Issue: Administrative Review of Hearing Officer's Decision in Case No. 9929; Ruling Date: March 13, 2013; Ruling No. 2013-3522; Agency: Virginia Community College System; 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 Community College System
Ruling Number 2013-3522
March 13, 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 9929. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9929 are as follows:[1]

> The Virginia Community College System employed Grievant as a Police Officer at one of it Colleges until his removal effective August 13, 2012. He began working for the Agency on December 21, 2007. The purpose of his position was to provide security for college and personal property at the College through crime prevention activities, patrol, investigation of all reported and suspected criminal activity, and enforcement of State traffic laws.
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> Grievant had prior active disciplinary action. He received a Group II Written Notice on July 23, 2010.
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> On September 11, 2006, Grievant and his Wife, a Virginia State Trooper, had an argument at their residence. The Wife mentioned the altercation in confidence to another employee who she considered to be a friend. That employee disclosed the matter to Virginia State Police managers who initiated an investigation. Trooper S and Sergeant B of the Virginia State Police investigated the incident. Grievant told the investigators he denied the allegations. Trooper S spoke with the Commonwealth's Attorney who declined to bring charges against Grievant. Grievant was never arrested or detained by the Virginia State Police. Trooper S closed his case file on October 10, 2006.

[1] Decision of Hearing Officer, Case No. 9929 ("Hearing Decision"), January 4, 2013 at 2-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

Grievant submitted an application for employment dated September 18, 2007 in which he certified "that all statements and representations made by me in this form are true and correct to the best of my knowledge." Grievant did not disclose the September 11, 2006 alleged conflict on his application for employment because he did not see a question requiring such disclosure.

Lieutenant S conducted a background investigation of Grievant before the Agency hired Grievant. He was aware of the alleged domestic violence incident but did not consider it to be of a serious nature. The Agency hired Grievant as a Police Officer.

On June 24, 2011, Grievant signed the LInX user agreement stating:

I … hereby acknowledge that I have read, understood and agree to comply with the NCR LInX User rules, I also understand that the LInX system and equipment are subject to monitoring to ensure proper function and to protect against improper unauthorized use, access or dissemination of information. Unauthorized request, use, dissemination or receipt of LInX information could result in civil or criminal proceedings being brought against the agencies and/or individuals involved. Violations of these rules may subject the user to possible disciplinary action and LInX access termination."

Grievant received training on the LInX system. Grievant knew that Lieutenant W would often have employees run reports on themselves as part of that training. On August 10, 2011, Grievant used the LInX system to print a report on himself as a continuation of his training. Grievant's LInX report showed that he had been investigated by the Virginia State Police for alleged domestic violence in 2006. The report listed Grievant as an "offender" for "simple assault." Grievant believed that the investigation should not have been reported in LInX because he had not been arrested and no criminal charges had been brought against him. He believed that his LInX file was in error. He gave a copy of the report to his attorney with the objective of having his record corrected. He did not ensure that the report was destroyed within 72 hours as required by policy.

In February 2012, the Student lost a flash drive containing her work papers and a database important to her. She filed a report with Officer G of the Agency's Police Department to attempt to locate the flash drive. She called Officer G and asked if the Agency had found her flash drive. Officer G told her the flash drive had not been found. The Student told Officer G that the Police Department needed to find the flash drive. She waited for a few days but did not receive a response from Officer G or the Police Department. She went to the Police Department. Grievant and Officer G were working when she arrived. She stated why she was there but received no response. She waited for ten to twenty minutes without receiving a response. Grievant questioned why she could not

simply purchase another flash drive. She replied that she had important information on the flash drive and need the drive she had lost. She was told that the flash drive might be in the "lost and found". The Student asked for a business card from Officer G but he did not have one. Grievant had a business card so he suggested Officer G write his name on the back of Grievant's business card and the card be given to the Student. Officer G wrote his name on the card and the card was given to the Student. At some point, Grievant hit his fists on a table, stood up and said that the Student was accusing him of not doing a good job. The Student perceived Grievant's response as strange since she was not talking to Grievant. Grievant walked to the back and obtained a form and returned to the front. He shoved the form in the Student's right hand and told her she had to fill out the form. Grievant explained to her that if she filled out the form that he could come after her with a lawsuit and obtain a judgment and take her and her family for everything they had. The Student observed that Grievant was angry. Grievant pointed his finger at her and told her to get out. The Student concluded it was best to leave the Police Department. She was noticeably upset when she left the Police Department. She walked by the Provost's office and the Secretary asked the Student if she was all right. The Student explained what had happened. She later filed a complaint with the Sergeant regarding her treatment.

On May 29, 2012, Grievant signed the Administrative Proceeding Rights Notice of Allegations. The Notice advised Grievant that "[r]efusal to answer all questions pertaining to the allegations made by the complainant, both orally and in writing, shall be grounds for disciplinary action and may result in dismissal from the department." He was also informed that the "answers given during the investigation of an administrative matter cannot be used against you in any criminal proceedings." Lieutenant Commander W asked Grievant whether he had distributed LInX information to unauthorized individuals. Grievant refused to answer the questions presented to him. After his first refusal to answer the question, Grievant was advised that his refusal to answer the questions would constitute an act of insubordination and violation of the Agency's Police Department General Order 201, paragraph 1.4 (Performance of Duty) and 1.20 (Truthfulness). Grievant continued to refuse to answer the questions presented to him.

The agency issued one Group III Written Notice to the grievant based upon all of the following: unprofessional/unbecoming conduct in his interactions with the student, falsification of his application for employment, and failure to follow policy regarding the LInX report. In the January 4, 2013 hearing decision, the hearing officer reduced the agency's issuance of a Group III Written Notice to a Group II Written Notice. The only basis of misconduct supporting the issuance of a Group II that appeared to be upheld was the failure to follow policy regarding the

LInX report.[2] The removal of the grievant was upheld based on the accumulation of disciplinary action.[3] 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."[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 first 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. The grievant asserts that the hearing officer's finding that he "hit his fists on a table" while dealing with a student in the Police Department was erroneous and prejudicial to the grievant. He further challenges the credibility of the student in her testimony regarding the grievant's allegedly inappropriate behavior, thus, arguing that the hearing officer had no basis to find that the grievant's behavior on the day in question amounted to unsatisfactory work performance.

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 the grounds in the record for those findings."[7] 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 this instance, the grievant contests the evidence presented by the agency in support of its allegation on the Written Notice that the grievant engaged in unbecoming/unprofessional conduct. This issue was addressed extensively via the testimony at hearing and the record evidence.[8]

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 that the agency had presented sufficient evidence to support the issuance of a Group I

[2] Hearing Decision at 5-7.
[3] *Id.* at 8.
[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] In addition to testimony from the student and the grievant regarding this issue, the hearing officer received exhibits containing statements from staff members in the Office of the Provost and documenting the grievant's supervisor's investigation into the matter.

offense for unsatisfactory work performance.[9] Because this finding is based upon evidence in the record, EDR cannot substitute its judgment for that of the hearing officer. However, even if the grievant were correct in asserting that the hearing officer erred in this respect, it appears that there would be no effect on the outcome of the case, as the Written Notice issued to the grievant was upheld on a separate basis (failure to follow policy).[10]

Retaliation

The grievant also contends that the agency acted in retaliation when it issued the discipline, allegedly due to his filing a prior grievance. To this, the hearing officer found that:[11]

> No credible evidence was presented to show that the Agency took disciplinary action with removal against Grievant because of any prior participation in a grievance proceeding. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

With respect to his allegation of retaliation, the grievant's request for administrative review appears to contest issues such as 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 are within the hearing officer's authority. While the grievant may not agree with the hearing officer's determination that he did not satisfy the burden of proof to show that the agency's actions were retaliatory, a review of the hearing record shows nothing to suggest that the hearing officer's determination regarding the alleged retaliation was in any way unreasonable or not based on the actual evidence in the record. Thus, we will not disturb the decision on that basis.

Inconsistency with Agency Policy

The grievant's request for administrative review asserts various policy arguments with respect to the discipline issued for the grievant's failure to destroy the LInX report within 72 hours. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] 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. Accordingly, the grievant's policy claims will not be addressed further in this review.

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[9] Hearing Decision at 6.
[10] Essentially, the hearing officer found that the grievant's behavior in the incident involving this student could have been classified as unsatisfactory work performance, a Group I offense, which alone would not have been enough to support the Group III Written Notice that was issued. However, the decision indicates that another factual scenario described on the same Written Notice supported the discipline issued by the agency.
[11] Hearing Decision at 8.
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Agency's Investigation

The grievant claims that the agency's investigation into his alleged misconduct was improper. This issue was raised at hearing through the grievant's counsel's objection to certain documents presented by the agency as exhibits.[13] The hearing officer took the objection under advisement and stated on the record that if he agreed with counsel's objection, then he would not consider the documents presented as evidence.[14]

Receiving probative evidence is squarely within the purview of the hearing officer.[15] While the hearing officer did not explicitly rule on the grievant's objection with respect to the agency's exhibits, based on a review of the record, we cannot conclude that in this instance the hearing officer exceeded his authority to admit the agency's exhibits or that there was anything prohibiting the admission of these documents as exhibits. Furthermore, the exhibits in question were presented towards proving the charge of "falsification of records," a charge the hearing officer found that there was no basis to uphold.[16] Thus, even if the grievant were correct in asserting that the hearing officer erred in this respect, it appears that there would be no effect on the outcome of the case, as the Group II Written Notice issued to the grievant was upheld on a separate basis (failure to follow policy).[17]

Due Process

The grievant contends that he was denied due process because he was not provided with all of the documents upon which the agency based its recommendation for the discipline issued. The grievant's counsel raised this issue via a Motion for Sanctions against the agency for its alleged failure to produce relevant documents requested by the grievant.[18] At the outset of the hearing, the hearing officer indicated that he had no authority to order sanctions; however, could take an adverse inference against the agency if he found bad faith on the part of the agency in failing to produce documents.[19] The hearing officer ultimately found that, to the extent the grievant is correct in this argument, nevertheless, "that deficit has been cured. Grievant had notice of all the documents the Agency intended to present during the hearing and had the opportunity to present any evidence he wished during the hearing."[20]

We agree with the hearing officer's determination that the grievant's due process rights were not violated. Post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the

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[13] *See* Hearing Record at 02:40:00 through 02:43:47 (at close of agency's case).
[14] *Id*.
[15] Va. Code § 2.2-3005(C).
[16] Hearing Decision at 5.
[17] The hearing officer found no basis for the agency to issue discipline to the grievant based upon falsification of his application for employment. However, the decision indicates that another factual scenario described on the same Written Notice supported the discipline issued by the agency.
[18] *See* Hearing Record at 01:12 through 02:53 (opening of hearing).
[19] *Id*.
[20] Hearing Decision at 7.

presence of counsel.[21] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[22]

In this case, it is evident that the grievant had ample notice of the charges against him, as set forth on the Written Notice.[23] He had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the presence of counsel. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, the lack of pre-disciplinary due process (if any) was cured by the extensive post-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[24] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[25] Accordingly, we find no due process violation under the grievance procedure.

Mitigation

The grievant further asserts that the hearing officer did not properly consider potential mitigating factors in this case. He asserts that the discipline issued exceeds the limits of reasonableness given all the circumstances of his particular situation. In support of his position, the grievant argues that 1) his concerns regarding the LInX report were justified, 2) that his actions were not repeated in nature, 3) that he is not in a supervisory position with the agency, 4) that he only had one disciplinary action in his employment history, 5) that his actions had no impact on the business operations of the agency, 6) that his past work performance was satisfactory to the agency and this misconduct will have no effect on his continuing to perform his duties, 7) that the agency had reasonable alternatives to the discipline ultimately issued, and 8) that the agency acted in bad faith during the investigation process.

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[21] Reeves v. Thigpen, 879 F. Supp. 1153, 1174 (M.D. Ala. 1995). *See also* Garraghty v. Comm. of Virginia, 52 F.3d 1274, 1284 (4th Cir. 1995) (holding that "'[t]he severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'"); Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 559-561 (4th Cir. 1983) (Due process requirement met where: (A) the disciplined employee has the right to (i) appear before a neutral adjudicator, (ii) present witnesses on employee's behalf and, (ii) with the assistance of counsel, to examine and cross-examine all witnesses, *and* (B) the adjudicator is required to (i) adhere to provisions of law and written personnel policies, and (ii) explain in writing the reasons for the hearing decision.)

[22] *See* Va. Code § 2.2-3004(E) which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing, and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005 and 3006. *See also Grievance Procedure Manual* §§ 5.7 and 5.8, which discuss the authority of the hearing officer and the rules for the hearing, respectively.

[23] *See* Agency Exhibit B1.

[24] *See* Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his **due process** rights, the availability of **post**-termination grievance procedures will not ordinarily **cure** the violation.").

[25] *See* EDR Ruling No. 2011-2877(and authorities cited therein).

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]."[26] 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."[27] 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.[28]

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.[29] EDR will review a hearing officer's mitigation determination for abuse of discretion,[30] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer found no mitigating circumstances which would support a decision to reduce the discipline issued by the agency.[31] 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

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[26] Va. Code § 2.2-3005(C)(6).
[27] *Rules* § VI(A).
[28] *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).
[29] *E.g., Id*.
[30] "'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.*
[31] Hearing Decision at 8.

tolerable limits of reasonableness.'"[32] Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, we are unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the actual evidence in the record. The facts upon which the hearing officer relied support the finding that a Group II Written Notice was appropriate for the violation of policy regarding the printing and destruction of LInX reports and did not exceed the limits of reasonableness. 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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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[32] *See Rules* at VI(B)(1) note 22 citing to Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981). *See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.")
[33] *Grievance Procedure Manual* § 7.2(d).
[34] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[35] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).