Issue: Administrative Review of Hearing Officer's Decision in Case No. 11225; Ruling Date: October 19, 2018; Ruling No. 2019-4774; Agency: Department of Alcoholic Beverage Control; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Alcoholic Beverage Control Authority
Ruling Number 2019-4774
October 19, 2018

The grievant 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 11225. For the reasons set forth below, EEDR declines to disturb the hearing officer's decision.

FACTS

The relevant facts as set forth in Case Number 11225 are as follows:[1]

> The Department of Alcoholic Beverage Control employed Grievant as a Store Manager. He had been employed by the Agency for approximately nine years but only served as Store Manager for approximately eight months.
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> Grievant had prior disciplinary action. On March 3, 2017, Grievant received a Group I Written Notice for unsatisfactory performance and disruptive behavior. May 16, 2017, Grievant received a Group II Written Notice for failure to follow policy.
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> The LSA and Assistant Store Manager reported to Grievant.
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> When a customer returns a bottle of alcohol to a store, the Agency receives the product and returns the purpose price to the customer. If the product costs more than $100, however, the Agency charges the customer a 15% restocking fee on the amount over $100. For example, if a customer returned a bottle that cost $149.99, the Agency would charge the customer a restocking fee of $7.50.
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> Grievant was responsible for conducting and reconciling the Store's inventory. This process involved counting the number and type of alcohol bottles and comparing that physical count to the number of bottles shown in the Store's electronic inventory. To complete this process, Grievant had to print out an Inventory Worksheet when the Store first opened for business. During the day,

[1] Decision of Hearing Officer, Case No. 11225 ("Hearing Decision"), August 20, 2018, at 2-5 (citations omitted).

Grievant and other employees would count the number and type of bottles of alcohol located on Store's shelves and enter that information on the Inventory Worksheet. After the Store closed for the day, Grievant was to update the Store's Point Of Sale (POS) Inventory. He then printed out the POS Inventory worksheet. Grievant was to take the Inventory Worksheet showing the physical count of Store inventory and compare it to the POS Inventory.

Each brand and type of alcohol had an assigned code number. Worksheets consisted of many pages with columns showing the names of the alcohol products and the code for those products. To reconcile the physical inventory count with the POS inventory count, Grievant had to take a sheet from the physical inventory and compare it to a matching sheet from the POS inventory. The preprinted portion of each sheet should match. In other words, the column of codes shown in the physical inventory worksheet was supposed to be identical to the column of codes shown in the POS inventory worksheet. If the two columns of codes were not identical, reconciliation could not be completed. The Hearing Officer will refer to this as a code conflict.

The Agency did not have any policy informing employees what to do if the column of codes for the physical inventory worksheet did not match the column of codes for the POS inventory worksheet. For example, the code 643 might appear on one worksheet, but not the other. No policy explained how put code 643 on a worksheet when only one worksheet had a code.

Before becoming a Store Manager, Grievant worked as an Assistant Store Manager. He reported to Store Manager K. Store Manager K encountered a code conflict when she was attempting to complete and reconcile her store's inventory. She showed Grievant and another employee how to log into a cash register, create a "sale and return" or a "sale and post void" transaction. For example, if code 400 was missing from the POS Inventory sheet, Store Manager K would key into a cash register that a customer had returned a product with code 400 and a second customer immediately purchased that product. Neither customer existed. As a result of the transaction, the POS Inventory would show code 400 but with zero change inventory. Store Manager K described this "an unspoken but common practice."

On April 24, 2018, Grievant and the LSA were working at the Store. Grievant attempted to reconcile the physical inventory sheets with the POS inventory sheets.

Grievant had an employee assisting him counting store inventory. The employee was using a pen instead of a pencil to file in his count. When Grievant realized the employee was using a pen, Grievant had to print new sheets for the employee to enter the information in pencil. While doing this, Grievant realized that three products were "not on the older sheets nor were they items that have

been on our other inventory sheets in the past." The three bottles of alcohol were not in the store. Grievant realized he had a code conflict for codes 643, 10862, and 62807.

Grievant wanted to train the LSA regarding how to resolve the code conflict. He went to the LSA's cash register and explained to the LSA how to resolve the conflict. Grievant used the LSA's cash register number because Grievant intended to train the LSA. If Grievant had logged out the LSA and entered his own employee number into the register, it could have resulted in delays to customers wanting service.

Grievant entered a transaction that was a Return Without Receipt for three items for a total of $182.24. He aborted the entry and decided to have separate transactions for each product code. Grievant entered a transaction that was a Return Without Receipt for product code 10862 in the amount of $149.99 plus $7.66 tax for a total of $160.04. The cash register system reduced the amount refunded by $7.50 to account for a 15% restocking fee. Grievant entered a transaction that was a Return Without Receipt for product code 62809 in the amount of $6.08 plus $0.27 for a total of $6.36. Grievant entered a transaction that was a Return Without Receipt for product code 643 in the amount of $17.99 plus $0.98 tax for a total of $18.94.

Grievant entered these transactions into the cash register system even though there was no actual customer returning products.

After Grievant finished the transactions, Grievant left the receipts next to the LSA's cash register. The LSA cleared his area and took the receipts away from the register. The LSA and Assistant Manager wrote on the receipts. They wrote the names of fictitious customers. The LSA testified that Grievant instructed him to enter false names on the receipts. Grievant did not write on the printed receipts. Grievant denied instructing the LSA or Assistant Manager to enter false information on the receipts. Grievant's denial was credible. It is also consistent with the reasoning that Grievant would not have instructed the LSA or Assistant Manager to create fictitious names for the first aborted transaction.

Grievant failed to account for the $7.50 restocking fee in the process. As a result, the LSA's cash register balance was short $7.50. This meant the LSA had to pay the shortage from his own funds. After he complained to the Agency, the Agency began an investigation.

On May 2, 2018, the Regional Manager sent Grievant an email stating:

I received a call this morning concerning a 15% restocking fee, it appears to be for a return without receipt done on 04/24/18 for Item number 10862 completed by cashier [the LSA]. This return was for a return without a receipt yet the

> customer was given cash back instead of a gift card. Please email me complete details on this transaction today.
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> Grievant replied approximately 14 minutes later:
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> There was no actual customer as we were in the middle of inventory we had to reprint some sheets because a clerk was using a pen. When we did this we realized the sheets were not lining up correctly. So my thought process was in order to get the sheets to line up and match to do a return on the bottle and a repurchase of the bottle. In the [midst] of this we overlooked the restocking and forgot to waive it. I thought this was the best course of action.

The grievant timely grieved his termination from employment and a hearing was held on August 3, 2018.[2] On August 20, 2018, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.[3] The grievant has now requested administrative review of the hearing officer's decision.

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 . . . ."[4] 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 a party; the sole remedy is that the action be correctly taken.[5] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Due Process

The grievant argues that the hearing officer erred by upholding the discipline based on an offense that exceeds the scope of the misconduct alleged on the Written Notice. As such, the grievant alleges that his due process rights have been violated. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[7] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[8] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EEDR will also address the issue.

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[2] Hearing Decision at 1.
[3] *Id.* at 7.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[7] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[8] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[9] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[10]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[11] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[12]

The grievant argues in his request for administrative review that the hearing officer upheld the discipline issued to him for a "separate and distinct offense," specifically, accessing the cash drawer of a subordinate in violation of agency policy. Section VI(B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[13] Our rulings on

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[9] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[10] *Loudermill*, 470 U.S. at 546.

[11] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[12] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[13] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002)(holding that "[o]nly the charge and specifications set out in the Notice may be used to justify

administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[14] In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified" cannot be remedied through a hearing."[15] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

The agency, which bears the burden of proof at hearing, must provide notice of charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. While a grievant may be aware of the facts surrounding the Written Notice, he would also need to know why or on what theory he is being disciplined by the agency.[16] In this instance, we cannot conclude that the grievant did not have notice of the facts constituting the misconduct for which he was disciplined. While the Written Notice does not explicitly state that the grievant was disciplined for opening another employee's drawer in violation of agency policy, it clearly states that he was disciplined for ringing fictitious returns on someone else's register under that employee's cashier number.[17] The creation of these "fictitious transactions" is what led the hearing officer to uphold the Written Notice as a Group III, not the access of another employee's drawer.[18] Thus, even if the portion of the hearing decision addressing access of another employee's drawer was removed from the decision, there would be no effect on the outcome of the case. In reviewing the language used in the Written Notice, EEDR cannot find that the grievant was not put on notice of the allegedly inappropriate conduct that ultimately led to his termination being upheld.

Further, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EEDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[19] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[20] Accordingly, EEDR finds no due process violation under the grievance procedure.

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punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[14] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[15] *Rules for Conducting Grievance Hearings* § I.

[16] *See* EDR Ruling 2007-1409.

[17] *See* Agency Exhibit 14.

[18] Hearing Decision at 6.

[19] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[20] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

Hearing Officer's Consideration of the Evidence

In his request for administrative review, the grievant argues that the hearing officer's decision is inconsistent with state policy regarding "falsification," and challenges the hearing officer's finding that his action of creating a fictitious return constitutes falsification. Essentially, this claim involves a mixed question of fact and policy in that the grievant is claiming that the hearing officer's conclusion that he violated policy is not supported by evidence in the record.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[21] and to determine the grievance based "on the material issues and grounds in the record for those findings."[22] Further, in cases involving discipline, the hearing officer reviews the evidence *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[23] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[24] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Where, as here, the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. EEDR has thoroughly reviewed the testimony at hearing and the facts in the record, and finds that there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the Written Notice and that the behavior constituted misconduct.[25] The hearing officer's determinations were based in part on the grievant's own admissions about his actions.[26] It was not disputed that the grievant created three "fictitious" transactions, because, as the hearing officer found, "the three Return Without Receipt transactions were not for actual customers."[27] The grievant's Regional Manager testified that the grievant's actions were "fraudulent" and there would be no reason for him to have to created false records.[28] Thus, the hearing officer determined that the grievant's actions constituted falsification of agency records.[29] To this, the grievant argues in his request for administrative review that he intended only to correct an issue in the agency's system by entering fictitious

[21] Va. Code § 2.2-3005.1(C).
[22] *Grievance Procedure Manual* § 5.9.
[23] *Rules for Conducting Grievance Hearings* § VI(B).
[24] *Grievance Procedure Manual* § 5.8.
[25] Hearing Decision at 7.
[26] *Id*. at 3-7; Hearing Record at 02:54:25 – 02:58:24; 03:07:29 – 03:08:01.
[27] Hearing Decision at 6.
[28] Hearing Record at 01:27:57 – 01:28:12.
[29] Hearing Decision at 6.

records, and he had no intent to defraud the agency, thus, he did not engage in falsification of records.

State policy does not provide a specific definition for the term "falsification." While not cited, the hearing officer appears to have applied a standard that has been similarly used in other past cases. EEDR does not find any indication that the hearing officer has utilized a standard of assessing "falsification" in a way that is inconsistent with state policy. In this instance, as described above, the hearing officer's findings are based upon evidence in the record and the material issues of the case. Therefore, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings and declines to disturb the decision on this basis.

Failure to Mitigate

The grievant challenges the hearing officer's decision not to mitigate the Group III Written Notice with termination. He points to the fact that the hearing officer cited to several circumstances which could have supported mitigation.[30] Ultimately, the hearing officer determined that the disciplinary action could not be mitigated under the mitigation standard provided under the grievance procedure.[31] The grievant challenges this determination.

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 rules established by [EEDR]."[32] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide 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."[33] 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.[34]

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"

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[30] Hearing Decision at 6-7.
[31] *Id.*
[32] Va. Code § 2.2-3005(C)(6).
[33] *Rules for Conducting Grievance Hearings* § VI(A).
[34] *Id.* § VI(B)(1).

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.[35] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[36] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[37]

In this case, the hearing officer applied the "exceeds the limits of reasonableness" standard and concluded that, in this instance, the factors outlined above would not support a finding that the agency's disciplinary action exceeded the limits of reasonableness.[38] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[39] Though the hearing officer indicated that he "believes it is inappropriate to remove Grievant under the circumstances. . . [and] recommends the Agency reinstate Grievant," nevertheless, he could not find that the agency's actions were not exercised within the tolerable limits of reasonableness, given the stringency of EEDR's standard for mitigation.[40] Even considering all of the arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EEDR is unable to find that the hearing officer's determination regarding mitigation was unreasonable or not based on the evidence in the record. As such, EEDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

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.[41] 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

[35] 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).
[36] "'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.*
[37] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[38] *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[39] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[40] Hearing Decision at 7.
[41] *Grievance Procedure Manual* § 7.2(d).

arose.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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[42] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).