

Issue: Group III Written Notice with Termination (failure to follow policy and falsifying records); Hearing Date: 02/12/16; Decision Issued: 03/03/16; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10743; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 03/16/16; EDR Ruling No. 2016-4322 issued 04/07/16; Outcome: AHO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 03/16/16; DHRM response issued 04/11/16; Outcome: No policy violation cited. Request to review denied.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10743**

Hearing Date: February 12, 2016

Decision Issued: March 3, 2016

#### **PROCEDURAL HISTORY**

On October 29, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating policy and falsifying records.

On November 17, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 17, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2016, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative  
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?

### **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 employed Grievant as a Retail Manager II at one of its Stores. He began working for the Agency in 1998. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for the operations of his Store including maintaining and reporting the Store's alcohol inventory. The Assistant Store Manager reported to Grievant.

On August 17, 2015, an employee found \$40 on the sales floor. Grievant and the Assistant Store Manager were not working that day. The employee gave the \$40 to the Lead Employee who put the money in the store safe. The Lead Employee notified the Assistant Store Manager of the found money. The Assistant Store Manager moved the \$40 from the safe to a drawer in a desk. When Grievant returned from vacation, the Assistant Store Manager told him about the \$40 in the drawer. The money remained in the drawer for several weeks.

Grievant was responsible for managing the inventory for his Store. He was evaluated based on how well he managed his Store's inventory. He realized that he was two bottles "short" of vodka. On September 26, 2015, the Assistant Store Manager told Grievant that they would lessen the shortage by purchasing a bottle of vodka using the \$40 that was found on the floor. A bottle of vodka cost \$48.65. Grievant went to the shelf in the store containing vodka bottles and read aloud the inventory number for vodka. The Assistant Store Manager was standing at the cash register and entered the

number into the cash register to identify the purchase of a bottle of vodka. Grievant purchased a bottle of vodka using his credit card to pay \$8.65 and the \$40 in the drawer. Grievant did not take a bottle of vodka with him when he left the store that day. Other employees noticed what Grievant and the Store Manager were doing and that a bottle of vodka was not removed from the shelf. The transaction was reported to Agency managers several days later.

Grievant completed an inventory on September 27, 2015. It showed a shortage of one bottle of vodka. The shortage was actually two bottles but because of Grievant's transaction, the inventory showed a shortage of only one bottle. Grievant sent a copy of the Inventory Adjustment Report to the Regional Manager.

The Agency investigated the transaction. Grievant provided truthful answers to the Agency's investigator.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>1</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Agency Policy 403-0007 required that:

All unaccounted for monies (money found on floor, ....) must be added to today's sales by selecting the Cash Received option from the Cash Received Function. In situations where it is known who the money belongs to, place the money in a sealed envelope within the safe with the date and circumstances notated on the envelope. If the money is not claimed within one week, deposit as above. If claimed after this period, refer to the Revenue Refund section.

When Grievant learned of the found money, he took no action to enter the money into the Store's cash register system.

"[F]alsification of records" is a Group III offense.<sup>2</sup> Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Grievant was responsible for maintaining the Store inventory. He knew that his inventory was short by two bottles of vodka. To change the inventory report, Grievant purchased one bottle of vodka using \$40 that did not belong to him but did not remove the bottle. He presented an Inventory Adjustment Report (an Agency record) to the Regional Manager showing a shortage of only one bottle of vodka when he knew the actual shortage was two bottles. Grievant falsified the Inventory Adjustment Report thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant asserted that the disciplinary action resulted from racial bias and because he requested approval for outside employment. No credible evidence was presented to support these allegations. Agency managers took disciplinary action against Grievant because of his behavior.

*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 Human Resource Management ....”<sup>3</sup> 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. 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, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated to a level less than removal. He argued that he was treated differently from the Assistant Store Manager

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<sup>3</sup> Va. Code § 2.2-3005.

who was involved in the transaction. He points out that it was the Assistant Store Manager's idea to create the false transaction that led to the falsified inventory report. The Assistant Store Manager failed to report the transaction as required by policy.

The inconsistent application of disciplinary action among similarly situated employees is a basis to mitigate disciplinary action. The Assistant Store Manager received a Group II Written Notice. He was not removed from employment.

Although the discipline given to the Assistant Store Manager could have been greater, the Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action. Grievant and the Assistant Store Manager were not similarly situated. Grievant was responsible for the Store's operations and was in a position to reject the Assistant Store Manager's idea. Although the demeanor of the Assistant Store Manager during the hearing showed that it was his idea to falsify the inventory, the Agency did not know whose idea it was to purchase the vodka with the \$40. The Assistant Store Manager claimed it was Grievant's idea and Grievant claimed it was the Assistant Store Manager's idea. The Agency was unable to resolve the discrepancy and not able to fully assess the Assistant Store Manager's responsibility. The Agency fully considered that Grievant was truthful throughout the investigation, but it ultimately concluded that it could no longer trust Grievant to operate a Store as a Store Manager. The Agency considered Grievant's length of service and satisfactory work performance. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.<sup>4</sup>

[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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.