

Issues: Group I Written Notice (unsatisfactory job performance), and Termination (due to accumulation); Hearing Date: 07/03/14; Decision Issued: 07/07/14; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10376; 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: 10376**

Hearing Date: July 3, 2014

Decision Issued: July 7, 2014

#### **PROCEDURAL HISTORY**

On April 28, 2014, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. Grievant was removed from employment based on the accumulation of disciplinary action.

On April 30, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 29, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 3, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
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 Department of Alcoholic Beverage Control employed Grievant as an ABC Store Manager Assistant B at one of its stores. Grievant had been employed by the Agency for approximately five years. The organizational objective of his position was:

To participate in the effective and efficient retailing of all products sold in Va. ABC stores, 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. On June 16, 2012, Grievant was issued a Group II Written Notice with a three workday suspension for failure to follow policy. On June 4, 2012, Grievant received a Group II Written Notice with demotion and disciplinary pay reduction for failure to follow policy.

Grievant worked as a Store Manager but was demoted and placed under the Supervisor because the Supervisor was highly regarded by Agency managers for his experience and ability to manage an ABC store.

On Sunday March 30, 2014 at approximately 10:30 a.m., Grievant and the Supervisor were finishing work on the store's quarterly inventory report. The Supervisor

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<sup>1</sup> Agency Exhibit 6.

released his subordinates to go home. Grievant “clocked out.” Grievant approached the Supervisor and asked to purchase alcoholic beverages called “minis” with his debit card. Grievant did not have cash with him to make the purchase because he usually used his debit card to make purchases. The Supervisor told Grievant he could not ring up the sale yet because it was Sunday morning before 1 p.m. when alcohol could be sold under Virginia law. The Supervisor told Grievant that Grievant could take the minis and once the store opened, Grievant could come back and pay for them. Grievant took a piece of paper and wrote the items he was taking, the cost, date and his name. The Supervisor took the piece of paper and posted it on the computer in an office in the back of the store.

On March 31, 2014, Grievant returned to the store and paid for the 10 bottles he took on March 30, 2014 and paid for two more items. The total cost was \$41.49.

Grievant did not intend to steal the items he removed. Neither he nor the Supervisor intended to hide or conceal the transaction.

The Supervisor believed that he had the authority to permit Grievant to remove the items and pay for them later. The Agency presented evidence showing the Supervisor did not have the authority to delay payment for a sale. The Supervisor received a Group III Written Notice for his part in authorizing the transaction.

### **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.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>3</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency has presented sufficient evidence to show that removing items from a store without paying for the items at the time of removal was such an aberration of the Agency’s operations that Grievant should have recognized it as an inappropriate action. There are no circumstances during an Agency’s store operations when alcoholic

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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.

beverages would be purchased from a store at one time without the payment being received at the time of removal. The Agency does not permit sales of alcohol on credit or layaway. Grievant should have recognized that the transaction was inconsistent with the Agency's customary operating practices. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant has now accumulated two Group II Written Notices and one Group I Written Notice thereby justifying the Agency's decision to remove him from employment.

*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.

Grievant contends the disciplinary action should be mitigated because the transaction was under the direction and authorization of an experienced and respected store supervisor. Mitigating circumstances to remove the Group I Written Notice do not exist in this case. The Agency alleged that it could have issued Grievant a Group III Written Notice for unauthorized removal of State property. A Group III offense was not supported by the evidence because the removal was authorized by the Supervisor. The Agency elected to issue Grievant a Group I Written Notice. It is not difficult for an agency to establish unsatisfactory performance by an employee. The Agency considered Grievant's work history and performance and concluded that no mitigating circumstances existed to eliminate the Group I Written Notice. The Hearing Officer must give deference to the Agency's consideration of mitigating circumstances even if the Hearing Officer does not agree with the issuance of discipline. Issuing a Group I Written Notice under the facts of this case does not exceed the limits of reasonableness. Although the Supervisor authorized the transaction, Grievant should have recognized that the transaction was an aberration under the Agency's customary practices. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

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<sup>4</sup> Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## **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>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.