

Issues: Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 11/19/13; Decision Issued: 11/25/13; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10196; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 10196**

Hearing Date: November 19, 2013  
Decision Issued: November 25, 2013

**PROCEDURAL HISTORY**

On July 3, 2013, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to comply with policy.

On July 28, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 28, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 19, 2013, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

**APPEARANCES**

Agency Party Designee  
Agency 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 Virginia Department of Alcoholic Beverage Control employed Grievant as an ABC Store Manager B. The purpose of his position was:

To participate in the effective and efficient retailing of all products sold in Va. ABC store, so that customers experience excellence in service provided, acquire the products they want at a reasonable cost; and to ensure that a high level of alcoholic beverage control and public safety is maintained.<sup>1</sup>

Grievant had prior active disciplinary action. He received a Group II Written Notice on May 16, 2012 for failure to follow policies regarding store funds, computer administrative PC systems, and Licensee Sales.

The Agency has policies governing use of its Computer Point of Sale System, Time Keep, and Lottery Procedures. On December 10, 2012, the Regional Manager conducted a store audit of Grievant’s store. The audit showed numerous violations of policy including:

- Type 1 adjustments were not included in the adjustment folder.
- A number of employees were working over 6 hours with no break.
- Daily paperwork did not include a lottery balance report.
- Daily paperwork did not include voided checkout paperwork with a signature and reason for the void.

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<sup>1</sup> Agency Exhibit 5.

- The inspection record did not list POS Maintenance or Data Redundancy as having been verified.

On December 14, 2012, an Internal Auditor conducted an audit of Grievant's store and concluded that scratch lottery tickets were not being counted against the compact inventory report on a daily basis as required by policy.

On May 24, 2013, the Regional Manager conducted another store audit and observed that several of the policy violations noted in the December store and internal audits had not been corrected.

The Agency's disciplinary action taken in this case was consistent with the Agency's discipline in similar cases.

### **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>2</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."

Failure to follow policy is a Group II offense.<sup>3</sup> The Agency conducted several audits and each audit revealed some violation of the Agency's policies governing Computer Point of Sale System, Time Keep, and Lottery Procedures. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Grievant did not appear at the hearing to present any evidence to support his defenses. As part of filing a grievance, Grievant alleged he had health concerns affecting his work performance. Grievant had not sought any accommodation from the Agency prior to the disciplinary action. No credible evidence was presented to show that any of his health concerns affected his work performance to the extent that disciplinary action should be lessened or reversed.

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

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>4</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. In light of this standard, 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 II 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:

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<sup>4</sup> Va. Code § 2.2-3005.

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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.