

Issues: Group II Written Notice (failure to follow policy/procedures), Group III Written Notice (falsifying records) and Termination; Hearing Date: 10/18/11; Decision Issued: 10/24/11; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9678; Outcome: Partial Relief; **Judicial Review: Appealed to Martinsville Circuit Court; Final Order issued 02/23/12; Outcome: AHO's decision affirmed.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9678**

Hearing Date: October 18, 2011  
Decision Issued: October 24, 2011

**PROCEDURAL HISTORY**

On May 6, 2011, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established written policy and procedures. Also on May 6, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of documents.

On May 12, 2011, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 6, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of a party. On October 18, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

The Department of Alcoholic Beverage Control employed Grievant as a Retail Manager I at one of its Facilities. She began working for the Agency in 1998. The purpose of her position was:

Manages and operates an ABC store in compliance with the requirements of the policies and operational Procedures of the Department of Alcoholic Beverage Control. Plans, organizes, and directs a store's operation and participates in all activities that are essential to the operation of an ABC store.<sup>1</sup>

To make their products more attractive to consumers, vendors sometimes attach small bottles to larger bottles of alcohol. These smaller bottles are sometimes referred to as 50ml hangers or 50ml minis or mini bottles. Agency Standard Operating Procedure 403-7043 provides:

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<sup>1</sup> Agency Exhibit 4.

Vendors are not allowed to leave sample bottles of alcoholic merchandise for the employees to taste or to give to customers without related purchases. The 50 ml hangers that are removed for licensee orders should be either attached to other products from the same distributor or collected and given to the Regional Manager. Employee should not take these for themselves or give them to customers who are not purchasing bottles from that label.<sup>2</sup>

An employee who received and kept 50ml hangers could be subject to disciplinary action by the Agency.

Ms. A worked as a Relief Assistant Manager. Her work location rotated among several Agency stores. On March 9, 2011, Ms. A was working at M Store. The Vendor Representative, Mr. G, spoke with Ms. A and then gave her a 2' x 2' display sign (also referred to as a case card) and rebate slips so that Ms. A could take them to S Store. The Vendor Representative did not often travel to S Store so he wanted Ms. A to take those items to S Store. Grievant was not present at M Store on March 9, 2011.

On March 12, 2011 Ms. A told Grievant that she had received a display sign and rebate slips from the Vendor Representative. Ms. A did not state that she had received 50ml hangers from the Vendor Representative. Ms. A asked Grievant what she should do with the display sign and rebate slips. Grievant said that Ms. A should take the display sign and rebate slips to the S Store. Ms. A later took the sign and rebate slips to S Store.

On March 18, 2011, Grievant sent the Regional Manager an email stating:

On 3/12/2011 [Ms. A] the Relief Assistant Manager offered some 50ml hangers to me that the Representative for one of the vendors had given her to take to the [S store], cause [Ms. A] had asked him for some stuff to take to the [S Store] cause the representatives rarely visit the store. When talking with the Acting Manager of [S Store] this morning I asked her if she had received the 50ml hangers. She informed me that she did not receive any 50ml hangers, but [Ms. A] did deliver some rebate slips and a case card to the [S Store].

After reading over the acceptance of gifts policy I feel it is my duty & responsibility to inform you of this since she first offered these to me.

Wholesale/Retail Division employees are in a position of public trust and therefore should conduct themselves in such a manner that there is no doubt about their honesty and integrity.<sup>3</sup>

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<sup>2</sup> Agency Exhibit 5.

<sup>3</sup> Agency Exhibit 6.

In response to Grievant's statements regarding Ms. A, the Agency began an investigation.

On March 28, 2011, the Regional Manager asked Grievant about her conversation with Ms. A. The Regional Manager asked, "Do you think [Ms. A] was offering the 50ml's to you or to the store?" Grievant responded, "She was offering the 50ml to my store, but [I] told her to take to [S Store] anyway." The Regional Manager asked Grievant to provide him with a statement. Grievant wrote:

On 3/12/2011 [Ms. A] (Relief Assistant Manager) was working at [R Store] she offered me [Grievant] (Store Manager) some 50 ml hangers that the representative had given her to take to the [S Store] cause she did not think that they sold [brand of alcohol] and I told her to take them to [S Store] any way cause they could hang them on [brand of alcohol] bottles. I did not see the 50 ml hangers. I do not know who the representative was that gave them to her, but she did take a case card and some rebate slips to [S Store]. The reason I spoke with the [S Store] was my ABC was down on Thursday 3/17/2011 and that was my day off, so I returned to work on Friday 3/18/2011. I was putting in the clock in and out times in my ABC and I asked [Ms. F] (Acting Manager) if she had received the 50 ml hangers from [Ms. A] and she said no all [Ms. A brought] to the [S Store] was a case card and some rebate slips.<sup>4</sup>

Grievant signed her name below the statement.

The Senior Audit Specialist interviewed Grievant on April 5, 2011. The Senior Audit Specialist wrote in his report to Agency managers:

[Grievant] confirmed her allegation that [Ms. A] on 3/12 at [Grievant's store] offered her some 50ml bottles she had received from the local Rep for business use at [Grievant's store] as [Ms. A] was unsure that they could be used at [S Store]. [Grievant] stated that she told [Ms. A] to go ahead and deliver them to [S Store] as they could hang them on some appropriate product and she did not need them at [Grievant's store]. [Grievant] stated she never saw the bottles and did not know what brand they were. Later [Grievant] spoke with the Acting Manager, [Ms. F] of [S Store] and learned that the bottles never arrived at the store.<sup>5</sup>

The Agency conducted a polygraph examination of Grievant.<sup>6</sup> Following the examination, Grievant told the Polygraph Examiner that it was not done deliberately,

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<sup>4</sup> Agency Exhibit 6.

<sup>5</sup> Agency Exhibit 8.

<sup>6</sup> The results of polygraph examinations are not admissible in grievance hearings.

that Grievant did not want Ms. A to get into trouble and that Grievant may have misunderstood what Ms. A said. Grievant also says that she confused mini bottles with mini pads. Grievant told the Polygraph Examiner that Ms. A never said mini bottles and that she got them mixed up with rebate pads. The Polygraph Examiner told Grievant that an apology would go a "long way". He told her that she should call her boss and apologize but not to admit to something she did not do. He told Grievant to be truthful about the matter.

On April 27, 2011, Grievant called the Regional Manager and told him that she had misunderstood Ms. A. Grievant said that she realized that it was not 50ml hangers but it was rebate slips and case cards to which Ms. A had referred. Grievant apologized to the Regional Manager.

During the hearing, Grievant testified that Ms. A advised Grievant that Ms. A had been given some "mini bottles".

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>7</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[F]alsification of records" is a Group III offense.<sup>8</sup> Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

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<sup>7</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>8</sup> See, Attachment A, DHRM Policy 1.60.

On March 9, 2011, Ms. A told Grievant that she had received a display sign and rebate slips from the Vendor Representative. On March 18, 2011, Grievant sent the Regional Manager an email stating that Ms. A offered her 50ml hangers. Grievant knew that if the Agency believed that Ms. A had received 50ml hangers, Ms. A would be subject to disciplinary action. On March 28, 2011, Grievant told the Regional Manager that she believed Ms. A was offering the 50ml hangers to Grievant's store. Grievant wrote a statement stating that Ms. A had offered her 50ml hangers.

Ms. A did not receive 50ml hangers from the Vendor Representative. Ms. A did not tell Grievant that she had received 50ml hangers from the Vendor Representative. Grievant knew that Ms. A had not told Grievant that Ms. A had received 50ml hangers. Grievant wrote an email to the Regional Manager and wrote a statement falsely stating that Ms. A had told her Ms. A had received 50ml hangers. Emails and written statements are records of the Agency. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsifying records. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Agency has not established that she knowingly falsified a record. Grievant argued that she told the Regional Manager that she "may have misunderstood" Ms. A's comments. Grievant's argument fails. No credible evidence was presented for the Hearing Officer to conclude that Grievant "may have misunderstood" Ms. A's comments. Ms. A did not mention 50ml hangers in her discussion with Grievant on March 9, 2011. No credible evidence was presented to show the Grievant had difficulty understanding Ms. A's comments. It is not likely that Grievant confused 50ml hangers with display signs and rebate slips. The Senior Audit Specialist testified that a 50ml hanger is a "pretty definitive item". Grievant's initial reports to the Regional Manager did not express any uncertainty regarding what Grievant allegedly heard from Ms. A. Grievant did not initially inform the Regional Manager that she had any doubt about what Ms. A had told her. The evidence showed that Grievant did not like working with Ms. A. Grievant knew that her report to the Regional Manager would place Ms. A at risk of disciplinary action including removal. Grievant falsely informed the Regional Manager that Ms. A had received 50ml hangers from the Vendor Representative.

If the Hearing Officer assumes for the sake of argument that Grievant's testimony was true that Ms. A told Grievant that Ms. A had received 50ml hangers from the Vendor Representative, then Grievant's statement to the Regional Manager on April 27, 2011 was untruthful. It cannot be the case that Grievant knows Ms. A told her Ms. A had received 50ml hangers and that Grievant believes that she may have misunderstood Ms. A's statement that Ms. A had received case cards and rebate slips. Grievant's defense would support a basis for disciplinary action.

The Agency issued Grievant a Group II Written Notice for failure to follow established written policies and procedures. The Agency's Office of Internal Audit

policy governs the Director of Internal Audit's authority to investigate and report findings regarding complaints of employee misconduct. Section IV provides:

A. All Department employees are required to fully cooperate with designated personnel in connection with any investigation.

B. All Department employees should truthfully answer any questions put to them in connection with an official investigation.

C. An employee may be directed to answer questions for administrative purposes. The failure to answer a question after being administratively ordered may result in disciplinary action. In addition, giving an answer that is proven false or misleading may result in disciplinary action up to and including termination. The Division Director of the employee or their assigned designee shall determine disciplinary action in all cases.

The Group II Written Notice must be reversed for two reasons. First, the Agency's Office of Internal Audit policy is directed at the operations of the Agency's Internal Audit. It is not clear that Grievant received adequate notice of the terms of that policy. Second, the basis to take disciplinary action against Grievant under the Group II is not materially different from the basis to take disciplinary action against Grievant under the Group III Written Notice. Both the Group III and the Group II Written Notice alleged the Grievant was untruthful to Agency employees. The Group II Written Notice is essentially a "lesser included offense" of the Group III Written Notice. Accordingly, the Group II Written Notice must be reversed.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."<sup>9</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency failed to provide her with procedural due process. Grievant argued that the Agency did not properly notify her that it had begun an investigation of her. Grievant's argument fails. To the extent the Agency failed to

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<sup>9</sup> *Va. Code § 2.2-3005.*



provide her with procedural due process, that error was cured during the hearing process. Grievant had the opportunity to present to the Hearing Officer any facts and arguments supporting her defense that she would otherwise have presented to Agency Managers prior to the issuance of disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**. The Group II Written Notice of disciplinary action is **reversed**.

## 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
Richmond, VA 23219

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 give a copy of all of your appeals to the other party and to the

EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>10</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF MARTINSVILLE

Appellant,

v.

Case No. CL11000234-00

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

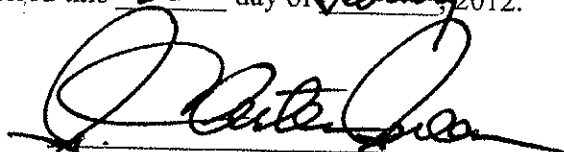
Appellee.

FINAL ORDER


This matter came before the Court as an appeal of a decision of a hearing officer under the Grievance Procedure for state employees pursuant to Va. Code § 2.2-3006, brought by the Appellant challenging the termination of her employment with Appellee Department of Alcoholic Beverage Control. Appellant has argued that her procedural and substantive due process rights were violated by Appellee.

Having reviewed the record in this matter and having heard oral argument, the Court finds that the decision of the hearing officer is not contradictory to law as required for a reversal of that decision. Accordingly, that decision should be, and hereby is, **AFFIRMED**. The Clerk is requested to send copies of this order to counsel of record.

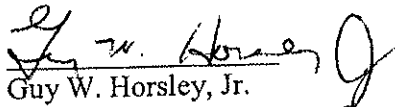
Entered this 23<sup>d</sup> day of February, 2012.

  
\_\_\_\_\_  
Judge

IN TESTIMONY that the foregoing is a true Copy taken from the records of said Court, I, Ashby R. Pritchett, Clerk thereof set my hand and affix the Seal of said Court

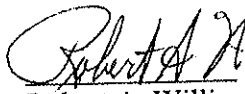
This the 24<sup>th</sup> day of February, 2012  
  
\_\_\_\_\_  
Clerk  
Circuit Court, City of Martinsville, VA

I ask for this:

  
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