Issue: Administrative Review of Hearing Officer's Decision in Case No. 11142; Ruling Date: April 12, 2018; Ruling No. 2018-4695; Agency: Department of Corrections; 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 Department of Corrections
Ruling Number 2018-4695
April 12, 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 11142. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11142 are as follows:[1]

> The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency for approximately 19 years. She worked in a unit with female inmates.
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> Offender T identified as a transgender male.
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> On September 21, 2017, Grievant was assigned to clear the recreation yard in preparation for grass cutting. Grievant called out to the offenders in the yard to move into the housing unit. Grievant called out to Offender T several times, but Offender T did not respond. Offender S, Offender K, and Offender M told Grievant that Offender T may not have heard Grievant because "he" was wearing ear buds. Grievant said, "What." Grievant asked the offenders why they were referring to Offender T as "he." Grievant said, "That is not a he. Does he have a d--k." One offender responded, "He is a man to me." Grievant said, "Has he had sex with you yet." Offender T did not hear Grievant's comments.
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> Offender K approached Offender T. Offender M and Offender S also approached Offender T. Offender K was visibly upset. Offender K told Offender T what Grievant said to the three offenders. Hearing this made Offender T feel "extremely dehumanizing and prejudiced." Offender T approached Sergeant M and asked Sergeant M to speak with Offender S, Offender K, Offender M about a

[1] Decision of Hearing Officer, Case No. 11142 ("Hearing Decision"), March 12, 2018, at 2-3.

> disrespectful comment made about Offender T. Sergeant M approached the offenders and they told her what Grievant told them.
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> Grievant apologized to Offenders S, K, and M. Grievant wanted to apologize to Offender T but was moved to another unit before having the opportunity to meet with Offender T.

On November 17, 2017, Grievant was issued a Group III Written Notice of disciplinary action, with removal, for violation of the Prison Rape Elimination Act and DOC Operating Procedure 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*.[2] The grievant timely grieved her termination from employment and a hearing was held on February 8, 2018.[3] On March 12, 2018, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.[4] 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 . . . ."[5] 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.[6]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. She argues that she should have been advised that the facility housed a transgender inmate, points out that she apologized for the incident, and states that she does not believe "damage [was] done to anybody that was involved in the situation." Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] 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.[9] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a

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[2] *Id.* at 1.
[3] *Id.*
[4] *Id.* at 3-5.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).

preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[10] 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.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings in this matter.[11] Sergeant M testified that she received a complaint by the three offenders who had heard the grievant's comments, and was subsequently approached by the grievant, who admitted to making the statements as relayed by the offenders.[12] Further, in her testimony, the grievant did not dispute that she made the comments in question, but rather, stated that she was "just trying to clarify" the statements made by the three complaining offenders because they had referred to Offender T as male.[13] However, the hearing officer found that grievant's "reference was sexual harassment and, thus, sexual misconduct under DOC Operating Procedure 038.2."[14] 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. EEDR has reviewed the record in its entirety and finds that there is evidence in the record to support the hearing officer's determination that the agency met its burden of proof to show that the Group III Written Notice was warranted and the grievant's termination was proper. Because 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. Accordingly, we decline 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. She cites to her almost twenty years of satisfactory state service and the fact that she failed to take her prescribed medication on the day of the incident as potential mitigating factors.

As to the grievant's claim of mitigation, the hearing officer found that:[15]

> It is clear that the Agency could have addressed Grievant's behavior with a level of disciplinary action lower than removal. This is especially true given Grievant's 19 years of service to the Agency. Grievant's behavior had nothing to do with rape or sexual assault. Her behavior involved using inappropriate words that were insulting and demeaning to a person convicted of a felony and under the

[10] *Grievance Procedure Manual* § 5.8.
[11] *See* Hearing Decision at 3-5.
[12] Hearing Recording at 27:31-30:22.
[13] *Id.* at 51:56-52:20.
[14] Hearing Decision at 4.
[15] *Id.* at 4-5.

> Agency's supervision. The Agency's decision to remove Grievant, however, was authorized by its policies.
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> . . . .
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> Grievant argued that she failed to take depression medication on September 21, 2017 and this affected her judgment. Grievant did not present sufficient evidence to show that her lack of medication caused her to make the inappropriate comments. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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]."[16] 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."[17] 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.[18]

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.[19] EEDR will review a hearing officer's mitigation determination for abuse

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[16] Va. Code § 2.2-3005(C)(6).
[17] *Rules for Conducting Grievance Hearings* § VI(A).
[18] *Id.* § VI(B)(1).
[19] 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).

of discretion,[20] 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.[21]

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.[22] The weight of an 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 III Written Notice.

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.'"[23] 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, EEDR 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, EEDR will not disturb the hearing officer's decision on this basis.

Inconsistent Discipline

Finally, in her request for administrative review, the grievant also argues that the agency did not apply disciplinary action to her consistent with other allegedly similarly situated employees. A review of the hearing record indicates that the grievant did not raise the issue of potentially inconsistent discipline at hearing. Therefore, the grievant's evidence of inconsistent discipline can only be considered if it is "newly discovered evidence."[24] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or

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[20] "'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.*

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

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

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

[24] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see also, e.g.*, EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of grievance procedure).

discovered) by the aggrieved party until after the hearing ended.[25] The party claiming evidence was "newly discovered" must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[26]

Here, the grievant has provided no information to support a contention that the additional records should be considered newly discovered evidence under this standard. The grievant had the opportunity at the hearing to submit this evidence in support of her position and did not do so. Consequently, there is no basis to re-open or remand the hearing for consideration of this additional evidence.

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.[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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[25] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[26] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[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).