

Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 10/23/17; Decision Issued: 02/12/18; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11085; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling Request received 02/27/18; EEDR Ruling No. 2018-4686 issued 03/12/18; Outcome: AHO's decision affirmed; Judicial Appeal: Appealed to Staunton Circuit Court on 04/09/18; Outcome pending.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11085

Hearing Date: October 23, 2017¹
Decision Issued: February 12, 2018

PROCEDURAL HISTORY

On July 24, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for ordering the seizure of money and other evidence without a search warrant or expressed written consent in violation of the Fourth Amendment of the US Constitution.

On July 31, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 28, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 10, 2017, a hearing was held at the Agency's office. The Agency submitted its closing letter on October 23, 2017.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

¹ The parties were given until October 23, 2017 to submit any final arguments.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Department of Alcoholic Beverage Control employed Grievant as a Special Agent in Charge in one of its regions. He had been employed by the Agency for approximately 27 years. No evidence of prior active disciplinary action was introduced during the hearing.

The purpose of Grievant's position was:

This position is assigned to the Bureau of Law Enforcement Operations and is responsible for executing the Agency's law enforcement mission in one of eight large geographic regions of the Commonwealth. The Regional Special Agents in Charge (SAC) supervise administrative staff and subordinate supervisors, plan, direct and administer assigned personnel, budget, office facilities and field operations. SACs have broad discretionary power to ensure the efficient and effective use of assigned resources and accordingly set regional goals and objectives, prioritize

work and deploy resources in order to meet established Agency and Bureau goals and objectives. SACs serve as the Agency and Bureau liaison with federal, state and local officials and command level personnel with other law enforcement agencies and collaborate with such officials and other Bureau SACs when investigations cross regional boundaries or require sharing resources.²

Grievant supervised the ASAC who was responsible for the direct supervision of the agents and all investigations conducted by the region. Mr. W and Mr. B were Special Agents reporting to the ASAC. Grievant reported to the Deputy Chief Field Ops.

The Agency's law enforcement employees were involved in several high profile arrests that generated controversy and negative publicity for the Agency. Agency special agents are vested with police powers pursuant to Virginia Code § 4.1-105. The Governor and Agency managers concluded its law enforcement employees should receive additional training.

The Governor issued Executive Order 40 on March 24, 2015 regarding Improving ABC Law Enforcement. The Executive Order provided:

The ABC Board shall require the immediate retraining of all ABC special agents in the areas of use of force, cultural diversity, effective interaction with youth, and community policing, to be completed no later than September 1, 2015.

Grievant received training on June 1, 2015 and June 2, 2015 addressing several work related topics including "Upholding Constitutional Rights of Citizens." The training was intended to enable Grievant to be able to:

Define "search" and "seizure" as each term pertains to government actions regulated by the Fourth Amendment. ***

Define and properly conceptualize probable cause and reasonable suspicion.³

The Lodge was a private club accessible only to members and invited guests. It is not readily accessible to the public. In 2016, the Lodge was warned by Agency employees not to engage in illegal gambling.

Mr. B worked as a Special Agent with the Agency. He began working for the Agency in 2013. He was a member of the Lodge and had an identification card allowing his entry into the Lodge. His identification card did not show his picture.

² Agency Exhibit 13.

³ Agency Exhibit 20.

On January 19, 2017, Mr. B received tip from a Former Special Agent that the Lodge was conducting an illegal football pool for the upcoming Super Bowl. The Former Special Agent knew that the Lodge had been issued a warning the previous year for illegal football gambling.⁴

Mr. W worked as a Special Agent with the Agency.

On January 24, 2017, Grievant spoke with the ASAC and Mr. W regarding a possible Super Bowl gambling case involving the Lodge. The ASAC and Mr. W discussed whether to use Mr. B's identification card to enter the Lodge. Grievant approved their plan of having Mr. W enter the Lodge using Mr. B's identification card.

On January 27, 2017, Mr. W and Agent T made an "Internal Observation" at the Lodge. They approached the door of the Lodge and were "buzzed in". They entered the Lodge and sat at the bar. A Female Bartender approached them and looked at Mr. W's identification card which showed Mr. B's name. Mr. W was asked to "sign in" his guest. Mr. W wrote in a book that his guest was Mr. J. The Female Bartender asked the two men if they wanted a drink. Both men ordered beers. Mr. W paid \$3.50 for the beers and left \$1.50 as a tip. As they consume their beers, Mr. W noticed a flyer behind the bar referring to Super Bowl 51. Mr. W asked the Female Bartender what event the Lodge "had going" for the Super Bowl. She replied that they had a Super Bowl Board that was legal this year. She said that for \$30, he could enter a Super Bowl Party where he could get a square on the board and be in the running for a payout of \$500 for a quarter, \$400 for a number, and \$25 for a North, South, East or West on the board. She also said that the event would include draft beer, shrimp, wings, and meatball sandwiches.

The Female Bartender brought a board with 100 squares for Mr. W to see. She told Mr. W that when he paid his entry fee he did not get to pick his number on the board but instead got a chip from a bag and once Mr. W open the chip, a number would be revealed and it corresponded with the numbered squares on the board. She said that would be his numbered square. The game board squares that were covered up would be revealed at the party in random order. Mr. W paid \$30 to the Female Bartender and she allowed him to pick one of the cardboard chips from a baggie. Mr. W opened the chip and it showed the number 83. Mr. W then wrote Mr. B's first name and last initial on the square numbered 83. The Female Bartender put the \$30 with other money that appeared to be kept separate. The Female Bartender told Mr. W to come by the Lodge two hours before the football game.

Mr. W and Agent T left the Lodge. As they were leaving, Mr. W noticed the flyer which advertised a "LEGAL" Super Bowl Board.

⁴ Mr. B was involved in investigating the Lodge for illegal football gambling for 2015 and 2016.

Mr. W met with Mr. B after the observation and told Mr. B what he had learned. Mr. W gave the chip to Mr. B.

On January 31, 2017, Mr. B met with Grievant and the ASAC to discuss the game. Mr. B said he thought the game was legal. Grievant asked “why” and Mr. B said because there was a serial number on the chip. Grievant looked at the chip and noticed that it read that it was legal in California. Grievant explained that they were not in California and the three elements (chance, prize, and consideration) necessary for illegal gambling existed. Grievant and the ASAC concluded that the game was illegal.

Mr. B did not believe there would be any criminal charges brought against the Lodge even if the game was illegal. He informed Grievant he did not want to seize the money if the game turned out to be illegal. Mr. B did not see the point of seizing the money. Grievant instructed Mr. B to seize the money as well because it was evidence for the case. Mr. B said he would seize the money since Grievant was telling him to do so.

Grievant did not obtain or instruct Mr. B to obtain a search warrant. Grievant did not speak with or instruct Mr. B to speak with the Agency’s Internal Legal Counsel regarding the legal requirements to search the Lodge. Grievant did not instruct Mr. B to use the Agency’s Consent to Search form.

On February 1, 2017, Mr. B went to the Lodge to discuss the Super Bowl football pool being conducted inside the premises. Mr. B met with Mr. D who was the ABC manager and bartender. The Lodge was not yet open for business and Mr. D was preparing the location to open for business. Mr. B noticed a flyer advertising the football board as “LEGAL” and listed the payouts as \$500 per quarter, \$400 to the winner and \$25 each for “North, South, East and West.” Mr. B explained the reason for his visit and asked to see the football pool in question. Mr. D showed Mr. B the Super Bowl game board with squares which was located in plain view behind the bar. Mr. B asked where were the chips for purchase. Mr. D went into a backroom and returned with a plastic bag with chips that had not been sold.

Mr. D explained that he would call the Acting Administrator, Mr. H, to notify him of Mr. B’s visit. Mr. B photographed the flyer hanging in plain view.⁵

Mr. B called Grievant to provide an update. Mr. B told Grievant he was not sure whether the game was legal or illegal. Grievant told Mr. B he would “get the name” of someone “at gaming” to call Mr. B.

Approximately 20 minutes later, Mr. H came to the Lodge along with Ms. T, Acting Secretary for the Lodge. Mr. B showed them his credentials and explained why he was at the Lodge. Ms. T was familiar with the game in question and had invoices

⁵ By taking a photo of the flyer, Mr. B’s action may have constituted a seizure subject to the 4th Amendment requirements.

upstairs. Mr. B and Ms. T went upstairs in the Lodge. The “upstairs” had a “banquet facility” with an office in the back. Ms. T went into the office and then provided Mr. B with two copies of invoices for the purchase of the “GameDay” boards. The boards were purchased from the Distributor in another state. Mr. B called an employee with the Distributor and asked her about the boards. This employee called an employee of the Manufacturer of the boards who said the game boards were legal to sell and use in Virginia.

Grievant called Mr. B and provided him with the name of Mr. M, a compliance manager with the Virginia Department of Agriculture and Consumer Services. Grievant said Mr. M was busy but would call Mr. B in 30 minutes. Grievant reminded Mr. B that if the game was illegal, Mr. B was to seize the money.⁶ Mr. B remained convinced that even if the game was illegal, the Lodge would not be prosecuted criminally. The matter would be handled administratively, according to Mr. B.

After waiting approximately 45 minutes, Mr. B decided to call Mr. M. Mr. B contacted Mr. M who asked Mr. B to send him pictures of the game board along with the associated chips. Mr. B complied with Mr. M’s request. Mr. M told Mr. B that the game was illegal for two reasons:

1. The game was intended to be a \$1/square and the Lodge was altering the entry fee to \$30 per square. (The intended rules were stamped on the back of the “GameDay” board).
2. The game was intended to have a pre-determined winner but the Lodge was using the game score of the Super Bowl to determine the winner.

Mr. B told Mr. H and Ms. T that the game was illegal for the two reasons described by Mr. M. Mr. B told them there would be two administrative charges but no criminal charges. He told them that, “I would like to seize the game and proceeds as evidence.”

They all walked downstairs. Mr. B stood at a table while Mr. H and Ms. T brought him envelopes.

Mr. H and Ms. T complied with Mr. B’s statement and “volunteered the money acquired from the game along with the game board, remaining unused chips, and three unopened “GameDay” boards”, according to Mr. B. Ms. T organized the money and she and Mr. B counted it for a total of \$1,636.

Mr. B seized the following:

⁶ Grievant did not instruct Mr. B to seize only items and money that were in plain view. Mr. B understood Grievant’s instruction to mean he was to seize the money with the only condition that he was to first determine if the game was illegal.

1. \$1,636
2. Nine Sure tip game boards with envelopes (Winners won a spot or two depending upon sure tip board used).
3. One GameDay chip purchased by Mr. W on January 27, 2017.
4. The remaining GameDay chips sealed in a zip lock bag.
5. Two invoices from the Distributor for GameDay board purchases.
6. One GameDay board that had been opened and used.
7. Three GameDay Boards that were unopened.

All of the evidence was labeled, sealed, photographed, and entered into a temporary storage locker.

On February 7, 2017, Mr. B spoke with the local Assistant Commonwealth's Attorney regarding whether criminal charges should be made against the Lodge. The Assistant Commonwealth's Attorney told Mr. B he would not pursue criminal charges against the Lodge because the Lodge was not an ongoing gambling enterprise and the monetary value attached to the case was not substantial.

The Agency conducted an investigation. The Investigator spoke with Mr. H. Mr. H stated regarding Mr. B that:

I think the words that he used when he got off the phone was that he had been asked to confiscate the – the games as well as all cash that was made from the board. ***

The board that we were playing was behind the bar as well as most of the cash. Some of the cash, we had been (inaudible). It's called a (inaudible) board to help sell spaces on there and that money was located in – back in the cash bag from the previous night that were in the safe in the back of the social quarters and some of it we had upstairs in the safe in the office.

I told him I'd give him anything and everything that he needed. You know, I wanted to cooperate in any way that I could. ***

Required, told do, ordered, requested from his – I from his – I don't know if he had supervisor or – or who, but that's what he needed to do that day.⁷

The Investigator spoke with Ms. T. Ms. T stated regarding Mr. B that:

And after talking with them that, you know, he would need to see everything that was associated with the games and he did let us know that he was going to have to confiscate the board and the items that went with it and the cash that went with it. ***

⁷ Agency Exhibit 14.

The way he put it basically he didn't have a choice. He – this was what he needed to do was to confiscate it all. ***

No. No. There wasn't – no. Well, I don't – no, we weren't given a choice about it, although he did – he wasn't really thrilled about taking the money.⁸

Grievant filed a grievance to challenge the Agency's action. Grievant wrote on the Grievance Form A:

[Mr. B] advised that he did not think the Commonwealth Attorney would prosecute the case because he had declined prosecution the year prior on a similar case at this [Lodge]. Since this was a repeat offense at the [Lodge], I explained that I thought that it was reasonable to assume that the Commonwealth Attorney would prosecute a case this time especially since we had actively participated in the "game" unlike the previous year. *** [Mr. B] and I went to [the ASAC's] office where I asked [the ASAC] if he agreed that we should seize any possible evidence, if it was determined the game was illegal, for the criminal case. [The ASAC] agreed that if the evidence could be legally seized it should be seized for the criminal case.⁹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their will is in and will and in and in and in and in and in and in and in and in a severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹⁰ 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."

Disciplinary Action

General Order 501 governs Licensee Inspections. The purpose of the General Order to provide guidance to agents regarding the conduct of license inspections. Section III states:

An inspection is an official examination of premises licensed to sell alcoholic beverages, and all invoices, records, and accounts therein, and

⁸ Agency Exhibit 14.

⁹ Agency Exhibit 2.

¹⁰ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

is a judicially recognized exception to the search warrant requirement. However, an inspection shall not be conducted when the agent has advanced knowledge/probable cause that the evidence of a criminal violation is located upon the licensed premises. In this instance, the agent will obtain and execute a search warrant in accordance with General Order 301, Search Warrants.

General Order 301 governs Search Warrant and provides:

The Fourth Amendment to the US Constitution guarantees every citizen the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Supreme Court decisions regarding search and seizure placed the responsibility on law enforcement to ensure that citizens' Fourth Amendment rights are protected. Agents shall observe constitutional guidelines when conducting searches and always remain mindful of their lawful purpose.

General Order 106 governs Code of Conduct. Section V (03) addresses issuing lawful orders and provides:

Bureau supervisors will not knowingly or willfully issue any order in violation of a law, ordinance, rule or order of the United States, Commonwealth of Virginia, or the Bureau of Law Enforcement.

Failure to follow policy is a Group II offense.¹¹ Prior to February 1, 2017, Grievant knew that the Super Bowl game was illegal. Grievant explained to Mr. B that he believed it was likely the Commonwealth's Attorney would prosecute the Lodge this year. In other words, Grievant had advance knowledge that the Super Bowl game was a criminal violation occurring on the Lodge's premises. Grievant was obligated by General Order 301 to "observe constitutional guidelines when conducting searches". Grievant was obligated by General Order 501 to refrain from conducting an inspection of the Lodge. He was obligated to obtain a search warrant and then execute the search warrant in accordance with General Order 301. Grievant failed to obtain a search warrant and authorized a search of the Lodge. Grievant ordered Mr. B to seize the money if the game was illegal. The game was illegal. Grievant's order was in violation of law. Grievant's actions were contrary to policy thereby justifying the issuance of a Group II Written Notice.

Elevation of Group II Offense

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a

¹¹ See, Attachment A, DHRM Policy 1.60.

security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

The Agency had experienced several instances of intense negative public criticism regarding its law enforcement officers. This criticism resulted in the Governor issuing an Executive Order 40 which required additional oversight of the Agency and re-training of law enforcement officers. Grievant was aware of the public criticism, Executive Order 40, and he took the required training which specifically addressed search and seizure requirements. Failure to comply with search and seizure policies and laws created a unique impact on the Agency that would justify elevation of a Group II Written Notice to a Group III Written Notice.

Amendment IV of the *United States Constitution* provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 10 of the *Virginia Constitution* provides:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

A “search” is an intrusion by an officer upon a constitutionally-protected area or upon a reasonable expectation of privacy. If an officer physically intrudes upon a constitutionally-protected area he has conducted a search, regardless of the level of privacy one would reasonably expect regarding the area in question. A “seizure” of property occurs when an officer interferes meaningfully or significantly with another person’s possessory interest in that property.

Mr. B acted at Grievant’s direction. It is reasonable to assign the actions of Mr. B to Grievant. On February 1, 2017, Mr. B searched the Lodge and seized gambling contraband including \$1,636.

Grievant did not obtain or instruct Mr. B to obtain a search warrant before entering the Lodge on February 1, 2017 to conduct a search.¹² Grievant instructed Mr.

¹² When the Agency questioned Grievant about the search and seizure, Grievant described Mr. B as conducting a “knock and talk.” This argument is not persuasive because the Agency does not have a specific procedure describing a “knock and talk” and Grievant did not instruct Mr. B to conduct a “knock and talk.”

B to confiscate the money. Mr. B told Mr. H and Ms. T that he wanted to confiscate the money. Confiscating the money was a seizure of the Lodge's property. The confiscation occurred without a search warrant describing money to be seized. Mr. B's action was contrary to the Fourth Amendment unless an exception existed to the search warrant requirement.

Grievant argued that the Agency did not need a search warrant to seize the money because the Lodge was part of a highly regulated industry without the expectation of privacy. The Fourth Amendment protects businesses from unreasonable searches and seizures. The liquor industry falls within the highly regulated industry exception to the warrant requirement. The legality of a search of a highly regulated industry depends on the authority given under a valid statute.

The Agency did not discipline Grievant for an unlawful search. Grievant was disciplined for an unlawful seizure of money. Va. Code § 4.1-204(F) grants authority to search a highly regulated industry and provides:

special agents shall be allowed free access during reasonable hours to every place in the Commonwealth and to the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein.

General Order 501 defines the scope of the authority to search granted by Va. Code § 4.1-204(F). Section III (B), provides:

In accordance with Code of Virginia Section 4.1-204.F, Records of Licensee; Inspections of Records and Places of Business. "The Board and its special agents shall be allowed free access during reasonable hours of every place in the Commonwealth and to the premises of ... every delivery permittee wherever located where alcoholic beverages are ... Offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein."

Section IV(A) defines the scope of inspection to include:

4. Evidence of violation of state and federal criminal laws which could constitute grounds for suspension or revocation of a license pursuant to Virginia Code Section 4.1-225. These will include, but not be limited to, the following: ***

c. Gambling violation;

5. Agents can inspect the premises where the items outlined above could reasonably be located. While conducting inspections agency may seize

items of evidence, under the plain view doctrine of criminal violations if they have probable cause to believe such items constitute evidence of a crime. Upon seizing any such items however, inspection should cease with the scene secured, and either a search warrant or consent to search from a person authorized to provide consent should be obtain.

Grievant argued it was unnecessary to obtain a search warrant because the money was in plain view. The Plain View Doctrine of Warrantless Search allows an officer who is lawfully present in a given location and who sees in plain view an item which is immediately apparent to be evidence of a crime to seize that item without a warrant. Several of the items seized by Mr. B were in plain view. The game boards and chips were on display for anyone in the Lodge to see. Not all of the money, however, was in plain view. Some of the money was in envelopes behind the bar. Some of the money was in a cash bag in a safe in the social quarters and some of the money was in a safe in the office. Because some of the money was not in plain view, not all of the money could be seized without a warrant.

Grievant argued it was unnecessary to obtain a search warrant because of “Exigent Circumstances.” “Exigent Circumstances” is a clearly-established exception to the search warrant requirement and may be used in situations where an officer has probable cause to believe that a person located in a public place is in possession of contraband or other evidence of a crime. In such circumstances, a warrantless, probable cause-based, exigent circumstances search would be lawful because of the inherent mobility of the evidence and the likelihood the evidence and the suspect would go if the officer left to obtain a search warrant.

Although money is inherently mobile and easily concealed, Grievant’s argument is unpersuasive. The exigency did not exist independently of Grievant’s instruction to seize the money. Grievant knew as early as January 27, 2017 that the Lodge was receiving money from gambling because Mr. W gave the Lodge \$30 in return for a board square. Prior to February 1, 2017, Grievant believed the Lodge was involved in a prosecutable crime involving money. The exigency was created by Mr. B’s compliance with Grievant’s instruction to confiscate the money. Grievant could have obtained a search warrant to avoid the exigency. On February 1, 2017, Mr. B could have “frozen the scene” until he was able to obtain a search warrant.

Grievant argued that the money was given to Mr. B voluntarily. The desire of Mr. H and Ms. T to cooperate fully with Mr. B’s statement that he wanted to confiscate the game and money, however, does not mean they consented to the seizure of the money. Mr. H and Ms. T knew the Lodge was regulated by the Agency and Mr. B derived his authority from the Agency. They knew their actions towards Mr. B could result in consequences to the Lodge affecting its ability to operate. Grievant did not inform them that they could refuse to provide the items Mr. B wanted. To resolve any question about whether a licensee consented to a search, the Agency created a Consent to Search form that identified the items to be searched, authorized seizure of items connected to a

crime, and required the signature of the person granting permission. Grievant did not ask Mr. B to present the Consent to Search to Mr. H or Ms. T.

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 Human Resource Management”¹³ 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 argued the Agency inconsistently applied disciplinary action. Mr. B received disciplinary action but was not removed from employment. The ASAC received a Group II Written notice without removal. An agency may distinguish between employees based on their level of managerial responsibility. In this case, Grievant was the Special Agent in Charge of the region and he specifically instructed Mr. B to confiscate the money. The ASAC reported to Grievant and his communication with Mr. B was overshadowed by Grievant. Mr. B did not have managerial duties similar to Grievant’s duties. The Agency was permitted to distinguish between these three employees based on their level of managerial duties.

The Agency’s discipline in this matter was harsh. Grievant’s behavior could have been addressed fully with a level of discipline not including removal especially given his 27 years of service to the Agency. Once an agency meets its burden of proof to show that disciplinary action was appropriate, the Hearing Officer can only reduce the discipline if mitigating circumstances exist. An employee’s length of service and otherwise satisfactory work performance is rarely a mitigating circumstance under the *Rules for Conducting Grievance Hearings*. Grievant’s satisfactory work performance and length of service is not sufficient to mitigate the disciplinary action in this case. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Other Defenses

¹³ *Va. Code § 2.2-3005.*

Grievant asserted that the Agency failed to comply with several provisions of its policy governing investigations. If the Hearing Officer assumes that assertion to be true, the violations would not form a basis to alter 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 request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer