

Issues: Four Group II Written Notices (failure to follow policy) and Termination (due to accumulation); Hearing Date: 08/15/14; Decision Issued: 09/03/14; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 10412; Outcome: Partial Relief;
Administrative Review: EDR Ruling Request received 09/16/14; EDR Ruling No. 2015-3999 issued 09/30/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 09/12/14; DHRM Ruling issued 10/14/14; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10412

Hearing Date: August 15, 2014
Decision Issued: September 3, 2014

PROCEDURAL HISTORY

On June 17, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy for an offense date of November 2, 2013. On June 17, 2014, Grievant was issued a second Group II Written Notice for an offense date of December 2, 2013. On June 17, 2014, Grievant was issued a third Group II Written Notice for failure to follow policy for an offense date of December 20, 2013. On June 17, 2014, Grievant was issued a fourth Group II Written Notice for failure to follow policy for an offense date of January 28, 2014. Grievant was removed from employment based on the accumulation of disciplinary action.

On June 20, 2014, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On July 14, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Motor Vehicles employed Grievant as a CSC Generalist at one of its branches. No evidence of prior active disciplinary action was introduced during the hearing.

Tellers at DMV branches receive payments from customers including dollars and checks. At the end of the day, tellers are supposed to total their customer transactions including the amount of checks and cash they received. They print out an adding machine tape showing their addition. They record this information on an FS 54 form. The FS 54 and machine tape are given to a senior employee or supervisor who verifies that the numbers balance.

During the week of January 6, 2014, the Agency learned that the Bank had determined that a bank deposit made on November 2, 2013 was short \$62.75. The shortage originated from a transaction conducted by Grievant. The Customer gave Grievant \$62.75 in cash but Grievant keyed the transaction as having been paid by check. The Agency was unable to locate a check in the amount of \$62.75. After

additional investigation, the Agency was unable to determine what happened to the cash given by the customer.

On January 16, 2014, the Agency learned that a bank deposit made on December 2, 2013 was short in the amount of \$68.87. The shortage originated from two customer transaction conducted by Grievant. Grievant received \$88.77 in cash from a customer and posted the transaction as cash. She then changed the transaction to indicate the transaction was made in two parts -- \$28.12 by check and \$60.63 in cash. The Agency was unable to locate a check in the amount of \$28.12. Grievant received \$40.75 in cash from another customer. She later changed the transaction to show receipt of a check in the amount of \$40.75. The Agency was unable to locate a check in the amount of \$40.75. The two missing checks totaled \$68.87.

On January 31, 2014, the Agency learned that a bank deposit on December 20, 2013 was short in the amount of \$62.75. The shortage originated from two transactions conducted by Grievant. Grievant received \$10 and originally posted the transaction as cash. She later changed the transaction to be by check. Grievant received \$50.75 in cash and originally posted the transaction as cash. She later changed the transaction to check. The Agency was unable to locate a check for \$10 or \$50.75. The two missing checks totaled \$62.75.

On January 28, 2014, an employee at Grievant's facility reported that the total checks for the day did not balance by \$50.75. Grievant had reported on her FS 54 and adding machine tape that she received a check in the amount of \$50.75. The missing check was from one of Grievant's transactions. Grievant received cash from the customer in the amount of \$50.75. Those funds were not located by the Agency.

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."¹ 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.² 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.

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

² See Attachment A, DHRM Policy 1.60.

At the end of each day, Grievant was responsible for adding up the total amount paid by check and the total amount paid by cash for her customer transactions. She was to record those totals on an FS 54 form and submit the adding tape and FS 54 form for review by a senior employee or supervisor.

Grievant incorrectly calculated the amount of her checks and cash on November 1, 2013, thereby justifying the issuance of a Group I Written Notice. Grievant incorrectly calculated the amount of her cash and checks on December 2, 2013 thereby justifying the issuance of a Group I Written Notice. Grievant incorrectly calculated the amount of her cash and checks on December 20, 2013 thereby justifying the issuance of a Group I Written Notice. Grievant incorrectly calculated the amount of her cash and check on January 28, 2014 thereby justifying the issuance of a Group I Written Notice. Upon the accumulation of four Group I Written Notices, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

The Agency argued that Grievant should receive a Group II Written Notice in each case because she violated its policy providing:

Record check total from the adding machine tape in the Checks field on the front of the FS-54. DO NOT record total of check collections from the system total. Customer checks must be added to receive accurate check collection totals.³

The evidence showed that Grievant did not ignore this policy. She attempted to comply with the policy adding the cash and checks for her daily transactions. She made a calculation error which is best described as a Group I offense for unsatisfactory performance rather than a Group II offense for violating written policy.

Grievant argued that had the Agency more timely notified her of the errors, she would have been able to explain the nature of the transactions. Although this is likely true, it does not affect the outcome of this case. The Agency has established errors by Grievant and that is sufficient to support the issuance of Group I Written Notices despite any explanation that Grievant could have offered for the errors.

Grievant also argued that had the Agency notified her of the November 2, 2013 error on a timelier basis she may have been able to improve her work performance to avoid the subsequent errors. Although this may have been true, the Agency did not learn of the errors until January 2014. The Agency's failure to notify Grievant sooner is understandable.

Grievant argued that other employees could have detected the errors when she turned in her FS 54 and adding machine tape at the end of her shift. Although this is

³ Agency Exhibit 8.

true, it does not change the fact that Grievant failed to correctly add her checks and cash on the days she made errors.

Grievant argued that it was possible that senior employees or supervisors could access her computer account to change the information she recorded regarding the erroneous transactions. Although this may have been possible, it was not likely to have happened. Grievant had a unique log in identification and her account was password protected with a password she selected. If a manager accessed her account and changed a transaction, the computer system would have recorded the change as being made by the manager and not by Grievant.

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”⁴ 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuances to the Grievant of four Group II Written Notices of disciplinary action are **reduced** to four Group I Written Notices. The Agency’s decision to remove Grievant 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:

⁴ Va. Code § 2.2-3005.

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.⁵

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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