Issue: Administrative Review of Hearing Officer's Decision in Case No. 10246); Ruling Date: March 28, 2014; Ruling No. 2014-3831; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.

# *COMMONWEALTH of VIRGINIA*
## *Department of Human Resource Management*
*Office of Employment Dispute Resolution*

## ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2014-3831
March 28, 2014

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 10246. For the reasons set forth below, EDR will not disturb the hearing decision.

### FACTS

The relevant facts in Case Number 10246, as found by the hearing officer, are as follows:[1]

> On July 18, 2013 a group of inmates in a State Correctional Facility found a canister of OC Spray lying on the floor in one of the cell pods. One inmate took possession of it. Shortly after taking possession of the spray the inmate approached the building lieutenant and indicated that he wished to speak with him privately. The inmate turned over the canister to the lieutenant and indicated that he had seen the grievant drop it. No incident involving the spray occurred while the inmate was in possession of it.
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> While making his assigned rounds on July 18 the grievant noticed that his OC Spray canister had slipped from his holster. He began a search for it. The building lieutenant approached him and advised that the canister had been found by an inmate. The grievant told the lieutenant that he had been having problems keeping his holster containing the spray snapped.
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> OC Spray is a substance similar to commercially available pepper spray. The agency issues that to the corrections officers to be used as a means of maintaining control and security when necessary. The grievant carried the canister of spray on his belt, the canister being secured by a snap on the holster.

On August 23, 2013, the grievant was issued a Group II Written Notice for "unsatisfactory job performance with a breech [sic] of security" involving a violation of "safety rules where there is a threat of physical harm."[2] Pursuant to the relevant DHRM and agency policies,[3] the agency determined that the misconduct justified a Group III Written Notice with a

[1] Decision of Hearing Officer, Case No. 10246 ("Hearing Decision"), February 19, 2014, at 2.
[2] Agency Exhibit 1.
[3] DHRM Policy 1.60, *Standards of Conduct*, Attachment A (classifying "violating safety rules (where threat of bodily harm exists)" as misconduct warranting a Group III Written Notice); Department of Corrections Operating

disciplinary suspension.[4] The agency mitigated the disciplinary action to a Group II Written Notice with no suspension.[5]

The hearing officer also made the following findings of fact in relation to two incidents involving other employees who may have been similarly situated to the grievant:[6]

> On a date prior to the grievant losing possession of his spray canister, a different corrections officer had lost his state issued radio. That radio has yet to be located. An investigation by the agency has been unable to determine whether the radio was stolen, destroyed, improperly labeled, or otherwise account for its disposition. The officer whose radio went missing received only a Written Notice of Improvement Needed, not any Group Notice under the standards of conduct.
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> Subsequent to the incident involving the grievant, an inmate took unauthorized possession and control of a pair of fingernail clippers and attached cable. No corrections officer has been disciplined for that event.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant violated a safety rule where there was a threat of physical harm, finding in the affirmative, and upheld the agency's issuance of the Group II Written Notice.[7] The hearing officer also found that the grievant was not similarly situated to the two comparator employees and declined to mitigate or rescind the Written Notice on that basis.[8] 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."[9] 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.[10]

*Inconsistency with State Policy*

The grievant's request for administrative review appears to claim that the hearing officer's decision is inconsistent with state policy. Specifically, he argues that he should have been issued a Group I Written Notice because he was disciplined for "unsatisfactory job

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Procedure 135.1, *Standards of Conduct*, § V(D)(g) (stating that "[v]iolating safety rules where there is a threat of physical harm" would ordinarily result in the issuance of a Group III Written Notice).
[4] Agency Exhibit 1.
[5] *Id.*
[6] Hearing Decision at 2-3.
[7] *Id*. at 3-6.
[8] *Id.* at 4-5.
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).

performance."[11] "Unsatisfactory work performance" is listed in DHRM Policy 1.60, *Standards of Conduct*, as misconduct warranting a Group I Written Notice.[12] Whether the misconduct as found by the hearing officer was sufficient to justify the severity of the disciplinary action that was issued involves a question of policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[13] If he has not already done so, the grievant may raise this issue in a request for administrative review to the Director of DHRM, 101 North 14th Street, 12th Floor, Richmond, VA 23219.

*Hearing Officer's Consideration of Evidence*

The grievant asserts that the hearing officer erroneously concluded the grievant was negligent in losing his gas canister. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[14] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[15] 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.[16] 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.[17] 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.

Having reviewed the hearing decision, EDR is unable to identify any affirmative statement of fact or other conclusion that the grievant "negligently lost his gas canister." The word "negligent" appears in the hearing decision only in the hearing officer's discussion of the incident with the missing radio. The hearing officer stated that "the evidence" on this issue "[did] not show that the officer ever negligently lost control of the radio."[18] This sentence could be interpreted to imply that the grievant was negligent in losing his can of OC spray. While the grievant may disagree with the hearing officer's characterization of his conduct, there is no indication that the hearing officer's findings of fact, as stated in the hearing decision, are not based on the evidence in the record. The grievant admitted to losing possession of the OC spray.[19] One witness testified that the grievant was aware that his holster, which was intended to hold the gas canister, was not working properly before the incident occurred.[20] The hearing officer's determination that the grievant lost his gas canister and "had been having problems

[11] *See* Agency Exhibit 1.
[12] DHRM Policy 1.60, *Standards of Conduct*, Attachment A (describing examples of misconduct grouped by the corresponding level of the offense).
[13] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[14] Va. Code § 2.2-3005.1(C).
[15] *Grievance Procedure Manual* § 5.9.
[16] *Rules for Conducting Grievance Hearings* § VI(B).
[17] *Grievance Procedure Manual* § 5.8.
[18] Hearing Decision at 5.
[19] *See* Agency Exhibits 5, 7, 8.
[20] Hearing Recording at 26:04-26:22 (testimony of Assistant Warden).

keeping his holster containing the spray snapped" are supported by the evidence in the record.[21] It would not have been unreasonable for the hearing officer to further conclude that the grievant's failure to properly secure his gas canister could be considered an act of negligence.[22]

Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[23] Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer, and we decline to disturb the hearing decision on this basis.

*Evidentiary Issue*

The grievant further claims that the hearing officer erred by admitting a written report into evidence that was not "legal and binding" because it was "not properly executed."[24] The *Rules for Conducting Grievance Hearings* (the "*Rules*") states that a grievance hearing "is not intended to be a court proceeding," "the technical rules of evidence do not apply, and most probative evidence (any evidence that tends to prove that a material fact is true or not true) is admitted."[25] "The purpose of liberal admission is to allow the introduction of evidence that might not be admissible under evidentiary rules, not to encourage the substitution of less reliable evidence for more reliable evidence."[26] There is no requirement under the grievance procedure that a document be "legal and binding" or formally executed in some way in order to be admitted into evidence or considered relevant and credible by the hearing officer. Although there may have been some technical issue with the report at issue here, there is no indication that it was unreliable, inaccurate, or irrelevant. Indeed, the report was prepared as a part of the agency's investigation of the conduct for which the grievant was disciplined. Furthermore, the witness who prepared the report testified at the hearing and confirmed the accuracy of the report.[27] Accordingly, EDR will not disturb the decision on this basis.

*Mitigation*

The grievant alleges that the hearing officer should have mitigated the Group II Written Notice because he was not disciplined consistently with other similarly situated employees. 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

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[21] Hearing Decision at 2.
[22] The grievant seems to argue that the hearing officer erred in finding that the grievant's holster was not working properly because this issue was not documented in writing. A hearing officer's decision must "contain findings of fact on the material issues *and the grounds in the record for those findings*." *Grievance Procedure Manual* § 5.9 (emphasis added). The hearing record consists, in part, of both testimony and exhibits that are entered into evidence. *Id.* § 5.8; *see Rules for Conducting Grievance Hearings* § VII(B). The hearing officer's consideration of witness testimony on this point was not, therefore, in error.
[23] *See, e.g.*, EDR Ruling No. 2012-3186.
[24] *See* Agency Exhibit 6.
[25] *Rules for Conducting Grievance Hearings* § IV(D).
[26] *Id.*
[27] Hearing Recording at 10:06-10:22 (testimony of Lieutenant N).

established by [EDR]."[28] 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."[29] 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.[30]

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 the 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.[31] EDR will review a hearing officer's mitigation determination for abuse of discretion,[32] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "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.[33] At the hearing, the grievant presented evidence that another employee at his facility was issued a Notice of Improvement Needed/Substandard Performance as a result of an incident in which the employee's state-issued radio was lost at the facility.[34] The grievant presented further evidence to show that no employee was disciplined for an incident in which a set of nail clippers, along with the cable and lock mechanism used to secure the clippers to the wall, were removed by an inmate without permission.[35]

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[28] Va. Code § 2.2-3005(C)(6).
[29] *Rules for Conducting Grievance Hearings* § VI(A).
[30] *Id.* § VI(B).
[31] 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).
[32] "'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.*
[33] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[34] *See* Grievant's Exhibit 1.
[35] Hearing Recording at 33:06-34:05 (testimony of Assistant Warden).

The hearing officer evaluated the evidence in relation to these incidents and determined that the missing radio was "distinguishable by the fact that there is no evidence that the radio ever was in the possession of an inmate" and or that the officer "negligently lost control of the radio."[36] The hearing officer further concluded that the incident with nail clippers was not similar to the event for which the grievant was disciplined because "[t]he clippers were placed in the possession of an inmate for a legitimate purpose," the lock and cable "were destroyed through a malicious act by the inmate," and there was no evidence to show that a correctional officer was "required to be in a position to prevent the destruction from occurring."[37]

The hearing officer's findings of fact with regard to the comparator employees are based on the evidence in the record. For example, one witness testified that the missing radio was left by an employee in the facility's central control booth, was never in the possession of an inmate, and was never exposed to any inmates.[38] Although the radio could not later be located, an inventory assessment of the radios at the facility indicated that all radios were accounted for, even though the particular radio that went missing could not be specifically identified.[39] There was no evidence to show that the radio was subsequently moved to an area where inmates would have had access to it or that any inmate ever actually had possession of the radio. Likewise, witnesses testified that inmates were permitted to have access to the nail clippers that were the subject of the second incident.[40] Although they could not ultimately be located, the agency determined that an inmate was responsible for removing the lock, cable, and clippers without permission.[41] The agency was unable to conclude whether the unauthorized removal of the lock, cable, and clippers was due to a particular employee's actions, a malfunction in the lock, or tampering by the inmate.[42] It seems that no discipline was issued because the agency could not identify any employee who was responsible for the unauthorized removal of the lock, cable, and clippers.[43]

The evidence in the record supports the hearing officer's conclusion that these two incidents were not similar to the conduct for which the grievant was disciplined. The grievant, for example, lost his canister of OC spray on one of the facility's pod floors, where inmates had access to it.[44] Indeed, the canister was actually in the possession of the inmate who found and returned it.[45] Furthermore, the lock, cable, and clippers were not lost by an employee at the facility.[46] The evidence suggested that, unlike the nail clippers, inmates are not permitted to have access to OC spray because it is a chemical agent that is used by security officers to maintain control of inmates.[47] Furthermore, the grievant admitted that he was responsible for the incident.[48] Based on EDR's review of the hearing record, there is nothing to indicate that the hearing officer's mitigation analysis was in any way unreasonable or not based on the actual

[36] Hearing Decision at 5.
[37] *Id.*
[38] Hearing Recording at 48:52-49:09, 1:06:31-1:06:42 (testimony of Warden).
[39] *Id.* at 49:10-50:12 (testimony of Warden).
[40] *Id.* at 34:06-34:20 (testimony of Assistant Warden), 46:44-47:14 (testimony of Warden).
[41] *Id.* at 47:15-47:23, 1:06:05-1:06:18 (testimony of Warden), 1:17:32-1:18:08. (testimony of Sergeant S).
[42] *Id.* at 1:05:43-1:06:05 (testimony of Warden), 1:18:25-1:18:54 (testimony of Sergeant S).
[43] *Id.* at 1:07:52-1:08:04 (testimony of Warden).
[44] *See* Agency Exhibit 1.
[45] Hearing Recording at 7:45-8:24 (testimony of Lieutenant N).
[46] *Id.* at 48:05-48:18 (testimony of Warden).
[47] Hearing Decision at 4; *see* Hearing Recording at 45:08-45:46 (testimony of Warden); Agency Exhibit 4.
[48] Hearing Decision at 4.

evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and we cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

## CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.[49] 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.[50] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[51]

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