

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10043; Ruling  
Date: April 22, 2013; Ruling No. 2013-3584; Agency: Department of Corrections;  
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 Department of Corrections  
Ruling Number 2013-3584  
April 22, 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 10043. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 10043, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Corrections employed Grievant as a Senior Lab Tech at one of its Facilities. She began working for the Agency in 2008. Grievant had prior active disciplinary action. On July 11, 2012, Grievant received a Group I Written Notice for excessive personal use of the Internet and abuse of State time.

Grievant worked in the same office with Ms. S, an LPN. Ms. S was on short-term disability from August 7, 2012 to September 23, 2012 and did not work at the Facility. Ms. S had a unique identification and password to log into the Agency’s computer system. Once she entered the computer system, she was able to access the Internet. Ms. S wrote her password on a piece of paper and placed that paper in the drawer of her desk. She did not lock her desk. Ms. S did not tell anyone where she kept her password. She did not authorize anyone else to log into the Agency’s computer system under her name. She did not access her account from a remote location.

Grievant often sat Ms. S’s desk. Grievant opened Ms. S’s desk drawer while Ms. S was on short-term disability and without Ms. S’s permission to do so. Grievant noticed the paper containing Ms. S’s password. Grievant used the computer on Ms. S’s desk and entered Ms. S’s unique identification and the password she read from the piece of paper in Ms. S’s desk. Once Grievant was inside the Agency’s computer system, she accessed a link to the Internet. She accessed a link to a school in which she was a student. She viewed information on

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<sup>1</sup> Decision of Hearing Officer, Case No. 10043 (“Hearing Decision”), April 2, 2013, at 2-4.

the school's website. She visited the same websites for which she was disciplined for accessing in July 2012.

Grievant had been disciplined for excessive personal use of the Internet. She used Ms. S's log in information in order to prevent the Agency from identifying her as an employee who frequently accessed the Internet.

The Agency identified excessive use of the Internet by someone at Ms. S's computer. Agency managers questioned Ms. S and she explained that she was not working at the Facility on the day of her account was used because she was on short-term disability. She identified several employees including Grievant as people who might have accessed her computer account.

On January 25, 2013, Grievant met with the Warden and the Special Investigator. The Warden told Grievant several times that it was important that she be honest when answering his questions. The Warden and Special Investigator asked Grievant whether she accessed Ms. S's computer account and the circumstances surrounding that access. Grievant wrote a statement:

Sometime during my employment possibly last summer while [Ms. S] contacted me and requested me to look something up on her account for her. I don't specifically recall what it was that [Ms. S] requested me to check. [Ms. S] conveyed to me her login information and password information for me to gain access to her account. I don't remember if I talked to [Ms. S] while I checked what she wanted. I gained access to her account and checked the information she requested. I got what she needed and later provided the information to her. I don't remember ever using [Ms. S] computer account for any purpose other than to provide her with the information she requested.

While I was researching the information that [Ms. S] requested, [Nurse M] came and asked what I was doing. I told [Nurse M] that I was getting some information for [Ms. S].

On January 25, 2013, the Investigator met with Nurse M who provided a statement:

During the course of period that [Ms. S] was on medical disability, I did see [Grievant] at Ms. S's computer station. I never inquired why she was on [Ms. S's] computer. I assumed that [Grievant] was using her own account. [Grievant] never stated to me that she was requested by [Ms. S] to access something for her on [Ms. S's] account. I never gave [Grievant] permission to use [Ms. S's] account.

On January 30, 2013, and Grievant approached the Investigator and indicated that she wished to amend her previous statement. Grievant provided a statement:

When I stated that [Ms. S.] had requested me to do something on her computer account and had provided me her log on information and password information to gain access to her account that statement was false. [Ms. S] never provided me her computer account information and security password information. [Ms. S] never requested me to gain access to the computer. I gained access to [Ms. S.'s] computer by gaining her logon information and security password from a book that she keeps in her desk. Because we work so closely together, I knew that she kept the information written in the book. The purpose of maintaining access to her account was I was trying to keep her account active to keep it [from] becoming deactivated. [Nurse M] specifically knew of what I was doing. I specifically told [Nurse M] what I was doing and the purpose for doing so.

I provided you a false statement because I was scared and never spoken to someone from the Inspector General's Office before. I also was scared because I had recently received disciplinary action and I didn't know what the purpose of the meeting was. I apologize for making the false statement and I have been trying to meet with you to rectify my earlier statement [when] we met last Friday.

In regards to whether or not I accessed my account at [school] with [Ms. S.'s] account, there is a possibility that I may have. I am not completely sure because at the time I dropped the Anatomy class I was enrolled in during the summer months and had a lot of things going on in my personal life regarding some health issues I was having.

[Ms. S] and I have been close friends for a period of the last six years. We work together previously at a doctor's office before becoming employed at [the Facility]. We regularly talk to each other via telephone. I believe that [Nurse M] may have conveyed information to [Ms. S] regarding statements I made to the Special Investigations Unit because [Ms. S] is presently not accepting my phone calls.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant engaged in theft of another employee's property by misappropriating her account information, finding in the negative.<sup>2</sup> He reduced the Group III Written Notice for theft to a

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<sup>2</sup> Hearing Decision at 5.

Group II Written Notice for violation of the agency's information technology security policy.<sup>3</sup> In addition, the hearing officer upheld the agency's issuance of a Group III Written Notice with removal for falsifying records, based on grievant's written statements during the investigation.<sup>4</sup> The grievant now appeals the hearing decision to 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."<sup>5</sup> 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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>6</sup>

#### *Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Specifically, she claims that the evidence does not support a finding that she intentionally falsified agency records.<sup>7</sup> Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>8</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.

There is sufficient evidence in the record to support the hearing officer's finding that the grievant knew or should have known providing false statements during the agency's investigation constituted falsification of records. At the hearing, the agency presented its written

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<sup>3</sup> Hearing Decision at 5-7.

<sup>4</sup> Hearing Decision at 6-7.

<sup>5</sup> Va. Code § 2.2-1202.1(2), (3), and (5).

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> The grievant's administrative review request does not challenge the hearing officer's conclusion that she violated the agency's information technology security policy. Consequently, this ruling will not address that aspect of the hearing decision.

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* ("Rules") § VI(B).

<sup>11</sup> *Grievance Procedure Manual* § 5.8.

policy defining conduct classified as falsifying documents and the potential consequences for such conduct.<sup>12</sup> The agency also presented the grievant's employee orientation checklist, on which she certified that she had received a copy of the agency's policies, including those covering standards of conduct and disciplinary action.<sup>13</sup> In her second written statement of January 30, 2013, the grievant admits, multiple times, that the initial statement she provided several days earlier was a "false statement."<sup>14</sup> These facts all indicate that, in making her initial written statement, the grievant knew or should have known that she was falsifying agency records, as well as the disciplinary action she might receive as a result.

The hearing officer's finding that the grievant falsified documents is, therefore, supported by evidence in the record, and 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.

### *Mitigation*

The grievant also challenges the hearing officer's decision not to mitigate the agency's disciplinary action. By 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]."<sup>15</sup> The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "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."<sup>16</sup> 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.<sup>17</sup>

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

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<sup>12</sup> Department of Corrections Operating Procedure 135.1: Standards of Conduct § V(D)(2)(b).

<sup>13</sup> Agency Exhibit 11.

<sup>14</sup> Hearing Decision at 4.

<sup>15</sup> Va. Code § 2.2-3005(C)(6).

<sup>16</sup> *Rules* at § VI(A).

<sup>17</sup> *Rules* at § VI(B).

under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.<sup>18</sup> EDR will review a hearing officer's mitigation determination for abuse of discretion,<sup>19</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant argues in her request for administrative review that the hearing officer should have mitigated the disciplinary action because, when she violated the agency's information technology security policy, it was for the purpose of accessing a personal website for a period of approximately ten minutes. However, the grievant was dismissed after receiving a Group III Written Notice for falsifying documents, not for improper personal use of the Internet. EDR does not find that the hearing officer abused his discretion by not mitigating on that basis.

Based on the totality of the circumstances, 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.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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.<sup>20</sup> 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.<sup>21</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>22</sup>



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<sup>18</sup> 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).

<sup>19</sup> "'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.*

<sup>20</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>21</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>22</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).