Issue: Administrative Review of Hearing Officer's Decision in Case No. 9885, 10001; Ruling Date: April 22, 2013; Ruling No. 2013-3557; Agency: Department of Conservation & Recreation; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Conservation and Recreation
Ruling Number 2013-3557
April 22, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 9885/10001. For the reasons set forth below, EDR remands the decision to the hearing officer for consideration of the potential mitigating factors.

FACTS

The relevant facts as set forth in Case Number 9885/10001 are as follows:[1]

> The Department of Conversation and Recreation employs Grievant as an Environmental Manager II. He has been employed by the Agency for approximately 25 years. The purpose of his position is:
>
> > Oversees program developments and consistency statewide through central office and field professional staff. Coordinates multiple programs and staff work to improve and protect the state water quality through the management of Virginia's soil and water resources. Follows a comprehensive watershed management approach that provides leadership, coordinates DCR's specific programs with those of other nonpoint source pollution control agencies, organizations, businesses, and individuals. Enforces the laws of the Commonwealth to reduce the environmental risks to the public and the environment. Discovers and explores opportunities to increase public awareness of nonpoint source pollution issues and involve citizens in developing solutions.

No evidence of prior active disciplinary action was introduced during the hearing.

[1] Decision of Hearing Officer, Case No. 9885/10001 ("Hearing Decision"), February 28, 2013, at 2-6. (Some references to exhibits from the Hearing Decision have been omitted here.)

Grievant reported to the Former Supervisor. The Former Supervisor was a poor manager who was disrespectful to employees. The Agency removed the Former Supervisor from employment. The Agency had doubts about the Former Supervisor's treatment of employees including Grievant. The Former Supervisor issued the Group II Written Notice which was lowered to a Group I Written Notice during the Step Process. It is likely that the Former Supervisor issued the Written Notice against Grievant based on an improper purpose. The Agency realized the Former Supervisor was a poor supervisor and the Former Supervisor was removed from employment.

The Agency enters into contracts with 47 local Districts to govern the distribution of money for projects and other needs. The Agency drafts proposed contracts for each District and then submits the contracts to the Soil and Water Board for approval. Once the contracts are approved by the Soil and Water Board, the Agency Head and Chief Deputy sign the contracts and the contracts are sent to the local Districts. The contract process must be timely concluded in order to ensure prompt execution of the contracts.

The Agency maintains the Agency Head's and Chief Deputy's signature in electronic form so that it can be assigned to documents that need to be processed in large volume. Using electronic signatures enables the Agency to avoid having the Agency Head or Chief Deputy sign multiple copies of documents. Use of electronic signatures is at the discretion of the Agency Head and the Chief Deputy.

On June 24, 2012, the Chief Deputy sent Grievant and Mr. M an email stating:

> I need you guys to get together tomorrow and come up with a realistic timetable that I can tell the Board [when] we will get them their operational funding. I know we need to send them the contracts after the Board approves the funding on Thursday and then the local boards have to approve the contract. I understand all that.
>
> What I need to know is how long will it take us to process in IDSS the money. I told [initials] I would get back to him and the Association before the Board meeting. So with that in mind I need to meet with you both Wednesday morning.

On June 25, 2012 at 8:34 p.m., Grievant sent the Chief Deputy an email stating:

> Good evening, [the Comptroller] and I discussed that district operational funds today. We surely think we can have the funds in their hands in a timely manner.
>
> To get this done two things need to happen. One is the development and distribution of the 47 or more contracts. To expedite this, we need to use yours and/or Director [name] electronic signatures. We have them in our possession from past contracts.
>
> The contracts are close to completion. We will show you the signature page template when we are ready. There is just the same one page for all the contracts. Can we use these electronic signatures? Thank you.

On June 26, 2012 at 7:08 a.m., the Chief Deputy sent Grievant and email stating:

> I believe you can use my signature however bring me one that is complete and let me review it tomorrow. Thx.

On June 26, 2012 at 3:45 p.m., Grievant wrote the Chief Deputy an email stating:

> Can we meet in the morning tomorrow for a short meeting. We'll show you the District contracts and signature page and finalize the discussion on how to make this happen. If ok, what time would be good for you? Thank you.

On June 27, 2012, Grievant met with the Chief Deputy regarding the proposed contracts. The Chief Deputy wanted to get a better understanding of the terms of the contracts. At the end of the meeting, the Chief Deputy told Grievant that Grievant could attach the Chief Deputy's electronic signature to the contracts but that Grievant needed to talk to the Secretary to get the Agency Head's approval to use his electronic signature. Grievant did not speak with the Secretary or the Agency Head to obtain permission to use the Agency Head's electronic signature on the contracts.

The Soil and Water Board met on June 28, 2012. The Board approved the contracts with some minor revisions. Several Board members expressed concern that the District Operations funding was a critical element and that it was important to get this funding to the districts by the mid-August target date. The Chief Deputy expressed during the meeting that he wanted his staff to meet the deadline. During a break at the Board meeting, several staff met in the General Assembly Building foyer and discussed how to best accomplish the important

task of getting the contracts to the Districts on a timely basis. Ms. M agreed to prepare the 94 contracts (two contracts for each of the 47 Districts) for review and subsequent delivery to the Districts. Grievant did not mention to Ms. M that the Chief Deputy had asked Grievant to speak with the Secretary to determine if the Agency Head would permit his electronic signature to be used. Ms. M assumed she would attach the Agency Head's electronic signature to the contracts as she had done in the past.

On June 28, 2012 at 6:09 p.m., the Chief Deputy sent the Secretary an email with a copy to Grievant stating:

> I gave [Grievant] authority to use my signature for the district contracts. Plz asked [Agency Head] in the am if we can use his signature also to get these in the mail tomorrow. Thx.

On June 28, 2012 at 7:41 p.m., Grievant forwarded a copy of the Chief Deputy's email to Ms. M and an employee helping Ms. M. Grievant wrote:

> Please check with [Secretary] per the note below … thanks to the both of you persevering throughout the day. I will be monitoring my [cell phone] so let me know of any announcements, etc.

On June 28, 2012 at 8:08 p.m., Ms. M sent Grievant an email stating:

> Too late – all contracts have been merged and printed for [employee name] to mail tomorrow.

On June 28, 2012 at 9:08 p.m., Grievant sent an email to Ms. M stating:

> Ok but we need to ensure these are correct with no errors … please double-check them before they are mailed. Thank you.

On June 29, 2012 at 7:51 a.m., the Secretary sent Grievant an email stating:

> [Agency Head] wants to see the contract before I put signatures on them. Thanks.

On June 29, 2012 at 9:26 a.m., Grievant sent Ms. M an email stating:

> Morning. Please do not send those contracts out without [Agency Head] reviewing them. Absolute …!

The draft contracts were later reprinted without the Agency Head's electronic signature. The Agency Head hand signed each of the 97 contracts that were sent to the districts.

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On March 27, 2012, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant initiated a grievance on April 24, 2012. During the Third Step, the Group II Written Notice was reduced to a Group I Written Notice. On August 2, 2012, Grievant was issued a Group II Written Notice with a ten workday suspension for failure to follow a supervisor's instructions.[2]

On August 28, 2012, Grievant timely filed a grievance to challenge the Group II Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 4, 2012, the Office of Employment Dispute Resolution (EDR) issued Ruling No. 2013-3486 consolidating the two grievances for a single hearing. On December 19, 2012, EDR assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On January 31, 2013, a hearing was held at the Agency's office.[3]

In a February 28, 2013 hearing decision, the hearing officer rescinded the agency's issuance of the Group I Written Notice of disciplinary action for failure to follow policy.[4] The hearing officer upheld the agency's issuance of the Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instructions.[5] 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."[6] 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.[7]

[2] *Id*. at 1.
[3] *Id*.
[4] *Id.* at 8.
[5] *Id*.
[6] Va. Code § 2.2-1202.1(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review 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 and the facts he chose to include in the decision. Specifically, the grievant has pointed to two facts that he feels support his claims and states there are two other material facts not referenced in the hearing decision that also support his claims. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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.[10] 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.[11] 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 record evidence, there is sufficient evidence to support the hearing officer's finding that the "[u]se of electronic signatures is at the discretion of the Agency Head and the Chief Deputy."[12] For example, the Chief Deputy testified that he explicitly told the grievant that he could not use the agency head's electronic signature for these contracts without obtaining permission from the agency head's secretary first to use the agency head's electronic signature.[13] Although the hearing decision includes a discussion of the grievant's testimony regarding why he believed he could use the agency head's electronic signature in this instance without his pre-approval, the hearing officer held that "[a]lthough [the grievant's] assertions may be true, they are not sufficient to serve as authorization for Grievant to disregard the Chief Deputy's instruction to contact the Secretary first to ensure the Agency Head's approval of use of his electronic signature."[14] Consequently, the hearing officer's finding that the grievant knew or should have known his choice to use the agency head's electronic signature without his pre-approval was prohibited is supported by record evidence. 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.

[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 3.
[13] Hearing Record at 50:09 through 50:31 (testimony of the grievant's supervisor, the Chief Deputy).
[14] Hearing Decision at 7.

Based on a review of the record evidence, there is also sufficient evidence to support the hearing officer's finding that "[a]t the end of the meeting, the Chief Deputy told Grievant that Grievant could attach the Chief Deputy's electronic signature to the contracts but that Grievant needed to talk to the Secretary to get the Agency Head's approval to use his electronic signature. Grievant did not speak with the Secretary or the Agency Head to obtain permission to use the Agency Head's electronic signature on the contracts."[15] The Chief Deputy testified that he specifically instructed the grievant in that meeting that he had permission to use his electronic signature on the contracts because he had previously reviewed the contracts, but he did not have the authority to grant the use of the agency head's electronic signature without the agency's head pre-approval.[16] Likewise, in his hearing decision, the hearing officer stated that "[t]he Chief Deputy instructed Grievant to contact the Secretary so that the Agency Head could decide whether to use his electronic signature on the contracts or sign each contract by hand. Grievant did not contact the Secretary thereby acting contrary to a supervisor's instruction."[17] Although grievant admits he did not contact the Secretary in his request for administrative review, he maintains that he never received instruction from the Chief Deputy to do so in the first place. However, because the hearing officer's findings are based upon evidence in the record and the material issues of the case, and because the hearing officer has the sole authority to weigh the evidence and determine witnesses' credibility, EDR cannot substitute its judgment for that of the hearing officer with respect to that finding.

The grievant also challenges that the hearing officer's decision omitted (1) any reference that the grievant did not have a deadline to carry out the agency head's instruction; and (2) any reference that the contracts could not leave the agency without the agency head's signature on the cover letter. We disagree. It appears that the hearing officer briefly considered all of the grievant's assertions in his hearing decision, including these two assertions, but determined these assertions were "not sufficient to serve as authorization for Grievant to disregard the Chief Deputy's instruction to contact the Secretary first to ensure the Agency Head's approval of use of his electronic signature."[18] Therefore, we decline to disturb the decision for this reason.

Mitigation

The grievant challenges the hearing officer's decision not to mitigate the Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. 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]."[19] 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

[15] *Id.* at 4.
[16] Hearing Record at 41:00 through 42:23 (testimony of grievant's supervisor, the Chief Deputy); s*ee* Agency Exhibit 2 at 5.
[17] Hearing Decision at 6-7.
[18] *Id.* at 7.
[19] Va. Code § 2.2-3005(C)(6).

that are found to be consistent with law and policy."[20] 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.[21]

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.[22] EDR will review a hearing officer's mitigation determination for abuse of discretion,[23] 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 the hearing officer should have mitigated the disciplinary action because: (1) the agency head never revoked the authority he granted to Ms. M on January 24, 2011 to use his electronic signature without his pre-approval; (2) the grievant's supervisor did not provide the grievant with a deadline when the grievant was supposed to have the agency head's approval to use his electronic signatures on the contracts before the contracts left the agency; (3) the agency head never communicated that he wanted to pre-approve the use of his electronic signature on the contracts prior to them being sent to the regional offices; (4) the grievant did make his supervisor's deadline because he did obtain approval from the agency head to use his electronic signature on the contracts before they left the agency; (5) the grievant has a "superlative work performance" history; and (6) the hearing officer rescinded the Group I Written Notice for failure to follow policy, and as such, the grievant had a clean disciplinary record which the grievant alleges the hearing officer did not consider under the totality of the circumstances.

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[20] *Rules* § VI(A).
[21] *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).
[22] *E.g., Id.*
[23] "'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.*

While it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor alone could adequately support mitigation.[24] Ultimately, the applicable standard to consider is the same for all issues of mitigation: did the mitigating factors support a finding that the disciplinary action exceeded the limits of reasonableness? In this case, the grievant's longevity of service and favorable work performance are commendable, especially given the fact the grievant was selected as the agency's "Employee of the Year" in 2011. In his hearing decision, the hearing officer acknowledged the grievant's work performance and length of service, but stated these two factors, "standing alone, are not sufficient to mitigate disciplinary action."[25] However, the hearing officer did not address whether these two factors may serve as a basis to mitigate when the grievant's disciplinary record was cleared after the hearing officer rescinded the Group I Written Notice for failure to follow policy as part of this hearing. Likewise, the hearing officer did not address whether other mitigating factors, when considered in their totality and in combination with the grievant's work record, could serve as a basis to mitigate the Group II Written Notice for failure to follow a supervisor's instruction.[26] Accordingly, the hearing decision must be remanded for an explanation and/or reconsideration of all mitigating factors, considered in their totality and in light of the mitigation standard.

Inconsistency with Agency Policy

It appears the grievant's request for administrative review asserts that the hearing officer's decision to uphold the agency's Group II Written Notice is inconsistent with state policy because the agency allegedly only gave the grievant a general, not specific, instruction to follow. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[27] Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

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[24] *See* EDR Ruling Nos. 2013-3394, 2008-1903, 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

[25] Hearing Decision at 8.

[26] The grievant alleges the following four mitigating factors: (1) the agency head never revoked the authority he granted to Ms. M on January 24, 2011 to use his electronic signature without his pre-approval; (2) the grievant's supervisor did not provide the grievant with a deadline when the grievant was supposed to have the agency head's approval to use his electronic signatures on the contracts before the contracts left the agency; (3) the agency head never communicated that he wanted to pre-approve the use of his electronic signature on the contracts prior to them being sent to the regional offices; and (4) the grievant did make his supervisor's deadline because he did obtain approval from the agency head to use his electronic signature on the contracts before they left the agency.

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

Length of Closing Argument

The grievant asserts that he did not have sufficient time to present his closing argument in the ten minutes provided by the hearing officer. The *Rules* do not expressly require the hearing officer to grant a party a particular amount of time to present his case. Based on the totality of circumstances in this case, we cannot conclude that the hearing officer did not allow the grievant a fair opportunity to present his closing statement. While the grievant may have wished for additional time during his closing argument, we cannot conclude that the amount of time he was granted was insufficient or unfairly prejudicial or that additional time would have changed the outcome. When a reasonable time limit is imposed b a hearing officer, it is incumbent upon the parties to tailor their presentation of a closing statement to fit within the given parameters. The ten-minute limit is not unreasonable for closing statements in this case. Thus, we will not disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing officer must reconsider all of the mitigating factors in their totality and to what extent, if any, the outcome of this case may be affected. 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.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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Director
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[28] *Grievance Procedure Manual* § 7.2(d).
[29] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[30] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).