

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11069;  
Hearing Date: December 19, 2017; Ruling No. 2018-4642; 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 2018-4642  
December 19, 2017

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

The relevant facts in Case Number 11069, as found by the hearing officer, are as follows:<sup>1</sup>

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.
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.
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.

**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.

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<sup>1</sup> Decision of Hearing Officer, Case No. 11069 (“Hearing Decision”), October 18, 2017, at 2-8 (citations omitted).

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.

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.

6. The evidence does not establish that Grievant was the employee who assembled, verified, and/or charged Licensee on December 27, 2017.

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.

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.

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.

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.

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.

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 than expected if there is a corresponding shortage.

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 without a corresponding shortage must be adjusted as a Type 2 inventory adjustment. List on the Inventory Audit Report.

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.

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.

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

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

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

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.

16. As of January 6, 2017, the SOP reasonably permitted the corrective action Grievant took regarding the Licensee incident.

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.

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.

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.

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.

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.

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

The evidence is insufficient to show that during the interview that RM informed Grievant that the corrective action Grievant employed was inappropriate.

22. Over three months after the March 16, 2017 interview, Grievant received a Group II Written Notice regarding the Licensee incident.

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.

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.

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.

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.

27. The Agency did not provide any documentation of specific, mandatory inventory accounting procedures to correct errors and mistakes.

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.

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.

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.

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.

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.”

Then pursuant to a subsequent audit, on February 9, 2017, Grievant promised upper management that she would verify all cashier tills upon surrender.

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

34. On May 2, 2017, Grievant failed to verify a cashier's till upon surrender.

### OTHER

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

On July 6, 2017, the grievant was issued two Group II Written Notices for failure to follow instructions and/or policy and terminated based on her accumulation of disciplinary action.<sup>2</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>3</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 license."<sup>4</sup> The grievant timely grieved the disciplinary actions and a hearing was held on September 28, 2017.<sup>5</sup> In a decision dated October 18, 2017, the hearing officer concluded that the agency had presented sufficient evidence to support the issuance of the first Group II Written Notice for "failing to verify cashier checkouts."<sup>6</sup> The hearing officer further determined, however, that the agency's decision to issue the second Group II Written Notice (relating to the licensee order) was not supported by the evidence in the record.<sup>7</sup> As a result, the hearing officer rescinded the second Group II Written Notice, 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>8</sup> The agency now appeals the hearing decision to EEDR.<sup>9</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>10</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>11</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>12</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency asserts that the hearing officer erred in rescinding the Group II Written Notice relating to the licensee order because the grievant's

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<sup>2</sup> *Id.* at 1; *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>3</sup> Agency Exhibit 1 at 1; *see* Hearing Decision at 7.

<sup>4</sup> Agency Exhibit 1 at 3; *see* Hearing Decision at 6.

<sup>5</sup> *See* Hearing Decision at 1.

<sup>6</sup> *Id.* at 11-13.

<sup>7</sup> *Id.* at 9-11.

<sup>8</sup> *Id.* at 14-15.

<sup>9</sup> As neither party has challenged the hearing officer's conclusions relating to the first Group II Written Notice, it will not be discussed further in this ruling.

<sup>10</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>11</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>12</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).



manner of correcting the error by “provid[ing] a licensee with a product that was different than listed on the purchase order” was prohibited under agency policy. In support of its position, the agency cites to SOP 403-0012, *Licensee Sales*, which discusses the process for finalizing a licensee order, and states that the sales receipt and purchase order for a licensee order must be compared for accuracy.<sup>13</sup> This policy provision appears to intend that when a licensee receives an order, the agency’s computer system must accurately reflect the purchase and product received. The agency asserts that the grievant failed to follow this policy by directing that the licensee receive an inaccurate order in January to correct the error in its December order, and that the hearing officer should have upheld the issuance of the Written Notice as a result.

The grievant’s conduct in this case essentially created a wash between the licensee’s December and January orders: the licensee paid for liter bottles in December, but received 750 milliliter bottles;<sup>14</sup> so the grievant gave the licensee liter bottles in January, but only charged the licensee for 750 milliliter bottles. The hearing officer found that the grievant’s conduct was acceptable in this case because she had not received sufficient notice from the agency of the behavior required under policy to resolve such a situation.<sup>15</sup> However, the hearing officer has not adequately assessed the evidence that the grievant allowed a sale in January in which the licensee received an order that was not accurately reflected in the purchase order system, which may violate the above-referenced provision of SOP 403-0012. Although the error in the licensee’s December order was not the direct fault of the grievant, the hearing officer must address whether it was appropriate for the grievant to execute a second inaccurate sale in January.<sup>16</sup> EEDR has reviewed the hearing record and cannot identify any provision of policy that specifically authorized the grievant to correct the error with the licensee order in the manner she chose here.<sup>17</sup> Accordingly, the hearing officer must reconsider her findings in these regards.<sup>18</sup>

In concluding the grievant’s conduct did not violate agency policy, the hearing officer noted that the agency “contend[ed the] Grievant should have conducted a Licensee return” but found this argument unpersuasive because SOP 403-0012, *Licensee Sales*, “only address[ed] the situation where a Licensee actually returns an item(s) purchased from the agency store . . . and then receives a refund.”<sup>19</sup> The hearing officer determined there was no evidence “to show that

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<sup>13</sup> Agency Exhibit 9 at 16.

<sup>14</sup> The hearing officer refers to “milliliter bottles” in the hearing decision, but the size of these bottles is more accurately described as 750 milliliters. The hearing officer should correct these errors in the remand decision.

<sup>15</sup> Hearing Decision at 9-11.

<sup>16</sup> The hearing officer’s findings are unclear as to whether the January sale was accomplished through a “manipulation” of the inventory or a purchase order that was inconsistent with the product the licensee received. Although the distinction between these two statements may not matter, it does not change the fact that the licensee received an order in January that was not consistent with what it paid for at that time.

<sup>17</sup> Even if the hearing officer continues to find that the grievant did not have notice of the precise way in which to correct the problem in the December order, that point does not address the question of why the grievant was permitted to utilize a correction method that may be contrary to policy: directing that a second inaccurate sale be made.

<sup>18</sup> The hearing officer addressed the policy language by stating that there was insufficient evidence to show the grievant had assembled and verified the licensee’s December order. Hearing Decision at 10. While EEDR has reviewed no record evidence to dispute this finding, the hearing officer also finds that it was the grievant’s plan “to compensate the licensee in the manner employed.” *Id.* Consequently, to the extent this planned compensation was executed in a manner that violated policy, it is reasonable to hold the grievant accountable for that conduct in the January sale.

<sup>19</sup> Hearing Decision at 10.

the Licensee had all the merchandise to return” as contemplated by SOP 403-0012.<sup>20</sup> However, the hearing officer does not appear to have considered the applicability of SOP 403-0001, *Computer POS System - SAP*, which provides that a “licensee return is when an order is adjusted after completion.”<sup>21</sup> This policy suggests that a licensee return need not solely be linked to a return of product, but rather is a transaction in the agency’s purchase order system that effectuates a change to an order after it is completed. It appears the hearing officer did not explicitly consider this language in SOP 403-0001 related to returns and how it would impact the outcome of this case. The hearing officer’s analysis instead seems to ignore the grievant’s inaccurate January sale by stating that there was essentially no other way to address the discrepancy from the December order.<sup>22</sup> However, as discussed above, agency policy requires that licensee orders in the agency’s computer system must be accurate and consistent with the actual product received by the licensee. The agency asserts that the grievant should have addressed this issue properly under policy by conducting the January sale accurately, and fixing the December sale using the return process described in SOP 403-0001 and SOP 403-0012.

On the other hand, the evidence in the record relating to the appropriate process to be used for conducting a licensee return under the circumstances presented in this case is somewhat unclear. The hearing officer determined that “the evidence was 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.”<sup>23</sup> On remand, the hearing officer must reassess her findings relating to the licensee returns process in light of the policy requirements of SOP 403-0001. To the extent needed to provide the parties with a full and fair hearing, the hearing officer may, in her discretion, reopen the hearing record for additional evidence from the parties on issues such as, for example, the process for conducting a licensee return under agency policy when the licensee is unable to return the physical merchandise. Accordingly, the case must be remanded to the hearing officer for reconsideration of this issue.<sup>24</sup>

Finally, the hearing officer also determined that the agency had not demonstrated the Written Notice was warranted and appropriate under the circumstances because there was insufficient evidence to show that the 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.”<sup>25</sup> However, the misconduct set forth on the Written Notice—failure to follow policy—did not charge the grievant with attempting to hide anything, falsify documents, engage in unfair conduct, or otherwise gain an advantage (although the Written Notice does allege that the grievant “manipulated” her store’s inventory).<sup>26</sup> Rather, the agency alleged that the grievant’s method of correcting the licensee

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

<sup>21</sup> Agency Exhibit 7 at 32.

<sup>22</sup> *See* Hearing Decision at 10-11.

<sup>23</sup> Hearing Decision at 10.

<sup>24</sup> While the hearing officer rescinded the Written Notice at least partly on the basis that the grievant had no notice of the proper method for correcting the licensee order under policy, *see* Hearing Decision at 11, such a determination could also be considered in a mitigation analysis. Consistent with the directives of this ruling regarding the requirements of the policies the grievant was charged with violating and any additional evidence that is admitted into the record, the hearing officer may consider mitigating factors on remand, including the question of whether the grievant received sufficient notice of the agency’s rules regarding licensee returns and/or its interpretation of those rules. *See Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>25</sup> Hearing Decision at 11.

<sup>26</sup> Agency Exhibit 1 at 3.

order violated policy. To the extent the hearing officer found that the grievant acted in good faith, the lack of a wrongful motive would not necessarily serve to invalidate the Written Notice if the grievant failed to follow policy as charged. EEDR has not identified any provision of the agency policies the grievant was charged with violating that would require proof of the intentionally wrongful conduct the hearing officer appears to have required here. Accordingly, the hearing officer must reassess her findings on this issue, as well as the effect such findings may have on her analysis of the case in light of the discussion above.<sup>27</sup>

### CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for further consideration of the evidence in the record relating to the applicability of agency policy. Once the hearing officer issues her reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).<sup>28</sup> Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.<sup>29</sup>

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>30</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>31</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>32</sup>



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Director  
Office of Equal Employment and Dispute Resolution

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<sup>27</sup> As EEDR finds that the hearing officer has not fully considered the impact of agency policy on the facts presented by the parties, this ruling does not address any questions relating to the hearing officer's assessment of the evidence in the record. Should either party request administrative review of the hearing officer's reconsidered decision on that basis, EEDR may address any evidentiary questions as a matter of the grievance procedure.

<sup>28</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>29</sup> See *Grievance Procedure Manual* § 7.2.

<sup>30</sup> *Id.* § 7.2(d).

<sup>31</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>32</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).