

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10954; Ruling
Date: April 19, 2017; Ruling No. 2017-4531; Agency: Department of Corrections;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2017-4531
April 19, 2017

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10954. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed as a Captain by the Department of Corrections (“agency”).² On November 3, 2016, the grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.³ The grievant timely initiated a grievance to challenge the disciplinary action, and a hearing was held on March 30, 2017.⁴ In a decision dated March 31, 2017, the hearing officer upheld the disciplinary action.⁵ The grievant has now requested an administrative review of the hearing decision.

DISCUSSION

By statute, EDR 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.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁷

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

² Decision of Hearing Officer, Case No. 10954 (“Hearing Decision”), March 31, 2017, at 2; Agency Exhibit 2 at 1.

³ Agency Exhibit 1; *see also* Hearing Decision at 1.

⁴ Agency Exhibit 2; *see* Hearing Decision at 1.

⁵ Hearing Decision at 1, 3-5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Consideration of Evidence

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁸ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁹ Further, in cases involving discipline, the hearing officer reviews the facts *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.¹⁰ 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.¹¹ 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant appears to argue that she should not have been charged with unsatisfactory performance because no violation of policy occurred. She also asserts that the words “Resulting in a Breach of Security” should be removed from the Written Notice.¹² The hearing officer upheld the charge of unsatisfactory performance on the basis of the grievant’s failure to ensure that her subordinates performed their duties and receive reports when their tasks were complete.¹³ This finding was not dependent on a showing by the agency that a policy violation occurred, nor was it necessary for the agency to demonstrate a breach of security. Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer’s conclusion that the grievant’s performance was unsatisfactory.¹⁴ As such, there is no basis to disturb the hearing decision.

Mitigation

The grievant’s request for administrative review also challenges the hearing officer’s decision not to mitigate the agency’s disciplinary action. In particular, she asserts that the disciplinary action should be mitigated in recognition of her long service and past satisfactory work performance.

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Although the agency characterized the offense as “unsatisfactory performance” and coded it as such on the Written Notice, the agency described the conduct, in parentheses, as “Resulting in a Breach of Security.” Agency Exhibit 1. The hearing officer, in effect, considered the language regarding the breach of security as mere surplusage, unnecessary to the charge against the grievant. Under the facts presented here, it does not appear the hearing officer’s actions were an abuse of his discretion.

¹³ Hearing Decision at 4.

¹⁴ *See, e.g.*, Agency Exhibits 1, 2.

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 [EDR].”¹⁵ 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.”¹⁶ 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.¹⁷

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.¹⁸ EDR will review a hearing officer’s mitigation determination for abuse of discretion,¹⁹ 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.²⁰

While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer’s decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer’s finding that an agency’s disciplinary action exceeded the limits of reasonableness.²¹ The weight of an

¹⁵ Va. Code § 2.2-3005(C)(6).

¹⁶ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁷ *Id.* § VI(B)(1).

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

¹⁹ “‘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.*

²⁰ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

²¹ *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, neither the grievant's length of service nor her otherwise satisfactory work performance is so extraordinary as to justify mitigation of the Group I Written Notice for unsatisfactory performance.

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.'"²² Even considering all of the arguments advanced by the grievant in her request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision.²³ 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.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁶



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²² EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22.

²³ To the extent this ruling does not address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that any such issue is not material, in that it has no impact on the result in this case.

²⁴ *Grievance Procedure Manual* § 7.2(d).

²⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁶ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).