

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9953; Ruling
Date: January 22, 2013; Ruling No. 2013-3493; Agency: Department of Juvenile
Justice; 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 Department of Juvenile Justice
Ruling Number 2013-3493
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 9953. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9953 are as follows:¹

The Grievant has worked for the Agency for over 9 years. The Agency's Assistant Superintendent for Security testified consistently with the allegations contained in the Written Notice. The Written Notice charged that the Grievant, on August 23, 2012:

Allowed residents to enter and remain in an area (the gym corridor) without having sight and sound supervision. . . . As a result of no direct supervision, two (2) residents brutally assaulted another resident, which also resulted in the resident (the victim) being sent out to the Emergency Room with facial lacerations and a potential nasal fracture. . . . According to IOP # 212-4.2 (paragraph #1): All staff are responsible for maintaining sight and sound supervision of assigned residents (and must be physically present), inside and outside the buildings, at all times.

As for circumstances considered, the Written Notice stated:

This is not your first occurrence in regards to violating the aforementioned policy. On 04/19/12, you were issued a Group II with suspension for your failing to conduct 15 minutes checks on

¹ Decision of Hearing Officer, Case No. 9953 ("Hearing Decision"), November 16, 2012, at 3-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

your assigned unit residents for nearly two (2) hours. Due to the serious impact of the current violation and your violation of this same procedure within the past six months which also posed a serious potential threat to the safety of residents, management does not deem any mitigation appropriate.

The Assistant Superintendent testified that the Grievant was provided training on the applicable policy. The Assistant Superintendent also described the video of the assault that showed the placement of the Grievant and the second staff member (recreational staff) who was assigned to the group supervision in question. The Grievant had exited the building, the recreational staff member was still in the gym, and the residents were allowed to proceed out of the gym into the gym corridor area unsupervised by either staff member.

The Grievant testified that there should be three staff members supervising resident activities, and that she was responsible for the front of the line of residents and the recreational staff member was responsible for the rear of the line. The Grievant conceded that there is no policy requiring three supervising staff members, but that is her opinion. The Grievant also testified that the recreational staff member was just as much at fault, and that the recreational staff member was disciplined with only a notice of improvement needed.

The Grievant also testified that she believed her discipline and termination was disparate treatment and constituted discrimination on account of her race (black). The recreational staff member is white. The Grievant conceded that her chain of supervision is distinct from the recreational staff chain of supervision.

In a November 16, 2012 hearing decision, the hearing officer upheld the agency's issuance of the Group III Written notice with removal for a violation of policy that resulted in bodily harm to a resident.² 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 matters related to procedural compliance with the grievance procedure.”³ 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.⁴

² *Id.* at 7.

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

⁴ *See Grievance Procedure Manual* § 6.4(3).

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.⁵ Thus, the grievant's contentions regarding the application of agency policy 212-4.2 to the conduct in question would be properly considered by the Director of DHRM. The grievant has requested such a review.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review, in stating that she disputes that her behavior constituted misconduct, essentially challenges the hearing officer's findings of fact based on the weight and credibility that she 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"⁶ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁷ 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.⁸ 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.⁹ 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.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the Written Notice and that the behavior constituted misconduct.¹⁰ The Assistant Superintendent of Security testified that he had reviewed the video recording of the grievant's behavior on the day in question and that the video demonstrated that she did not have proper supervision of the residents as required by agency policy.¹¹ Based upon this testimony and the agency's policy as admitted into the hearing record as exhibits, the hearing officer found that the grievant did engage in the conduct alleged, in violation of agency policy, and that her actions constituted misconduct.¹² Because 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

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

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ Hearing Decision at 5.

¹¹ See Hearing Record at 09:24 through 09:36 (testimony of Assistant Superintendent of Security).

¹² Hearing Decision at 5.

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 nine years of service with the agency as a potential mitigating factor and further argues that the agency did not apply disciplinary action to her consistent with other similarly situated employees.

As to the grievant's claim of mitigation, the hearing officer found that:¹³

The Agency expressed its position that there are aggravating circumstances present more so than any mitigating circumstances, specifically the repeat violation of the supervision policy within a relatively short time span, and the resulting physical injury to a resident.

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant's supervision lapse resulted in the opportunity for and actual occurrence of a violent assault and warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and residents in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's 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 [EDR]."¹⁴ 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."¹⁵ 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,

¹³ *Id.* at 6.

¹⁴ Va. Code § 2.2-3005(C)(6).

¹⁵ *Rules* § VI(A).

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁶

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 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.¹⁷ EDR will review a hearing officer's mitigation determination for abuse of discretion,¹⁸ 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 termination for the Group III offense was appropriate and did not exceed the limits of reasonableness due to the severity of the offense, which compromised the security of the facility and led to the injury of a resident.

To the extent that the grievant argues that her length of service should have been considered as a mitigating factor, we find this argument unpersuasive. While it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.¹⁹ 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, the grievant's length of services is not so extraordinary as to justify mitigation of the agency's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity. Furthermore, the hearing record demonstrates that the grievant had been disciplined only a short time prior to this incident, having received a Group II Written Notice on or about April 19, 2012, for failing to perform the required checks on residents.²⁰ Therefore, based upon a review of the entire record, there is

¹⁶ *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).

¹⁷ *E.g., Id.*

¹⁸ "'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.*

¹⁹ See EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

²⁰ See Agency Exhibit C.

nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that basis.

Discrimination/Inconsistent Discipline

The grievant further challenges the hearing officer's decision not to mitigate the discipline issued to the grievant based on inconsistency of discipline between similarly situated employees. She indicates that the other employee allegedly responsible for supervising the residents on the day in question received a Notice of Improvement Needed, while the grievant received a Group III Written Notice with removal, for the same conduct involved in the same incident. She alleges that the disparity in treatment occurred based on race, as the Grievant is African-American and the other employee is Caucasian.

In his hearing decision, the hearing officer found that "[t]he Grievant advanced her belief of racial discrimination but she did not present any evidence in support, beyond her own opinion. Therefore, the Grievant has not borne the burden of proof to demonstrate that the disciplinary action was based on her race."²¹ A review of the hearing record indicates that the grievant raised the issue of allegedly inconsistent discipline at hearing solely via her testimony.²² She did not submit additional evidence, nor did she call any other witnesses to testify to the discipline given to any other employees or to establish that such employees were similarly situated. Accordingly, the hearing officer determined that there was not enough evidence to support a finding of inconsistent discipline or that any such inconsistencies were based on racial discrimination.

Section VI(B)(2) of the *Rules* provides that an example of mitigating circumstances includes "whether the discipline is consistent with the agency's treatment of other similarly situated employees." The grievant has the burden to raise and establish any mitigating factors.²³ While reasonable minds may differ as to the weight that should be granted to testimony provided by the grievant that might tend to support such a finding, the hearing officer has the sole authority to weigh evidence, determine credibility, and make such factual findings.²⁴ As long as the hearing officer's findings are based upon record evidence 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, EDR cannot conclude that the hearing officer's decision was an abuse of discretion or without record evidence support.

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

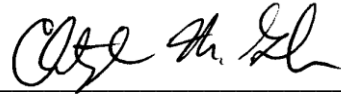
²¹ Hearing Decision at 6.

²² See Hearing Record at 23:12 through 24:08 (testimony of grievant).

²³ *Grievance Procedure Manual* § 5.8(2); *Rules for Conducting Grievance Hearings* § VI(B).

²⁴ Va. Code § 2.2-3005.1(C).

review have been decided.²⁵ 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.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷



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²⁵ *Grievance Procedure Manual* § 7.2(d).

²⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁷ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).