

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9921; Ruling  
Date: January 22, 2013; Ruling No. 2013-3476; Agency: Department of State  
Police; Outcome: Hearing Decision in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resources Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Virginia State Police  
Ruling Number 2013-3476  
January 22, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9921. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9921 are as follows:<sup>1</sup>

01. Grievant is a Trooper II and has been employed by Agency for over 6 years.
02. On December 20, 2011, during an investigation concerning a matter not involving Grievant, Agency received information an individual had placed Oleoresin Capsium (OC) on a biscuit Trooper ate. The individual who placed OC on the biscuit was subsequently identified as Grievant.
03. Trooper indicated to Agency investigators that during May or June of 2011, while on duty, Grievant placed OC on a biscuit he gave to Trooper and which Trooper ate.
04. Both Trooper and Grievant indicated Grievant's placing OC on the biscuit Trooper ate was a joke. Grievant indicated that no harm was intended. No injury or harm was alleged by Trooper.
05. Grievant does not contest he placed OC on Trooper's biscuit. He indicated to investigators and testified he placed a few drops of OC onto a spoon and applied it to the egg portion of a sausage, egg, and cheese biscuit he gave to Trooper. He and Trooper stated this was a practical joke. Grievant further stated no harm was intended. Grievant told Trooper about the OC after Trooper's first bite or two. Even after Trooper was told of OC being placed on his biscuit Trooper finished eating the biscuit. Trooper indicated no harm was done.

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<sup>1</sup> Decision of Hearing Officer, Case No. 9921 ("Hearing Decision"), October 29, 2012 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

06. Oleoresin Capsium (OC) is a derivative of a strain of South American pepper called the Habanera. The oil extract of this pepper is then dried and powdered to microscopic density. Simplified: OC is a derivative of cayenne pepper.
07. OC Aerosol Spray is an aerosol product in which the active ingredients are the five most active compounds of oleoresin capsicum, or cayenne pepper. OC is an oily resin with a yellowish-orange color formulated at a 5.5% concentration. OC is classified as an organic inflammatory agent.
08. Oleoresin Capsium (OC) Spray is issued to Agency sworn employees, including Grievant, who have been trained and certified in its proper use. OC Spray is required to be carried by uniform personnel at all times while on duty and may be carried off-duty also.
09. Officers are required to be trained concerning OC and are required to complete a Departmental approved OC training program prior to being issued OC and a bi-annual recertification is conducted. Grievant has received training on OC.
10. Agency has adapted and promulgated policy concerning Oleoresin Capsium (OC) Spray and its authorized use.
11. Agency training manual insert volume 2, MEMO-2007-No. 11 provides, in pertinent part:

V. AUTHORIZED USES, OPERATION:

- A. OC Aerosol Spray can be used at any time a sworn employee encounters resistance, aggression against himself/herself, or any other violence that may threaten others in the execution of an arrest or in the lawful performance of their duties.
- C. OC Aerosol Spray will not be used in a non-justifiable manner. OC will not be sprayed in a manner so as to engage in horseplay or pranks. ...
- D. Operation: ...
  5. All uses of OC constitute use of force. The sworn employee is required to comply with use of force reporting requirements in effect. ...

In an October 29, 2012 hearing decision, the hearing officer upheld the agency's issuance of the Group III Written Notice with five day suspension.<sup>2</sup> The grievant now seeks administrative review from 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

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<sup>2</sup> *Id.* at 12.

matters related to procedural compliance with the grievance procedure.”<sup>3</sup> 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 a party; the sole remedy is that the action be correctly taken.<sup>4</sup>

#### *Inconsistency with Agency Policy*

The grievant’s request for administrative review asserts that the hearing officer’s decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>5</sup> Thus, the grievant’s contentions regarding the application of agency policies to the conduct in question would be properly considered by the Director of DHRM. The grievant has requested such a review.

#### *Noncompliance with Grievance Process*

The grievant claims that he did not receive a fair process during the management resolution steps of the grievance procedure. He asserts that the first step-respondent was unable to address the issues and relief requested, and that the second and third step-respondents were biased due to each being part of the chain of command initially issuing the discipline to the grievant. However, the grievance procedure requires that all claims of party noncompliance be raised immediately.<sup>6</sup> Thus, if Party A proceeds with the grievance after becoming aware of Party B’s procedural violation, Party A may waive the right to challenge the noncompliance at a later time.<sup>7</sup> Here, the grievant claims alleged procedural violations that occurred at the first, second and third resolution steps of the grievance process. Although the grievant was aware of the possible procedural errors during these steps, nevertheless, he advanced through the resolution steps and ultimately to hearing. As such, the grievant waived his right to now challenge the agency’s alleged noncompliance during the resolution steps.<sup>8</sup>

#### *Hearing Officer’s Consideration of the Evidence*

The grievant’s request for administrative review also challenges the hearing officer’s findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>9</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>10</sup> 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.<sup>11</sup> Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has

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<sup>3</sup> Va. Code § 2.2-1202.1(2), (3), and (5).

<sup>4</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>5</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>6</sup> *Grievance Procedure Manual* § 6.3.

<sup>7</sup> *Id.*

<sup>8</sup> Although the issues need not be addressed, based on the grievant’s assertions, we are unable to find any violations of the grievance procedure.

<sup>9</sup> Va. Code § 2.2-3005.1(C).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>12</sup> 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 this instance, the grievant contests the evidence presented by the agency and claims that the hearing officer overlooked details regarding his case, essentially arguing that the agency did not bear its burden of proof to show that this disciplinary action was warranted and appropriate under the circumstances. The Written Notice issued to the grievant described the offense as an unauthorized use of "a less lethal weapon," which constituted conduct that undermines the effectiveness or efficiency of the Department's activities.<sup>13</sup> The hearing officer found that the agency met its burden of proof in showing that the grievant, "while on duty, provided another employee with a biscuit, consumed by the other employee, which was knowingly adulterated with OC (Oleoresin Capsicum) spray by Grievant," and found "that this is an unauthorized use of a less lethal weapon," a violation of agency policy, and a Group III Offense.<sup>14</sup>

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings. The grievant did not dispute that he had in fact applied a few drops of OC spray to a biscuit which he then gave to another employee as a practical joke. He maintains that he had no intent to harm the other employee, and the hearing officer found that no evidence showed any intent to bring about harm.<sup>15</sup> The grievant testified at hearing that, at the time, he did not consider his actions in applying the OC spray to the biscuit to be a violation of agency policy.<sup>16</sup> However, the agency presented a great deal of evidence regarding training received by the grievant as to the proper use of weapons, including testimony from the officer in charge of agency training, lesson plans from agency trainings which included policy regarding proper use of chemical agents and OC spray, and a copy of an agency Powerpoint presentation regarding OC.<sup>17</sup> The hearing officer ultimately found that the grievant was aware or should have been aware of the agency policy specifically prohibiting his actions, even if his intent was only to carry out a prank.<sup>18</sup>

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group III offense for engaging in conduct that undermines the effectiveness or efficiency of the Department's activities.<sup>19</sup> Because the hearing

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<sup>12</sup> *Grievance Procedure Manual* § 5.8.

<sup>13</sup> Agency Ex. C.

<sup>14</sup> Hearing Decision at 12.

<sup>15</sup> *Id.* at 9.

<sup>16</sup> See Hearing Record at 02:47:41 through 02:47:49 (testimony of grievant).

<sup>17</sup> See Hearing Record at 55:39 through 56:57 (testimony of First Sergeant P), Agency Ex. P, Q, and R.

<sup>18</sup> Hearing Decision at 10.

<sup>19</sup> *Id.* at 3.

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. 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 suspension. He asserts that the discipline issued exceeds the limits of reasonableness given all the circumstances of his particular situation. As to mitigation, the hearing officer found that:<sup>20</sup>

The evidence indicates that Agency took into consideration mitigating factors. Agency chose to issue only one Group III Written Notice with a 5 day suspension. Even though the normal Disciplinary action for a first Group III Offense is termination Agency did not terminate and also did not impose the maximum workday suspension period provided by policy.

The Hearing Officer does not find that the agency's discipline exceeds the limits of reasonableness.

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 [EDR].”<sup>21</sup> The *Rules for Conducting Grievance Hearings* (“*Rules*”) provide that “a hearing officer is not a ‘super-personnel officer’” therefore, “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.”<sup>22</sup> 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.<sup>23</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

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

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<sup>20</sup> *Id.* at 12.

<sup>21</sup> Va. Code § 2.2-3005(C)(6).

<sup>22</sup> *Rules* § VI(A).

<sup>23</sup> *Rules* § VI(B). 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).

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.<sup>24</sup> EDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>25</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard. Here, the facts upon which the hearing officer relied support the finding that a Group III Written Notice with suspension was appropriate and did not exceed the limits of reasonableness due to the severity of the offense, which was a non-justifiable use of an issued weapon and could have resulted in an even more severe disciplinary action, such as termination from employment. As such, EDR will not disturb the hearing officer’s decision on that 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.<sup>26</sup> 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.<sup>27</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>28</sup>



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<sup>24</sup> *E.g., Id.*

<sup>25</sup> “‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion.” Black’s Law Dictionary 10 (6<sup>th</sup> 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.*

<sup>26</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>27</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>28</sup> *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).