Issue: Administrative Review of Hearing Officer's Decision in Case No. 10007; Ruling Date: May 31, 2013; Ruling No.2013-3593; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2013-3593
May 31, 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 10007. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10007 are as follows:[1]

1. The Grievant was a juvenile corrections officer ("JCO"), Security Officer III, formerly employed by the Agency at a juvenile detention center (the "Facility").

2. The Grievant was so employed on September 16, 2012.

3. At approximately 12:52 p.m. on September 16, 2012, the Grievant and another JCO ("C") were trying to get a resident to return to her room after she had taken a shower.

4. The location of the incident was Unit 59, a unit reserved for particularly aggressive residents who could not be placed among the general population of the Facility.

5. The resident, who by all accounts is troublesome and difficult, continued to refuse to go to her room and was oppositional even after repeated requests by the two JCOs.

[1] Decision of Hearing Officer, Case No. 10007 ("Hearing Decision"), April 15, 2013 at 2-4 (some references to exhibits from the Hearing Decision have been omitted here).

6. Matters began to get out of hand when the resident called the Grievant dumb. The Grievant admits that this comment got under her skin because the Grievant had been called dumb in the earlier part of her childhood.

7. The Grievant admits that the comment by the resident that the Grievant was dumb hurt the Grievant's feelings and that the Grievant intended to cause the resident some pain by saying "you got beat" to the resident as payback for the resident causing the Grievant some pain.

8. The Grievant was in a custodial role at the time and when asked on cross-examination by the Advocate whether this constituted emotional abuse the Grievant responded that she did not know.

9. The comment "you got beat" referred to an earlier incident at the Facility in which the resident, according to hearsay within the Facility, was assaulted by another resident.

10. The Grievant's comment incensed the resident who began to walk towards the Grievant. C stood between the two antagonists and credibly testified that the Grievant kept taunting, provoking and antagonizing the resident.

11. The resident was trying to get to the Grievant and the resident was swinging at the Grievant who was behind C. Eventually the resident hit the Grievant in the face and the Grievant needed medical treatment for the injury.

12. While the resident was trying to get to the Grievant and C was trying to keep the resident from doing so, C directed the Grievant at least three (3) times to get off the hallway or remove herself from the situation. However, the Grievant did not follow the direction even though the Grievant admitted that she was not then providing any benefit to her partner and could have moved away and not lost sight supervision.

13. The Grievant admits that the Grievant's comment "you got beat" which the Grievant admits she made to the resident, was not appropriate. The Grievant admits that she put C in danger and admits that she apologized to C.

14. The Grievant admits that her words set off the resident's attack and battery.

15. The Grievant admitted on direct examination that she was familiar with the standards of conduct and all policies and procedures, which would include the Agency's active extinction and de-escalation protocols.

16. The Grievant did not follow Agency protocols and policies.

17. On cross-examination the Grievant admitted that nine times out of ten she would not handle the situation the way she had been trained to.

18. The Grievant received training in various forms (including hands-on training and post-orders) concerning how to handle maladaptive behavior of residents.

19. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

In an April 15, 2013 hearing decision, the hearing officer upheld the agency's issuance of a Group III Written Notice with termination, but rescinded the accompanying Group II Written Notice which was based upon the same conduct.[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 hearing officer correct the noncompliance.[4]

Inconsistency with Policy

The grievant argues that the hearing officer's decision is inconsistent with policy. The Director of DHRM 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. Accordingly, the grievant's policy claims will not be addressed in this review.[6]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review also 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 denies that she made several taunting statements to the resident, only admitting to telling the resident "You got beat," and asserts that this comment should not be considered verbal abuse or a taunt. She disputes that she presented any risk to the

[2] *Id.* at 10.
[3] Va. Code § 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[6] To the extent that the grievant argues that a policy violation occurred due to the issuance of two separate Written Notices based upon the same conduct, we note that the hearing officer rescinded the Group II Written Notice; thus, this issue is now moot.

agency by her continued employment and indicates that she continued to work at the facility while the discipline was pending. Finally, she asserts that testimony of another officer regarding her history with this resident should have been given more weight and contends that the record of the resident should have been considered in determining her discipline for this incident. Thus, she essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] 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.[9] 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.[10] 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 finding that the grievant engaged in inappropriate conduct with respect to a resident at the agency's facility. Notably, the hearing officer allowed a review of the agency's security videotape showing the incident during the hearing.[11] The agency introduced testimony of the other officer present at the incident to clarify the events captured on camera. This officer testified that she could hear the grievant laughing at the resident's behavior and also making a comment to the resident indicating that the resident had recently "gotten beat."[12] The officer further testified that she was angry as to how the grievant had handled the situation, as she felt that the grievant's actions had placed them in danger, and she could have been hurt in her attempt to hold the resident back.[13] The hearing officer ultimately found that the grievant's behavior provoked and antagonized the resident, and her actions violated agency policy and procedure.[14]

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

[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] *Grievance Procedure Manual* § 5.8.
[11] *See* Hearing Record at CD 1, 01:10:11 through 01:16:33; CD 2, Track 1, 00:00 through 13:42.
[12] *See* Hearing Record at CD 2, Track 1, 05:55 through 06:28.
[13] *See* Hearing Record at CD 2, Track 1, 15:07 through 16:15.
[14] Hearing Decision at 3-4.

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 III offense for the grievant's conduct.[15] 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.

Retaliation

The grievant contends that the agency acted in retaliation when issuing the discipline, allegedly due to her filing a discrimination complaint in 2012. The hearing officer found that the grievant did not meet the burden of proof to demonstrate a causal link between the adverse employment action and the protected activity.[16]

With respect to the 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 she 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.

Failure to Mitigate

The grievant challenges the hearing officer's decision not to mitigate the Group III Written Notice. She appears to contend that the hearing officer did not properly consider potential mitigating factors in this case such as her length of service and otherwise satisfactory work 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]."[17] 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."[18] 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

[15] Hearing Decision at 9.
[16] *Id*. at 6.
[17] Va. Code § 2.2-3005(C)(6).
[18] *Rules* § VI(A).

> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[19]

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 difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[20] EDR will review a hearing officer's mitigation determination for abuse of discretion,[21] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Here, the facts upon which the hearing officer relied support the finding that termination for the Group III offense was appropriate and did not exceed the limits of reasonableness due to the severity of the offense, which constituted a breach in the agency's policies regarding safety and security.

To the extent the grievant argues that her length of service and otherwise satisfactory performance should also have been considered as mitigating factors, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[22] 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. In this case, neither the grievant's length of service nor her otherwise satisfactory work performance are so extraordinary as to justify mitigation of the agency's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity. Based upon a review of the record, there is nothing to indicate that the hearing officer's

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[19] *Id.* at § VI(B) (citations omitted).
[20] 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] "'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.*
[22] *See* EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

mitigation determination was in any way unreasonable or not based on the actual evidence in the record. 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.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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