of the business day, the cash drawers must balance. In this particular grievance, at the end of the day on April 6, 2009, one CSR discovered that he had a \$20.00 cash overage in his drawer. This CSR was a witness for the Agency. He notified his fellow employees as well as the Grievant of the overage. The Grievant's position was that of Office Operations Coordinator ("OOC") which essentially amounted to an assistant manager of the office. Rather than going through the procedures set forth in CSCOM-205.3(6) and (7), the CSR testified that he thought he would recognize the person who he thought was due the money and he decided to not enter the \$20.00 overage into the system but rather put it in his locker in hopes that the customer would return on April 7, 2009 requesting a refund. As it turns out, April 7, 2009 was this particular CSR's Rest Day. Further, one of the CSR's co-workers notified the manager on the evening of April 6, 2009 about what she had been told about this \$20.00 by the CSR. On the morning of April 7, 2009, the manager e-mailed her superior, the District Manager, requesting advice. Her superior called and told her to go to the CSR's locker and determine if the \$20.00 was inside. Her superior also advised her to take witnesses with her. The manager, the Grievant, and another employee went to the CSR's locker and determined that indeed the \$20.00 was therein and an additional \$12.00 was found in the locker.

All three (3) of these people returned to the manager's office and a conference call was initiated with the District Manager. The District Manager testified that she was quite upset when it was confirmed that there was money found within the CSR's locker. She testified that she said that she was, "tired of being lied to," and that comment was addressed to the Grievant. The totality of the District Manager's testimony was that she deemed a policy violation to be a lie. Inasmuch as the Grievant tolerated a policy violation, then the Grievant lied to her District Manager.

The Grievant testified that the CSR did tell her about the \$20.00 and that she did know he was placing it in his locker overnight. She testified that the intent was to hold it overnight to see if someone claimed it on April 7, 2009 and if not then to enter it into the State's accounting system.

CSCOM 205.3 provides in part the following regarding Management Responsibilities:

1. CSC management is responsible to review, monitor, and follow up on all revenue collection discrepancies in their CSC following the disciplinary guidelines provided in this procedure. Management's non-compliance with these requirements may result in disciplinary action.
2. Review the Over/Short policy and performance expectations with each employee.

⁴ Agency Exhibit 1, Tab 4, Page 4

9. Daily, submit any significant overages or shortages (\$20.00 or more) by completing the Overage/Shortage Notification form (CSMA 45) and attaching it to an email and send to District Office. Keep the original notification, signed and dated by both management and the responsible CSR, in the employee's file (refer to CSCOM-1101).⁵

The Grievant testified that she did not notify her manager of the overage at the time it was found. It is clear that the Grievant did not follow the policies set forth in CSCOM 205.3.

The Written Notice alleges that the Grievant allowed the CSR to keep the \$20.00 in his locker until he returned to work on April 8, 2009. In point of fact, the testimony was that the money was in the locker until the morning of April 7, 2009. The CSR's testimony and the Grievant's testimony was that the intent was to bring the money into the system if the person to whom it belonged did not come and make a claim on April 7, 2009. While the Agency's language is in artfully drawn, it is clear that the Grievant allowed the CSR to retain the funds in his locker at least overnight in violation of policy.

Finally the Agency alleged in its Written Notice that the Grievant, "knew of additional money left in the locker to cover overages and shortages." The Grievant testified that she was not aware of these funds. Further, the Agency entered as one of its own exhibits a memo from the Grievant to her immediate manager which was dated July 1, 2009. In that memo, the Grievant clearly stated that she was only aware of the \$20.00 and that she was not aware of any slush fund for overages and shortages. Both in that memo and through her testimony, the Grievant indicated that she was aware of a "coffee fund" that had been discontinued some time earlier and that the "coffee fund" had been funded by those people who used coffee from their personal funds. The Agency introduced this as its own document and the Agency did not offer any testimony to contradict its validity. The District Manager, who was the author of the Written Notice, admitted in her testimony that she had no independent evidence which she could present at the hearing to show that the Grievant was aware of the additional \$12.00 in the locker. Accordingly, the Hearing Officer finds that so much of the Written Notice as deals with additional money left in the locker is not valid and that the Agency has not borne its burden of proof regarding that portion of the Written Notice.

The Agency justified termination in this matter because of the aggregation of this Group II Written Notice with a prior Group II Written Notice. The offense date of the Written Notice before this Hearing Officer is April 6, 2009 and the Written Notice was issued on July 9, 2009. The prior Group II Written Notice offense date was March 28, 2009 and it was issued on April 17, 2009.⁶ Thus the two (2) Written Notices arose from two (2) separate events that occurred in a time frame of only approximately ten (10) days.

⁵ Agency Exhibit 1, Tab 4, Page 5

⁶ Agency Exhibit 1, Tab 13, Page 1

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”⁷ Under the Rules for Conducting Grievance Hearings, “a Hearing Officer must give deference to the Agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency’s discipline only if, under the record evidence, **the Agency’s discipline exceeds the limits of reasonableness.**”⁸ (Emphasis added)

The issue of mitigation is only reached if the Hearing Officer finds the Agency has sustained its burden of showing that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the Agency’s discipline was consistent with law and policy.⁹

If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

CSCOM 205.3 states, under Examples of Mitigating Circumstances for CSR, as follows:

With approval from District Office, in situations where compelling conditions exist, CSC management may reduce the level of a corrective action taken to promote the interests of fairness and objectivity based on an employee’s otherwise dependable, accurate and efficient work performance.¹⁰

On the Written Notice before this Hearing Officer, under Circumstances considered, the Agency stated as follows:

Your years of service were considered however that does not lessen the severity of the actions when you chose not to follow policy and procedures.¹¹

During her testimony, the District Manager, who was the author of the Written Notice, indicated that she considered the Grievant’s long term service with the Agency. The Grievant’s

⁷ *Va. Code § 2.2-3005*

⁸ *Rules for Conducting Grievance Hearings* Section VI(B); Administrative Review of Director Ruling Number 2009-2157, 2009-2174 dated March 13, 2009

⁹ *Rules for Conducting Grievance Hearings* Section VI(B)

¹⁰ Agency Exhibit 1, Tab 4, Page 5

¹¹ Agency Exhibit 1, Tab 2, Page 1

immediate manager, the person who discovered the \$20.00 in the locker, testified that the Grievant was a good employee, a hard worker, came in early, left late and was very conscientious. There is nothing contained in the Written Notice to indicate that the Grievant's quality of service was considered as a mitigating factor.

The CSR who precipitated this event by putting the \$20.00 in his locker, testified that the Grievant was "conscientious to a fault." He further testified that he received a five (5) day suspension for failure to follow procedure by placing the money in his locker.

There was a stipulation entered into between the Agency and counsel for Grievant that two (2) further witnesses would testify on behalf of the Grievant that the Grievant was a good, hard working, conscientious employee of the Agency. The Grievant testified that she became a full-time employee of this Agency in 1996 and that she had worked as a contract agent for many years prior to that. This entire event was reviewed by the Special Investigations Unit for the State and no criminal activity was found.¹² In her Employee Work Profile for the years 2006, 2007 and 2008, the Grievant was either deemed to be a Contributor or an Extraordinary Contributor.¹³ The Grievant was deemed to be a valued employee to the Agency.

Standards of Conduct Policy 1.60 states in part as follows:

Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance.¹⁴

The Hearing Officer understands that he must give deference to the Agency's consideration and assessment of mitigating circumstances and that he can only mitigate the Agency's discipline if he finds that the Agency's discipline exceeds the limits of reasonableness. In this matter, the Hearing Officer finds that the Agency's discipline does exceed the limits of reasonableness. The CSR who precipitated this entire grievance by putting \$20.00 in his locker received a five (5) day suspension. The Grievant, with a previous Group II Written Notice, was terminated. The Agency offered no evidence to indicate that there was any fraudulent intent regarding the \$20.00. The Agency introduced no evidence that the intent was anything other than to give the customer a chance to come back and claim her \$20.00 the following day and, if the customer did not return, then to enter the \$20.00 into the system. Other than the prior Group I Written Notice and Group II Written Notice, the Agency offered no evidence to indicate that the Grievant was anything other than a long-standing, outstanding and exemplary employee. Both Agency and Grievant witness testified to the Grievant's excellent work ethic and character. Giving deference to the Agency does not require the Hearing Officer to blindly follow the Agency's interpretation and use of mitigation. The Hearing Officer finds that this case warrants mitigation. While the Hearing Officer finds that mitigation is appropriate in this matter, he finds that the Grievant cannot return to a position where she supervises other employees. In this matter, she clearly did not properly supervise the CSR who had the overage.

¹² Agency Exhibit 1, Tab 8, Page 1

¹³ Grievant Exhibit 1, Tab 1

¹⁴ Agency Exhibit 1, Tab 19, Page 9

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof regarding that portion of the Group II Written Notice that deals with the Grievant's failure to require a CSR to comply with CSCOM 205.3, to notify her manager of the overage, and to allow the CSR to place the overage in his locker. The Hearing Officer finds that the Agency has not borne its burden of proof regarding the additional funds found in the CSR's locker.

The Hearing Officer finds that termination by accumulating this Group II Written Notice with the prior Group II Written Notice, while permissible under the Standards of Conduct, was not proper in this matter as it exceeded the limits of reasonableness. The Hearing Officer finds that the Grievant should have been suspended without pay for thirty (30) work days and then demoted to the position of CSR. Inasmuch as thirty (30) work days have elapsed since her termination on July 9, 2009, the Hearing Officer orders that the Agency reinstate the Grievant to the position of CSR or to an objectively similar position. The Hearing Officer awards no back pay or seniority rights for the time from July 9, 2009 until the date that the Grievant is reinstated.

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 Street, 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

600 East Main Street, Suite 301
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 and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁵ 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.¹⁶

[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]

William S. Davidson
Hearing Officer

¹⁵An 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).

¹⁶Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In re:
Case No: 9214

Hearing Date:	November 18, 2009
Decision Issued:	November 23, 2009
Response to EDR issued:	March 3, 2010

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management (DHRM) and The Department of Employee Dispute Resolution (EDR). The Agency requested that EDR review the Hearing Officer's Decision issued November 23, 2009. On March 2, 2010, The Director of EDR issued an Administrative Review of Director and found as follows:

For the reasons set forth above, the bases upon which the hearing officer relied to reduce the discipline in this case are insufficient to warrant mitigation. Based on the facts set forth in Case #9214 and the factors relied upon for mitigation, the discipline issued by the agency in this case cannot be viewed as unconscionable, abusive, totally unwarranted or otherwise beyond the bounds of reasonableness. Accordingly, the hearing officer is ordered to reconsider his decision in accordance with this ruling.

OPINION

Inasmuch as the Hearing Officer, in his original Decision dated November 23, 2009, found that, "The Agency has borne its burden of proof regarding that portion of the Group II Written Notice that deals with the Grievant's failure to require a CSR to comply with CSCOM 205.3, to notify her manager of the overage and to allow the CSR to place the overage in his locker...The Hearing Officer finds that termination by accumulating this Group II Written Notice with the prior Group II Written Notice, while permissible under the Standards of Conduct, was not proper in this matter as it exceeds the limits of reasonableness."

Pursuant to the Administrative Review of Director, EDR has ruled that mitigation is not available in this matter. Accordingly, the Hearing Officer finds that the Agency has borne its burden of proof and that the Group II Written Notice, which was before the Hearing Officer, coupled with a prior active Group I Written Notice and a prior active Group II Written Notice, justified termination by the Agency and such termination was permissible under the Standards of Conduct.

APPEAL RIGHTS

You may request a judicial review if you believe the decision is contradictory to law.¹⁷ 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.¹⁸

[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]

William S. Davidson
Hearing Officer

¹⁷An 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).

¹⁸Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

March 9, 2010

RE: **Grievance of [Grievant] v. Department of Motor Vehicles**
Case No. 9214

Dear [Agency] and [Grievant]:

The Department of Motor Vehicles requested an administrative review of the hearing officer's decision in the above referenced case. The request asked that the Department of Human Resource Management review the hearing officer's consideration of mitigating factors. In his remand decision, the hearing officer reversed his decision, thus granting the relief requested by the Department of Motor Vehicles. Therefore, this Agency will not intervene in the application of this decision.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services