Issue: Administrative Review of Hearing Officer's Decision in Case No. 10167; Ruling Date: January 22, 2014; Ruling No. 2014-3777; 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 2014-3777
January 22, 2014

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 10167. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10167 are as follows:[1]

1. The Agency is a prison. It employed Grievant as a correctional officer prior to her termination on July 3, 2013.

2. Grievant's boyfriend was also an employee of the Agency until October 2012, when he was fired because he was unable to satisfactory complete his probationary period.

3. Grievant met with the Warden in his office in October/November 2012 and expressed that "things were not going well for her." The Warden referred Grievant to the employee assistance counseling. But Grievant did not participate in this counseling.

4. On or about January 2013, it came to the Warden's attention that one of the Agency's gas credit cards was missing. It was also determined that from October 2012, to January 8, 2013, the card was used to obtain without authorization about $30,000.00 worth of gas/diesel. The Warden then commenced an investigation which concluded June 2013. The ensuing investigative report was also issued in June 2013.

5. A few days after the Warden launched the investigation, Grievant met with the Warden again and expressed she was in a bad and abusive situation with her then boyfriend and needed immediate time off to reside with her parents outside the area. The Warden granted Grievant a 90 day unconditional leave period. About nine days later, Grievant left the area to live with her parents.

[1] Decision of Hearing Officer, Case No. 10167 ("Hearing Decision"), November 18, 2013 at 2-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

During that time, she received therapy for about two months. Grievant returned to work from her leave on April 25, 2013.

6. In the course of the investigation, the Agency was able to view several videos from December 2012/January 2013 provided by stores that had sold the gas that was purchased with the Agency's missing gas card. Surveillance videos from an earlier time were not available due to their being recorded over because of the lapse of time.

7. The videos and other information obtained during the investigation revealed that Grievant's boyfriend was the holder and user of the card. As referenced above, Grievant's boyfriend, a former employee of the Agency, had been previously fired from the Agency.

8. Several of the videos viewed during the investigation showed Grievant driving her vehicle up to the gas pump and her boyfriend filling her vehicle with gas. Grievant was aware her boyfriend fueled her vehicle. She was also aware that her boyfriend's activity was illegal. Grievant admitted this during an interview pursuant to the investigation and during her spring/summer grievance meeting with the Warden.

9. While Grievant knew her boyfriend was engaged in illegal activity, she did not know that he was using the Agency's credit card to fuel vehicles.

10. Grievant did not report her boyfriend's illegal activity to the Agency or anyone at the time. Thereafter, however, when Grievant was interviewed during the course of the investigation, she admitted having knowledge of her boyfriend's illegal activity and permitting him to fuel her vehicle.

11. The Warden concluded that Grievant's behavior in effect was consorting with and having knowledge of criminal activity. Further, he believed that this conduct reflected poorly on the Agency, a facility tasked in part with facilitating the correction of the behavior of lawbreakers. The Warden also concluded that Grievant's behavior undermined the Agency's credibility. In addition the Warden opined that Grievant's credibility and trustworthiness had been compromised by her conduct and she could not be trusted to supervise felons, a responsibility she held as a correctional officer.

12. This was the Warden's first encounter with a case of this nature and the facts were unique.

13. The Warden conferred with his chain of command and other management. Agency management then determined Grievant's conduct was so serious that termination was warranted. Then on July 3, 2013, the Agency issued Grievant a Group III Written Notice with removal for inappropriate behavior that may also be criminal.

Specifically, the group notice described the offense as follows:

> SIU Case File [#########] determined that [Grievant] was aware of a fraudulent scheme perpetrated by her boyfriend, [Boyfriend], a former employee of [the Agency]. Boyfriend was selling gas for half price to anyone he could convince to participate in the fraudulent activity. [Boyfriend] was using a [gas card] which was the property of the [Department/Agency]. By her own admission, [Grievant] had her vehicle fueled by [Boyfriend] on several occasions in the fall of 2012 ending early January 2013. By her own admission, [Grievant] was aware that the activity of [Boyfriend] was illegal beginning in December 2012. By failing to report this illegal activity, [Grievant] did not adhere to her sworn oath of office, to uphold the Laws and Constitution of the State of Virginia. Further, knowing the scheme was illegal, she could reasonably be considered an accessory to the crimes purportedly committed by [Boyfriend].

14. By fall 2012, Grievant was in an abusive relationship with her boyfriend. Grievant remained in the relationship until about February 3, 2013, when she departed for a 90 day leave period. Upon her return from leave, Grievant returned to the abusive relationship for the summer 2013.

During the relationship, Grievant became very depressed. Her boyfriend on several occasions reported he would commit suicide if Grievant left him. He threatened to harm Grievant and did physically abuse Grievant by, among other things, grabbing Grievant around the throat, hitting Grievant's face.

In the November 18, 2013 hearing decision, the hearing officer upheld the agency's issuance of a Group III Written Notice with termination.[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]

Inconsistency with Agency Policy

The grievant argues that various state and agency policy, including DHRM Policy 1.60, *Standards of Conduct*, was misapplied in determining the appropriate categorization of discipline warranted, if any, for her actions. The Director of DHRM has the sole authority to interpret all

[2] *Id*. at 1, 10.
[3] Va. Code § 2.2-1202.1(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

policies affecting state employees, and to make a final determination on whether the hearing decision comports with policy.[5] Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these 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.

Due Process

The grievant argues that she did not receive adequate notice of the charges against her, such that she could adequately defend herself. As such, the grievant alleges that her due process rights have been violated. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[6] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[7] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings (Rules)*. Further, the DHRM Standards of Conduct contain a section expressly entitled "Due Process".[8] As mentioned above, the grievant may request administrative review from the DHRM Director based on her allegations that the agency failed to follow the provisions of state policy, including the due process provisions within the Standards of Conduct.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[9] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[10]

On the other hand, 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 an

---

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

[6] E.g., Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974) (holding that notice prior to hearing was not adequate when the employee was told that the hearing would be held to argue for reinstatement, and instead was changed by the agency midstream and held as an actual revocation hearing).

[7] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

[8] *See* DHRM Policy 1.60, *Standards of Conduct*, §E.

[9] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985). State policy requires:

> Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

See DHRM Policy 1.60, Standards of Conduct, §E. Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[10] 470 U.S. at 545-546.

opportunity for the presence of counsel.[11] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[12]

In this case, the Written Notice described the offense as "Inappropriate behavior that may also be considered criminal."[13] In an attachment, the following detail was provided:

> SIU Case File [##########] determined that [Grievant] was aware of a fraudulent scheme perpetrated by her boyfriend, [Boyfriend], a former employee of [the Agency]. [Boyfriend] was selling gas for half price to anyone he could convince to participate in the fraudulent activity. [Boyfriend] was using a [gas card] which was the property of the [Department/Agency]. By her own admission, [Grievant] had her vehicle fueled by [Boyfriend] on several occasions in the fall of 2012 ending early January 2013. By her own admission, [Grievant] was aware that the activity of [Boyfriend] was illegal beginning in December 2012. By failing to report this illegal activity, [Grievant] did not adhere to her sworn oath of office, to uphold the Laws and Constitution of the State of Virginia. Further, knowing the scheme was illegal, she could reasonably be considered an accessory to the crimes purportedly committed by [Boyfriend].[14]

Section VI(B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[15] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[16] In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified" cannot be remedied through a hearing."[17] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

Here, the grievant argues that the Written Notice did not adequately describe the misconduct with which she was charged, such that she could not ascertain whether the agency issued the discipline for her failure to report illegal activity against the agency, failure to report illegal activity in general, or participation in illegal activity. She asserts that at the hearing, she came prepared to prove that she had no knowledge that her boyfriend was committing a continuing crime against the agency, and thus, should not be penalized for failure to report such conduct. Indeed, the hearing officer found that "[w]hile Grievant knew her boyfriend was

---

[11] Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 559-561 (4th Cir. 1983).
[12] 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; s*ee also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).
[13] Agency Exhibit 1 at 1.
[14] *Id*. at 2.
[15] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002)(holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).
[16] *See* EDR Rulings No. 2011-2704; EDR Ruling No. 2007-1409.
[17] *Rules for Conducting Grievance Hearings* § I.

engaged in illegal activity, she did not know that he was using the Agency's credit card to fuel vehicles."[18] In considering the grievant's argument that the Written Notice did not provide her with adequate due process, the decision states that "[t]he Hearing Officer has reviewed the group notice and assertions against Grievant. Having done so, she finds Grievant's argument unpersuasive."[19]

The agency, which bears the burden of proof at hearing, must provide notice of charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. While a grievant may be aware of the facts surrounding the Written Notice, she would also need to know why or on what theory she is being punished by the agency.[20] In this instance, while the Written Notice could have been written more clearly (for instance, to eliminate qualifying phrases such as "may also be" and "reasonably be considered"), we cannot conclude that the grievant did not have notice of the facts constituting the misconduct for which she was disciplined. The hearing officer concluded that the grievant "had knowledge of her boyfriend's fraudulent scheme and then allowed him to fuel her tank…. Grievant's EWP expects her as a correctional officer who supervises offenders to be a role model and exhibit positive behavior. Her conduct was contrary to these expectations and therefore inappropriate."[21] In reviewing the language used in the Written Notice, EDR cannot find that the grievant was not put on notice of such inappropriate conduct. Further, she had a full hearing before an impartial decision-maker, an opportunity to present evidence, and an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker.[22] Accordingly, we cannot find that the hearing officer erred in not finding that the grievant suffered a due process violation as a matter of the grievance procedure. Whether any alleged due process violation supports a contention that the hearing decision is contrary to law is a question that can be raised in a legal appeal to the appropriate circuit court.[23]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review challenges the hearing officer's findings of fact in several areas based on the weight and credibility that she accorded to evidence presented and testimony given at the hearing.[24] She asserts that the agency did not bear its burden of proof to show that the disciplinary action at issue was warranted and appropriate under the circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[25] and to determine the grievance based "on the material issues and grounds in the record for those findings."[26] Further, in cases involving discipline, the hearing officer reviews the

[18] Hearing Decision at 3.
[19] *Id*. at 9.
[20] *See* EDR Ruling 2007-1409.
[21] Hearing Decision at 7-8.
[22] *See, e.g., Detweiler*, 705 F.2d at 559-61.
[23] *See* Va. Code §2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[24] In support of her position, the grievant's request for administrative review cites to several provisions of the Code of Virginia. We would note that those provisions not found under the applicable statutes (Va. Code § 2.2-1202.1, Va. Code § 2.2-3000 *et seq*.) have no relevance to this proceeding and thus will not be addressed further in this review.
[25] Va. Code § 2.2-3005.1(C).
[26] *Grievance Procedure Manual* § 5.9.

evidence *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.[27] 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.[28] 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.

The grievant argues that the evidence given by the investigating officer, Sergeant K, was insubstantial and should have been excluded by the hearing officer, as it was not the best evidence that the agency could have provided of her alleged misconduct. The grievant argues that her interview was conducted by Special Agent E, and thus, he should have testified at the hearing rather than Sergeant K. She asserts that Sergeant K testified regarding a video surveillance of her vehicle; however, such video was not produced or shown at hearing. Further, she asserts that she was unable to present impeachment evidence regarding Sergeant K because she was not provided with all of the documents she had requested regarding an agency investigation of which Sergeant K was the subject, or other documents related to her own testimony. A review of the hearing record reveals no witness order for the appearance of Special Agent E, no order for the production of video surveillance showing the grievant, and no order for the other documentation that the grievant states she requested. The *Rules for Conducting Grievance Hearings* allow a hearing officer to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as ordered.[29] However, in the absence of such an order, an adverse inference would not be appropriate. Further, as discussed below, the hearing officer upheld the discipline issued by the agency on facts independent of the agency's investigation by Sergeant K or his testimony regarding such; in particular, the hearing officer relied primarily upon the grievant's own statements and the warden's testimony.

The grievant also argues that her original statement to investigators was never produced, and the agency instead relied upon a version that was typewritten after her original statement was taken, and contained differences in information from the original. It is not entirely clear what differences allegedly exist between the original and the typewritten version, or how such differences may impact the outcome of this matter upon administrative review. However, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[30] Accordingly, the technical rules of evidence do not apply.[31] By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.[32] 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

[27] *Rules for Conducting Grievance Hearings* § VI(B).
[28] *Grievance Procedure Manual* § 5.8.
[29] *Rules for Conducting Grievance Hearings* § V.B.
[30] *Rules for Conducting Grievance Hearings*, § IV(D).
[31] *Id.*
[32] Va. Code § 2.2-3005(C)(5).

have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. The hearing officer in this instance analyzed the evidence and testimony provided and found that the grievant "was aware that her boyfriend was engaged in illegal activity. Yet she drove her car to the gas stations and allowed her boyfriend to fill her tank with gas. This activity could reasonably be construed as assisting her boyfriend in committing an illegal activity."[33] The hearing officer determined that this action constituted misconduct as it was contrary to the expectations placed upon the grievant in her position as a correctional officer.[34]

Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the July 3, 2013 Written Notice and that the behavior constituted misconduct.[35] The hearing officer's determinations were based largely on the grievant's own testimony and admissions about the extent of her knowledge of her boyfriend's scheme and her own actions.[36] For instance, the grievant admitted in her testimony that she did allow her boyfriend to fuel her car while they were out on two occasions, knowing that her boyfriend was involved in some "business" wherein he was not paying for the gas with the use of his personal funds.[37] To this, the Warden testified that engaging in such an action, one that has at a minimum even the appearance of constituting criminal behavior, undermines one's ability to perform his or her duties as a correctional officer and raises questions about character and honesty.[38] The hearing officer found that this behavior in itself constituted misconduct, regardless of any duty the grievant may have had to report such activity to the agency.[39] 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.

The grievant's request for administrative review also asserts that the hearing officer erred by not allowing into evidence a letter dated October 23, 2013 regarding in-patient treatment she received. While this contention is couched as "newly discovered" evidence, we believe this point is fairly read as an evidentiary issue. During the hearing, the hearing officer discovered that she had received a faxed copy of this letter directly; however, a copy had not been provided to the agency advocate.[40] Upon the agency advocate's objection, the hearing officer determined that she would not admit the letter into evidence because it had not been provided to the agency prior to the deadline for the parties to exchange copies of their exhibits.[41]

Receiving probative evidence is squarely within the purview of the hearing officer.[42] Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as

---

[33] *Id.*
[34] *Id.* at 9.
[35] Hearing Decision at 9.
[36] *Id*. at 7.
[37] *See* Hearing Record at Track 3, 11:23 through 12:26 (testimony of grievant).
[38] *See* Hearing Record at Track 1, 50:48 through 51:12 (testimony of Warden).
[39] Hearing Decision at 8.
[40] *See* Hearing Record at Track 4, 27:02 through 28:03.
[41] *Id.*
[42] Va. Code § 2.2-3005(C).

necessary or specified in the grievance procedure.[43] To this end, the hearing officer has the authority to require the parties to exchange a list of witnesses and documents.[44] An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.[45] In this instance, a review of the record indicates that there was no dispute that the document had not been provided to the agency, as ordered by the hearing officer.[46] Under the *Rules for Conducting Grievance Hearings*, the hearing officer may exclude evidence not timely exchanged consistent with the hearing officer's orders.[47] Thus, we cannot conclude that the hearing officer exceeded her authority in refusing to admit this exhibit into evidence.

To the extent that the grievant argues that the hearing officer did not address every piece of evidence presented, including specific grounds for sustaining or overruling objections, we find no basis to disturb the decision for this reason. It is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented, and there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing or rulings on objections made during the hearing. Mere silence as to a particular witness's testimony or other piece of evidence does not constitute a basis for remand in this case.

Alleged Misconduct During Hearing

The grievant alleges the hearing officer allowed the agency's representative and the warden of the facility to act inappropriately during the hearing. She argues that the agency's representative was disruptive at several times during the grievant's testimony, and made several unfounded objections during opening and closing statements, as well as during witness testimony throughout the hearing. Finally, she asserts that the hearing officer improperly limited the testimony of witnesses, including herself, throughout the hearing

The *Rules for Conducting Grievance Hearings* state that hearings must be conducted in an "orderly, fair, and equitable fashion.[48]" Further, the *Grievance Procedure Manual* states that "Parties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications."[49] Allowing a party's representative to disrupt a hearing in the manner alleged could create an appearance of unfairness and partiality on the part of the hearing officer. Here, EDR has thoroughly reviewed the recording of the hearing and we are unable to conclude that the agency advocate's conduct was improper to the extent that the grievant may have been prejudiced in presenting her case. While we do not find overly disruptive conduct in this instance, EDR encourages hearing officers to ensure that such situations are promptly addressed so that an appearance of prejudice does not occur. Agency advocates need to consider that objections during opening and closing statements should be minimal, if any, as such statements are not considered evidence. In this matter, there

[43] *Grievance Procedure Manual* § 5.7; *see also* Va. Code § 2.2-3005.
[44] *Id. at* § 5.7(2).
[45] *See, e.g.*, EDR Ruling No. 2003-123, EDR Ruling No. 2004-742, EDR Ruling No. 2004-934, and EDR Ruling No. 2005-1037.
[46] *See* Hearing Record at Track 4, 27:02 through 28:03.
[47] *Rules for Conducting Grievance Hearings* § IV(D).
[48] *Rules* § IV(C).
[49] *Grievance Procedure Manual* § 1.9.

is no clear evidence in the recording that the hearing officer or the agency's representative acted improperly, and consequently EDR cannot conclude that the grievant was prejudiced by the agency representative's or warden's alleged misconduct in this regard. While hearing officers are cautioned to prevent parties and representatives from engaging in conduct that may violate the Code of Civility as set forth by the *Grievance Procedure Manual*, EDR cannot, in this case, disturb the hearing officer's decision based on the grievant's allegation.

With respect to the grievant's allegations that the hearing officer improperly limited the evidence she wished to present at hearing, EDR has reviewed the hearing record in its entirety and we cannot agree with this position. In response to an agency objection as to the relevancy of one of the grievant's witness's testimony, the hearing officer overruled the objection and indicated that she would allow "some testimony but not lengthy testimony" in order for the grievant to develop her argument about mitigating circumstances relating to the time period in question.[50] The hearing officer further asked her own questions of witnesses for each side in order to clarify the questions presented in this matter. 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 her case through witness testimony at the hearing. Further, the *Rules for Conducting Grievance Hearings* provides that "the hearing officer may question the witnesses."[51] The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[52] Based on a review of the record, we find the hearing officer's questions to be relevant and reasonable. Both parties had the opportunity to further inquire of the witness on the topic raised. Consequently, we find nothing inappropriate with the hearing officer's conduct with respect to the grievant's witnesses. Thus, we will not disturb the decision on this basis.

Mitigation

The grievant asserts that the hearing officer did not properly consider potential mitigating factors in this case. She asserts that the discipline issued exceeds the limits of reasonableness given all the circumstances of her particular situation. In support of her position, she argues, for example, that 1) she suffered severe abuse from her boyfriend, placing her under his control as she feared for her life, 2) the agency did not apply discipline to her consistent with that of similarly situated employees, and 3) she had been an excellent performer in her role prior to the conduct giving rise to the disciplinary action. Each argument will be addressed below.

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]."[53] 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

[50] *See* Hearing Record at Track 2, 17:14 through 19:54.
[51] *Rules for Conducting Grievance Hearings* § IV(C).
[52] *Id.*
[53] Va. Code § 2.2-3005(C)(6).

that are found to be consistent with law and policy."[54] 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.[55]

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.[56] EDR will review a hearing officer's mitigation determination for abuse of discretion,[57] 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.[58] 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.[59]

In this instance, the hearing officer considered the grievant's evidence regarding the abuse she had suffered at the hands of her former boyfriend and perpetrator of the gas card scheme, but found that those circumstances did not support a reduction of the discipline issued

---

[54] *Rules* § VI(A).
[55] *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).
[56] *See* EDR Ruling No. 2011-2992.
[57] "'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.*
[58] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [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).
[59] 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 Service, 38 M.S.P.R. 55, 59 (1988).

by the agency.[60] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[61] Even considering the grievant's situation as outlined in her testimony and request for administrative review as ones that could reasonably support mitigating the discipline issued, we are unable to find that the hearing officer's determination regarding mitigation was unreasonable or not based on the actual evidence in the record. That other reasonable minds might have determined the appropriate level of discipline for involved employees differently does not render the agency's process and the discipline subsequently issued beyond the bounds of reason.[62] As such, EDR will not disturb the hearing officer's decision on that basis.

The grievant also argues that the agency did not apply disciplinary action to her consistent with other similarly situated employees. Section VI(B)(2) of the *Rules for Conducting Grievance Hearings (*the *"Rules")* provides that an example of mitigating circumstances includes "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[63] The hearing decision addresses the issue of inconsistent discipline as follows: "[Grievant] contends another employee was charged with a crime, but he was not terminated. The Hearing Officer finds the evidence shows the employee referenced by Grievant and Grievant were not similarly situated. Thus, the evidence is not sufficient to show Grievant was treated differently under similar circumstances."[64]

Essentially, the hearing officer found that the grievant did not submit sufficient evidence to show that she was similarly situated to any other agency employee who may have been terminated for such an offense. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's determinations as to the issue of inconsistent discipline were in any way unreasonable or not based on the actual evidence in the record and thus, we will not disturb the decision on this basis.

Finally, to the extent that 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.[65] 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

---

[60] Hearing Decision at 9-10.
[61] *See Rules* at VI(B)(1) note 22 citing to Davis v. Dep't of Treasury, 8 M.S.P.R. 317 (1981). *See also* Mings v. Dep't of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(This Court has held that it "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors.")
[62] *See* EDR Ruling 2010-2465.
[63] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(2).
[64] Hearing Decision at 9.
[65] *See* EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

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. As such, EDR will not disturb the hearing officer's decision on this basis or the other bases of mitigation cited in her appeal.

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.[66] 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.[67] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[68]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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