

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (falsifying records) and Termination; Hearing Date: 03/04/15; Decision Issued: 07/10/15; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10541, 10542; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 07/27/15; EDR Ruling No. 2016-4199 issued 08/28/15; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/27/15; DHRM Ruling issued 08/31/15; 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: 10541 / 10542

Hearing Date: March 4, 2015

Decision Issued: July 10, 2015

PROCEDURAL HISTORY

On December 4, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On December 4, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying records.

On December 29, 2014, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On January 26, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 4, 2015, a hearing was held at the Agency's office.

APPEARANCES

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

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 B at one of its stores. The purpose of her position was:

Manages and operates a high-volume, retail ABC store which has a greater variety of product codes, larger inventory, and more complex scheduling requirements in compliance with the policies and procedures of the Department of ABC. Plans, organizes, and directs a store's operation and participates in all activities that are essential to the operation of an ABC store.¹

Grievant received a "High Contributor" rating on her most recent annual performance evaluation. She began working for the Agency on September 13, 2012. She became a store manager in July 2014. Her husband was also employed by the Agency at another store.

All ABC Stores use a point of sale (POS) system which tracks all inventory movements at the store level including: shipments received from the warehouse, transfers back to the warehouse and to another store; shortages, breakages, and overages.

¹ Agency Exhibit 4.

Agency employees routinely count the number of bottles of alcohol in stores as part of a “physical count.” The results of physical counts are compared with the inventory number tracked by the Agency’s POS system. The amount of the difference between the physical count and the POS inventory determines which accounting adjustment is needed.

A case of Vodka 38008 included six bottles. Four bottles amounted to less than a case under the Agency’s accounting system. A typical store manager might prefer for the discrepancy between the physical count and the POS inventory to be less than a case of alcohol because Agency managers considered a discrepancy of a case to unfavorable and reflect negatively on the store manager. An unfavorable inventory report could result in the Agency concluding it needed to increase the number of store inventory audits from quarterly to monthly.

On or before September 5, 2014, Grievant wrote a note stating, in part, “over 1 case 38008 (6 bottles).”²

Grievant told the Assistant Manager that having a full case would not help the inventory at all but if a bottle or two broke or even vanished, it would help.

Grievant kept a list on a bulletin board at the store. The list showed the date, alcohol type, inventory number in the point of sale system, actual inventory count, difference between point of sale inventory and actual inventory and initials of the person making the entry. The list showed that prior to September 15, 2014, the point of sale system showed an inventory of 66 bottles, an actual count of 72 bottles, and a difference of six bottles of Vodka 38008.

On September 14, 2014, Grievant spoke during a mandatory staff meeting. She spoke about her employees posting items on the bulletin board list. She said she might not have enough time to fix the problems and she might have to bring in her Husband who was “a master manipulator at inventory.”

Grievant drafted a “to-do” list. One of the items listed was:

- make [Vodka 38008] or [Alcohol Brand] disappear count then fix³

On September 16, 2014, Grievant told the Lead Sales Associate that she had to go to a manager’s meeting but told the Lead Sales Associate to check the Vodka 38008. She said to check the bottom case to see if it was opened and not marked. The Lead Sales Associate checked the box and noticed that it was open and two bottles

² Agency Exhibit 6.

³ Agency Exhibit 1.

were missing. When Grievant returned from her meeting, Grievant asked the Lead Sales Associate if she had any good news. The Lead Sales Associate told Grievant that the box had two bottles missing. Grievant seemed happy to the Lead Sales Associate and said that this will help the inventory a lot.

Inside the store was a bathroom used to store product displays. Only employees could access the room. On September 24, 2014, the Assistant Manager and two other employees were in the bathroom “pulling out displays” when they noticed two half gallon bottles of Vodka 38008. The two bottles were inserted in to the bottom of a display. The bottles were located in a manner showing that someone hid the bottles and covered them up so as not to be visible or readily accessible by employees working in the store.

On September 25, 2014 at approximately 6:30 p.m., the Supervisor reviewed alcohol inventory balances. She recorded that the point of sale system showed 59 bottles of Vodka 38008 but she counted 65 bottles in the store. She included the two hidden bottles of Vodka 38008 because she had been informed of the bottle discovery.

On September 26, 2014 at 9:26 a.m., the Assistant Manager reviewed alcohol inventory balances. She recorded that the point of sale system showed 59 bottles of Vodka 38008 but she counted 63 bottles. She only counted the “sales floor.”

A physical count of inventory began on September 27, 2014. On September 28, 2014, a Physical Inventory Adjustment Report showed four bottles of Vodka 38008.

On October 7, 2014, the Assistant Manager checked the display case in the stock room and observed that the two bottles of Vodka 38008 were no longer there.

In July 2014, the Supervisor instructed Grievant not to use her Husband as a back-up position. The Supervisor restated the instruction during a manager’s meeting on September 18, 2014. As of September 29, 2014, Grievant listed her Husband as an Alternate User under her MyABC account.

In her response to the Agency’s notice of pending disciplinary, Grievant wrote:

When the Regional Manager informed me that I couldn’t use [Husband] as my back-up manager, I removed him and added another manager. But he did not want that additional responsibility. When I started having problems with my Time keep entries, which is very common with new manager, I asked if [Husband] would check over my time entries to make sure I was doing them correctly. In order for him to look at them I had to list him as an alternate user, per SOP 403-001B, in Time Keep ONLY. At no time was [Husband] asked to take on any of my responsibilities as a back-up manager. I read the instructions for this and found no restrictions in the SOP about who could be listed. Since my Regional Manager had indicated that she was unhappy with my Time Keep entries but had not

given me specific direction as to what I had done wrong or how to fix it, I was trying to proactively improve my training in this area. Since this complaint has been presented, I have removed him from access to my areas as an alternate user.⁴

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.”⁵ 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.”

Group III Written Notice

“[F]alsification of records” is a Group III offense.⁶ The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice for falsification of inventory records. This conclusion is supported by several reasons. First, Grievant knew that the physical inventory of Vodka 38008 was six bottles more than the POS system number. Second, Grievant believed that the Agency would perceive her work performance more favorably if her physical inventory showed four bottles over the POS instead of six bottles. Third, she wrote a “to-do” note referring to making alcohol disappear. Fourth, Grievant indicated she might not have enough time to fix the problems and she might have to bring in her Husband who was “a master manipulator at inventory.” Fifth, two bottles were placed in a storage area where they would not be subject to a physical inventory count. Sixth, Grievant asked the Lead Sales Associate to look at the Vodka 38008 before Grievant left the store. When Grievant returned, Grievant asked the Lead Sales Associate if there was any “good news.” Seventh, the bottles re-appeared after the physical count. All of these facts are consistent with an employee who wanted to “fix” her inventory by hiding two bottles of Vodka 38008 in order to alter the appearance of inventory at her store. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that no one knows who hid the two bottles. When the facts of this case are considered individually, none of them appear of great significance. When considered together, however, a clear pattern of intent and behavior follows. Wanting to make alcohol disappear, fix or manipulate inventory, is consistent with an intent to

⁴ Agency Exhibit 6.

⁵ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁶ See, Attachment A, DHRM Policy 1.60.

falsify. Making bottles disappear was not a phrase frequently used by ABC store employees. Although it might not be unusual for two bottles to be stolen from a store, it was highly unusual for two bottles to be hidden in a display in room only accessible by staff. Hiding two bottles of alcohol is consistent with wanting and acting to alter an inventory count. The Agency has presented sufficient evidence to show Grievant had sufficient intent to falsify the inventory count at her store.

Group II Written Notice

The Agency presented credible evidence showing that Grievant was instructed not to use her Husband as a “back-up” position. The Agency has not presented sufficient evidence to establish what constituted a “back-up” position. Grievant interpreted “back-up” position to mean having her Husband perform all of the tasks that she performed. She did not permit her Husband to perform all of her duties in her absence. She only permitted him to serve as an Alternate User to assist her with completing her employee time records because she was a relatively new manager and was not always sure how to account for employee time. SOP 403-0001B addresses Alternate Users and provides:

Some aspects of MyABC are limited to the Store Manager. The Store Manager or the Regional Manager may assign access to various MyABC functions to the Asst. Manger, Lead Sales Associate, Relief Asst. Managers, or “buddy” Store Manager by designating the persons as an Alternate User.⁷

The evidence is insufficient for the Hearing Officer to conclude that Grievant should have understood “back-up” position to mean Alternate User. The Group II Written Notice must be reversed.

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”⁸ 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

⁷ Agency Exhibit 7.

⁸ Va. Code § 2.2-3005.

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the Group III Written Notice.

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**. The Group II Written Notice is **rescinded**.

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.