

Issues: 3 Group III Written Notices with termination (failure to follow policy); Hearing Date: 04/09/14; Decision Issued: 04/28/14; Agency: ABC; AHO: Jane E. Schroeder, Esq.; Case No. 10261; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management
Office of Employment Dispute Resolution*

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10261

Case Heard: April 9, 2014

Decision Issued: April 28, 2014

PROCEDURAL HISTORY

The Grievant was employed as a store manager at the agency. On December 3, 2013, the Grievant received three Group II Written Notices for violations for Offense Code 13: Failure to follow written policy. The Grievant initiated the Employee Grievance Procedure in December, 2013 by completing Grievance Form A. The grievance was subsequently qualified for hearing. On January 15, 2014, the hearing officer was assigned to hear the case.

A telephonic pre-hearing conference was held on January 16, 2014. The hearing was set for February 25, 2014. Due to illness of the hearing officer, the hearing was rescheduled for March 10, 2014. Due to illness of the Grievant's attorney, the case was postponed again, and was rescheduled for April 9, 2014 and was heard on that date. The Grievant, by counsel, objected to five of the Agency's proposed exhibits. After argument by counsel of the Grievant and the agency advocate, Agency's Exhibits 1-17 were entered into evidence, with the exception of Exhibit 15, which was excluded. The Grievant's Exhibits 1-11 were entered into evidence without objection. Six witnesses, including the Grievant, testified. The eight-hour hearing was recorded on a digital recorder and stored on one compact disk.

APPEARANCES

Grievant

Grievant's Counsel

Grievant's Counsel's assistant

Agency's Director of Human Resources

Agency's Advocate

Witnesses for Agency:	#1	Regional Manager
	#2	Sales Associate
	#3	Lead Sales Associate
	#4	Agency's Special Agent Investigator
	#5	Agency's Director of Retail Operations

Witness for Grievant: Grievant

ISSUES

1. Whether to sustain, modify or revoke three Group II Written Notices issued to the Grievant on December 3, 2013, for violation of Code 13: Failure to follow written policy.
2. Because Grievant's employment was terminated due to accumulation of group offenses, whether to uphold the termination of the Grievant, or to reinstate the Grievant's employment in the agency.

The first Group II Written Notice was given for an alleged violation of Code 13: Failure to follow written policy: SOP 403-0001. "The manager is not to view or be provided with any financial report that would allow the cashier to determine an overage or shortage prior to the cashier checkout function. You admitted to performing the tender report prior to cashier checkouts on a repetitive basis."

The second Group II Written Notice was given for an alleged violation of Code 13: Failure to follow written policy: SOP 403-0007. "All unaccounted monies (money found on floor, change left by customer, restitution, etc.) must be added to today's sales by selecting the cash received option from the cash received function on the POS. Money is a "slush fund" was used to pay back charge bag shortages."

The third Group II Written Notice was given for an alleged violation of Code 13: Failure to follow written policy: SOP 403-0007. "All unaccounted monies (money found on floor, change left by customer, restitution, etc.) must be added to today's sales by selecting the cash received option from the cash received function on the POS. Money that was over in lottery machine you did not properly process on a repetitive basis."1

BURDEN OF PROOF

In disciplinary actions, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency. In this case, the agency must prove that it is more likely than not that the Grievant did not properly process the monies received at the store and that she improperly used the tender reports. The agency must prove that issuing the three Group II Written Notices was warranted and appropriate.

FINDINGS OF FACT

1. The Grievant worked as a retail store manager for the agency for fourteen years. During that time she generally received good performance reviews. Her last performance review, dated 9/28/2013 showed an overall rating earned was “High Contributor.” One of the measures evaluated was, “Ensures the security of all store funds, stock and property by following all guidelines.”²
2. All store monies are the responsibility of the store manager. The procedures for handling the money in the store are outlined in the agency document, “Store Funds Guidelines for Management and Security SOP 403-0007.” According to the procedures outlined, “All unaccounted for monies (money found on the floor, change left by customer, restitution, etc) must be added to today’s sales. All discrepancies in funds are to be documented by e-mail to the Regional Manager. . . under no circumstances are personal funds to be used to correct a discrepancy. . . All sales cash shortages in excess of 25 cents are the responsibility of the employee and all cash overages become the property of the Commonwealth.”³
3. As part of the Grievant’s core responsibilities, she trained and supervised the staff including sales associates and lead sales associates who worked as cashiers at the store.⁴
4. The computer procedures for the managers and cashiers to follow are outlined in the agency document, Computer POS [point of sale] System – SAP, SOP 403-0001.” The Cashier Checkout procedure is outlined on page 35 of this document. When the cashier checks out, the cashier first counts the money in that cashier’s register drawer. Then the management counts the money. The cashier or manager continues with several more steps on the computer before the cashier checkout function is complete. If the money is short of what the cashier should have, the cashier must pay for the shortages. If there is an overage, the overage becomes part of the deposit and is placed in the vault by the manager. A note in bold print cautions, “**NOTE: The cashier/manager is not to view or be provided with any financial report that would allow the cashier to determine an overage or shortage prior to the cashier checkout function.**”⁵
5. The Regional Manager testified that the financial report generated in the stores that shows what the cashier sold for the day is called the tender report. The managers are instructed to not run the tender reports prior to the cashier checkout function being completed. In a meeting the Regional Manager held for the managers in November, 2012, the Regional Manager reviewed this policy with the managers, including the Grievant.⁶

2 Grievant’s Exhibit 8.

3 Agency’s Exhibit 7, page 5.

4 Agency’s Exhibit 4, pages 3 and 4

5 Agency’s Exhibit 6, page 35.

6 Testimony of Regional Manager, Agency’s Exhibit 13, page 1.

6. In October, 2013, the Agency's Special Agent received a call from the county police. An employee of the Agency had applied for a job with the police department. The employee, who worked in the store that the Grievant was managing, alleged that there had been theft at the store by employees, that money was kept in a drawer in the store and not reported, and that the tender reports were being run inappropriately in the store.⁷
7. The Special Agent conducted an investigation, including interviews with three employees of the store, including the Grievant who was store manager. Criminal charges were filed against the three employees. The prosecutor declined to prosecute the Grievant. The other two employees pled guilty.⁸
8. When the Regional Manager learned about the investigation from the Special Agent, she interviewed many of the employees of the store which the Grievant managed. The Regional Manager's notes and some employee statements from these interviews are included in the evidence. The employees' statements describe the use of the tender reports by the manager or assistant manager every time the cashier's checked out. The manager would allow the cashier to use money from a cup in the manager's desk if needed for the cash to match the amount in the tender report. Dollar bills were kept in a red dictionary in the manager's desk. This money included overages from the cashier and from the lottery game.⁹
9. A Sales Associate and a Lead Sales Associate testified. Each testified that the Grievant and the assistant managers ran the tender reports on a routine basis during the cashier checkout process. After the tender reports were run, the cashiers were given the opportunity to add money if there was a shortage, using the money in the cup in the manager's desk. Overage money was placed in manager's desk in the cup, in the dictionary, or in a metal box in the manager's desk. The Lead Associate further testified that the Grievant taught him to run the tender reports and relay to the cashier the amount of cash the cashier should have prior to the completion of the cashier checkout process.¹⁰
10. Pictures taken by the Regional Manager show the money in the manager's desk, including coins in a cup and dollar bills, include at least one ten dollar bill, in the red dictionary.¹¹
11. The Regional Manager and the Special Agent interviewed the Grievant regarding the problems brought to light in the investigation by the Special Agent. They both testified that the Grievant admitted to using the tender reports to speed up the cashier checkout

7 Testimony of Special Agent

8 Testimony of Special Agent, Grievant; Grievant's Exhibit 1

9 Testimony of Regional Manager, Agency's Exhibit 10.

10 Testimony of Sales Associate and Lead Sales Associate.

11 Agency's Exhibit 11.

procedure. She admitted to the use of the cup and money in the dictionary in her desk drawer. She admitted that she put money in the dictionary that was from the lottery game. She admitted that this money was not accounted for in the daily reports and was not placed in the vault, as procedures dictate.¹²

12. In the attachment that the Grievant wrote to Grievance Form A, the Grievant, the Grievant denied showing the tender reports to the cashier. However she admits to sometimes running the tender reports “to expedite reconciliation... before an employee checks out.” In the same document she admits to putting money in the dictionary in her desk that was money left over from customers playing the lottery. If the customer returned for the money, she would return the money to the customer. ¹³
13. In the Grievant’s testimony, she admitted to using the money in the cup in the desk for overages and shortages during the cashier checkout procedure. She admitted to placing lottery money in the dictionary in her desk and not placing the money in the vault. She admitted that the procedures regarding using the money in the cup and placing the money in the vault were not followed. She testified that she does not contest the Written Notice allegations regarding money from the lottery machine was not placed in the vault on a repetitive basis. She admitted that she did not handle the money properly. She testified that the policies regarding the counting of the money did not allow for human error. So she did not follow the policies.¹⁴
14. The Agency’s Director of Retail Operations testified that the policies and procedures that were allegedly violated in this case, the Agency’s Computer Point of Sale System (SOP 403-0001) and Store Funds Guidelines for Management and Security (SOP 403-0007), were written as a standard for all 386 retail stores in the Agency. By taking money from a cup to be used for cashier shortages, the accounting for that store would show an inaccurately small number of shortages. By putting money in a cup if there was an overage, there would be an inaccurately small number of overages. This would distort the evaluation of the store in comparison to other stores in the Agency.¹⁵
15. The Agency’s Director of Retail Operations further testified that the profits from the stores go the state treasury. Every penny is accountable. Money put into a dictionary and not counted and placed into the vault is a serious violation of policy and of the Code of Virginia. The Director of Retail Operations testified that, since the Grievant, as manager, was custodian of the funds and had not properly managed the funds, the trust factor was broken. No mitigating circumstances including the Grievant’s length of service or work

¹² Testimony of Special Agent and Regional Manager, Agency Exhibit 8, page 2.

¹³ Agency’s Exhibit 2, page 2.

¹⁴ Testimony of the Grievant.

¹⁵ Testimony of Agency’s Director of Retail Operations.

performance evaluations could alter the determination that the Grievant's employment must be terminated.¹⁶

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section B.2.b. provides that Group II offenses 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.

The Code of Virginia § 4.1-115. B.(Reports and Accounting Systems [of Agency]) provides that the Agency shall maintain an accounting system in compliance with generally accepted accounting principles. The Code of Virginia § 4.1-116.A. (Disposition of moneys collected [by Agency]) provides that all moneys collected by the Agency shall be paid directly and promptly into the state treasury. The Agency has produces policies and procedures for employees to follow to fulfill the Agency's responsibilities for accounting for the moneys collected at the retail stores. One of these is "Store Funds Guidelines for Management and Security SOP 403-0007," which outlines procedures for accounting for store funds. Another is "Computer POS System – SAP SOP403-0001," which gives specific instructions on using the computers for, among other processes, checking out each cashier.

¹⁶ Testimony of Agency's Director of Retail Operations.

In the present case, the Grievant was given three Group II Written Notices for a violation of these policies, and her employment was terminated. In one of the Written Notices, it was alleged that the Grievant violated policy SOP 403-0001 by performing the tender report prior to cashier checkout on a repetitive basis. In the other two Written Notices, it was alleged that the Grievant violated policy SOP 403-0007 by not properly processing the lottery money on a repetitive basis and by using money as a “slush fund” to pay back change bag shortages. The Grievant filed Grievance Form A, and a hearing was scheduled and conducted to determine whether the three Group II Written Notices and the termination should be upheld.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section A Framework for Determining Whether Discipline was Warranted and Appropriate states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).¹⁷

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In this case, I find that the Grievant did engage in the behavior described in the Written Notices. It is clear from the facts presented that the Grievant kept store money in the manager’s desk drawer, including change in a cup which was used by the manager and other employees to make up for overages and shortages of the cashiers’ bags, and dollar bills in a dictionary used in the accounting of the lottery money. Although the Grievant testified that she occasionally ran the tender reports during the cashier checkout process, it was clear from the testimony that she did this on a regular basis, as well as trained her staff to do so. Her written admission in her attachment to the Grievance Form A is to periodically using the reports to expedite reconciliation before an employee checks out.

(ii) Whether the behavior constituted misconduct

The first Group II Written Notice was given for failure to follow written policy: SOP 403-0001. “The manager is not to view or be provided with any financial report that would

¹⁷Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

allow the cashier to determine an overage or shortage prior to the cashier checkout function...” When the Grievant, as manager, viewed the tender reports, and used the information to assist the cashiers in reconciling the money in their cash bags with the reports, this was a clear violation of the written policy.

The second Group II Written Notice was given for failure to follow written policy: SOP 403-0007. “All unaccounted monies (money found on floor, change left by customer, restitution, etc.) must be added to today’s sales by selecting the cash received option from the cash received function on the POS.” The Grievant, as manager, kept a change cup in her desk and used it in the checkout process. This change cup was kept in her desk over many years and moneys in it were not accounted for and were not added to the day’s sales and placed in the vault. This is a violation of written policy that occurred regularly over many years.

The third Group II Written Notice was also given for failure to follow written policy: SOP 403-0007. “All unaccounted monies (money found on floor, change left by customer, restitution, etc.) must be added to today’s sales by selecting the cash received option from the cash received function on the POS. “ In this violation, money that was over in lottery machine was not properly processed on a repetitive basis. The Grievant put money in a dictionary in her desk that was from the lottery game. The money should have been accounted for and added to the day’s sales and placed in the vault. Keeping this money in a desk drawer is a clear violation of written policy.

The Grievant repetitively violated the written policies of the Agency. These behaviors constitute misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy The Grievant was given three Group II Written Notices and was terminated. This level of discipline is consistent with the policies and Standard of Conduct analyzed above. This Hearing Officer finds that the agency=s disciplinary action is consistent with law and policy.

Mitigating Circumstances

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency=s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency=s discipline only if, under the record evidence, the agency=s discipline exceeds the limits of reasonableness.¹⁸

The Agency determined that the violations regarding the handling of monies and accounting were so severe that consideration of mitigating circumstances could not overcome the actions of the Grievant. After review of the agency’s consideration and assessment of mitigating

¹⁸ Rules for Conducting Grievance Hearings, p. 17

circumstances, this Hearing Officer finds that the agency's discipline of imposing three Group II Written Notices does not exceed the limits of reasonableness.

DECISION

The Grievant=s three Group II Written Notices of December 3, 2013 are upheld. The termination 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 14th St, 12th 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 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 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.¹⁹

[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].

April 28, 2014

Jane E. Schroeder, Hearing Officer

¹⁹Agencies must request and receive prior approval from EDR before filing a notice of appeal.