Issue: Administrative Review of Hearing Officer's Decision in Case No. 10975; Ruling Date: May 10, 2017; Ruling No. 2017-4540; Agency: Department of Corrections; Outcome: Hearing Decision Not in Compliance.

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 2017-4540
May 10, 2017

The Department of Corrections (the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10975. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts in Case Number 10975, as found by the hearing officer, are as follows:[1]

> The grievant has been employed by the agency for approximately 20 years. On June 2, 2016 he was serving in a supervisory position at a Correctional Facility operated by the agency.
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> On that date he observed an inmate (hereafter Inmate A) whose facial hair was not in compliance with agency guidelines. He asked the inmate who was responsible for the violation. The inmate identified the responsible person as being "the ugly black barber." The grievant went to the area where hair is cut in that unit. He saw a black inmate cutting hair. He asked that inmate if he was "the ugly black barber" who was responsible for the violation of the policy for Inmate A. Three other inmates were present when the statement was made, at least two of them being black.
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> The grievant left that immediate area. Shortly thereafter he spoke with Chief of Housing at the facility and told her of the exchange. The Chief of Housing is a black female. She recommended he return to the barbershop area and apologize. The grievant promptly went to that area. He apologized to the barber. According to another employee of the agency who overheard the apology, the grievant said "I'm sorry; you are not the only ugly one." The barber responded "you can call me ugly, but why do you have to say something about my being black?" Complaints were filed by the other inmates who were present and overheard the exchanges between the grievant and the barber. Correspondence was received by the agency from a family member and a friend of the barber. . . . .

[1] Decision of Hearing Officer, Case No. 10975 ("Hearing Decision"), Apr. 24, 2017, at 1-2.

On or about August 11, 2016, the grievant was issued a Group I Written Notice for using obscene or abusive language and unsatisfactory job performance for "us[ing] unprofessional and negative language" during his encounter with the offender.[2] The grievant filed a grievance to challenge the disciplinary action and a hearing was held on April 11, 2017.[3] In a decision dated April 24, 2017, the hearing officer concluded that the agency had not presented sufficient evidence to demonstrate that the grievant's language during the incident was obscene or abusive, but found that the grievant's behavior constituted unsatisfactory job performance.[4] The hearing officer further determined, however, that mitigating factors justified the reduction of the discipline and rescinded the Group I Written Notice.[5] The agency now appeals the hearing decision to EDR.

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]

Inconsistency with State Policy

In its request for administrative review, the agency asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] However, because this decision is being remanded to the hearing officer for further consideration of matters related to the issue of mitigation, it makes sense to await a remand decision from the hearing officer before any additional administrative review decisions are issued. Thus, to the extent either party wishes to raise concerns regarding the hearing officer's application of policy in the remand decision, the parties will have **15 calendar days** from the date of the remand decision to raise these issues to DHRM. Any such future review by DHRM will also have at issue any matters already raised by the agency with regard to the original hearing decision, if such matters are still ripe for review following the remand decision.

Mitigation

The agency further challenges the hearing officer's decision to rescind the Group I Written Notice based on his consideration of mitigating factors. 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]."[9] The *Rules for*

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[2] Agency Exhibit 1.
[3] *See id.*; Agency Exhibit 2.
[4] Hearing Decision at 2-5.
[5] *Id.* at 5-6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005(C)(6).

Conducting Grievance Hearings (the "*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."[10] 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.[11]

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 that 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.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the hearing officer determined that the grievant's actions "constitute[d] unsatisfactory work performance in violation of agency policy."[14] He went on to note that "[t]he grievant ha[d] no prior history of being disciplined by the agency," that the "incident had little impact on agency operations," that the grievant "made a poor decision . . . but [] did not act maliciously," and that "the barber was not personally insulted" by the grievant's comment.[15] The hearing officer further stated that the agency's advocate "acted flippantly" in questioning a witness about the details of the incident in a manner that was similar to the grievant's "unthinking choice of words."[16] Taken together, the hearing officer found that all of these factors supported a conclusion that the Written Notice should be rescinded 'in the interest of fairness and objectivity . . . ."[17]

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[10] *Rules for Conducting Grievance Hearings* § VI(A).
[11] *Id.* § VI(B)(1).
[12] 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).
[13] "'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.*
[14] Hearing Decision at 5.
[15] *Id.*
[16] *Id.*
[17] *Id.*

In support of its position, the agency claims that, in determining that the disciplinary action should be mitigated, the hearing officer "failed to give proper deference to the agency's discretion and replaced management's judgment with his own . . . ." More specifically, the agency argues that "[t]he hearing officer clearly found that the Grievant was guilty of unsatisfactory work performance," that "[t]here is nothing in the decision that discusses how the discipline exceeds the limits of reasonableness," and that the hearing officer improperly considered the conduct of the agency's advocate during the hearing to support mitigation of the disciplinary action. The agency essentially asserts that the mitigating factors cited by the hearing officer are insufficient to justify mitigation of the discipline.

While the agency certainly could have justified or imposed lesser discipline based on the mitigating factors discussed in the hearing decision, "the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."[18] Having reviewed the hearing record, EDR finds that the evidence does not support the hearing officer's finding that the agency's decision to issue a Group I Written Notice exceeded the limits of reasonableness. The mitigating factors cited by the hearing officer are not so extraordinary that they would support a finding that managerial judgment had not been properly exercised within the tolerable limits of reasonableness for conduct that the hearing officer found had occurred and constituted unsatisfactory job performance.[19]

As a result, EDR finds that the hearing officer abused his discretion in mitigating the disciplinary action. The hearing officer has not applied the mitigation standard set forth in the *Rules* appropriately. Thus, the hearing decision must be remanded for reversal of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling.[20]

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, EDR remands the decision for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[21] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[22]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has

[18] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[19] *See* Hearing Decision at 4-5.
[20] The hearing officer may, however, order that the agency revise the Written Notice to be consistent with his finding that the grievant did not use "[o]bscene or abusive language" as noted by Offense Code 36. *See* Hearing Decision at 5.
[21] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[22] *See Grievance Procedure Manual* § 7.2.

issued his remanded decision.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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[23] *Id.* § 7.2(d).
[24] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[25] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).