Issue: Administrative Review of Hearing Officer's Decision in Case No. 10902; Ruling Date: February 2, 2017; Ruling No. 2017-4478; Agency: Department of State Police; 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 Virginia State Police
Ruling Number 2017-4478
February 2, 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 10902. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed by the Virginia State Police ("agency") as a Law Enforcement Manager I.[2] On September 28, 2016, the grievant was issued a Group II Written Notice for failure to follow instructions and/or policy; a Group III Written Notice with termination for disclosing confidential information; and a Group III Written Notice with termination for failing to answer questions truthfully.[3] The grievant timely initiated a grievance to challenge these disciplinary actions, and a hearing was held on December 12, 2016.[4] In a decision dated January 4, 2017, the hearing officer rescinded the Group II Written Notice and the Group III Written Notice for failing to answer questions truthfully, but upheld the Group III Written Notice with termination for disclosing confidential information.[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

[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. 10902 ("Hearing Decision"), January 4, 2017, at 2; Agency Exhibit 2 at 2.
[3] Agency Exhibit 1.
[4] Agency Exhibit 2 at 2; *see* Hearing Decision at 1.
[5] Hearing Decision at 1, 5-10.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[7]

Inconsistency with Agency Policy

In his request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] Accordingly, the grievant's policy claims will be addressed in a separate policy review.

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, he asserts that the disciplinary action should be mitigated (1) because the two other charges were rescinded by the hearing officer, (2) in recognition of his length of service and past performance, (3) the manner in which similar offenses have been addressed by the agency, and (4) the lack of consequences from the grievant's actions.

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 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."[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 the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness"

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[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).
[10] *Rules for Conducting Grievance Hearings* § VI(A).
[11] *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.[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. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[14]

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[15] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. This is true even where, as here, the majority of the charges against a grievant were rescinded. Indeed, the *Rules* specifically explains that in such a case, the hearing officer may only mitigate the disciplinary action to the maximum level sustainable under law and policy unless the agency head or his designee has indicated during the grievance process or proceedings that it desires a lesser penalty be imposed.[16]

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.[17] 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.'"[18] Even considering those arguments advanced by the grievant in his 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

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

[15] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

[16] *Rules for Conducting Grievance Hearings* § VI(B)(1). T Although the grievant asserts that there was disputed evidence regarding whether a breach of confidential information, standing alone, would normally warrant termination, none of the evidence cited by the grievant would indicate a desire expressed by the agency head, or his designee that a penalty less than termination be imposed. Moreover, determinations regarding mitigation are squarely within the hearing officer's authority, and nothing in the record here would suggest that the hearing officer's mitigation decision was in any way unreasonable or not based on the evidence in the record.

[17] Hearing Decision at 9.

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

any way unreasonable or not based on the evidence in the record.[19] As such, EDR will not disturb the hearing officer's decision on this basis.

Hearing Officer's Consideration of Evidence

The grievant's request for administrative review also appears to argue that the hearing officer's findings of fact are not supported by the evidence. Specifically the grievant asserts that his conduct did not undermine his ability to supervise.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[20] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[21] 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.[22] 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.[23] 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.

In the hearing decision, the hearing officer assessed the evidence and concluded the grievant's actions, in discussing information about one employee with another, "undermined his ability to supervise" and "impaired his reputation."[24] The hearing officer's conclusions have support in the hearing record.[25] While reasonable minds could have reached different conclusions as to the evidence or the severity of the grievant's misconduct, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence was

[19] In his request for administrative review, the grievant presented factual assertions that he acknowledged were "beyond the hearing record." As the grievant bears the burden of establishing a basis for mitigation, he was responsible for presenting any evidence of mitigation at hearing. However, even considering the additional evidence presented by the grievant in his request for administrative review, there remains an insufficient basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the record evidence.
[20] Va. Code § 2.2-3005.1(C).
[21] *Grievance Procedure Manual* § 5.9.
[22] *Rules for Conducting Grievance Hearings* § VI(B).
[23] *Grievance Procedure Manual* § 5.8.
[24] Hearing Decision at 9.
[25] *See, e.g.*, Hearing Recording at 4:26:15-4:26:55, 4:28:13-4:28:48 (testimony of First Sergeant); 4:48:08-4:49-21 (testimony of Division Commander).

in any way unreasonable or not based on the actual evidence in the record. Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the hearing decision on this basis,

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision.[26] 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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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[26] To the extent this ruling does not address any issue raised by the grievant in his 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.
[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).