Issues: Group II Written Notice (failure to follow instructions/policy – licensee), Group II Written Notice (failure to follow instructions/policy – cash verification), and Termination due to accumulation; Hearing Date: 09/28/17; Decision Issued: 10/18/17; AHO: Ternon Galloway Lee, Esq.; Case No. 11069; Outcome: Partial Relief; **<u>Administrative Review</u>: Ruling Request received 11/02/17; EEDR Ruling No. 2018-4642 issued 12/19/18; Outcome: Remanded to AHO; Remand Decision issued on 06/12/18; Outcome: Original decision affirmed.**

DECISION OF HEARING OFFICER

In the matter of
Case Number: 11069
Hearing Date: September 28, 2017
Decision Issued: October 18, 2017

SUMMARY OF DECISION

The Agency had found that Grievant failed to follow instructions/policy on March 16, 2017, and issued Grievant a Group II Written Notice. Additionally, the Agency determined that, Grievant failed to follow policy on May 2, 2017, and issued Grievant another Group II Written Notice with removal. Regarding the first group notice issued by the Agency, the Hearing Officer has found that the Agency could not meet its burden. Accordingly, the Hearing Officer rescinded the Group II Written Notice pertaining to the alleged March 16, 2017 offense.

Regarding the group notice with removal related to the May 2, 2017 offense, the Hearing Officer determined that the Agency met its burden and showed that this Group II Written Notice was warranted and appropriate under the circumstances. However, the Hearing Officer determined that because this Group II Written Notice is Grievant's first and only group notice, the Agency's termination of Grievant was inconsistent with policy and law. Hence the Hearing Officer upheld the Group II Written Notice regarding the May 2, 2017 offense, but she rescinded the termination and ordered reinstatement of Grievant.

HISTORY

On July 6, 2017, the Agency issued Grievant two Group II Written Notices. The Agency also removed Grievant from her employment.

On July 17, 2017, Grievant timely filed a grievance challenging the Agency's discipline. On August 3, 2017, EEDR assigned the undersigned as the hearing officer to the appeal.

The Hearing Officer held a telephonic prehearing conference (PHC) on August 8, 2017.[1] Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was September 28, 2017. Accordingly, by agreement of the parties, the hearing was set for that date. On August 11, 2017, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during 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. None were presented. Then the Hearing Officer admitted the Agency's entire exhibits' binder, including Agency Exhibits 1 through 10. She also admitted Grievant's exhibit consisting of 18 pages. Neither party objected to the admission of the exhibits.

At the hearing held on September 28, 2014, both parties were given the opportunity to

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

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. Grievant represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (1, Grievant)

ISSUE

Were the group notices and removal 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 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 giving consideration to the demeanor of each witness who testified, the Hearing Officer makes the following findings of fact:

1. The Agency, among other functions, sells alcoholic beverages at its retail stores. During the 12 years prior to Grievant's termination, she had managed several of the Agency's retail stores. Before holding the position of retail store manager, Grievant was a Lead Sales Associate for about 10 years. Therefore, Grievant had been employed by the Agency for about 22 years. (G Exh.; Testimony of Grievant; A Exh. 4).

2. As retail manager, Grievant consistently received annual performance ratings of "Extraordinary Contributor," with one exception. Her supervisor, the Regional Manager (RM), rated Grievant a "Contributor" on Grievant's 2016 performance evaluation. (Testimony of Grievant; A Exh. 5/8).

3. On June 8, 2017, RM issued Grievant a Notice of Pending Disciplinary Action. Grievant responded to this notice on June 12, 2017, and on July 6, 2017, RM issued Grievant two Group II Written Notices with removal. One notice involved a licensee issue, the other notice involved verification of cashier checkout funds. The pertinent facts concerning these group notices are set forth below. (A Exhs. 1 and 6).

LICENSEE INCIDENT

4. Because sales of alcohol are regulated in the Commonwealth, business establishments selling alcohol to its customers must be licensed by the Agency. Further, the Agency assigns each licensee to one of its retail stores to place and retrieve their orders for alcoholic beverage products. (A Exh. 9; SOP 403-0012; Testimonies of Director of Retail Operations and RM).

5. On December 27, 2016, a business establishment's representative (Licensee) assigned to the store Grievant managed ordered multiple cases of alcohol. A case contains 12 bottles of alcoholic beverages. Depending on what quantity of alcohol was ordered, a case would have 12 milliliter bottles of alcohol, or 12 liter bottles of alcohol. When Licensee picked up the order, the store's cashier made a mistake regarding the amount owed for the liquor. Specifically, Licensee was charged for 12 liter bottles of a particular alcoholic product, but Licensee received 12 milliliter bottles of that product. Hence, Licensee overpaid for the alcohol Licensee received. The overpayment charge was unintentional. (A Exh. 1/14-15; Testimonies of RM and Grievant).

Because of this mistake, the store's documentation accounting for its inventory on December 27, 2017, would show 12 fewer liter bottles of the alcoholic product than were physically in the store. The inventory would also reflect 12 more milliliter bottles of the alcoholic product than were actually in the store. (Testimony of Assistant Director of Retail Operations; A Exh. 10/13).

6. The evidence does not establish that Grievant was the employee who assembled, verified, and/or charged Licensee on December 27, 2017. (A Exh. 1/14-15; A Exh. 6/16; Testimonies of RM and Grievant).

7. Rather, the evidence indicates that one of Grievant's subordinates, presumably Assistant Manager 1, conducted the transaction and made the mistake at issue here. (A Exh. 6/16; Testimony of RM).

8. Grievant discovered the overpayment on January 6, 2017. On January 6, 2017, when Licensee placed his next order for a case of the product in the liter size, Grievant became aware that there was a shortage of the milliliter product and an overage of the liter product. She determined the shortage and overage occurred because of the mistake made on December 27, 2017. (Testimony of Grievant; A Exh. 6/16).

The shortage and overage had a direct relation to the mistake that occurred on December 27, 2016. Thus, there was a corresponding shortage. Because of this connection, under Agency policy found in "Findings of Fact" #11, no inventory adjustment or notification to RM was required.

Grievant has concluded that since Licensee ordered multiple cases at a time, one case or bottle of alcohol was scanned which was in the quantity of liters and the cashier then manually entered the total number of bottles/cases. The cashier did not realize that Licensee's order also consisted of 12 milliliter bottles of alcohol. Hence, she believes this is what caused the overcharge/shortage.

(Testimony of Grievant; A Exh. 1/14-15; G Exh.).

9. Upon the situation coming to her attention on January 6, 2017, Grievant recognized that in her 12 years of managing the Agency's retail stores she had not experienced a similar incident. She then consulted the Agency's policies or SOPs for guidance. She found that none addressed the particular situation. Grievant had not received from upper management any updates regarding the application of Agency policies concerning the incident. Additionally, Grievant conferred with her two assistant managers on the corrective action to be taken.

With her assistant managers' knowledge, Grievant took the following action noted here. She spoke to Licensee and proposed correcting the overpayment on Licensee's January 6, 2017 order. Under the proposal, Licensee would receive 12 liter bottles of the alcoholic product for which he overpaid in December, 2016. However, Licensee would pay the price for 12 milliliter bottles of that product. This would compensate Licensee for the overpayment on December 27, 2016, and in effect provide Licensee with a refund. Licensee was satisfied with the corrective proposal.

(A Exh. 6/41-42; Testimony of Grievant; G Exh.).

10. Licensee came in the store on January 6, 2017, for his next order. Consistent with the offered resolution, Licensee received 12 liter bottles of alcohol and paid the price associated with the purchase of 12 milliliter bottles of the product. Thus, Licensee in effect received and was refunded the overpayment he made on December 27, 2016. (A Exh. 6/16; G Exh.).

11. Agency Policy SOP 403-0001 does not require an inventory adjustment and RM approval when a case of a product is determined to have more of the product in the case then expected if there is a corresponding shortage. (A Exh. 7/42-43).

The relevant section of SOP 403-0001 reads as follows:

> Anytime a full case is discovered over, a Type 2 inventory adjustment must be immediately executed. At the time of the required physical inventory, any close to full quantity cases discovered over <u>without</u> a corresponding shortage must be adjusted as a Type 2 inventory adjustment. List on the Inventory Audit Report.

(A Exh. 6/2; SOP 403-0001 at page 42).

12. As noted here, the shortage and overage were directly related to the mistake that occurred on December 27, 2016. Thus, there was a corresponding shortage. Because of this connection, under Agency policy, no inventory adjustment or notification to RM was required. (Testimony of Grievant; A Exh. 7).

13. To provide guidance and guard against the recurrence of an overpayment, on January 6, 2017, Grievant also verbally counseled her assistant managers about verifying orders. (Testimony of Grievant).

14. The term *"manipulate"* is defined as follows:

"to adapt or change (accounts, figures, etc.) to suit one's purpose or advantage"

See The Random House College Dictionary at p. 813

"Juggle" and "Falsify" are identified as synonyms of the word *"manipulate*."

Id.

15. Grievant did not announce to the RM the situation involving the mix-up in the Licensee order. Nor did she inform RM of the corrective action she took. Even so, the evidence does not establish that Grievant attempted to hide the incident from her superiors. Grievant did not believe she had done anything wrong. Further, the evidence is insufficient to show that Grievant had an incentive to cover up her subordinate's mistake and/or the corrective action she took. The evidence is insufficient to establish that Grievant's method of correction was to suit her purpose.

The Agency speculates that Grievant was attempting to hide the situation from upper management and gain an advantage regarding the accuracy of her store inventory. (Testimony of Assistant Director of Retail Operations).

16. As of January 6, 2017, the SOP reasonably permitted the corrective action Grievant took regarding the Licensee incident. (Testimony of Grievant; A Exh. 7/43).

The Hearing Officer finds that the evidence is insufficient to establish that Grievant wrongfully falsified, manipulated, was unfair, or attempted to gain an advantage by correcting the mistake her subordinate made. (*See also* Testimonies of Director of Retail Operations and Assistant Director of Retail Operations indicating Grievant received "no personal gain.")

17. On January 17, 2017, Assistant Manager 2 met with RM and reported, among other things, her version of what occurred regarding the Licensee incident to RM. At the request of RM, Assistant Manager 2 provided the RM with a statement regarding, among other things, the Licensee incident. (A Exh. 10/4-6, 13; Testimony of RM).

18. Assistant Manager 2 disliked her boss. At some point prior to Grievant being terminated, Assistant Manager 2 was disciplined by Grievant. Assistant Manager 2 disagreed with the discipline. She then contacted RM, met with RM, and reported having concerns about Grievant's management. (A Exh. 10/34).

The evidence is insufficient to establish the number of meetings Assistant Manager 2 had with RM regarding Grievant.

19. After Assistant Manager 2 met with RM, RM launched an investigation of Grievant, including auditing the store. (Testimony of RM; A Exhs. 6 and 10).

20. During the course of the investigation referenced above, RM interviewed Grievant on March 16, 2017. During that interview, Grievant was asked about the Licensee incident. Grievant informed RM how she handled the situation as referenced above in the "Findings of Facts."

The evidence is insufficient to show that on March 16, 2017, when Grievant informed RM how she handled the situation that RM expressed to Grievant that Grievant had inappropriately handled the Licensee matter. Further, the evidence is insufficient to show that RM informed Grievant she should have completed a return on March 16, 2017.

(Testimony of Grievant; A Exh. 6/42; G Exh.).

21. The March 16, 2017 interview occurred two months after the Licensee incident and RM being made aware of the incident. (Testimony of RM).

The evidence is insufficient to show that during the interview that RM informed Grievant that the corrective action Grievant employed was inappropriate. (Testimony of Grievant; A Exh. 6/42; A Exh. 10/1).

22. Over three months after the March 16, 2017 interview, Grievant received a Group II Written Notice regarding the Licensee incident. (Testimony of Assistant Retail).

23. The Group Notice described the nature of the offense as follows.

> Failure to follow policy and procedure - [Grievant] admitted to knowing that Gran Gala codes 66936 & 66937 were crossed. After researching it was determined that a licensee was charged and given the incorrect bottles in their order. [Grievant] informed the licensee of the error and was told they would be charged incorrectly to fix the error. The inventory was manipulated to correct the order instead of completing a return to the licensee when the error was discovered.

(A Exh. 1/3).

24. The Agency recognizes that a genuine mistake was likely made by an employee when the Licensee received an incorrect order or was overcharged for his order on December 27, 2016. (Testimony of RM).

25. However, the Agency contends that it issued Grievant the above-referenced Group II Written notice because of the manner – as stated in that notice - in which she corrected the mistake. (Testimony of RM).

26. The evidence is insufficient to show that on January 6, 2017, the Agency had provided Grievant with a policy or updates regarding policy that would address an overpayment such as occurred on December 27, 2016. (Testimony of Grievant).

27. The Agency did not provide any documentation of specific, mandatory inventory

accounting procedures to correct errors and mistakes. (Testimony of RM).

The Agency did not provide documentation that Grievant had received its procedures/policies regarding inventory accounting procedures. Neither did the Agency provide evidence of relevant monthly updates to policy.

CASHIER CHECKOUT VERIFICATION MATTER

28. In addition to the Group II Written Notice for the alleged offense on March 16, 2017, on July 6, 2017, RM issued Grievant a second Group II Written Notice for an alleged offense on May 2, 2017. That offense related to Agency procedure regarding verifying cashier checkout tills. (Testimony of Assistant Director of Retail Operations).

29. This second Group II Written Notice describes the nature of the offense as follows:

> Failure to follow policy and procedure -[Grievant] admitted to failing to verify cashier checkouts. [Grievant] can be seen on video failing to verify the cashier drawers at the end of their shift. [Grievant] can be seen on video and admitted to signing off on the drawer calculator tape if their money balanced in the POS system.

(A Exh. 1/1)

30. Specifically, RM contends in her Notice of Pending Disciplinary Action that Grievant violated SOP 403-0007 and 403-0012. In pertinent part they read as follows:

> SOP 403 - 0012 Computer POS System - The cashier will count their sales cash to include all media types (cash, check, and traveler's 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.
>
> SOP 403 - 0007 Store Funds- 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.
>
> SOP 403 - 0007 Store Funds – The Change Fund Bags/tills are verified when issued to each clerk at the beginning of their shift and are re-verified by management upon surrender by the clerk at the end of the shift. This must be documented by running a calculator tape with the total of the change fund. Any infrequently used change fund bags must be verified periodically, but not less than once per month. Store management must initial and date the tape and store with the Change Fund Bag or till.

(A Exh. 6/3;A Exhs. 8 and 9).

31. Grievant admits that she did not verify cashier check out tills when they balanced with the POS system. She would customarily sign off on the calculator tape without recounting the funds and have the till placed in the safe with the tape. Grievant contends that that her action was the common practice in her store and other Agency retail stores. (Testimony of Grievant).

32. RM audited Grievant in August 2016 and mentioned in the audit that Grievant failed to verify funds. Grievant then responded in writing that "[m]oving forward, management will verify after each cashier checkout that the bag was correctly counted and that the calculator tape with initials and date have been included." (A Exh. 10/39-40).

Then pursuant to a subsequent audit, on February 9, 2017, Grievant promised upper management that she would verify all cashier tills upon surrender. (A Exh. 10/43).

33. Thus, Grievant had sufficient notice of Agency policy requiring management to verify cashier tills upon their surrender. *Id*.

34. On May 2, 2017, Grievant failed to verify a cashier's till upon surrender. (Testimony of Grievant; A Exh. 6/42; Testimony of RM).

OTHER

35. The interpretation of the Agency's policies under the SOP are ultimately the responsibility of the Director of Retail Operations. (Testimony of Director of Retail Operations).

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[2]

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. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are mitigating circumstances. *See* Standards of Conduct Policy 1.60.

On July 6, 2017, management issued Grievant two Group II Written Notices for the reasons stated here. Moreover, under the second group notice, the Agency terminated Grievant's employment. 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. The Alleged March 16, 2017 Offense - Licensee Incident

First, the Hearing Officer considers the Agency's contention that Grievant manipulated the inventory and therefore violated policy.

In pertinent part, SOP 403-0001 reads as follows:

> Anytime a full case is discovered over, a Type 2 inventory adjustment must be immediately executed. At the time of the required physical inventory, any close to full quantity cases discovered over <u>without</u> a corresponding shortage must be adjusted as a Type 2 inventory adjustment. List on the Inventory Audit Report.

The facts establish Grievant was not required to adjust the inventory due to a corresponding shortage. (*See Statement of Facts 6 through 16)*. Specifically, the evidence demonstrates that on January 6, 2017, when Licensee placed an order for a case of a particular product in the liter size, it was discovered there was a shortage of that product in the milliliter

[2] Grievance Procedural Manual §5.8

size and an overage of the same product in the liter size. The evidence demonstrates that Grievant discovered the shortage and overage on January 6, 2017. The evidence shows that the shortage and overage were directly related to the mistake that occurred on December 27, 2016. Thus, there was a corresponding shortage. Because of this connection, the Hearing Officer finds that under Agency policy, SOP 403-0001, no inventory adjustment or notification to RM was required.

The Agency also avers that Grievant's handling of the Licensee incident violated a section of SOP 403-0012. The relevant provision cited by the Agency reads as follows:

> Licensee orders once assembled must be verified with a hand-held scanner to check for errors such as missing merchandise or code crosses using the instructions below:
>
> - Correct all discrepancies in the order by tapping No and enter the quantity of bottles expected.
> - If there are no exceptions or all exceptions have been corrected, the hand-held will return to the ABC Logo Main Menu screen.

(A Exh. 6/2; A Exh. 9/11-12).

First, regarding the Licensee's December 27, 2016 order, the evidence fails to establish that Grievant is the person who actually processed the order resulting in Licensee's overpayment. Additionally, the Agency has conceded that the overcharge was likely **"an honest mistake."** (emphasis added). This recognition implies that the Agency would permit, without penalty, acceptable correction of the error. Now, turning to Licensee's second order and any claim that Grievant should have verified it, the evidence is also insufficient to show Grievant assembled and verified that order. In fact, on both occasions, the evidence suggests the assistant managers, rather than Grievant, completed those tasks.

In addition, of particular note, the Agency also contends Grievant should have conducted a Licensee return. However, a close reading of another section of SOP 403 – 0012 (which was not cited by the Agency) that falls under the title "Licensee Returns," appears to only address the situation where a Licensee actually returns an item(s) purchased from the Agency store, pays any required restocking fee at the time of the return, and then receives a refund. (*See* A Exh. 9/17-18; *see also* A Exh. 7/22-23 - SOP 403-0001 - on returns contemplating that customer would return the merchandise for a refund). In the case before the Hearing Officer, the evidence is insufficient to show that the Licensee had all the merchandise to return such that the type of return now instructed by the Agency could take effect.

What is more, Grievant persuasively testified that the situation presented was unique. She also stated that she reviewed policy updates and none had been provided by the Agency addressing the Licensee situation. Grievant noted that she then talked to the store's assistant managers. Next, based on what procedures she had before her and managerial experience and authority, she made the decision to compensate Licensee in the manner employed. By doing so, Grievant in effect acknowledged that she refunded Licensee for the amount Licensee overpaid on

the prior order.

Upon consideration of the evidence, the Hearing Officer finds that the Agency has not met its burden and shown that Grievant violated Agency policy. The Hearing Officer had an opportunity to observe the demeanor of Grievant as she testified and found her credible. Moreover, the Hearing Officer finds that as late as March 16, 2017, let alone January 6, 2017, Grievant had no notice that the method of correction she employed was prohibited by policy. In addition, of particular note, RM testified that periodic updates on Agency policy go out monthly and that she requires her subordinates to sign acknowledging that they have received and reviewed those updates. Yet the Agency produced no proof of this claim. Accordingly, relevant to the case before the Hearing Officer, this means that no updated polices were provided as evidence relating to the unique situation Grievant encountered.

In addition, the evidence shows that on March 16, 2017, RM met with Grievant and asked Grievant about the overcharge. RM avers that during that meeting, she counseled Grievant about the alleged improper way Grievant handled the overcharge. Grievant denies RM counseled her or stated that Grievant had done anything wrong during that meeting. As previously indicated, the Hearing Officer had an opportunity to observe all the witnesses. She found Grievant's testimony credible regarding what, if any, counseling was provided. Hence, the Hearing Officer is not persuaded that on March 16, 2017, the Agency put Grievant on notice that her method of correcting the overcharge was improper.

The Hearing Officer has made the findings noted after careful deliberation of all the evidence/arguments whether specifically mentioned or not. This includes (but is not limited to) evidence regarding the possibility of agents visiting a Licensee's business to verify that alcoholic products at the business are consistent with orders placed. It also includes (i) information that the store manager is ultimately responsible for the products' assembling and verification and (ii) assertions that Grievant failed to perform a proper refund.

Further, regarding the Licensee incident, The Hearing Officer finds that the evidence is insufficient to establish that Grievant attempted to hide a situation from upper management, engaged in falsification/manipulation, was unfair, or attempted to gain an advantage by taking the action she did to correct the overcharge. This is so because as discussed above, Grievant reasonably determined a course of action based on the current Agency's policies she had during the relevant time period. In sum, the Hearing Officer finds the failed to (i) provide Grievant with sufficient notice to conform her behavior and (ii) meet its burden.

A. Failure to Verify Cashier Checkouts

Next, the Hearing Officer considers the Agency's contention that Grievant failed to verify cashier checkouts. Particularly, the Agency alleges Grievant failed to verify cashiers tills at checkout and therefore Grievant violated the following policies:

> SOP 403 - 0012 Computer POS System - The cashier will count their sales cash to include all media types (cash, check, and traveler's 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.
>
> SOP 403 - 0007 Store Funds- 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.
>
> SOP 403 - 0007 Store Funds – The Change Fund Bags/tills are verified when issued to each clerk at the beginning of their shift and are re-verified by management upon surrender by the clerk at the end of the shift. This must be documented by running a calculator tape with the total of the change fund. Any infrequently used change fund bags must be verified periodically, but not less than once per month. Store management must initial and date the tape and store with the Change Fund Bag or till.

(A Exh. 6/3;A Exhs. 8 and 9).

The evidence establishes that on several days, including May 2, 2017, Grievant was observed on video failing to verify cashier tills upon surrender per policy. For example, Grievant could be viewed receiving a calculator tape pertaining to a cashier's till, signing and dating the tape. Grievant did so without first recounting the funds in the till in the presence of the cashier to assure that funds claimed to be in the till were actually inside the till.

Grievant admitted to RM that up to June 12, 2017, she had not been recounting a cashier's till upon the cashier surrendering the till to Grievant if the cashier's till balanced with the point of sale (POS system. Grievant defended her action by claiming that it has been a longstanding practice of the Agency to forgo verifying a cashier's check-out till when it balanced in the system. (A Exh. 6/42).

However, Grievant's response to a store audit that took place on August 29, 2016, contradicts her claim about the existence or Agency's acceptance of such a practice. Of specific note, in the referenced audit, among other findings, RM determined that Grievant had not adhered to policy regarding verifying funds and signing off on calculator tapes only after the verification had taken place, and placing the calculator tape inside the till verified. In response to that audit finding, on September 5, 2016, Grievant wrote a response as to how she would correct the audit finding. Specifically, Grievant responded in pertinent part as follows:

> The calculator tape has been added, dated, and initialed by management for bag #5. **Moving forward, management will verify after each cashier checkout that the bag was correctly counted and that the calculator tape with initials and date have been included.** (Emphasis added).

(A Exh. 10/39-40).

Moreover, the evidence demonstrates that as late as February 9, 2017, Grievant also informed RM in writing "all management will recount the remaining tills at the end of each night ensuring that a reconciliation tape is added to them."

These written responses which predate May 2, 2017 – the date of the offense - show that Grievant was aware of Agency policies regarding verification of all cashier checkout tills upon surrender.

Considering the above, the Hearing Officer finds that Agency policy requires Grievant to recount a cashier's till in the cashier's presence once the till is surrendered to Grievant. Further, after the recounting takes place, Grievant is required to sign and date the calculator tape and place the tape in the till bag. In addition, she finds no exception to the policy. Grievant was on notice to conduct such verification of all tills once they were surrendered. Grievant, by her own admission, did not. Her explanation as to why she did not follow this policy is not persuasive. Thus, the Hearing Officer finds the Agency has met its burden and shown Grievant violated the policies regarding verification of tills and signing off on verified calculator tapes.

II. Was the discipline consistent with policy and law?

Because the evidence failed to establish Grievant engaged in misconduct on March 16, 2017, it is not consistent with policy and law.

Having found Grievant failed on May 2, 2017, to follow policy regarding the verification of cashiers' tills, the Hearing Officer now determines if the discipline for the misconduct was consistent with policy and law. As mentioned that discipline was the issuance of a Group II Written Notice with removal.

The Standards of Conduct indicates that failing to follow policy or instructions is a group II offense. The evidence shows Grievant committed this offense on May 2, 2017. Hence, under Policy 1.60 a group II written notice is appropriate discipline. Moreover, under this policy, while the Agency may suspend Grievant for up to 10 days for the first group II offense, no authorization for termination is provided. The Agency did more than suspend Grievant. Management terminated her employment. Accordingly, the termination is not consistent with policy/law.

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 Equal Employment Dispute Resolution ["EEDR"]."[3] EEDR'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."[4] More specifically, the *Rules* provide that in disciplinary, grievances, if the

[3] Va. Code § 2.2-3005 and (C)(6)
[4] *Rules for Conducting Grievance Hearings* VI(A)

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.[5]

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.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.[6]

The Hearing Officer has found that Grievant engaged in a group II offense – failing to follow policy - on May 2, 2017, and the Agency's issuance of the group notice was consistent with policy and law. However the termination was not.

Now, the Hearing Officer considers whether the group II Written notice for failing to verify tills without termination is unreasonable and therefore should be mitigated. To advance her claim of mitigation, Grievant points to her 20 plus years of employment with agency. She notes she has never been issued a written group notice. Grievant contends that it has been a long standing practice to not verify tills that balance in the POS. She states that she has received "extraordinary performance ratings" during her tenure with the Agency except for the last one. It was contributor. Having considered these claims and all evidence of record, the Hearing Officer does not find the group II written notice is unreasonable

DECISION AND ORDER

After a thorough consideration of all the evidence, whether specifically mentioned or not, and based on her findings here, the Hearing Officer's decision is set forth here.

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[5] *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.,* EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[6] *E.g., id.*

1. Group II Written Notice Regarding the Alleged March 16, 2017 Offense – Rescinded

The Hearing Officer has determined the Agency failed to meet its burden regarding the alleged offense occurring on March 16, 2017. Accordingly, the Group II Written Notice is rescinded.

2. Group II Written Notice Regarding the May 2, 2017 Alleged Offense

With respect to the Agency's Group II Written Notice with removal, based on the evidence of record the Hearing Officer finds the Agency has met its burden and showed that Grievant failed to follow the verification policies. Thus, the Group II Written Notice is upheld. However, because the other Group II Written Notice has been rescinded for lack of persuasive evidence, the Agency has no authority to remove Grievant from employment. Hence, Grievant's termination must be rescinded. The Agency is ordered to take the following action:

1. rescind the Group II Written Notice regarding the alleged March 16, 2017 offense related to accusations of manipulating inventory;

2. although the Group II Written Notice about the May 2, 2017 offense, related to the failure to verify checkout tills is affirmed, the Agency is ordered to rescind the removal or termination of employment that accompanied this Group II Written Notice;

2. pay full back pay for the period Grievant has been separated from her job (back pay is to be offset by interim earnings);

3. appropriately restore other benefits and seniority;

4. reinstate Grievant to her former position or, if occupied, to an equivalent position.

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 Equal 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.[7]

ENTERED NUNC PRO TUNC: October 18, 2017

Entered this 19th day of October, 2017.

____

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
EEDR's Director of Hearings

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

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10069

Remand Hearing Date: May 11, 2018

Record Closed on May 22, 2018

Decision on Remand Issued: June 12, 2018

SUMMARY OF DECISION

The Agency had found that Grievant failed to follow instructions/policy on March 16, 2017, and issued Grievant a Group II Written Notice. The Hearing Officer determined that Grievant failed to follow policy with regard to Agency Policy SOP 403-0012. However, the Agency failed to show a violation of Agency Policy SOP 403-0001. The Hearing Officer also determined mitigation was warranted, reduced the Group II Written Notice to a Group I Written Notice, and reinstated Grievant with appropriate back pay and benefits.

HISTORY

On July 6, 2017, the Agency issued Grievant two Group II Written Notices. One group notice specified that Grievant had failed to follow policy or instructions on March 16, 2017. The second group notice alleged that Grievant had failed to follow policy on May 2, 2017. After holding a grievance hearing on September 27, 2017, the Hearing Officer determined in her decision issued on October 18, 2017, that the Agency failed to meet its burden regarding the first Group II Written Notice which asserted Grievant violated policy on March 16, 2017. Although the Hearing Officer upheld the Group II Written Notice regarding the May 2, 2017 Group II offense, the Hearing Officer's decision reinstated Grievant because she had accumulated no more than a single Group II Written Notice offense.

The Agency appealed the Hearing Officer's decision regarding the Group II Written Notice pertaining to the March 16, 2017 alleged offense. After reviewing the appeal, EEDR remanded the Hearing Officer's decision for further consideration. Thereafter, the Hearing Officer permitted the parties to submit additional arguments and evidence in writing. She also reopened the hearing and took additional testimonial evidence on May 11, 2018. During this subsequent hearing, Agency witnesses testified that the Agency had amended its policies to address a situation similar to the one Grievant confronted on January 6, 2017 (January, 2017). When probed about the particulars of those amendments, the Agency witnesses were evasive. Accordingly, the Hearing Officer directed the agency to provide those updated policies. They were produced on May 18, 2018. The Hearing Officer granted the parties permission to provide any statement the Agency or Grievant deemed appropriate about any of the policy updates. Grievant submitted an email response on May 21, 2018; the Agency submitted its response on May 22, 2018. The Hearing Officer has admitted as exhibits the policy updates and any party responses to them.

Accordingly, in addition to evidence previously admitted prior to EEDR's remand, the following evidence/arguments have been made a part of the record.

(i) Agency's Supplemental Binder consisting of Agency Exhibits 11 through 14;

(ii) Post Hearing Letter argument/evidence from Grievant to Hearing Officer dated February 10, 2018;

(iii) Post Hearing Rebuttal Letter from Grievant received February 28, 2018;

(iv) email dated May 18, 2018, from Agency Advocate with eight (8) policy updates for SOPs 403-1000 and 403-0012;

(v) Grievant's email dated May 21, 2018; and

(vi) The Agency's email and letter dated May 22, 2018.

At the reopened hearing held on May 11, 2018, 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. Grievant represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (4)
Grievant
Witnesses for Grievant[8] (0)
Joint Witness (1)[9]

ISSUE

Was the group notice issued regarding the alleged March 16, 2018 offense 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 which shows that what is sought to be proved is more probable than not. GPM § 9.

After reviewing all the evidence of record and giving consideration to the demeanor of

[8] Grievant declined to testify at the reopened hearing.
[9] Both sides presented an identical witness. Accordingly, the Hearing Officer identifies this individual as a joint witness.

each witness who testified at the hearings held on September 28, 2017, and May 22, 2018, 2018, the Hearing Officer makes the following findings of fact:

1. The Agency, among other functions, sells alcoholic beverages at its retail stores. During the 12 years prior to Grievant's termination, she had managed several of the Agency's retail stores. Before holding the position of retail store manager, Grievant was a Lead Sales Associate for about 10 years. In this former position, Grievant was required to perform some managerial assignments. Therefore, Grievant performed managerial tasks during her last 22 years as an employee for the Agency. (G Exh.; Testimony of Grievant; A Exh. 4).

2. As retail store manager, Grievant received annual performance ratings of "Extraordinary Contributor" or "Contributor." Testimony of Grievant; A Exh. 5/8; Testimony of SOP Committee Chair).

3. On June 8, 2017, RM issued Grievant a Notice of Pending Disciplinary Action (NOPDA). Grievant responded to this notice on June 12, 2017, and on July 6, 2017, RM issued Grievant two Group II Written Notices with removal. One notice involved a licensee issue, the other notice involved verification of cashier checkout funds. The group II Written Notice regarding cashier verification was upheld by the Hearing Officer in her previous decision. Neither party appealed that determination. Hence, only pertinent facts concerning the group notice issued for the alleged March 16, 2017 incident are set forth below. (A Exhs. 1 and 6).

LICENSEE INCIDENT

4. Because sales of alcohol are regulated in the Commonwealth, business establishments selling alcohol to its customers must be licensed by the Agency. Further, the Agency assigns each licensee to one of its retail stores to place and retrieve their orders for alcoholic beverage products. (A Exh. 9; SOP 403-0012; Testimonies of Director of Retail Operations and RM).

5. On December 27, 2016, a business establishment's representative (Licensee) assigned to the store Grievant managed ordered multiple cases of alcohol. A case contains 12 bottles of alcoholic beverages. Depending on what quantity of alcohol was ordered, a case would contain twelve (12) 750 milliliter bottles of alcohol, or 12 liter bottles of alcohol. When Licensee picked up the order, the store's cashier made a mistake. Particularly the cashier rang up a case of liters, but the Licensee received a case of 750 milliliters. Because the case of liters cost more than the case of 750 milliliters, the Licensee overpaid for the product the Licensee received. Moreover, the result of the mistake was it created a cross-code. The Agency defines a "cross-code" as a particular product rang up as another product. The Agency requires cross-codes to be reported. (A Exh. 1/14-15; Testimonies of RM and Grievant).

Because of this mistake, the store's documentation accounting for its inventory on December 27, 2017, would show 12 fewer liter bottles of the alcoholic product than were physically in the store. The inventory would also reflect 12 more 750 milliliter bottles of the alcoholic product than were actually in the store. (Testimony of Assistant Director of Retail Operations; A Exh. 10/13).

6. The evidence does not establish that Grievant was the employee who assembled, verified, and/or charged Licensee on December 27, 2017. (A Exh. 1/14-15; A Exh. 6/16; Testimonies of RM and Grievant).

7. Rather, the evidence indicates that one of Grievant's subordinates, presumably Assistant Manager 1, conducted the transaction and made the mistake on December 27, 2016. (A Exh. 6/16; Testimony of RM).

8. On January 6, 2017, Grievant discovered the Licensee's overpayment. Also, on January 6, 2017, when Licensee placed the business establishment's next order for a case of the product in the liter size, Grievant became aware that there was a case shortage of the 750 milliliter product and an equivalent overage by one case of the liter product. She determined the shortage and overage occurred because of the mistake made on December 27, 2017. (Testimony of Grievant; A Exh. 6/16).

The shortage and overage had a direct relation to the mistake that occurred on December 27, 2016. Thus, there was a corresponding shortage. Because of this connection, under Agency policy found in "Findings of Fact" #11, no inventory adjustment or notification to RM was required.

Grievant has concluded that since Licensee ordered multiple cases at a time, one case or bottle of alcohol was scanned which was in the quantity of liters and the cashier then manually entered the total number of bottles/cases. The cashier did not realize that Licensee's order also consisted of 12 milliliter bottles of alcohol. Hence, she believes this is what caused the overcharge/shortage.

(Testimony of Grievant; A Exh. 1/14-15; G Exh.).

9. As of January 6, 2017, the product the licensee received on December 27, 2016, could not be physically returned to the store for a refund.

Upon the entire situation coming to her attention on January 6, 2017, Grievant recognized that in her 12 years of managing the Agency's retail stores, the situation was unprecedented. She then consulted the Agency's policies or SOPs for guidance. She found that none addressed the particular situation. Grievant had not received from upper management any updates regarding the application of Agency policies concerning the novel incident. Additionally, Grievant conferred with her two assistant managers on the corrective action to be taken.

With her assistant managers' knowledge, Grievant took the following action noted here. She spoke to Licensee and proposed correcting the overpayment on Licensee's January 6, 2017 order. Under the proposal, Licensee would receive 12 liter bottles of the alcoholic product for which he overpaid in December, 2016. However, Licensee would pay the price for twelve 750 milliliter bottles of that product. This would compensate Licensee for the overpayment on December 27, 2016, and in effect provide Licensee with a refund. Licensee was satisfied with the corrective proposal.

Neither the Agency nor Licensee would experience a monetary loss or gain from the proposed corrective action.

(A Exh. 6/41-42; Testimony of Grievant; G Exh.).

10. Licensee came in the store on January 6, 2017, for his next order. Consistent with the offered resolution, Licensee received 12 liter bottles of alcohol and paid the price associated with the purchase of twelve 750 milliliter bottles of the product. Thus, Licensee in effect received and was refunded the overpayment he made on December 27, 2016. (A Exh. 6/16; G Exh.).

11. On the date of the alleged offense, Agency Policy SOP 403-0001 provided in pertinent part the following language regarding Inventory Adjustments:

> Anytime a full case is discovered over, a Type 2 inventory adjustment must be immediately executed. At the time of the required physical inventory, any close to full quantity cases discovered over without a corresponding shortage must be adjusted as a Type 2 inventory adjustment. List on the Inventory Audit Report.

(A Exh. 6/2; SOP 403-0001 at page 42).

12. As noted here, the shortage and overage were directly related to the mistake that occurred on December 27, 2016. Thus, there was a corresponding shortage. Because of this connection, under effective Agency policy on March 16, 2017, no notification to RM was required. (Testimony of Grievant; A Exh. 7 at 42).

13. To provide guidance and guard against the recurrence of an overpayment, on January 6, 2017, Grievant also verbally counseled her assistant managers about verifying orders. (Testimony of Grievant).

14. On January 17, 2017, Assistant Manager 2 met with RM and reported, among other things, her version of what occurred regarding the January, 2017 Licensee Order. At the request of RM, Assistant Manager 2 provided the RM with a statement regarding, among other things, the Licensee incident. (A Exh. 10/4-6, 13; Testimony of RM).

15. After Assistant Manager 2's report to RM, the regional manager launched an investigation. (Testimony of RM; A Exhs. 6 and 10).

16. As part of her investigation, RM met with Grievant for an interview on March 16, 2017. This timeframe was 60 days after RM received Assistant Manager's 2 account of the licensee matter. During that interview, Grievant was asked about the Licensee incident. Grievant informed RM how she handled the situation as referenced in the "Findings of Facts" 9 and 10. (A Exh. 6; Testimony of Grievant).

17. The evidence does not establish that at any time during the March 16, 2017 meeting (March meeting), RM indicated that Grievant's plan of correction was misconduct. Moreover, RM offered no alternative way that Grievant could have handled the situation. At the meeting's

end, Grievant believed she had done nothing wrong. (Testimony of Grievant; A Exh. 6/42; G Exh.).

No evidence establishes that any instruction was provided to Grievant on how to handle a similar situation in the future during the two month hiatus between the occurrence of the incident and the interview with Grievant.

18. Assistant Retail Director is RM's immediate supervisor.

19. As referenced previously, on or about June 8, 2017, RM presented Grievant with a Notice of Pending Disciplinary Action (NPODA). After Grievant received the NOPDA, Grievant submitted a response to RM on or about June 12, 2017. In that response Grievant wrote, in pertinent part, regarding the licensee matter the following:

> When [RM] asked me what took place, I explained to her what happened and what I did to correct and at that time [RM] said "Oh, I see you offset it." At no time during that conversation did she imply I had done anything wrong.

(A Exh. 6/42).

20. Soon after receiving Grievant's response to the NOPDA, RM wrote to her supervisor to rebut certain responses of Grievant. In one such response, RM denies Grievant's account that no guidance was provided by RM as to how Grievant should have handled the situation. RM informed her supervisor that she had informed Grievant that a return should have been done. (A Exh. 10/1).

RM has provided no documentation to corroborate what guidance she provided Grievant during the March 16, 2017 meeting.

The Hearing Officer finds it is reasonable to assume that RM's supervisor promptly reviewed Grievant's response to Regional Manager's NOPDA.

21. Since Grievant's termination, the Agency's SOP Committee has established policy addressing a circumstance similar to what Grievant confronted on January 6, 2017. (Testimonies of RM and RM II).

For example, on or about January 1, 2018, the Agency added language to SOP 403-0012 regarding Licensee Sales. Particularly in the section titled "Finalizing the order at the POS Register," the Agency added the following language.

> If an error is discovered after the licensee has left the store, follow the below instructions:
>
> - **Immediately alert the Regional Manager or designee by email**
> - Same day – Contact the licensee to determine if they wish to

exchange the product. If they do, store personnel should take the product to the licensee and make the exchange. If the licensee does not want the exchange, perform a Post Vid and issue the licensee a corrected Licensee Order Form.

- **If a business day has passed – Contact the licensee to determine if they wish to exchange the product. If they do, store personnel should take the product to the licensee and make the exchange. If the incorrect product is no longer available or the licensee does not wish to make an exchange, contact the Regional Manager for assistance and/or approval. Under no circumstances is it permissible to correct the problem by intentionally delivering product in a future order that does not correspond to the Licensee Order Form.**

(January 1, 2018 Updated SOP 403-0012 at 17). (emphasis added).

22. The amended policy, effective January 1, 2018, explicitly addressed the situation when an error is discovered in a licensee order after the licensee has left the store. (SOP 403-0012, effective January 1, 2018 at 17).

23. Grievant received the Group II Written Notice regarding the Licensee incident over three months after the March meeting with RM and six months after the alleged offense. (Testimony of Assistant Retail; A Exh. 1 at 3; A Exh. 6 at 16).

24. The Group Notice described the nature of the offense as follows.

> Failure to follow policy and procedure - [Grievant] admitted to knowing that Gran Gala codes 66936 & 66937 were crossed. After researching it was determined that a licensee was charged and given the incorrect bottles in their order. [Grievant] informed the licensee of the error and was told they would be charged incorrectly to fix the error. The inventory was manipulated to correct the order instead of completing a return to the licensee when the error was discovered.

(A Exh. 1/3).

25. The Agency recognizes that a genuine mistake was likely made by an employee when the Licensee received an incorrect order or was overcharged for his order on December 27, 2016. (Testimony of RM).

26. However, the Agency contends that it issued Grievant the above-referenced Group II Written notice because of the manner – as stated in that notice - in which she corrected the mistake. (Testimony of RM).

27. As shown above, when the Agency provided a description of the offense in the group notice, in pertinent part, the Agency stated "…[Grievant] informed the licensee of the error and

was told [licensee] would be charged incorrectly to fix the error. The inventory was **manipulated** to correct the order instead of completing a return to the licensee when the error was discovered." (Emphasis added).

28. The Agency's diction here connotes wrongdoing, viz, any manipulation employed by Grievant was a misdeed. In addition, testimony by the Assistant Retail Director noted that Grievant's alleged misconduct involved intentional manipulation of inventory. Further, the NOPDA refers to the inventory manipulation as a fraudulent act. (Testimony of Assistant Retail Director; A Exh. 6/30).

29. The term *"manipulate"* is defined as follows:

> "to adapt or change (accounts, figures, etc.) to suit one's purpose or advantage"

See The Random House College Dictionary at p. 813

> "Juggle" and "Falsify" are identified as synonyms of the word *"manipulate*."

Id.

30. Under the grievance procedure, the Hearing Officer is required to determine if the Agency has met its burden. In this case, the Hearing Officer determined from reading the group notice that the Agency had specifically indicated in its group notice that the Grievant had "offensively" manipulated the inventory. Thus, the Hearing Officer believed she was obligated to address the Agency's accusation in her decision.

31. Accordingly, in her initial decision, the Hearing Officer determined Grievant did not wrongly manipulate the inventory as the Agency's diction indicated.

32. The Agency speculates that Grievant was attempting to hide the situation from upper management and gain an advantage regarding the accuracy of her store inventory. (Testimony of Assistant Director of Retail Operations).

33. Grievant did not announce to the RM the situation involving the mix-up in the Licensee order. Nor did she inform RM of the corrective action she took. Even so, the evidence does not establish that Grievant attempted to hide the incident from her superiors. Grievant did not believe she had done anything wrong. Further, the evidence is insufficient to show that Grievant had an incentive to cover up her subordinate's mistake and/or the corrective action she took. The evidence is insufficient to establish that Grievant's method of correction was to suit her purpose.

OTHER

34. Under Agency policy SOP 403-0001, a Licensee return is when an order is adjusted after completion. (A Exh. 7/32; SOP 403-0001).

36. A close reading of SOP 403-0012 that was effective on January 6, 2017, fails to clearly

and explicitly address how to handle an error discovered after the licensee has left the store and the product is not available to physically be returned. (A Exh. 9 at 16; Testimony of SOP Committee Chair).

37. The amended policy, effective January 1, 2018, addresses the situation Grievant confronted January, 2017. (SOP 403-0012, effective January 1, 2018 at 17).

38. The SOP Committee drafts the Agency's SOP policies. SOP Committee Chair holds himself out as an expert in Agency Policy and procedure. (Testimony of SOP Committee Chair).

39. SOP 403-0001 does not explicitly address how to handle a return when the product has left the store and is not physically available to return. (A Exh. 7 at 32; SOP 403-0001 at 32; Testimony of SOP Chair; A Exh. 11 at 5).

40. Agency Policy SOP 403-0012 provides in pertinent part that "all purchase orders must be rung through the POS cash registers the day the order leaves the store. The sales receipt must be compared to the licensee purchase order for accuracy." This provision of the policy is found under the heading "Finalizing the Order at the POS Register." (A Exh. 9 at 16).

41. A licensee order is required to be correct upon a licensee purchasing and obtaining the order from the store. Accordingly, policy requires the product the licensee receives in an order to coincide with the actual price of the order and the amount the licensee pays for it. (SOP 403-0012; Testimonies of RM and SOP Committee Chair).

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[10]

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. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are mitigating circumstances. *See* Standards of Conduct Policy 1.60.

On July 6, 2017, management issued Grievant a Group II Written Notice pertaining to the Licensee matter for reasons stated here. 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 regarding the licensee matter was Warranted and appropriate under the circumstances?

A. Was there a violation of Agency Policies SOPs 403-0012 and 403-0001

1. Did Grievant Violate SOP 403-0012?

First, pursuant to the EEDR Ruling 2018-4642, the Hearing Officer has been directed to address whether it was appropriate for Grievant to execute a second inaccurate sale in January, 2017.[11]

The Agency posits that Grievant's action was inappropriate and violated Agency Policy SOP 403-0012. The language of this policy provides in pertinent part that "all purchase orders must be rung through the POS cash registers the day the order leaves the store. The sales receipt must be compared to the licensee purchase order for accuracy." The referenced provision of the policy is found under the heading "Finalizing the Order at the POS Register." Accordingly, upon the licensee obtaining an order, Agency policy requires consistency in the product the licensee receives and the price paid for the product.

The evidence establishes that Grievant was aware of the referenced policy and the

[10] Grievance Procedural Manual §5.8
[11] EEDR Ruling 2018-4642 at 8.

Agency's expectations. Yet, on January 6, 2017, she permitted the Licensee to obtain a product but pay the price for another product. Specifically, on January 6, 2017, Grievant discovered the Agency owed the Licensee money as a result of the Licensee being mistakenly overcharged 10 days before. The product was not available for return that the licensee had received at the time of the prior order. The situation was novel. Grievant consulted Agency policy and found none to address her unprecedented circumstance. On the same day – January 6, 2017 - the Licensee was set to pick up another order. Using her discretion, Grievant permitted the Licensee to leave the store with a case of liter alcoholic product when the Licensee only paid the lesser price for a case of 750 milliliters of the same product. Grievant permitted this to occur as a way to refund the Licensee for being overcharged 10 days before. There was no monetary gain or loss by the Agency or Licensee as a result of this corrective transaction.

However, Grievant's plan of action meant that the Licensee's order purchased and received was not accurately reflected in the Agency's point of sale computer system. Therefore, Grievant's approval of the January sale to the Licensee violated the requirements of SOP 403-0012. This violation was misconduct.

2. Did Grievant Violate SOP 403-0001?

In addition to asserting that Grievant violated Agency Policy SOP 403-0012, the agency also contends Grievant failed to follow Agency Policy SOP 403-0001. Particularly, the Agency avers Grievant should have corrected the Licensee error that occurred in December, 2016, by effectuating a return.

Agency policy SOP 403-0001 is titled "Licensee Returns/Cancels." SOP 403-0001 defines "a return" as "when an order is adjusted after completion."[12] In addition, SOP-0001 goes on to say "[t]he individual verifying the return must list the code number, the POS system total, physical inventory counted, … to authenticate the validity of the transaction…."[13] A close reading of this policy reasonably seems to indicate that the "return" contemplated by the policy entails the Agency not only adjusting an order after the transaction has been completed, but also receiving the physical product as part of the return, verification process.

In the present case, the evidence indicates that a "physical" return as reasonably contemplated by SOP 403-0001 could not be effectuated. This is so because while the order the Licensee obtained on December 27, 2016, possibly could have been adjusted in the Agency's computer system, the products that accompanied the order were not physically available to return. Moreover, the Agency admits that during the relevant time period it had established no explicit policy to address how the Agency will return a product when the product is no longer available to return.[14]

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[12] A Exh. 7/32; SOP 403-0001 at 32.

[13] A Exh. 7/32; SOP 403-0001 at 32

[14] EEDR Ruling 2018-4642, directed the Hearing Officer to address the process for conducting a Licensee return under Agency Policy when the Licensee is unable to return the physical merchandise. The Hearing Officer believes she has addressed the matter in the text. However, here she elaborates further.

During the grievance hearing held on September 28, 2017, the RM testified that Grievant should have corrected the licensee overpayment issue by conducting a "return." The Hearing Officer noted in her initial decision

Yet, the Agency avers that Grievant engaged in misconduct because she failed to perform the impractical task referenced above; that is, effectuate a return on a product that could not be physically returned. Accordingly, the Hearing Officer finds no violation of SOP 403-0001 as alleged by the Agency.

Furthermore, subsequent to the Agency terminating Grievant, the Agency amended its policy (effective January 1, 2018), adding provisions to explicitly address situations similar to the one Grievant confronted on January 6, 2017. The addition to SOP 403-0012 now contains the following language under the heading "Finalizing the [Licensee] Order at the POS Register";

> If an error is discovered after the licensee has left the store, follow the below instructions:
>
> - **Immediately alert the Regional Manager or designee by email**
> - Same day – Contact the licensee to determine if they wish to exchange the product. If they do, store personnel should take the product to the licensee and make the exchange. If the licensee does not want the exchange, perform a Post Vid and issue the licensee a corrected Licensee Order Form.
> - **If a business day has passed – Contact the licensee to determine if they wish to exchange the product. If they do, store personnel should take the product to the licensee and make the exchange. If the incorrect product is no longer available or the licensee does not wish to make an exchange, contact the Regional Manager for assistance and/or approval. Under no circumstances is it permissible to correct the problem by intentionally delivering product in a future order that does not correspond to the Licensee Order Form.**

(January 1, 2018 Updated SOP 403-0012 at 17). (emphasis added).

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that the evidence was insufficient to establish that the merchandise was even available to effectuate a return. Thereby demonstrating that the RM's claimed solution to the problem was not possible. For the reasons given here and discussed above, the Hearing Officer concludes that no policy was in effect to handle the situation during the relevant time period.

After reviewing EEDR ruling, the Hearing Officer provided an opportunity for the parties to address the "licensee return issue" referenced above. Of significance, in its reply, the Agency acknowledged that its policy does not specifically address a return without a product. (Agency's February 16, 2018 Response, p. 5). Grievant responded in rebuttal to the Agency's reply that she had carefully perused the Agency's policies. Grievant then confirmed what the Agency had already conceded. In consequence, the Hearing Officer finds the evidence unequivocally shows that no Agency policy existed to specifically address how to conduct a licensee return when the physical merchandise cannot be brought back to the store. Yet, the Agency asserts Grievant violated a policy that by its own admission had not been established.

The highlighted sections above speak directly to the type of circumstance Grievant encountered on January 6, 2017.

Particularly, the changes in policy are several-fold. For one, now the policy requires the manager to report the situation to the RM. Before the change, Grievant was allowed to utilize her discretion. Second, the third bullet section of the changed policy provides explicit guidance on how to handle the situation when a Licensee order cannot physically be returned. Moreover, the change in policy specifically states "[u]nder no circumstances is it permissible to correct the problem by intentionally delivering product in a future order that does not correspond to the Licensee Order Form."

Grievant was not afforded the guidance of this amendment. Instead, she faced an exceptional situation without adequate notice on how to handle it.

What is more, the evidence suggests that it was only with hindsight that RM determined the Agency's sanctioned course of action to address the circumstance. This is evident because the evidence fails to show that RM offered Grievant guidance during her first meeting in March, 2017, with Grievant about what occurred. Also, during this meeting, RM did not indicate Grievant had done anything wrong. Yet, the Agency expected Grievant to follow a certain procedure even before her supervisor was aware of it. In effect, the Agency expected Grievant to follow policy that postdated the event, or was esoterically known by upper management, but not shared with Grievant.

In making the findings referenced in the immediate preceding paragraph, the Hearing Officer is cognizant of RM's statements or testimony alleging that RM did admonish Grievant during the March meeting and instructed Grievant on the action that should have taken place. Notwithstanding, Grievant's testimony and other supporting evidence contradict RM's claim of chastising and providing instruction to Grievant during the meeting. Having considered the evidence and demeanor of the witnesses, the Hearing Officer has determined that Grievant's account of the conversation during the March 16 meeting is credible.

Hence, the Hearing Officer cannot find Grievant violated SOP 403-0001.

3. Did Any Good Faith Efforts of Grievant Negate the Group Notice

EEDR's Ruling 2018-4642 also directs the Hearing Officer to address whether the good faith efforts of Grievant served to negate the Group Notice, assuming Grievant failed to follow agency policy.

In addressing this matter, the Hearing Officer notes that when the Agency provided a description of the offense in the group notice, in pertinent part, the Agency's diction included the following:

> [Grievant] informed the licensee of the error and was told they would be charged incorrectly to fix the error. The inventory was **manipulated** to correct the order

> **instead of** completing a return to the licensee when the error was discovered. (Emphasis added).

(A Exh. 1/3).

The evidence shows that the definition of the word "manipulate" is "to adapt or change to suit one's purpose or advantage." Moreover, the word often connotes behavior that is unscrupulous. Synonyms include "juggle" and "falsify."

In her October 18, 2017 decision, the Hearing Officer addressed whether Grievant intentionally engaged in wrongdoing because in the group notice, the Agency described Grievant's behavior as manipulative. Moreover, the group notice explicitly stated Grievant admitted "guilt." This word choice infers criminal activity which requires intent.

Under the grievance procedure, the Hearing Officer is required to determine if the Agency has met its burden.[15] To this point, after careful examination of the group notice, the Hearing Officer determined the Agency had specifically indicated in its group notice that, among other misconduct, the Grievant had engaged in "manipulation." Accordingly, the HO believed she was obliged to address this alleged act of wrongdoing in her initial decision.

That said, the Hearing Officer has determined autonomously of any "acted in good faith finding" that the Agency failed to show Grievant's behavior regarding SOP 403-0001 was misconduct.

B. Was the discipline consistent with policy and law?

Under Standards of Conduct 1.60, failure to follow policy or procedure is a Group II Offense. While the Hearing Officer has found the Agency failed to show Grievant violated SOP 403-0001, she had determined the Agency met its burden regarding the charge that Grievant disobeyed SOP 403-0012. Accordingly, the Group II Written Notice is consistent with policy and law.

II. Mitigation.

Next, under this alternative analysis, the Hearing Officer considers whether the Group II Written Notice upheld because of the SOP 403-0012 violation warrants 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 Equal Employment Dispute Resolution ["EEDR"]."[16] EEDR'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

[15] Grievance Procedural Manual §5.8.
[16] Va. Code § 2.2-3005 and (C)(6)

with law and policy."[17] 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.[18]

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.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.[19]

Under her alternative analysis, the Hearing Officer has found that Grievant engaged in a group II offense – failing to follow policy – by her informing RM on March 16, 2017, that she permitted the Licensee to pay for 750 liters, but obtain liters to offset the Licensee's overpayment in December, 2017. Moreover, under the alternative analysis, the Hearing Officer has determined the Agency's issuance of the group notice was consistent with policy and law.

Now, the Hearing Officer considers whether the Group II Written notice is unreasonable and therefore warrants mitigation.

The evidence establishes that the Licensee matter was unprecedented. Equally as important, the evidence shows that the Agency had established no policy or a policy that was insufficiently explicit on how to handle the novel situation that Grievant confronted on January 6, 2017. Accordingly, Grievant was without notice of what to do in the situation. The evidence shows that even two months after Grievant's actions, upper management was unable to provide her guidance on how the situation should have been handled. Grievant's meeting with RM on March 16, 2017, illustrates this point. During their meeting, after Grievant informed RM of how she handled the situation, RM did not indicate Grievant's conduct was misconduct. Further, RM

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

18 *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.,* EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

19 *E.g., id.*

provided no guidance on how the matter should have been addressed. The meeting ended with no mention from RM about any expected course of action. Grievant believed she had done nothing wrong.

What is more, the evidence reasonably establishes that after the fact, the Agency realized their policy was vacuous or unclear regarding a "Grievant like circumstance." As such it amended the policy on January 1, 2018. That amendment specifically addressed the situation Grievant confronted a year before. Yet Grievant without the benefit of the guidance from this new policy was terminated six months before the policy's inception.

In addition, prior to the amended version of the policy becoming effective, the Agency permitted Grievant to use her judgment in the situation she encountered. Grievant did so, but to the displeasure of the Agency. Under the new policy effective January 1, 2018, the store manager must seek the approval of her RM to approve the manger's course of action to address an identical situation. Hence in effect, the Hearing Officer finds the Agency is disciplining Grievant for not operating under the amended policy. This new policy was non-existent when Grievant engaged in the conduct for which the Agency has determined is misconduct.

The Hearing Officer has considered the relevant circumstances. They include, Grievant faced an unprecedented situation on January 6, 2017; she had no notice or policy was insufficiently explicit to guide her through the situation; the Agency's deficient policy regarding returns when the product is no longer physically available and the Agency's lack of guidance contributed to Grievant's violation of SOP 403-0012. The Hearing Officer also notes that Grievant's corrective action yielded no monetary gain or loss to the Licensee or the Agency. Moreover, until Grievant addressed the error the Agency owed the Licensee money due to an honest mistake. Moreover, the Agency posits that Grievant can no longer be trusted because of her exercise of poor judgment in the matter. Yet, the Agency knew about Grievant's actions for two months before RM even meet with Grievant about the situation and a total of six months before the Agency terminated her. During the six month hiatus, the Agency did not put Grievant on leave, but continued to permit her to work as a store manager. These actions discredit any claim by the Agency that Grievant is now untrustworthy.

Because of the totality of the circumstances discussed here, the Hearing Officer finds the discipline exceeds the limits of reasonableness.

DECISION AND ORDER

After a thorough consideration of all the evidence, whether specifically mentioned or not, and based on her findings here, the Hearing Officer's decision is set forth here.

The Hearing Officer has determined that the discipline was unreasonable. This is so because the evidence demonstrates either like of policy or insufficient, explicit policy to give Grievant notice as to what action she should have taken regarding the error in the licensee order. Moreover, under the relevant circumstances the discipline exceeds the limits of reasonableness. Mitigation is therefore warranted and the Agency is ordered to take the following action:

1. reduce the Group II Written Notice regarding the alleged March 16, 2017 offense related to a Group I Written Notice;

2. although the Group II Written Notice about the May 2, 2017 offense, related to the failure to verify checkout tills was previously affirmed and Grievant has accumulated in addition to the Group II, a Group I Written Notice, the Agency is ordered to rescind the removal or termination of employment. This is the case because Grievant has not accumulated enough Group Notices to warrant termination under the Standards of Conduct;

2. pay full back pay for the period Grievant has been separated from her job (back pay is to be offset by interim earnings);

3. appropriately restore other benefits and seniority;

4. reinstate Grievant to her former position or, if occupied, to an equivalent position.

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 Equal 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.[20]

Entered this 12th day of June 2018.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
EEDR's Director of Hearings

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