Issue: Administrative Review of Hearing Officer's Decision in Case No. 10042; Ruling Date: May 24, 2013; Ruling No. 2013-3595; Agency: Department of Corrections; Outcome: Hearing Officer's Decision Affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Numbers 2013-3595
May 24, 2013

The Department of Corrections ("agency") 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 10042. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10042 are as follows:[1]

1. Before his termination, Grievant was employed as a correctional officer with the Agency, a correctional facility operating under the Virginia Department of Corrections.

2. On or about December 23, 2012, in the Agency's break room and before several employees awaiting a meeting for the ongoing shift, Grievant (believing someone had stolen gifts cards of his) loudly and angrily stated words to the effect of "[i]f I find out who stole them, I will punch them in their face." "And the new Sergeant better not say anything, he is a snitch, if he says anything I will punch him in his face. Some of employees in the break room felt threatened by Grievant's remarks.

3. Agency Witness 1 and Dual Witness 2 then reported the incident to the senior sergeant (Grievant Witness 6) on duty on December 23, 2012. Those reporting the incident were informed they had the right to submit an incident report. Grievant Witness 6 counseled Grievant and instructed Grievant to apologize to all employees in the break room who heard the comments of Grievant. Grievant did apologize immediately as instructed and the matter was considered resolved. No incident reports were submitted on December 23, 2012.

[1] Decision of Hearing Officer, Case No. 10042 ("Hearing Decision"), April 11, 2013, at 2-5 (internal citations omitted).

4. On the night of the incident, a co-worker informed Grievant Witness 4 of it. Grievant Witness 4 believed further action was required. Thus, she reported the incident to the Captain, Agency Witness 3, the next day.

5. The Captain, Agency Witness 3, was on vacation the day of incident. Once she learned of the event and returned to work, she investigated the matter instructing each employee who were present during the event to submit an incident report. Those reports were submitted between December 26, 2012, and January 6, 2013. No incident report was obtained from Grievant. At the conclusion of the investigation, management issued Grievant a Group III Written Notice with termination for violation of the Agency's Workplace Violence Policy 130.3. The group notice described the workplace violence offense as the comments made by Grievant and referenced above in "Findings of Fact" # 2.

6. Agency Policy 130.3 on workplace violence provides in pertinent part the following:

> **Workplace Violence** - any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, obscene phone calls and/or electronic communications, and intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.

7. Violation of the workplace violence policy is considered a serious offence.

8. Other incidents had occurred at the Agency that were akin to workplace violence, and involving unwanted touching or threatening gesturing, but employees had not been terminated.

(i) On one occasion in 2008, a supervisor pointed at the chest of his subordinate, Grievant Witness 2. As described by Grievant Witness 2, in making this gesture, the supervisor made contact with Grievant Witness 2's chest which was unwelcomed and offensive to Grievant Witness 2.[2] Grievant Witness 2 reported the incident as workplace violence. The Agency's warden informed Grievant Witness 2 that the gesture/physical touching by the supervisor was not workplace violence as the supervisor was giving Grievant Witness 2 an instruction. The supervisor was not disciplined.

[2] When testifying about the incident, Grievant Witness 2 described it in pertinent part by stating "a supervisor had pointed at me on my chest." The Hearing Officer finds it is reasonable to conclude that the phrase "on my chest" means the supervisor made contact with Grievant Witness 2's chest.

(ii) On another occasion on or about May 11, 2011, Grievant Witness 2 was involved in another workplace violence incident. Concerning this incident, another correctional officer had volunteered to work on the night shift that Grievant Witness 2 was assigned. This correctional officer was sleeping on the post. When he was informed by Grievant Witness 2 that he was not allowed to sleep, the correctional officer punched Grievant Witness 2 in the face. The correctional officer was escorted out of the building by Grievant who happened to be working that shift. Several days later Grievant Witness 2 submitted a report of the incident. The matter was not investigated. Further, the correctional officer who was on probation at the time of the physical assault was not terminated for it.

(iii) Moreover, a third incident involved Grievant Witness 2 and an immediate supervisor, a sergeant - Grievant Witness 7. On one particular day, a faulty inmate count occurred prior to Grievant Witness 2's shift. During his shift Grievant Witness 2 was questioned about it by the captain on his shift. Grievant Witness 2 was hesitant to respond to the Captain's inquiry because he wanted to avoid reporting (or "snitching") on the work performance of one of his co-workers. Grievant Witness 2 was also sick and agitated at the time. Grievant Witness 2's immediate supervisor, Grievant Witness 7, commenced demanding responses from Grievant Witness 2. An altercation ensued which lead to Grievant Witness 2 standing up and pointing at his immediate supervisor. Grievant Witness 7 described Grievant Witness 2 as "blowing up."[3] This incident occurred in the presence of others. Grievant Witness 2 was not removed from his duty post as a result of the incident. However, incident reports were submitted by several who witnessed the event. Grievant Witnesses 2 and 7 then met with the watch commander. What followed was Grievant Witness 2 received a written group notice. As a result, a group notice for disruptive behavior remains active on his disciplinary record. Whether this group notice initially described the offense as workplace violence is not clear. However an exchange of questioning and testimony at the hearing suggests such was the case. Grievant Witness 2 was not terminated.

9. Grievant's 2011-2012 annual performance evaluation indicated he was a contributor at work.

10. Grievant's superiors described him as worker respectful of management, dependable worker who took on a lot of responsibility and performed all tasks requested of him by his superiors.

[3] The Hearing Officer finds that a reasonable person could interpret Witness 7's phrase "blowing up" as Witness 2 uttering heated words also.

On January 10, 2013, Grievant was issued a Group III Written Notice of disciplinary action with termination for violating the workplace violence policy.[4] In her April 11, 2013 hearing decision, the hearing officer amended the disciplinary action to a Group III Written Notice with a thirty day suspension.[5] She further ordered that the agency reinstate the grievant to his position prior to removal, or if the position is filled, to an equivalent position and to provide the grievant with back pay less any interim earnings that he received during the period of removal and appropriate restoration of benefits and seniority.[6] The agency 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."[7] 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.[8]

The agency alleges that that the hearing officer abused her authority in mitigating the disciplinary action. In support of its position, the agency asserts that the hearing officer should not have considered the 2008 incident as it involved a previous warden. The agency further argues that testimony showed that employees were not aware of disciplinary actions taken against other employees, and that none of the witnesses had initiated grievances regarding "their issues."

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 the Department of Human Resource Management."[9] EDR's *Rules for Conducting Grievance Hearings* (the *"Rules"*) provides 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."[10] 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,

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[4] Hearing Decision at 1.
[5] *Id*.
[6] *Id*. at 10.
[7] Va. Code § 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4.
[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules* § VI(A).

> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[11]

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.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[14] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, we also acknowledge that certain circumstances may require this result.[15]

One of the mitigating factors expressly listed in the *Rules* is "whether the discipline is consistent with the agency's treatment of similarly situated employees."[16] In this instance, the hearing officer essentially determined that the agency's discipline was unconscionably disproportionate compared with situations involving employees similarly situated to the grievant. The hearing officer summarized her decision to mitigate the discipline issued to the grievant in this case as follows:

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[11] *Rules* § VI(B)(1). The Merit Systems Protection Board's ("Board") 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).

[12] *E.g., id.*

[13] "'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.*

[14] Comparable case law from the Board provides that "whether an imposed penalty is appropriate for the sustained charges [is a] relevant consideration [] but not outcome determinative." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

[15] The Board views mitigation as potentially appropriate when an agency has knowingly and intentionally treated similarly situated employees differently. *See* Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991); Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988).

[16] *Rules* § VI(B)(2).

> Considering the incidents noted above the Hearing Officer finds Grievant was similarly situated to the other individuals accused of workplace violence. And the other accusers' conduct were equally aggravating, if not more so, than Grievant. In the incident that occurred in 2008, the supervisor's threat - offensive pointing and touching - was condoned. In the second event, a co-worker on probation battered Grievant Witness 2 and was not terminated. In the third incident, Grievant Witness 2 was agitated (as Grievant was agitated) "blew up" at his immediate supervisor. Yet Grievant Witness 2 continues to be employed by the Virginia Department of Corrections.[17]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[18] and to determine the grievance based "on the material issues and grounds in the record for those findings."[19] 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.

In this instance, the hearing decision notes that testimony was presented regarding three instances involving arguable workplace violence.[20] The earliest of these incidents was no more than four years before grievant's termination, and two of these incidents appear to have occurred during the administration of the current warden.[21] The hearing record also reflects that although Witness 2 was unaware of any particular disciplinary action taken against the co-worker engaging in workplace violence towards him, he gave unrebutted testimony that the co-worker continued to work at the agency.[22] Finally, with respect to the incident between Witness 2 and Witness 7, Witness 2 testified that he was not terminated as a result of his conduct.[23] As the hearing officer's decision is based on record evidence, EDR cannot find that the hearing officer clearly erred in mitigating the disciplinary action. As such, EDR is unable to reverse or otherwise disturb the decision.

While not explicitly put in these terms, the agency essentially presents a position of zero tolerance for workplace violence, a laudable and unimpeachable goal supported by EDR. The hearing officer correctly found that the grievant engaged in inappropriate conduct, for which he has been appropriately disciplined significantly. The question here was whether the grievant was properly terminated, as would be appropriate under a zero tolerance approach to workplace

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[17] Hearing Decision at 9.
[18] Va. Code § 2.2-3005.1(C).
[19] *Grievance Procedure Manual* § 5.9.
[20] Hearing Decision at 4-5.
[21] *Id.*
[22] Hearing Recording at Track 4, 54:12-55:00.
[23] *Id.* at Track 4, 42:02-30. With respect to the agency's argument that the witnesses did not grieve, EDR does not consider the witnesses' use or non-use of the grievance procedure to be relevant to the question of inconsistent treatment here.

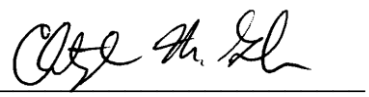
violence. However, a hearing officer can only decide cases based on the facts presented at hearing and made part of the hearing record.

In this case, the hearing officer heard unrebutted testimony that questioned whether there was a zero tolerance approach to workplace violence at this facility such that any incident of workplace violence would result in termination. The grievant presented evidence about incidents that were comparable to the grievant's conduct, and at least one incident that was more significant, all of which did not result in termination. There may be reasons why the comparable incidents could be explained or shown not to support the hearing officer's mitigation determination in this case. However, that evidence was not in the record. The agency presented no evidence to rebut or explain the grievant's evidence on mitigation. In such a case, a hearing officer may have little choice but to make determinations consistent with those made here. Similarly, without appropriate facts in the record, EDR has no way to find that the hearing officer's application of the "exceeds the limits of reasonableness" standard was an abuse of discretion in an administrative review of the hearing decision.

Going forward, the agency could consider holding a training session or issuing updated guidance to employees at this facility about its position of zero tolerance for incidents of workplace violence. Once that renewed training/information is provided, the agency should have few problems enforcing such a zero tolerance policy.

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.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]



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