Issue: Administrative Review of Hearing Officer's Decision in Case No. 9879; Ruling Date: February 4, 2013; Ruling No. 2013-3503; Agency: Virginia Department of Health; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia Department of Health
Ruling Number 2013-3503
February 4, 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 9879. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9879 are as follows:[1]

> The Virginia Department of Health employed Grievant as a Business Manager C at one of its locations. He had been employed by the Agency for approximately 25 years prior to his removal effective July 11, 2012. The purpose of Grievant's position was:
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> > Single and top administrative position in a health District/Central office work unit. Functions with a strategic focus on long-term issues, vision for central office work unit/District. Characteristics include: serves in the absence of the District/Office Director for all non-medical issues, primary spokesperson of business operations for external and internal entities. Independently allocates funding and staffing resources, promotes programs, prepares the budget, manage facilities, finances, and human resources based on management input and keeps the director informed on actions taken. Has overall responsibility to ensure quality assurance in relation to unit's strategic plans and areas of responsibility.
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> Grievant began reporting to Dr. G in December 2010. Ms. S reported to Grievant.

[1] Decision of Hearing Officer, Case No. 9879 ("Hearing Decision"), December 3, 2012, at 2-6. (Some references to exhibits from the Hearing Decision have been omitted here.)

Ms. S resided in Location B. The Agency had two offices south of Location B. The Agency's office in Location C was approximately 22 miles south of Ms. S's home. The Agency's office in Location D was approximately 22 miles south of Location C.

On February 25, 2003, Ms. S was hired as an Administrative Office Specialist II based in Location C. In 2006, Ms. S applied for the position of Program Support Technician which was based in Location D. To perform the duties of the position, Ms. S would have to travel more frequently to Location D thereby increasing the length and expense of her daily commute to work. Grievant and two other employees were on the hiring panel for the Program Support Technician position. Grievant offered the position to Ms. S. She inquired regarding whether she would receive a salary increase. Because the new position was a lateral transfer, Ms. S was told she would not receive a significant pay increase. Ms. S refused to accept the offer of employment. Ms. S was asked to reconsider her refusal. Ms. S said that she would accept the position if the base was changed to Location C from Location D. Grievant agreed to do so and Ms. S accepted the offer of employment in the new position.

Grievant designated Ms. S's base point as Location C. Even though Ms. S's base point was in Location C she spent the majority of her time in Location D. This was especially true when Ms. S became the Acting Clerical Supervisor in May 2011 for the employees working in Location D. Instead of working two to three days per week in Location D, Ms. S began working three to five days in Location D as Acting Clerical Supervisor.

Grievant assigned Ms. S responsibility for transporting interoffice mail between Location C and Location D. Ms. S's Employee Work Profile did not include reference to the task of transporting interoffice mail. Ms. W would leave her home at approximately 6:15 a.m. and arrive at Location C at approximately 6:35 a.m. or 6:40 a.m. She would drop off the mail she had picked up from Location D on the prior day. She would pick up mail from Location C intended to be delivered to Location D. Ms. S would drive to Location D and arrive there at approximately 6:55 a.m. or 7 a.m. After she finished her shift at Location D, Ms. S would drive home. She usually did not stop at Location C but rather drove directly to her home.

When Ms. S worked at Location D, she would submit a travel reimbursement voucher to Grievant. She did not claim mileage reimbursement for the approximately 22 mile distance from her home to Location C. She claimed reimbursement for the 22 mile distance while travelling from Location C to Location D. She claimed reimbursement for the 22 mile distance while travelling from Location D to Location C, but not from Location C to her home. Ms. S would claim mileage for travelling the distance between Location D and

Location C even if she did not stop at Location C prior to reaching her home. In other words, Ms. S sought reimbursement for travelling 44 miles on nearly every day she went to work at Location D. For example, in December 2011, Ms. S claimed reimbursement at 55.5 cents per mile for 44 miles or $24.42 for 14 days. From January 2011 through April 2012, Ms. S worked at Location D for the majority of the workdays in the month as follows:

Month, Year	**Number of Days Ms. S Reimbursed for Travel between Location C and Location D**
January, 2011	16
February, 2011	15
March, 2011	20
April, 2011	15
May, 2011	18
June, 2011	18
July, 2011	16
August, 2011	20
September, 2011	16
October, 2011	15
November, 2011	14
December, 2011	14
January, 2012	13
February, 2012	15
March, 2012	15
April, 2012	15

Ms. S submitted her monthly travel vouchers to Grievant for his review. He reviewed, signed and dated each voucher. In the space on the form directly above Grievant's signature, the following language appeared:

> I HEREBY CERTIFY THAT THE TRAVEL UNDERTAKEN IN THIS REIMBURSMENT VOUCHER HAS BEEN REVIEWED AND APPROVED AS NECSSARY FOR THE CONDUCT OF BUSINESS OF THE COMMWEALTH. [sic]

From fiscal year 2006 through April 2012, Grievant approved mileage reimbursement for Ms. S for her travel between Location C and Location D in the amount of $21,251.96. Grievant knew how Ms. S travelled from her home to Location D and when she stopped at Location C.

Dr. G recognized that an employee could not hold an "acting" position for an unlimited period of time. Several months after Ms. S became the Acting Clerical Supervisor in May 2011, Dr. G discussed with Grievant about when he intended to fill the clerical supervisor with a permanent employee and she

> discussed with Grievant that he should change Ms. S's base point to Location D since that was where she was performing her supervisory duties. Grievant did not make the changes Dr. G requested. In April 2012, Dr. G was turning in her travel reimbursement vouchers to the appropriate clerk and noticed a travel voucher belonging to Ms. S showing that Ms. S was continuing to receive mileage reimbursement for her travel between Location C and Location D. Dr. G brought her concern to the attention of the HR Manager and asked why Ms. S's base had not been moved to Location D. The HR Manager said that "Those things are supposed to be confidential." Given that Dr. G was in charge of the district office, she was taken aback by the HR Manager's comment and asked Grievant if Ms. S's base point had been changed. Grievant said it had not been changed. The following week, Dr. G reported to the Deputy Commissioner her concerns about Grievant's failure to change Ms. S's base point and the response she received from the HR Manager.
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> On May 1, 2012, Dr. G, Grievant, Ms. S and Ms. R attended a meeting regarding Ms. S's work duties and location. Dr. G directed Grievant to change Ms. S's base point from Location C to Location D because Ms. S was performing most of her duties in Location D. Grievant and Ms. S objected because it would result in a reduction in income to Ms. S. Grievant and Ms. S discussed the matter and Ms. S decided she could no longer perform as the Acting Clerical Supervisor. Grievant later sent an email to the clerks informing them that he would begin supervising them instead of Ms. S. The Deputy Commissioner instructed Dr. G to begin an investigation regarding Ms. S's mileage reimbursement.

In the December 3, 2012 hearing decision, the hearing officer upheld the agency's issuance of a Group III Written Notice of disciplinary action with removal for falsifying travel reimbursement forms, specifically, authorizing travel reimbursement for Ms. S to which she should not have been entitled.[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 9, 12.
[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 the Department of Human Resource Management has the sole authority to make a final determination on whether the hearing decision comports with policy.[5] The grievant has requested such a review. As such, we will not address the grievant's policy-based claims in this review.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review asserts that the hearing officer erred by 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 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"[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 falsified travel vouchers when he certified that the travel undertaken by Ms. S was necessary and proper.[10] Uncontroverted evidence presented included copies of the state policy mandating that all travel expenses must be limited to "only those expenses that are necessary for providing essential services" and that agency employees must seek ways to reduce costs of travel.[11] The grievant indicated in his testimony that he was familiar with that policy.[12] The Deputy Commissioner of the agency testified that the grievant, in a position as Business Manager, had a great level of responsibility for abiding by such a rule as a "steward of public funds" and a "model for following policy"

[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 8.
[11] Agency Exhibit 4(i).
[12] *See* Hearing Record at 05:20:41 through 05:21:23 (testimony of the grievant).

within the office.[13] The agency presented evidence that mileage reimbursement for Ms. S was inappropriately approved by the grievant as a salary augmentation for her.[14] The grievant admits that he approved the travel vouchers in question but denies that he did so with the intent to violate policy.[15]

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. The grievant essentially contests the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[16] In his hearing decision, the hearing officer found the testimony of the agency witnesses credible and held that the agency "has met its burden of proving that Grievant falsified Ms. S's travel reimbursement."[17] EDR cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence, i.e., witness testimony and the material issues in the case. 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. 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]."[18] 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."[19] 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] *See* Hearing Record at 05:39:29 through 05:39:52 (testimony of Deputy Commissioner L).
[14] Agency Exhibit 4(a); Hearing Record at 55:14 through 55:44, 01:28:20 through 01:28:38 (testimony of Dr. G).
[15] Hearing Record at 05:21:29 through 05:22:02 (testimony of the grievant).
[16] *Rules for Conducting Grievance Hearings* § VI(B).
[17] Hearing Decision at 8.
[18] Va. Code § 2.2-3005(C)(6).
[19] *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.[20]

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.[21] EDR will review a hearing officer's mitigation determination for abuse of discretion,[22] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant argues in his request for administrative review that: (1) the evidence did not support a finding that the grievant "had notice of the rule in question, how the agency interprets the rule, and/or the possible consequences of not complying with the rule"; (2) the disciplinary action imposed was not consistent with the agency's treatment of other similarly situated employees; and (3) the disciplinary action imposed was not free of improper motive. Each point is discussed below.

A. Lack of Notice

Section VI(B)(2) of the *Rules* includes "lack of notice" as an example of mitigating circumstances. Significantly, the *Rules* do not provide that each time there is a lack of notice the imposed discipline automatically "exceeds the limits of reasonableness." Even if the hearing officer finds that an employee lacked notice of the disciplinary consequences of breaking a rule, the hearing officer must still consider all facts and circumstances, including the lack of notice as a mitigating circumstance, to determine whether the imposed discipline "exceeds the limits of reasonableness."

Accordingly, the *Rules'* notice provision is not intended to require or permit a hearing officer to mitigate discipline simply on the basis that an agency had failed to provide the

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[20] *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).

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

[22] "'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.*

employee with prior notice that a particular offense could result in the specific discipline imposed, or indeed, with prior notice of the *Standards of Conduct* (although the latter would be a good management practice).[23] The *Rules* provision on notice does not require that exact consequences be spelled out in advance; rather, this provision must be read to include an objective "reasonableness" standard. This provision is intended to require actual or constructive notice of the consequences for misconduct only in cases where the severity of the discipline imposed could not have been anticipated by a reasonable employee.

Thus, consistent with the *Rules* provision quoted above, notice of the possible consequences may not even be required if a reasonable, objective employee should have anticipated the severity of the discipline in light of the founded misconduct. And even if the "reasonable, objective" employee would not have anticipated the severity of the discipline, he or she could still have actual or constructive notice of the possible consequences of breaking a rule. An employee would have notice if, for example, the possible consequences "had been distributed or made available to the employee" or had been "communicated by word of mouth or by past practice."[24]

In this instance, the grievant's own testimony indicated that he was aware of the state policy regarding travel.[25] Further, the Deputy Commissioner testified that the grievant, in his role as Business Manager, should be held to a high standard with respect to following such a policy as a "steward of public funds."[26] The hearing officer found that the grievant "knew or should have known that reimbursing Ms. S for travel from Location C to Location D on those days she worked in Location D and merely picked up the mail in Location C was not necessary and was not proper."[27] Where, as here, the hearing officer's findings are based on evidence in the record, EDR cannot substitute its judgment for that of the hearing officer on such determinations of disputed facts. Thus, EDR finds no abuse of discretion in the hearing officer's decision not to mitigate the discipline on this basis.

B. Inconsistent Discipline

The grievant has asserted that the hearing officer failed to consider his allegation that the agency disciplined employees inconsistently. The grievant points to evidence apparently showing that his supervisor, Dr. G, submitted travel vouchers incorrectly herself, offered to tender repayment for any mileage paid to her incorrectly, and received no discipline for this action. Even accepting all of these facts as undisputed, we cannot conclude that the hearing officer's failure to mitigate on this basis was an abuse of discretion. Nothing in the record indicates that the hearing officer clearly erred in determining that the discipline imposed did not exceed the limits of reasonableness on the basis of an argument of inconsistent discipline. For

[23] *Cf.* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 674 S.E.2d 563 (2009)(in due process context, declining to recognize "a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").
[24] *See* EDR Ruling No. 2013-3394.
[25] *See* Hearing Record at 05:20:41 through 05:21:23 (testimony of the grievant).
[26] *See* Hearing Record at 05:39:29 through 05:39:52 (testimony of Deputy Commissioner L).
[27] Hearing Decision at 8.

example, there is insufficient evidence in the record to establish that the grievant was similarly situated to Dr. G or that the incidents of alleged travel discrepancies were substantially similar. Accordingly, there is no basis to remand the case to the hearing officer regarding this issue.

C. Improper Motive

Much of the evidence and testimony presented by the grievant at the hearing focused on the grievant's allegations that he was targeted by the agency's Deputy Commissioner, who was searching for reasons to terminate him.[28] The hearing officer addressed this claim in the hearing decision, finding that although there was evidence presented that the Deputy Commissioner disliked the grievant and desired to have him fired, the decision in this case was made in concert with others, namely, the agency head and Dr. G, and not unduly influenced by the Deputy Commissioner.[29] Essentially, the hearing officer found that the grievant did not submit sufficient evidence to establish that the disciplinary action was issued for an improper motive.

The hearing officer has the sole authority to weigh evidence, determine credibility, and make factual findings when the evidence presented conflicts or is subject to varying interpretations. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's determinations as to this issue were in any way unreasonable or not based on the actual evidence in the record. Indeed, even if the grievant established some level of improper motive, the evidence would still need to meet the burden of showing that the disciplinary action exceeded the limits of reasonableness on that basis. Here, there is no indication that such a showing was made. Therefore, based upon a review of the entire record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or an improper application of the "exceeds the limits of reasonableness" standard. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

Newly Discovered Evidence

The grievant's request for administrative review further argues that the hearing officer erred by failing to reopen the hearing to receive new evidence that developed after the hearing. Prior to the issuance of the hearing decision, counsel for the grievant filed a Motion to Reopen the hearing in order to submit evidence showing that several people in the grievant's chain of command had ended or planned to end employment with the agency.[30] The hearing officer denied the grievant's Motion to Reopen.[31]

Because of the need for finality, documents and information not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[32]

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[28] Hearing Record at 04:06:17 through 04:07:29 (testimony of Ms. R), Grievant's Exhibit P00684-00685.
[29] Hearing Decision at 11.
[30] Hearing Decision at 11.
[31] *Id.* at 12.
[32] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also, e.g.*, EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[33] The party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…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.[34]

Here, the grievant seeks to present evidence of occurrences that were not in existence at the time of the hearing. Consequently, EDR cannot consider this information as "newly discovered evidence" as outlined above, and there is no basis to reopen or remand the hearing for consideration of this additional evidence. Further, we cannot find that the hearing officer abused his discretion by not granting the Motion to Reopen in the first place.

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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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[33] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[34] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[35] *Grievance Procedure Manual* § 7.2(d).
[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).