Issue: Administrative Review of Hearing Officer's Decision in Case No. 9916; Ruling Date: February 1, 2013; Ruling No. 2013-3501; Agency: Department of Alcoholic Beverage Control; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Department of Alcoholic Beverage Control
Ruling Number 2013-3501
February 1, 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 9916. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9916 are as follows:[1]

1. Grievant is employed in the capacity of a special agent with the Agency. Grievant's responsibilities range from street-level law enforcement duties to sedentary work at a desk reviewing documents. He has held employment with the Agency for 36 years.

2. While Grievant was on duty on June 23, 2011, and operating a state owned vehicle, he was involved in a single car accident. Grievant was traveling about 65 mph when his vehicle drifted off the left side of interstate 64, hit a tree, and overturned. Damage to the vehicle was so extensive that it was deemed a total loss. Grievant has been diagnosed with a seizure disorder since 2003.

3. Due to the accident, the Agency suspended Grievant's police powers and placed him on administrative leave with pay as of July 6, 2011. Before returning to work, Grievant was required to undergo a medical evaluation as referenced below.

4. The state trooper responding to the accident interviewed witnesses. They described the incident as Grievant moving at a constant speed on Interstate 64 while slowly drifting left off the side of the road. They observed no brake lights

[1] Decision of Hearing Officer, Case No. 9916 ("Hearing Decision"), November 30, 2012, at 2-6. (Some references to exhibits from the Hearing Decision have been omitted here.)

and described the incident as it appearing that Grievant fell asleep. The state trooper did not charge Grievant with an offense and noted there was no improper action by the Grievant. But he noted that Grievant had blacked out. The state trooper also concluded that Grievant was negligent due to Grievant acknowledging to Trooper that Grievant had a history of blacking out while operating a motor vehicle, yet Trooper noted he drove on the day of the accident. Trooper's report of the accident revealed that it occurred about 3:15 p.m. on a clear day. The highway was noted as paved.

5. As a result of the circumstances surrounding the accident, On July 11, 2011, Trooper requested the Division of Motor Vehicle ("DMV") obtain a medical examination of Grievant to determine his fitness to drive.

6. On July 22, 2011, Grievant's neurologist completed a medical report at DMV's request indicating Grievant had no neurological problems that would keep him from driving.

7. As a result of the state trooper's report regarding the accident and under Agency Policy 47, on or about July 14, 2012, the Agency also sought a medical evaluation of Grievant to determine if Grievant was fit for duty as a law enforcement officer. The medical review was completed on or about December 30, 2011. That report indicated Grievant more than likely suffered a seizure at the time of the accident. The examining physician recommended Grievant not drive for six months. However, the physician did qualify Grievant to perform essential job duties and Grievant returned to work on January 5, 2012.

8. On January 6, 2012, Grievant was interviewed as part of a fact finding investigation of the June 23, 2011 accident. The investigation had been requested by Grievant's supervisor on the day of the accident. But Grievant was not interviewed until he returned to work because the investigator believed Agency policy under §9.1-501 of the Code of Virginia required him to wait until Grievant returned to duty to interview Grievant.

9. On January 6, 2012 Grievant was provided the notification of pending investigation regarding the June 23, 2011 automobile crash and his administrative proceeding rights. Among other things, Grievant was informed that any admissions made during the course of the investigation could be used to discipline Grievant. The Agency then proceeded to interview Grievant on January 6, 2012.

10. During the interview, Grievant stated there were no problems with the vehicle and it was a relatively new vehicle. Also, an inspection of the vehicle on August 3, 2012, revealed no mechanical failures with the vehicle.

11. The fact finding investigation was concluded in January and the resulting report was produced on January 17, 2012. Regarding the accident, the report

concludes by describing the accident and noting that Grievant stated on interview that he did not recall what happened but felt the accident was not a result of his having a seizure.

12. By letter dated March 20, 2012, the Agency notified Grievant that he was being placed on monitoring by a physician to ascertain Grievant's compliance with courses of treatment to monitor and control his seizure disorder.

13. Practically 12 months after the vehicle accident, the Agency issued Grievant a Memorandum of Pending Disciplinary Action dated June 5, 2012; Grievant filed his response to the memorandum on June 11, 2012; and Grievant was issued a Group III Written Notice for damaging property on July 11, 2012.

14. Grievant wears glasses mainly for reading. Three days before the accident, Grievant had cataract surgery on his left eye. Thereafter, he had been told by his eye doctor that he did not need to wear glasses.

15. Under Agency Policy known as General Order 36 - Vehicle Operation and Assignment, if an investigation of a vehicular accident by an employee agent reveals that the agent acted with a high degree of negligence in causing an accident, the agent may be held responsible for repair of the vehicle.

16. Under Agency Policy known as General Order 36 - Vehicle Operation and Assignment, agents such as Grievant are required to operate their state vehicles safely and properly and in full compliance with all traffic laws and regulations.

17. Under Agency Policy known as General Order 44 concerning the care of issued equipment, agents may be held responsible for the repair or replacement of equipment issued to them if it is damaged due to their negligence.

18. Grievant has had numerous accidents while driving on duty. The dates and incidents appear below:

Date	**Accident/Driving Incident**
1977	Grievant struck from behind
June 16, 1987	Grievant passed out striking mailboxes
November 12, 1987	Deer accident (no fault)
October 18, 1989	Struck from behind while stopped (no-fault)
May 21, 1997	Grievant indicated he dose off while driving, almost striking a vehicle

February 15, 1995	Grievant charged with reckless driving. Grievant advises he was overcome from smoke while inside a licensee
October 14, 2003	accident, cause given was "partial complex seizure disorder"
June 23, 2011	single vehicle accident, drifted off the left lane of Interstate 64

19. Prior to the June 23, 2011 accident, Grievant had received a counseling memorandum for improper driving that could have caused serious consequences.

20. Under the Agency Policy regarding Vehicle Accident Review, should an investigation reveal that an employee is responsible for an accident, the Agency at its discretion may hold the employee responsible for repairs or subject the employee to disciplinary action. The Agency did not hold Grievant responsible for the damage to the vehicle he wrecked on June 23, 2011.

21. A report by the Agency's Accident Committee indicates that Grievant's accident could have been avoided if Grievant had reported any impairment and avoided driving.

22. A disciplinary summary of accidents by state employees from August 3, 2006, to December 20, 2010, shows there had been 26 crashes by employees. Disciplinary action taken on 17 of them was verbal counseling. On 2 of them the operator was not found at fault. On 7 of them discipline was noted as no record or "not enforcement."

23. A medical report from Grievant's neurologist dated August 28, 2012, stated that Grievant's seizures were under control and he was fit for full time work without restrictions.

24. Grievant's performance evaluations from 2006 to 2011 have rated him as either an extra or high contributor.

On July 11, 2012, the Agency issued Grievant a Group III Written Notice for damaging state property.[2] In the November 30, 2012 hearing decision, the hearing officer found mitigation

[2] *Id.* at 1.

to be appropriate due to an unreasonable delay in issuing the discipline to the grievant, and reduced the issuance of the Group III Written Notice to a Group II Written Notice.[3]

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."[4] 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.[5]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review asserts that the hearing officer erred in finding that the grievant engaged in the behavior described in the Written Notice and that this behavior constituted misconduct. This contention 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, i.e., damaging state property,[10] and that the behavior constituted misconduct.[11] The agency introduced an accident report, corroborated by the testimony of the state trooper investigating the accident,[12] indicating that the grievant's vehicle drifted off of the

[3] *Id*. at 9.
[4] Va. Code § 2.2-1202.1(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[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] *See* Agency Exhibit 1.
[11] Hearing Decision at 7-8.
[12] Hearing Record at CD 3, Track 2 (testimony of Trooper S).

road to the left without braking, struck a tree and overturned.[13] The agency's Division Director testified that the grievant was not able to provide an explanation for the accident upon investigation.[14] At hearing and in his request for administrative review, the grievant argued strenuously that the circumstances of the accident did not show that he was reckless in damaging state property. However, based upon her review of the testimony and exhibits presented, the hearing officer found that the accident "could not have occurred but for carelessness"[15] and thus, the grievant's actions constituted misconduct.[16]

The grievant argues that the hearing officer improperly shifted the burden to him by stating that the grievant "failed to offer any persuasive, alternative explanation" for the accident. While we understand the grievant's argument, we disagree. The record evidence described above is sufficient support for the hearing officer to find that the agency had met its burden. Consequently, in the absence of any other persuasive explanation, the hearing officer's conclusion is reasonable. Further, 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 hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

The grievant's request for administrative review also asserts that the hearing officer erred by allowing into evidence a Counseling Letter dated July 8, 1991.[17] While this contention is couched as "newly discovered evidence," we believe this point is fairly read as an evidentiary issue.[18] The grievant argues that the agency's obtaining a copy of the Counseling Letter from the files of his supervisor constituted a violation of policy and law; however, we disagree. EDR finds no prohibition against the agency's reliance upon evidence of past counseling in determining the appropriate discipline for a subsequent incident. In fact, to argue otherwise would contravene the requirement within the DHRM Standards of Conduct that agencies utilize progressive discipline.[19]

Receiving probative evidence is squarely within the purview of the hearing officer.[20] Throughout the hearing, both parties introduced evidence in support of their respective positions and all proferred exhibits were admitted by the hearing officer. We cannot conclude that in this instance the hearing officer exceeded her authority to admit the Counseling Letter or that there was anything prohibiting the admission of this document as an exhibit.

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[13] *See* Agency Exhibit 1.
[14] Hearing Record at CD 2, Track 1, 01:20 through 02:22 (testimony of Division Director W).
[15] Hearing Decision at 7.
[16] *Id*. at 8.
[17] Agency Exhibit 18.
[18] To the extent that the grievant asserts that the hearing officer's decision is inconsistent with relevant Department of Human Resource Management (DHRM) and/or agency policy, that issue is properly considered upon review by the Director of DHRM. The grievant has requested such a review.
[19] *See* DHRM Policy 1.60, Standards of Conduct.
[20] Va. Code § 2.2-3005(C).

Inconsistent Discipline

The grievant argues that the agency did not apply disciplinary action to him consistent with other similarly situated employees. Section VI(B)(2) of the *Rules for Conducting Grievance Hearings (*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." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[21] The hearing decision addresses the issue of inconsistent discipline as follows: "Grievant basically contends that other agents or employees have damaged state property or been involved in an accident with a state owned vehicle but were not punished by receiving a Group III Written Notice. The evidence shows Grievant's circumstances are unique as he had numerous incidents where he was involved in accidents. The evidence also shows the Agency has employed progressive discipline because in at least one event he was counseled."[22]

Essentially, the hearing officer found that the grievant did not submit sufficient evidence to show that he was similarly situated to any other agency employee who may have been involved in a vehicular crash. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's determinations as to the issue of inconsistent discipline were 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.

Mitigation

The grievant's request for administrative review further asserts that he was unfairly burdened by the agency's failure to timely impose its disciplinary action, upon which ground the hearing officer found mitigation appropriate. The hearing officer reduced the Group III Written Notice issued to a Group II Written Notice; however, the grievant appears to argue that in this case, the discipline should have been further reduced. 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]."[23] The *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."[24] 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,

[21] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(2).
[22] Hearing Decision at 8.
[23] Va. Code § 2.2-3005(C)(6).
[24] *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.[25]

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.[26] EDR will review a hearing officer's mitigation determination for abuse of discretion,[27] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Here, we see no abuse of discretion in the hearing officer's decision to mitigate the Group III Written Notice to a Group II Written Notice. The hearing officer found that a thirteen month delay from the date of the incident in question "unfairly burdened Grievant with developing his case to oppose any disciplinary action"[28] and for this reason, mitigated the agency's discipline. We cannot find that the hearing officer in this case exceeded or abused her authority in rendering this determination or in not mitigating the disciplinary action further. That one could reasonably reach a different conclusion does not cause the hearing officer's decision to be unreasonable. As the hearing officer has not abused her discretion in applying the "exceeds the limits of reasonableness" standard, EDR will not disturb the hearing officer's decision.

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.[29] 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

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[25] *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).

[26] *E.g., Id*.

[27] "'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.*

[28] Hearing Decision at 9.

[29] *Grievance Procedure Manual* § 7.2(d).

arose.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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