

Issues: Group II Written Notice (failure to follow policy/procedures), Group II Written Notice (failure to follow policy/procedures and falsification) and Termination (due to accumulation); Hearing Date: 06/27/16; Decision Issued: 07/17/16; Agency: ABC; AHO: Ternon Galloway Lee, Esq.; Case No. 10813; Outcome: Partial Relief, Termination Upheld; **Administrative Review: EDR Ruling Request received 08/01/16; EDR Ruling No. 2017-4406 issued 09/02/16; Outcome: AHO's decision affirmed.**

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10813

Hearing Date: June 27, 2016

Decision Issued: July 17, 2016

SUMMARY OF DECISION

The Agency had found Grievant failed to follow procedure due to excessive cell phone use while on duty. It then issued Grievant a Group II Written Notice. The Hearing Officer found Grievant engaged in the conduct alleged in the group notice and the discipline was consistent with policy and reasonable. The Hearing Officer then upheld the group II written notice.

The Agency also found Grievant failed to follow cash handling procedures and falsified records. The Agency then issued Grievant another Group II Written Notice with termination. The Hearing Officer found the Agency met its burden regarding the failure to follow policy. The Hearing Officer also determined that the Group II written notice with termination was consistent with policy and reasonable. The discipline was upheld.

HISTORY

On March 21, 2016, the Agency issued Grievant a Group II Written Notice for failing to follow procedure due to her excessive cell phone usage. On March 22, 2016, the Agency also issued Grievant a second Group II Written Notice with termination for failing to follow cash handling procedures and falsification of records. On April 20, 2016, Grievant timely filed her grievance challenging the Agency's discipline. The Office of Employment Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance on May 6, 2016.

The Hearing Officer held a telephonic prehearing conference (PHC) on May 18, 2016.¹ Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was June 27, 2016. Accordingly, by agreement of the parties, the hearing was set for that date. On May 21, 2016, the Hearing Officer issued a scheduling order addressing those matters discussed and ruled on during the PHC.

The Hearing Officer held a second PHC on June 23, 2016, at the request of the Agency's Advocate for the purpose of addressing matters related to witness testimony. It was determined during the PHC that the Grievant had not timely submitted her witness list. Neither had Grievant requested any witness orders. Further, Grievant's list of witnesses indicated that the Agency employed seven (7) of them. The Agency's Advocate challenged the relevance of some of the witnesses. After considering the parties' arguments, the Hearing Office instructed the Agency's Advocate to make reasonable efforts to have the 7 witnesses available for the hearing.

¹ This was the parties' first date available for the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. The Grievant objected to the Agency's Exhibit 6, pages 17 through 19. Grievant stated that the three (3) pages had not been timely provided to her. The Agency contended that the 3 pages were provided to Grievant as attachments when Grievant received her "Notice of Pending Disciplinary Action." Further, the Agency had asserted that these pages were mistakenly omitted from the exhibits the Agency previously provided to Grievant under the "exchange of exhibits" provision of the scheduling order. Subsequently, the Agency's Advocate emailed the 3 pages to the Grievant one day after exhibits were due to be exchanged between the parties. The Hearing Officer considered the arguments of the parties and also the untimeliness of Grievant's witness and exhibit disclosures. After careful deliberation and to be fair to the parties, the Hearing Officer overruled Grievant's objection.²

Thereafter, the Hearing Officer admitted the Agency's entire exhibit binder which included its exhibits 1 through 5, exhibit 6 in its entirety (pages 1 through 19, and exhibits 7 through 12. Grievant's exhibits 1 through were also admitted.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Although Grievant represented herself, she was assisted, as she desired, by her advocate.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (2 witnesses)
Grievant
Witnesses for Grievant (7, including Grievant)³
Joint witness (1)

ISSUE

Was the written notices and termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). A preponderance of the evidence is evidence

² Of particular note, Grievant had not timely provided her witness lists and exhibits to the Agency or the Hearing Officer. And as noted here, the Hearing Officer did admit Grievant's exhibits and permitted her witnesses to testify.

³ Grievant identified another individual as a possible witness. Grievant had the opportunity to call this witness by telephone during the hearing, but Grievant decided to not obtain testimony from this person.

which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant has been employed by the Agency for at least 10 years. The Agency, among other functions, sells alcoholic beverages at its retail stores. Grievant's position at the time of her termination was assistant relief manager. On February 16, 2016, Grievant was working as the manager on duty in one of the retail stores. Her shift was from 1:00 p.m. to 9:30 p.m., including a 30 minute lunch break. As the manager on the shift, Grievant was responsible for the funds received from sales during that period. (A Exh. 4; A Exh. 6, p. 6; G Exh. 2, p. 1; Testimony of Supervisor).

2. The store Grievant was assigned to on February 16, 2016, was considered an "A" store. Such designation indicates that the store has minimal foot traffic from customers entering it to purchase alcohol. As is the case with several of the retail stores, the design of the store consists of a front room which is the retail area and a back office/stockroom. (Testimonies of Store Manager 1, Supervisor; and Director of Retail Operations).

3. Sales Clerk 1 (Clerk 1) and Sales Clerk 2 (Clerk 2) worked along with Grievant on February 16, 2016. Clerk 1's shift ended at 7:00 p.m., Clerk 2's at 9:30 p.m. Grievant returned to the store from her lunch break at about 6:24 p.m. (Testimony of Supervisor; A Exh. 6, p. 6). Immediately thereafter, Grievant began talking on her personal cell phone with her daughter. After February 16, 2016, Grievant informed her supervisors that she needed to converse with her daughter due to her daughter experiencing a mental break down. The cell phone conversation between Grievant and her daughter lasted from 6:24 p.m. to 7:05 p.m. During this period, neither Grievant nor the two (2) clerks were on the sales floor. (Testimonies of Supervisor and Grievant; Video viewed during hearing; A Exh. 6, p. 5).

4. Just prior to Clerk 1's shift ending, Clerk 1 gives Grievant her cash till to check out for the evening. The till indicates a \$18.00/18.01⁴ excess of funds (overage) taken in by Clerk 1 during her shift. At the time Clerk 1 delivered her till to Grievant, Grievant continues her conversation on her cell phone. In addition, Grievant does not ensure that Clerk 1 count her cash from the till in the presence of Grievant. Nor does Grievant, after receiving the funds, count Clerk 1's cash in the clerk's presence. Clerk 1 leaves and Grievant places the clerk's funds in the store's vault. Grievant then ends her cell phone conversation at 7:05 p.m. Hence, Grievant does not verify and re-verify Clerk 1's funds. (A Exh. 1, pp. 6, 11; A Exh. 10; Testimonies of Supervisor and Grievant).

5. No reason was established that would excuse Grievant's non-verification of Clerk 1's funds. (Testimony of Supervisor).

6. The purpose of verifying and re-verifying the funds of a clerk is to identify any

⁴ A discrepancy exists in the evidence as to whether the overage was \$18.00 or \$18.01.

discrepancy with what funds the clerk contends she has and the actual funds submitted. Once the funds have been verified and discrepancies addressed, then the funds are to be placed in the vault as store funds. (Testimony of Supervisor).

7. Grievant also used her cell phone to continue conversing with her daughter on February 16, 2016, from 7:23 p.m. to 7: 25 p.m.; from 7:42 p.m. to 9:02 p.m.; and from 9:17 p.m. to 9:23 p.m. (Testimony of Supervisor; Video viewed during the hearing).

8. As noted above, Grievant informed management that she was talking to her daughter due to an emergency. (Testimony of Supervisor; A Exh. 6, p. 5). The evidence also revealed that at least one of Grievant's daughter had a history of suicidal ideations. (Testimony of Regional Manager 2).

9. While Grievant was on her cell phone from 7:42 p.m. to 9:01 p.m., Clerk 2 was in the back office area or stockroom sitting down with his head down on the table. Clerk 2 would get up whenever a customer would enter the store and go to the sales area. Grievant remained at her desk in the back in the stockroom during her cell phone conversation. Occasionally, she would get up and stand in front of the opened stockroom door. Thus, from about 6:30 p.m. to 9:30 p.m., Grievant failed to maintain a constant presence on the sales floor. (Testimony of Supervisor; A Exh. 6, p. 19; Viewing video during the hearing).

10. Just as Clerk 1 was permitted to leave at the end of her shift without counting her funds in Grievant's presence, so too was Clerk 2. Thus, there was no verification of Clerk 2's funds. In addition, Grievant did not count Clerk 2's funds in his presence after they were delivered to Grievant. (Testimonies of Supervisor and Grievant; Viewing video during the hearing). There was no legitimate reason for Grievant to not verify Clerk 2's funds. (Testimony of Supervisor).

11. Also, at the end of Grievant's shift, she does not perform a vault count by recounting all funds collected during her shift before making the store deposit. (Testimony of Supervisor; Viewing video during the hearing).

12. Because Grievant failed to verify and re-verify Clerk 1's cash drawer at the close of that clerk's shift, Grievant checked out the clerk with purportedly an \$18.00/\$18.01 overage. Sales audit later determined the purported overage was erroneous. (Testimonies of Supervisor and Store Manager 1). This error was undetected by Grievant because she failed to conduct verification and re-verification of the funds. Had Grievant performed the verification, she would have determined that Clerk 1 did not have an overage. This error affected the store funds at the end of Grievant's shift, because the undetected error made it appear that the store funds were short by \$18.00/\$18.01. (Testimony of Supervisor).

13. Grievant ended her shift on February 16, 2016, with the perception that there was a \$18.00 to \$20.00 discrepancy in what was actually taken in by the store during her shift and what the vault count showed. Grievant did not attempt to resolve the discrepancy by verifying the funds. Instead, Grievant filled out a deposit ticket for the bank adding in an unverified overage amount of \$18.00/\$18.01. The amount of funds she noted as being deposited in the bank was \$1,226.64. This amount included the overage. Grievant also left a note for the manager opening

the store the next day about the discrepancy. (Testimonies of Store Manager 1 and Supervisor; A Exh. 2, p. 5; A Exh. 6, p. 12).

14. Upon receiving the note about the discrepancy the next day, Store Manager 1, conducted his own investigation to determine the cause of the discrepancy. His investigation revealed that there was no overage of \$18.00 and the amount of store funds should have been reported as \$1,208.64. The cashier Clerk 1 had made a mistake. She was off by \$18.00 and did not have an overage. (Testimony of Store Manager 1). Store Manager 1 created another bank deposit ticket with the correct amount of the funds from Grievant's shift. That amount was \$1,208.64. As noted above, the deposit completed by Grievant the night before had indicated \$1,226.64 was being deposited in the bank as the store funds from Grievant's shift on February 16, 2016. Grievant's deposit slip had to be voided as it was incorrect. (Testimony of Supervisor; A Exh. 6, pp. 9,12, and 13).

15. As a result of Store Manager's investigation, the discrepancy initially reported by Grievant to Store Manager 1 came to Supervisor's attention on February 17, 2016. This came about when Store Manager 1 contacted the auditor of sales by email about the reported discrepancy. Store Manager 1 also copied his supervisor, Regional Manager 2, on the email. Regional Manager 2 then notified Grievant's Supervisor. (Testimonies of Store Manager 1 and Regional Manager 2).

16. Grievant's supervisor then launched her own investigation. As part of that investigation, she viewed the video of Grievant's shift on February 16, 2016. The video revealed that Grievant engaged in multiple conversations on her cell phone between 6:30 p.m. and 9:30 p.m. The video indicated the total time Grievant spent on her cell phone during the shift was over 2 hours. She also observed on the video that for several hours, Grievant left the back door of the store opened.⁵ In addition, the video showed that for lengthy periods of time during Grievant's shift, no staff was present on the sales floor. This was the case because staff was in the stockroom/back office. Further the video showed that Grievant failed to properly check out her clerks as no verification or reverification of funds was conducted. (Testimonies of Supervisor, Regional Manager 2, and Store Manager 1; Viewing video at the hearing).

17. By way of example, the Video revealed that from about 7:43 p.m. to 9:02 p.m., Grievant could be seen still on her cell phone in the stockroom/back office and not out on the sales floor. (Testimony of Supervisor).

18. According to policy as mentioned below, store funds are required to be counted prior to depositing them and before entering the information in the Point of Sale (POS). Grievant failed to follow these policies. (Testimony of Supervisor; A Exh. 8).

19. For example, the video showed that after the store closed at 9:00 p.m., Grievant returned

⁵ The evidence shows that the practice of leaving the back door to the store opened was a common practice by several managers. One reason given for doing so at the store Grievant worked in on February 16, 2016, was to help cool off the room. The evidence showed that the backroom was mostly glass. Because of this, the room would heat up to about 85 degrees inside. The back door to the room was opened to help cool off the room. (Testimony of Store Manager 1 and Grievant).

to the sales floor, rang up her cash register, and retrieved her till. She did not count the funds, but at 9:12 p.m., she printed the vault count and at 9:13 p.m. she printed the store deposit. (Testimony of Supervisor; Viewing of Video at Hearing; A Exh. 6, p. 14 - 15).

20. After viewing the video Supervisor determined that Grievant engaged in violations of Agency policy. Violations noted by Supervisor were multiple: Safety violations with no one being on the sales floor; the back door to the stock room was open at all times⁶; and money was left out in plain view. In addition, Grievant's supervisor noted that Grievant failed to verify the funds of the clerks. Also, she failed to verify the entire store funds for that day when she entered the deposit information. Grievant also violated the cell phone policy and did not participate in the day to day duties of the manager in charge while on the cell phone. (Testimony of Supervisor).

21. Supervisor also asserted that Grievant falsified the amount she put on the deposit ticket because the amount placed on the bank deposit ticket must be determined after verification of the funds. Grievant failed to verify them. But she put an amount on the deposit slip anyway. That number was not consistent with the actual funds collected by the store that day. (Testimony of Supervisor; A Exh. 6, pp. 12 - 16).

22. After consultation with other management, Supervisor issued Grievant a notice of intent to discipline. Supervisor provided Grievant with the policies the Agency contended Grievant violated. Management determined that Grievant acted with gross negligence. Particularly management noted that Grievant breached security in several ways by leaving the back door open for several hours, by being on her cell phone for over 2 hours, and by abandoning the sales floor. Further, management was of the belief that Grievant's behavior set a poor example for her subordinates, Clerk 1 and Clerk 2, as she failed to follow cell phone usage policy and did not comply with cash handing procedures. (Testimony of Supervisor).

23. Grievant responded to the notice of possible disciplinary action letter. In her response, among other things, Grievant acknowledged that she had failed to count the funds throughout the day, but she noted that as typical, the store had few customers that day. (A Exh. 2, p. 5).

24. Management reviewed Grievant's reply to the notice and decided the appropriated discipline for Grievant was the issuance of two Group II Written notices with removal.⁷ (A Exh. 6, pp. 1 through 5, 17 through 19; A Exh. 1; Testimonies of Supervisor, Retail Director and Assistant Retail Director).

GROUP NOTICES

⁶ As referenced in footnote 5 above, having the back door open for lengthy periods of time was apparently practiced by several store managers. Thus, the Hearing Officer declines to find Grievant violated any policy because she left the store's back door open for hours.

⁷ The date of the offenses that the Agency contends Grievant committed is February 16, 2017. However, the group notices indicate the offenses took place on February 17, 2016. (A Exh.1, pp. 1 and 7). Although the offense date placed on the group notices by the Agency is erroneous, after considering the evidence, the hearing officer finds that both parties were aware that the agency contends Grievant violated employee standards on February 16, 2016. Hence the Hearing Officer finds the incorrect offense date on the notices is harmless error.

25. Regarding the group notices, Grievant was issued the first Group II Written Notice on March 21, 2016, for failing to comply with policy. That notice describes the nature of the offense as follows:

Failure to follow procedure for excessive cell phone use while on duty. On four separate occasions, [Grievant] can be seen on her personal cell phone and on some occasions excessive lengths of time. The time periods the cell phone was being used were 6:24pm -7:05pm (continued talking as she completed a cashier cash out, 7:23pm -7:25pm, 7:42pm -9:02pm and 9:17pm -9:23pm. The investigation findings can be seen on the video surveillance CDs and photos.

(A Exh. 1, p. 7).

26. Next, on March 22, 2016, Grievant received a second Group II Written Notice with termination for failing to follow policy and falsification of records. That notice describes the nature of the offense as follows:

Failure to follow procedures for cash handling. Failed to verify cash funds during 2 cashier checkouts and at EOD closing. Falsified the EOD calculator tape, the calculator tape and actually (sic) store funds amount showed a discrepancy of \$18.00. [Grievant] failed to investigate the discrepancy and instead falsified the information. Documentation that includes investigation findings, cashier checkout, e-mail from sales Audit & video surveillance backup written documentation.

(A Exh. 1, p. 1).

27. Grievant had previously been counseled by Regional Manager 2 in the fall of 2015, on cash handling procedures and verifying funds. Grievant's supervisor witnessed the counseling. (Testimonies of Supervisor and Regional Manager 2; A Exh. 6, pp. 1 and 4).

POLICIES

28. The Agency has established the following relevant provisions of policy SOP 403-0007 regarding accounting for Sales Cash at a retail store:

Sales Cash is required to be balanced and verified at various times throughout the day as noted below:

Opening-funds must be balanced even if the opening manager closed the previous evening;

Closing-this must be documented by running a calculator tape with the total of the sales cash to include all checks. Initial and date the tape and store with the funds;

Prior to making the deposit;

Shift change-prior to the management person on duty leaving for the day, the money must be verified by the management person assuming responsibility;

In addition, the policy mandates the following:

All discrepancies in funds require documentation by an E-Mail memo to the Regional Manager. Should the discrepancies exceed \$20.00, the Regional Manager must also be notified immediately by email or telephone.

(A Exh. 8, p. 5 (emphasis added); Testimonies of Supervisor and Store Manager 3).

29. The Agency has established the following relevant provisions of policy SOP 403-0001 regarding cashier checkout procedures and verification of funds:

the cashier will count their sales cash to include all media types (cash, check, and travelers checks);

management will verify same in the presence of the cashier. If management is the cashier, every effort should be made to have a second party verify the funds;

NOTE: recount the out of balance tender and make any necessary corrections. Click the balance button over reentry.

(A Exh. 7, p. 35; Testimonies of Supervisor and Store Manager 3; A Exh. 6, p. 16).

30. Under Agency policy, after finalizing cashier checkouts, a vault count was required to be conducted. The Vault Count reflected all current loans, pickups, and checkouts. To perform the vault count, the closing manager is required to take the following steps:

Count the store funds;

If the totals do not balance, recount the funds to resolve the discrepancy. After recounting the store funds and the sales cash is over, it will be necessary to review the tender report by detail for each cashier to verify the [end of day] (EOD) has been completed. If the EOD has not been completed on any cashier, complete the EOD and re-verify the sales cash to the vault count before proceeding to store the deposit.

(A Exh. 7, p. 37 (emphasis added)).

31. Before entering funds in the POS system at the end of the shift, the manager on duty is required to verify them. Grievant never verified the funds of the two clerks working the shift.

(Testimony of Supervisor; A Exh. 7, pp. 32-33; Agency Policy SOP 403-0001).

32. Regarding cell phone usage, Agency policy SOP 403-1032 prohibits personal cell phone use while in the Sales areas and while on duty. However, an employee may make or receive a personal phone call due to an emergency. In such cases, the usage must be kept to a minimum, a few minutes. Also, the emergency phone conversation must take place off the sales floor. (Testimony of Supervisor; A Exh. 9, p.11).

33. Mobile device usage must not interfere with the store's or individual's productivity or work performance. (A Exh. 9, p.11).

34. Under the Standards of Conduct Policy 1.60, failing to follow written policy is a Group II offense. (A Exh. 3, p. 22 (Policy 1.60)).

JOB DESCRIPTION

35. Under Grievant's Employee Work Profile (EWP), among other core duties, Grievant bears the responsibility of ensuring customer relations. The EWP indicates that 25% of her job responsibilities fall in this area. As such, in this area she has assignments such as, but not limited to, monitoring subordinates by maintaining a presence in the sales area to provide and ensure excellence in customer service, assuring a safe workplace, assisting customers with selection and sale of merchandise, and effectively managing time. (A Exh. 4, p. 3)

36. In addition, Grievant's EWP requires her to be responsible for Cash accounting and operating expenses. This duty comprises 30% of her responsibilities. In pertinent part, Grievant's tasks in this core area include the following:

Accounting for all store funds to include sales receipts, petty cash/change funds;

accurately performing bank deposits;

monitoring the use of mini safes that marked money;

operating a POS terminal with minimal errors not to exceed on average one (1) error per 500 customers;

accounting for personal cash shortages, and collecting employee shortages by deadlines;

(A Exh. 4, p.3; Testimony of Supervisor).

OTHER

37. In response to her due process notice of intent to discipline, Grievant admitted to failing to verify funds as required during an incident that occurred in the fall of 2015. Grievant had received counseling regarding the incident in the fall of 2015. Also, prior to the February 16,

2016 incident, Supervisor had counseled Grievant about her attendance and on at least one occasion about Grievant not being present on the sales floor. Grievant also admitted to failing to verify funds several times on February 16, 2016. (Testimonies of Supervisor, Grievant, and Regional Manager 2; A Exh. 2, p. 2; A Exh. 6, pp. 1 and 4).

38. As an assistant relief store manager, Grievant is a classified employee. Grievant received On the Job Training (OJT) when she was elevated from an hourly employee to a classified employee. OJT included, but was not limited to, training in using the Standard Operating Procedures (SOP). Employees are expected to follow the SOP. The SOP includes the policies for handling store funds. (Testimony of Supervisor; A Exhs. 7 through 9).

39. The evidence does not establish that Supervisor precluded Grievant from speaking to the Director of Retail and his assistant prior to her being issued the group notices. (Testimony of Supervisor).

40. The Agency has disciplined another assistant manager who failed to handle store money properly. The evidence was insufficient to show the extent of the discipline. Also, the evidence was not sufficient to establish whether the other assistant manager had been previously disciplined for a similar offense. (Testimony of Supervisor; G Exh. 4, p. 14).

41. Regarding Grievant's absence from the sales floor, the manager's presence on the floor is important so that customers will receive appropriate service and so that the manager will be aware of what is taking place in the sales area of the store. Also, presence is necessary for safety of the employees and to assure the safe keeping of merchandise. (Testimony of Supervisor; A Exh. 4).

42. Grievant's cell phone usage precluded her from performing her duties. She was distracted and failed to verify Clerk 1's and Clerk 2's funds. Grievant also abandoned the sales floor. She compromised the employees and the store's safety. (Testimonies of Assistant Director of Retail Operations and Supervisor; Video viewed during hearing).

43. Management determined that a group II written notice was appropriate for the cell phone usage because Grievant was on the phone for over 2 hours. Management also determined Grievant had committed violations of other offenses, but elected not to discipline Grievant for those. (Testimony of Retail Director).

44. Retail Director has been employed by the Agency for over 30 years. He was formerly a clerk and a store manager and believed based on his experience in those positions that Grievant's use of the cell phone was excessive. (Testimony of Retail Director).

45. It is reasonable to conclude that Grievant's use of a cell phone for personal reasons for 2 hours during the time she was supposed to be working for the Agency was excessive.

46. Other employees –classified and hourly- have used their personal cell phones while at their job site for texting, conversing, viewing a movie, etc. The evidence is insufficient to establish that any of these workers engaged in such usage excessively or for 2 hours or more

during their work shift and while on duty. (Testimonies of Regional Manager 2, Sales Associate, and Store Managers 1 and 2).

47. Management has also permitted employees with small children to check their cell phones and to take important calls from agencies such as the IRS. However, the evidence establishes that during those times the usage was minimal and the cell phones were used in the back office/stockroom and during the employees break time. (Testimony of Store Manager 2).

45. Regional Manager 2 has had to discipline some employees for cell phone usage during prohibited times. In those situations, Regional Manager 2 had determined the usage was minimal. The violators usually received verbal counseling for the first or second occurrence. For subsequent usage, the employee usually received written counseling. (Testimony of Regional Manager 2).

46. The Agency has employed Sales Associate for 2 years. During her employment with the Agency, Sales Associate has reported observing what she believes was misconduct of another assistant manager. This purported misconduct includes the following:

(i) intentionally deleting an email that revealed a mistake this assistant manager had made to preclude her superiors from becoming aware of the mistake;

(ii) using her personal cell phone to hold a conversation with an employee and recording it. Also, allowing Sales Associate to listen to the recorded conversation;

(iii) reporting an overage in funds from one till when none existed (This resulted in the store funds being short. Then the assistant manager requested that Sales Associate pay the shortage. An investigation revealed that no shortage existed)

Sales Associate stated that the above described conduct was reported to the assistant manager's superiors; however, this assistant manager remains employed by the Agency. (Testimony of Sales Clerk).

47. Sales Clerk does not hold a managerial position. Thus, she is unaware of what discipline, if any, employees have received for misconduct. (Testimony of Sales Clerk).

48. Management determined that Grievant had not attempted to defraud the Agency. (Testimony of Retail Director).

49. Grievant received a "contributor" rating for her annual performance evaluation in November 2015. (G Exh. 2, p. 20; A Exh. 2, p. 20).

50. Several store managers found Grievant dependable. Also, Store Manager 1 stated that Employees loved Grievant. (Testimonies of Store Managers 1 and 2).

51. There is a history of one of Grievant's daughters experiencing severe suicidal ideations.

During that time, the Agency made accommodations for Grievant and permitted her to attend counseling with her daughter. (Testimony of Regional Manager 2).

52. Grievant could have requested and received leave on February 16, 2016, to address her family emergency. Grievant never requested leave. (Testimony of Supervisor/Regional Manager 1).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides 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/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Also, generally, the misbehaviors significantly impact agency operations. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On March 21 and 22, 2016, management issued Grievant two Group II Written Notices for the reasons stated in the above section. The Hearing Officer examines the evidence to

determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?

1. Excessive Phone Calls

The agency contends that on February 16, 2016 grievant excessively used her cell phone while on duty in violation of Agency policy. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

Under Agency Policy SOP 403-1032, the use of cell phones while on duty in the Sales Area is strictly prohibited. Also, under the policy, personal cell phone usage is permitted only during scheduled meal breaks and during supervisor approved 15 minute breaks. Moreover, mobile device usage must not interfere with the store's or individual's productivity or work performance. (A Exh. 9, p.11).

The evidence clearly demonstrates that for the last three hours of Grievant's shift on February 16, 2016, she was engaged in a personal cell phone conversation for over two hours. Grievant's timesheet for the shift indicates she worked 8.1 hours. Of that time, she spent practically 25% on her personal cell phone. Hence, the Hearing Officer finds the cell phone usage was excessive and violated the Agency's policy.

Having made this finding, the Hearing Officer has considered, among other evidence, Grievant's representation that she was addressing an emergency involving her daughter. Understandably, emergencies do arise at work. But, Grievant's subsequent course of action after learning about her daughter's crisis is troubling. Grievant could have ended the calls more quickly. In addition, if a brief conversation with her daughter failed to resolve the crisis, the evidence shows that Grievant could have requested and taken immediate leave to address the situation. In lieu of proceeding in a more appropriate manner, Grievant spent over 2 hours - while she was supposed to be on duty for her employer - engaging in a personal cell phone conversation.

2. Failure to Follow Policy and Falsification of Records

The second group notice issued by the Agency contends that Grievant failed to follow cash handling policies and falsified the end of day calculator tape. Now, the Hearing Officer examines the evidence to determine if the Agency has met its burden regarding this group notice.

Agency Policy SOP 403-0007 requires the manager on duty to balance and verify sales cash at various times throughout the manager's shift. In addition, Agency Policy SOP 403-0001 sets forth the procedure the manager must follow to verify funds. The steps require counting of

a cashier's cash till when he/she is ending the shift. This counting must be done in the presence of the manager on duty. The manager then recounts the funds in the presence of the cashier. Under the policy, this is known as verification and reverification of the cashier's check-out funds. The evidence clearly shows that Grievant failed to comply with this policy. In fact, Grievant admitted such. Also, the video that shows what occurred during Grievant's shift, depicts Grievant on her cell phone and not verifying Clerk 1's cash drawer funds as the clerk is checking out. Accordingly, Grievant failed to verify and she had no excusable reason for the noncompliance with policy.

In addition, under Policy SOP 403-0007, any discrepancy in funds must be documented. Moreover, the manager on duty is required to notify the regional manager of any discrepancy regarding the funds by an email memorandum. If the discrepancy exceeds \$20.00, the manager on duty is required to notify the regional manager immediately by telephone or email. The evidence demonstrates that Grievant had determined that there was a discrepancy of \$18.00. Although, the next day, the auditor concluded that Clerk 1 had made an error in tallying her funds, by policy once Grievant determined there was a discrepancy she was required to notify her supervisor of it via email. While the evidence does demonstrate that Grievant left a note about the discrepancy for the manager who would open the store the next day, she clearly failed to comply with policy and inform her supervisor. In fact, Supervisor learned of the discrepancy by someone else the next day. This happened when Store Manager 1 investigated the discrepancy the next day and informed his supervisor, Regional Manager 2, about it. Regional Manager 2 then informed Grievant's supervisor.

Moreover, under Policy SOP 403-0007, Grievant was required to conduct a vault count after finalizing the cashier check outs. Among other steps, this involves counting and verifying the store funds and comparing those funds with the vault count. If the totals do not balance, the manager on duty is required to recount the funds to resolve any discrepancy. That is, the manager is required to verify the sales cash to the vault count before proceeding to the store deposit step and entering the store deposit amount on the Point of Sale (POS) screen.

The evidence shows that Grievant failed to perform the functions with respect to the vault count and store deposit. For one, as mentioned above, Grievant had not verified the funds from her two clerks. In addition, she took no measures to rectify the problem such as (i) summoning the clerks back to the store so that verification could be performed or (ii) counting all of the store funds herself. Without confirming what store funds she had actually collected during her shift, Grievant entered a store deposit amount in the POS. The amount was over by \$18.00 due to an error Clerk 1's made in counting her funds. Hence, the store deposit ticket that Grievant prepared for the bank was inaccurate. This was so because the deposit amount written on the ticket reflected store funds that were \$18.00 over what was actually collected on February 16, 2016. Subsequently, the deposit ticket was voided and a new one prepared that reflected the actual amount the store received in sales on February 16, 2016. Had Grievant conducted her verifications throughout the shift and at its conclusion, she would have detected the error and been in a position to accurately provide the store deposit/complete the bank deposit ticket.

In sum, Grievant's own admissions as well as other evidence of record clearly show she failed to follow the cash handing procedures of the Agency. Thus, the Hearing Officer finds

Grievant failed to follow the Agency's policies.

As noted above, the Agency also contends that Grievant falsified a record. The Hearing Officer interprets this offense to require proof of an intent to misrepresent. Of note, the evidence shows that management found Grievant had no intent to defraud the Agency. Considering the Agency's own finding and other evidence of record, the Hearing Officer finds the evidence insufficient to show Grievant falsified a record.

B. Was the discipline consistent with policy and law?

As mentioned above, Grievant engaged in excessive use of her cell phone while on duty. Moreover, she failed to follow Agency policy with regard to personal cell phone usage and cash handling procedures.

Regarding the Group II Written Notice for the excessive cell phone usage, the Hearing Officer finds the offense was more than minor as Grievant used her cell phone to engage in personal conversations for over 2 hours. This was a violation of Agency policy. While on her cell phone, Grievant was supposed to be working for the Agency. However, the evidence shows she was distracted and, thus, severely neglected her duties while carrying on the multiple conversations. Particularly, Grievant failed to verify the funds from either of the cashiers' tills. Moreover, while she was on the phone, she failed to maintain a presence on the sales floor and provide safety and customer service. Moreover, her phone usage precluded her from verifying the store funds at the end of her shift. As a result, she inaccurately reported the store's deposit. Sales audit became involved and the initial bank deposit ticket had to be voided. Grievant also set a poor example for her subordinates by grossly violating the cell phone usage policy. Thus, the Hearing Officer finds the Agency's issuance of the Group II Written Notice for the offense was consistent with policy and law.

Having made this finding, the Hearing Officer is cognizant that the evidence shows other employees have used their cell phones while at work before. That said, the evidence was not sufficient to demonstrate any employee utilized his/her cell phone to the extent Grievant did on February 16, 2016.

Regarding the second group II written notice Grievant received, the Agency issued this one contending that Grievant failed to follow cash handling policies and falsified a record. While the Hearing Officer determined that the Agency failed to commit the latter offense, the Agency did show Grievant failed to follow the referenced policies. These policies are written and the evidence establishes that Grievant received on the job training regarding them.

The Standards of Conduct, Policy 1.60, Attachment A, indicates that failure to comply with written policy is a Group II offense. Accordingly, the Hearing Officer also finds the second group II written notice was properly issued. Policy 1.60, Attachment A also indicates that when an employee has an active group II written notice and then receives another like notice of the same level, termination normally follows. Such is the case here. Hence, the Hearing Officer also finds that the Agency properly issued the second group II written notice with termination.

The Hearing Officer notes again that she is also mindful of Grievant's claim that she is being treated differently. She has also considered the testimony of Sales Associate regarding the alleged misconduct of another assistant manager and other employees. After careful thought to all relevant evidence, the Hearing Officer finds disparate treatment has not been shown.

II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁸ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁹ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁰

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the first group II written notice and that the behavior was misconduct. Regarding the second group II written notice with termination, the Hearing Officer has determined Grievant failed to follow written policies about cash handling. And further, the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

In her plea for mitigation Grievant makes, among other assertions, a claim that she is being disciplined more harshly than others who have committed the same or similar offenses. As discussed above, the evidence is insufficient to establish such unequal treatment. Grievant also requests that the Hearing Officer consider her contention that her daughter was in crisis state on

⁸ Va. Code § 2.2-3005 and (c)(6)

⁹ *Rules for Conducting Grievance Hearings* VI(A)

¹⁰ *Rules for Conducting Grievance Hearings* VI(B)

February 16, 2016, and Grievant's cell phone usage was excusable. What is more, the evidence demonstrates that management had made accommodations in the past for Grievant when her daughter was experiencing suicidal ideations. Grievant also presented evidence that several of her superiors described Grievant as a dependable worker. Of note also, the evidence shows Grievant had been employed by the Agency for at least 10 years when she was terminated.

In considering whether mitigation is warranted, the Hearing Officer also notes certain aggravating factors. They include the extreme degree to which Grievant violated the personal cell phone usage policy. In addition, Grievant's misconduct is exacerbated by the fact that she is a manager and her behavior sets an example for her subordinates. What is more, Grievant's failure to follow policy compromised the safety of the employees, customers, and the Agency's merchandise.

The Hearing Officer has considered all of Grievant's arguments and all evidence whether specifically mentioned or not. Having undergone this thorough deliberation, the Hearing Officer finds the Agency's discipline is reasonable.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's issuance of the Group II Written Notice for violation of the personal cell phone usage policy.

Regarding the second Group II Written Notice, the Hearing Officer upholds it concerning the failure to follow cash handling policies, but not regarding the falsification of records. The Agency is ordered to redact the "falsification of records" wording from the second group II written notice.

Further, due to the accumulation of two active group II Written Notices, the Hearing Officer also upholds the termination.

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
Departmental of Human Resource Management
101 N. 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 N. 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.¹¹

Entered this 17th day of July, 2016.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant/Grievant's Advocate
EDR's Director

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.