

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10006; Ruling
Date: March 21, 2013; Ruling No. 2013-3539; Agency: Department of Taxation;
Outcome: Hearing Officer in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Taxation
Ruling Number 2013-3539
March 21, 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 10006. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10006 are as follows:¹

The Department of Taxation employed Grievant as an Error Resolver. She had been employed by the Agency for approximately nine years. The purpose of her position was:

To examine, analyze, and resolve any type of tax form on error using the information given in the IRMS/CARS data system, or through communication with the taxpayer, attorneys, and accountants. Completes the correction process according to agency policy, procedures, and objectives.

Grievant had prior active disciplinary action. On May 9, 2012, Grievant received a Group I Written Notice for unsatisfactory performance. On September 25, 2012, Grievant received a Group II Written Notice for unsatisfactory performance.

On April 30, 2009, the Taxpayer submitted a 2005 tax return claiming an Out-of-State Credit (OSC) in the amount of \$36,180. The credit applied to multiple states on a consolidated statement. The credit had to be entered manually into the Agency's systems. Grievant failed to follow the proper

¹ Decision of Hearing Officer, Case No. 10006 ("Hearing Decision"), January 30, 2013 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

procedures. She posted the tax return but denied tax credit even though the OSC consolidated statement was attached to the taxpayer's submission. The Taxpayer was billed \$54,731.45. The Agency began lien proceedings including placing a first lien of payment on the Taxpayer's account.

On August 16, 2012, the Taxpayer submitted a duplicate return for 2005 again claiming the OSC. Another employee reviewed the request and determined that Grievant had incorrectly denied the credit. The tax return was given to Grievant for her to correctly enter the OSC. Correcting the error should not have taken more than two or three hours. Grievant printed off tax forms and entered the information by hand which required her to take several days to correct her mistake instead of two or three hours had she used the automated system to make the changes.

In the January 30, 2013 hearing decision, the hearing officer upheld the Group II Written Notice with removal of the grievant based on the accumulation of disciplinary action.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

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review first challenges the hearing officer's findings of fact based upon her assertion that she was not given ample time to present her case at hearing. She claims that the hearing officer improperly refused to listen to evidence she was attempting to present regarding the issuance of a prior Written Notice and yelled at her that he did not want to hear any further evidence about the prior discipline.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁵ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁶ 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

² *Id.* at 4.

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

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

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

aggravating circumstances to justify the disciplinary action.⁷ 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.⁸ 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, we cannot agree with the grievant's contention that she was not afforded sufficient time to present her case. The hearing officer afforded the grievant the opportunity to present her evidence via testimony and cross-examination of the agency's witnesses, and the grievant closed her case by indicating that she had nothing further to present.⁹ Further, the grievant introduced eight written exhibits, which were admitted in their entirety.¹⁰ While the hearing officer did instruct the grievant during her cross-examination of one witness that he did not want to accept any further evidence regarding the prior Written Notice issued to the grievant,¹¹ at no time did the grievant indicate that she needed additional time to present further evidence during the hearing. In addition, based on our review of the hearing recording, the hearing officer did not raise his voice with the grievant in any way.

By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.¹² In this instance, the hearing officer did not abuse his authority in refusing to allow the grievant to present repetitive and arguably irrelevant evidence regarding a disciplinary action that was not at issue in the present case. Hearing officers have the sole authority to weigh evidence, determine the witnesses' credibility, and make findings of fact. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group II offense for unsatisfactory work performance.¹³ 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.

Pretrial Discovery Documents

The grievant contends that, essentially, she was denied due process because she was not provided with all of the documents upon which the agency based its recommendation for the discipline issued. Specifically, she states that she did not receive any attachments to the Written

⁷ *Rules for Conducting Grievance Hearings* § VI(B).

⁸ *Grievance Procedure Manual* § 5.8.

⁹ See Hearing Record at 01:52:20 through 01:52:27 (close of grievant's case).

¹⁰ See Hearing Record at 01:52:40 through 01:54:12 (close of grievant's case), Grievant's Exhibits 1-8.

¹¹ See Hearing Record at 01:12:03 through 01:12:21 (testimony of grievant's supervisor).

¹² See Va. Code § 2.2-3005(5), *Rules for Conducting Grievance Hearings* § IV.D.

¹³ Hearing Decision at 3.

Notice issued by the agency documenting her allegedly unsatisfactory work performance regarding the incident for which the Written Notice was issued. At the hearing, the grievant objected to the introduction of the Written Notice as an agency exhibit, but did not specify the basis for her objection.¹⁴

We cannot find in this instance that the grievant's due process rights were violated by the agency's failing to attach supporting documentation to the Written Notice. 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 presence of counsel.¹⁵ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁶

In this case, it is evident that the grievant had ample notice of the charges against her, as set forth on the Written Notice.¹⁷ She 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 opportunity to obtain the representation of counsel or a lay advocate. 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.¹⁸ 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.¹⁹ Accordingly, we find no due process violation under the grievance procedure.

¹⁴ See Hearing Record at 01:17:04 through 01:17:26 (conclusion of agency's case).

¹⁵ *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.'"); See also *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.)

¹⁶ 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.

¹⁷ See Agency Exhibit 1.

¹⁸ 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.").

¹⁹ See EDR Ruling No. 2011-2877 (and authorities cited therein).

Mitigation

The grievant further contends that the hearing officer did not properly consider potential mitigating factors in this case, as she asserts that the agency should have levied a lesser form of discipline and provided her with more opportunity to correct her performance.

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].”²⁰ 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.”²¹ 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.²²

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.²³ EDR will review a hearing officer’s mitigation determination for abuse of discretion,²⁴ and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard. Based upon a review of the record, there is sufficient evidence to support the hearing officer’s mitigation determination. For instance, the

²⁰ Va. Code § 2.2-3005(C)(6).

²¹ *Rules* § VI(A).

²² *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).

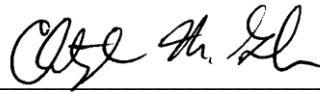
²³ *E.g.*, *Id.*

²⁴ “‘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.*

agency presented testimony from the grievant's supervisor that he had offered her the opportunity for additional assistance and training in order that she might improve her work performance, and the grievant did not avail herself of these opportunities.²⁵ As such, EDR cannot find that the hearing officer's determination was in any way unreasonable or not based on the actual evidence in the record and we decline to disturb the decision on this 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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸



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²⁵ See Hearing Record at 48:44 through 49:11 (testimony of grievant's supervisor).

²⁶ *Grievance Procedure Manual* § 7.2(d).

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

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