

Issue: Administrative Review of Hearing Officer's Remand Decision in Case No. 11069;  
Ruling Date: August 13, 2018; Ruling No. 2018-4752; Agency: Department of  
Alcoholic Beverage Control; Outcome: Remanded to AHO.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Alcoholic Beverage Control  
Ruling Number 2018-4752  
August 13, 2018

The Department of Alcoholic Beverage Control (the “agency”) has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11069. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS AND PROCEDURAL HISTORY

The substantive and procedural facts of this case are set forth in EEDR’s first administrative review in this matter, EEDR Ruling Number 2018-4642, and are incorporated herein by reference. In summary, this case concerns the agency’s issuance of two Group II Written Notices on July 6, 2017 for failure to follow instructions and/or policy, and the grievant’s termination upon the issuance of the second Written Notice due to her accumulation of disciplinary action.<sup>1</sup> The first Written Notice listed an offense date of March 16, 2017 and charged the grievant with improperly “failing to verify cashier checkouts.”<sup>2</sup> The second Written Notice listed an offense date of May 2, 2017 and charged the grievant with manipulating her store inventory to correct an error with a licensee order “instead of completing a return to the licensee.”<sup>3</sup>

In the original hearing decision, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant failed to follow agency policy by failing to verify cashier checkouts, and upheld the first Written Notice charging her with that misconduct.<sup>4</sup> The hearing officer further determined, however, that the evidence was insufficient to support the issuance of the second Written Notice for correcting an error with a licensee order in violation of agency policy, rescinded that disciplinary action, ordered the grievant reinstated to her former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.<sup>5</sup> The agency requested administrative review from EEDR, challenging the hearing officer’s conclusion that second Group II Written Notice must be rescinded. In EEDR ruling Number 2018-4642, this Office remanded the case to the hearing officer for reconsideration of the evidence in the record regarding the application of agency

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<sup>1</sup> Decision of Hearing Officer, Case No. 11069 (“Hearing Decision”), October 18, 2017, at 1, 9-14; *see* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of “[a] second active Group II Notice normally should result in termination”).

<sup>2</sup> Agency Exhibit 1 at 1; *see* Hearing Decision at 7-8.

<sup>3</sup> Agency Exhibit 1 at 3; *see* Hearing Decision at 3-7.

<sup>4</sup> Hearing Decision at 11-15.

<sup>5</sup> *Id.* at 9-11, 14-15.

policy to the misconduct charged on the second Written Notice. More specifically, EEDR directed the hearing officer to reconsider the applicability of the agency's policy stating that transactions must be entered into the agency's purchase order system accurately, as well as policy provisions regulating the return and/or correction of licensee orders.

The hearing officer reopened the hearing record to accept additional evidence from the parties and issued a reconsidered decision on June 12, 2018.<sup>6</sup> In the reconsidered decision, the hearing officer found that the grievant failed to follow agency SOP 403-0012, *Licensee Sales*, by entering an inaccurate transaction into the agency's computer system when she corrected the licensee order, which justified the issuance of a Group II Written Notice.<sup>7</sup> The hearing officer further determined, however, that the grievant did not violate SOP 403-0001, *Computer POS System – SAP*, because that policy did not prescribe the method for conducting a licensee return when the physical product was not available to return to the store.<sup>8</sup> Finally, the hearing officer concluded that, although the Group II Written Notice was justified, the totality of the circumstances warranted mitigation to a Group I Written Notice because the grievant did not have notice of the agency's rule for correcting the particular error with the licensee order at issue in this case.<sup>9</sup> The hearing officer again ordered the agency to reinstate the grievant and restore her benefits because she had not accumulated sufficient disciplinary action to support termination.<sup>10</sup> The agency now appeals the reconsidered decision to EEDR.<sup>11</sup>

### DISCUSSION

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”<sup>12</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>13</sup>

In its request for administrative review, the agency challenges the hearing officer's decision to mitigate the disciplinary action to a Group I Written Notice and reinstate the grievant. By 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 rules established by [EEDR].”<sup>14</sup> The *Rules for Conducting Grievance Hearings* (the “Rules”) provide

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<sup>6</sup> See Reconsidered Decision of Hearing Officer on Remand, Case No. 10069 (“Reconsidered Decision”), June 12, 2018, at 1-2.

<sup>7</sup> *Id.* at 10-11.

<sup>8</sup> *Id.* at 11-13. The agency has not challenged the hearing officer's factual conclusion that the grievant's conduct was not a violation of SOP 403-0001, *Computer POS System – SAP*, and thus that issue will not be addressed further in this ruling.

<sup>9</sup> Reconsidered Decision at 14-16.

<sup>10</sup> *Id.* at 16-17.

<sup>11</sup> As the hearing officer's conclusions relating to the first Group II Written Notice were not challenged by either party when the original hearing decision was issued, that disciplinary action is no longer subject to administrative review by EEDR and will not be discussed in this ruling. See *Grievance Procedure Manual* §§ 7.2(a), 7.2(d); e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>12</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>13</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>14</sup> Va. Code § 2.2-3005(C)(6).

that “a hearing officer is not a ‘super-personnel officer’” and that “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.”<sup>15</sup> 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.<sup>16</sup>

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.

Importantly, 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 the 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 unconscionably disproportionate, abusive, or totally unwarranted.<sup>17</sup> EEDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>18</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

The *Rules* provide that a hearing officer may consider “whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule” as part of her mitigation analysis.<sup>19</sup> The *Rules* further state that:

[A]n employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.<sup>20</sup>

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<sup>15</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>16</sup> *Id.* § VI(B)(1).

<sup>17</sup> The Merit Systems Protection Board’s approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>18</sup> “‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion.” Black’s Law Dictionary 10 (6th ed. 1990). “It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts.” *Id.*

<sup>19</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>20</sup> *Id.* n.26.

Significantly, the *Rules* do not provide that each time there is a lack of notice the imposed discipline automatically “exceeds the limits of reasonableness.”<sup>21</sup>

In the reconsidered decision, the hearing officer concluded that the particular issue with the December order that the grievant confronted—an error with a licensee order where the product could not be physically returned to the store—was “unprecedented” and that the agency “had established no policy or a policy that was insufficiently explicit on how to handle the novel situation confronted by the Grievant.”<sup>22</sup> As a result, the hearing officer determined that the grievant “was without notice of what to do in the situation.”<sup>23</sup> In essence, the hearing officer found that the grievant’s violation of SOP 403-0012 by entering the January order inaccurately was, at least in part, justified because she lacked notice of any other rule or method for correcting the December order.

The hearing officer’s mitigation analysis based on lack of notice is flawed given how she determined that the disciplinary action was supported by the facts, policy, and law.<sup>24</sup> The hearing officer held that “Agency policy requires consistency in the product the licensee receives and the price paid for the product,” and that the grievant had engaged in misconduct warranting the issuance of a Group II Written Notice because she violated SOP 403-0012 when she entered the January order inaccurately.<sup>25</sup> The hearing officer also concluded that the evidence showed the “Grievant was aware of the referenced policy and the Agency’s expectations” regarding the accuracy of sales records.<sup>26</sup> Thus, it is unclear how the hearing officer has determined that a lack of clarity in policy regarding licensee returns negates, in part, the disciplinary action.

The hearing officer appears to have determined in her mitigation analysis that the grievant was unaware of any method for correcting the licensee’s December order other than to violate policy by entering the January order incorrectly. The evidence in the record, however, indicates that the grievant was expected to contact the RM for guidance if she did not know how to address an issue at her store,<sup>27</sup> and, the grievant herself testified at the original hearing that she would typically contact the RM if she was unsure about how to handle a situation.<sup>28</sup> More importantly, that the grievant may not have had notice about how to conduct a licensee return under the circumstances presented here has no bearing on the question of whether she had notice that agency policy required licensee orders to be entered accurately. Thus, the factors the hearing officer relied upon do not support mitigation in this case. There is evidence in the record to support a conclusion that the grievant failed to follow SOP 403-0012 when she entered the licensee’s January order inaccurately and that she knew her conduct was prohibited, and the hearing officer explicitly concluded as such in the reconsidered decision.<sup>29</sup> In short, whether the grievant knew the proper method for correcting the error with the December order does not

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<sup>21</sup> *Cf. Va. Dep’t of Transp. v. Stevens*, 53 Va. App. 654, 674 S.E.2d 563 (2009) (declining to recognize “a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired” in the context of due process).

<sup>22</sup> Reconsidered Decision at 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 10-11, 15.

<sup>25</sup> *Id.* at 10-11; *see* Agency Exhibit 9 at 16.

<sup>26</sup> Reconsidered Decision at 11.

<sup>27</sup> Reopened Hearing Recording at Track 3, 2:52-3:28 (testimony of Sales Audit Manager), Track 5, 13:38-14:36 (testimony of SOP Committee Chair).

<sup>28</sup> Original Hearing Recording at Track 4, 35:08-35:18 (testimony of grievant).

<sup>29</sup> Reconsidered Decision at 10-11.

change the fact that she engaged in misconduct by intentionally entering the January order incorrectly.

The agency undoubtedly could have justified or exercised lesser discipline here and, indeed, there appears to have been some confusion even among the agency's witnesses as to what the grievant should have done to correct the licensee's December order.<sup>30</sup> However, the hearing officer clearly found that SOP 403-0012 requires licensee orders to be entered accurately, that the grievant intentionally entered the licensee's January order incorrectly because she believed it was the most effective way to resolve the issue with the December order, and that she had notice that her conduct was a violation of agency policy.<sup>31</sup> A hearing officer "must give due weight to the agency's discretion in managing and maintaining employee discipline" and recognize that her function is only to "assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."<sup>32</sup>

Based on the analysis above, EEDR finds that the mitigating factors cited by the hearing officer do not place the agency's decision to issue a Group II Written Notice outside the "tolerable limits of reasonableness" in this case.<sup>33</sup> As a result, EEDR concludes that the hearing officer abused her discretion in mitigating the disciplinary action. The hearing officer has not adhered to the requirements of the grievance procedure and *Rules* in her mitigation analysis. Accordingly, the hearing decision must be remanded for reversal of the mitigation determination in the reconsidered decision consistent with the requirements of the grievance procedure as stated in this ruling.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the reconsidered decision is remanded to the hearing officer for revisions consistent with this ruling. Because mitigation is not supported under the parameters in the grievance procedure and *Rules*, the Group II Written Notice must be upheld with termination based on the hearing officer's factual determinations. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>34</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the

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<sup>30</sup> See *id.* at 8-9; Reopened Hearing Recording at Track 4, 23:34-24:20 (testimony of Assistant Director of Retail Operations), Track 5, 17:11-22:52 (testimony of SOP Committee Chair).

<sup>31</sup> Reconsidered Decision at 10-11.

<sup>32</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>33</sup> See *id.* The hearing officer further noted, as mitigating factors, that the "RM did not indicate Grievant's conduct was misconduct" during an investigatory meeting on March 16, 2017, that the agency realized its policy was "unclear regarding a 'Grievant like circumstance'" and amended the policy after the grievant had been disciplined, and that the grievant's method of correcting the licensee order "yielded no monetary gain or loss to the Licensee or the Agency." Reconsidered Decision at 15-16. The hearing officer also stated that the agency's position that the grievant could "no longer be trusted because of her exercise of poor judgment" was not persuasive because the agency "knew about Grievant's actions for two months before RM even met with Grievant about the situation and a total of six months before the Agency terminated her" and the grievant "continued . . . to work as a store manager" throughout that time. *Id.* at 16. For the same reasons that EEDR finds that the hearing officer's mitigation analysis was flawed with respect her consideration of whether grievant had notice that her conduct was prohibited, these additional mitigating factors do not support a finding that the disciplinary action exceeded the limits of reasonableness in this case.

<sup>34</sup> *Grievance Procedure Manual* § 7.2(d).

circuit court in the jurisdiction in which the grievance arose.<sup>35</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>36</sup>



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<sup>35</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>36</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).