Issue: Administrative Review of Hearing Officer's Decision in Case No. 10304; Ruling Date: May 14, 2014; Ruling No. 2014-3873; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2014-3873
May 14, 2014

The Department of Behavioral Health and Developmental Services (the "agency") 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 10304. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The grievant was employed by the agency as forensic mental health technician.[1] On or about February 6, 2014, she was issued a Group II Written Notice with termination for failure to follow agency policy "for having her cell phone, which is considered contraband, in the forensic building" in violation of agency policy.[2] The grievant had a previous active Group II Written Notice, issued May 25, 2011.[3] The grievant was terminated based on her accumulation of two active Group II Written Notices.[4]

The hearing officer made further relevant findings of fact as follows:[5]

> The Agency's witnesses, the security director, registered nurse manager, and assistant chief nurse executive, testified consistently with the charge in the Written Notice of the conduct in question. They testified to the applicable policies, the purpose and importance of the contraband policy, particularly as it applies to cell phones. The Grievant was assigned to Building 96, a forensic building. The assistant chief nurse executive testified that contraband violations are always considered a Group II violation because it is failure to follow policy. The potential for harm is present regardless of whether the violation was intentional. The RN manager, who issued the Group II Written Notice, testified that she followed policy in issuing the termination because "more than two Group II" Written Notices results automatically in termination. On cross-examination, the RN manager testified that she does not make exceptions when following

[1] Decision of Hearing Officer, Case No. 10304 ("Hearing Decision"), April 8, 2014, at 1; *see* Agency Exhibit 3.
[2] Hearing Decision at 1; *see* Agency Exhibit 1 at 1; Agency Exhibit 7 at 1-2.
[3] Agency Exhibit 2.
[4] *See* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[5] Hearing Decision at 4-5 (citations omitted).

policy, wants to be consistent in every application, and leaves exceptions up to the grievance process.

Two witnesses who had worked with the Grievant testified to the Grievant's good character and her careful attention to following rules and policies. The Grievant testified that on the offense date, she was organizing a New Year's Day potluck event for the staff, and when she came to work she was carrying items from her car. Taking these things to the break room led her to put her phone in her pocket after clearing the security checkpoint. Because of this distraction, she was not attentive to her routine of putting her cell phone in her locker. The Grievant returned to her car to retrieve more things for the event, with her cell phone still in her pocket. When she returned to the security checkpoint to re-enter, the security staff used a wand and did not detect the cell phone. She put her Agency radio in the same pocket, did not notice the cell phone, and she also wore her Agency smock over her pocket. In her grievance Form A, the Grievant wrote:

> I acknowledge the violation of the policy, however, there were mitigating circumstances surrounding this incident. I didn't purposely take my cell phone to my work area. Normally, I either leave my cell phone in my car or place it in my locker. This violation was solely committed because I was rushing with organizing my ward's New Year's holiday party. I was put in charge of the party, and my main focus was to ensure everything was in place for the party. I was rushing and overwhelmed with thoughts about preparing for the party. On the night of the party, I reported to my ward, grabbed a radio put it in my pocket. Next, I began going back and forth with carrying items from my car to the ward, while providing directions to co-workers, and telling them where to find and place items. Coordinating the party became chaotic. I was scatter-brained and pulled in so many different directions to the point I just forgot the cell phone was in my pocket. I didn't realize I had the cell phone in my pocket until four hours later. When I sat down and started talking with my supervisor, we heard a noise but didn't know the source of it. That's when I discovered my cell phone was in the same pocket as the radio. The weight of the radio pressed against the power button on my cell phone.
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> I have successfully performed all assigned duties in a professional manner for the past eight years. As a professional, my work ethic and demeanor doesn't allow me to purposely violate company policy. I wouldn't go against company policy; I know better. The violation was committed because of a sincere oversight on my behalf. This was an honest mistake caused by human error. As such, I'm fervently and respectfully requesting reconsideration of this dismissal.

The Grievant's testimony was consistent with this written account.

> The Grievant submitted 26 letters of good character and recommendation, and they show a consistent opinion of the Grievant's good, worthy and effective job performance and value to the Agency.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had failed to follow agency policy, finding in the affirmative.[6] He also considered the evidence regarding the agency's mitigation analysis and concluded that the agency "[had] not expressed any mitigation analysis other than two Group II Written Notices normally (or automatically) result in termination."[7] The hearing officer determined that the agency had failed to consider other mitigating factors and, as a result, found that the discipline issued fell "outside the limits of reasonableness because it [was] unconscionably disproportionate when considering all the facts and circumstances."[8] He upheld the Group II Written Notice, but rescinded the termination and ordered the grievant "reinstated to her former position" with "full back pay, benefits, and seniority."[9] 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."[10] 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.[11]

Inconsistency with State Policy

The agency's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy, specifically the provisions of DRHM Policy 1.60, *Standards of Conduct* relating to mitigation. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] However, because this decision is being remanded to the hearing officer for further consideration of matters related to the issue of mitigation, it makes sense to await a remand decision from the hearing officer before any additional administrative review decisions are issued.[13] Thus, to the extent either party wishes to raise concerns regarding the hearing officer's application of policy in the remand decision, the parties will have **15 calendar days** from the date of the remand decision to raise these issues to DHRM. Any such future review by DHRM will also have at issue any matters already raised by the agency as to the original hearing decision, if still ripe following the remand decision.

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[6] *Id.* at 6.
[7] *Id.* at 8.
[8] *Id.*
[9] *Id.*
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] The agency has already requested a policy review by DHRM.

Mitigation

The agency further challenges the hearing officer's decision to mitigate its disciplinary action from a Group II Written Notice with termination to a Group II Written Notice with no suspension or termination. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[14] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[15] 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.[16]

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.[17] EDR will review a hearing officer's mitigation determination for abuse of discretion,[18] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the hearing officer determined that the discipline exceeded the limits of reasonableness because the agency had failed to consider two "work-related factors" that "actually contributed to the offense."[19] Specifically, he found that the grievant was "distracted for a work-related reason" because she was preparing for a "holiday event" at the facility and the security check that was performed when the grievant entered the facility "did not detect the cell

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[14] Va. Code § 2.2-3005(C)(6).
[15] *Rules for Conducting Grievance Hearings* § VI(A).
[16] *Id.* § VI(B).
[17] 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).
[18] "'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.*
[19] Hearing Decision at 7.

phone in her pocket."[20] The hearing officer concluded that the agency "essentially relied on the standard that two active Group II Written Notices automatically result in termination" and failed to consider these work-related reasons for the grievant's inadvertent violation of the contraband policy.[21] The agency argues the hearing officer erred in determining that it had not considered all mitigating factors prior to issuing the discipline and that its decision not to mitigate because the grievant had accumulated two Group II Written Notices was not "excessive, beyond reason, or disproportionate to the offense."

In her due process response, the grievant stated that she "was in charge of the arrangements" for a work-related event on January 1, that she "just forgot that [she] had [her] phone in her pocket," and that she "did not realize [she] had [her] phone" until it was turned on in her pocket.[22] The grievant's supervisor confirmed that she was aware of the grievant's explanation of events prior to the issuance of the Group II Written Notice,[23] and the Written Notice itself states that the mitigating factors considered included the information provided by the grievant in her due process response.[24] The grievant's supervisor, however, further testified that she was obligated to follow policy and issue a Group II Written Notice consistent with her treatment of other similarly situated employees, regardless of any mitigating factors.[25] Another manager explained that, regardless of the intentional or accidental nature of an employee's actions, introducing contraband into the facility creates a risk of harm to staff and patients.[26] This manager further testified that an unintentional violation of policy by itself would not justify mitigation and the agency's past practices show that it has not previously mitigated in cases of this type.[27] Essentially, it seems that the agency has determined that all violations of the contraband policy must be disciplined with a Group II Written Notice and that the accumulation of two Group II Written Notices must result in termination, regardless of the circumstances. As a result, the agency concluded that there was not a "sufficient reason to mitigate" in this case.[28]

Even assuming that the agency did not consider the mitigating factors cited by the hearing officer, its failure to do so would not, by itself, justify mitigation by the hearing officer here. In grievances challenging disciplinary actions, the hearing officer must "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances" and may mitigate only if the discipline exceeds the limits of reasonableness.[29] In cases where the agency does not consider certain mitigating factors, or any mitigating factors at all, the hearing officer shows no deference to the agency's mitigation analysis because there is no such analysis to which he may defer.[30] Regardless of whether or not the agency considered mitigating factors, "the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness."[31] While consideration of mitigating factors prior to the issuance of discipline would be a best practice, there is no

[20] *Id.*
[21] *Id.* at 8.
[22] *Id.* at 3-4.
[23] Hearing Recording at 17:50-18:26 (testimony of Supervisor S).
[24] Agency Exhibit 1 at 1.
[25] *Id.* at 20:03-21:10, 21:53-22:06 (testimony of Supervisor S).
[26] *Id.* at 35:06-35:45 (testimony of Manager F).
[27] *Id.* at 41:57-42:14 (testimony of Manager F).
[28] Agency Exhibit 1 at 1; *see* Hearing Recording at 18:50-19:03 (testimony of Supervisor S).
[29] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[30] *See* EDR Ruling Nos. 2008-1749, 2008-1759.
[31] *Rules for Conducting Grievance Hearings* § VI(B)(1).

mandatory requirement that an agency do so. Consequently, the hearing officer's conclusion that the agency failed to consider certain mitigating circumstances is not a basis on which an agency's disciplinary action could be shown to exceed the limits of reasonableness.

Having reviewed the hearing record, EDR finds that the evidence does not support the hearing officer's finding that the agency's decision to issue a Group II Written Notice with termination exceeded the limits of reasonableness or was "unconscionably disproportionate to the offense."[32] The agency demonstrated that the grievant's failure to follow policy justified the issuance of a Group II Written Notice,[33] that the grievant had a prior, active Group II Written Notice when the conduct at issue here occurred,[34] that the accumulation of two Group II Written Notices ordinarily results in termination,[35] and that its interest in applying policy consistently to all similarly situated employees required that result here.[36] Furthermore, as discussed above, the agency presented evidence that the grievant's apparently unintentional failure to follow policy would not necessarily excuse the violation. Indeed, the hearing officer seems to have agreed with the agency on this point, noting that such actions create "[t]he potential for harm . . . regardless of whether the violation was intentional."[37] Thus, it is unclear how the fact that the grievant was "distracted" by a holiday event rendered the disciplinary action unreasonable. Similarly, there is no basis to support the conclusion that the agency's failure to detect the grievant's cell phone at the security checkpoint would absolve the grievant of her responsibility to follow the contraband policy. While the factual record in this case may reflect that the agency's decision to terminate the grievant was fairly debatable, particularly with respect to the unintentional nature of the grievant's conduct, such a decision is, by definition, within the bounds of reason and thus not subject to reversal by a hearing officer under these facts.[38]

We do not disagree that the agency's discipline in this case was harsh. But while the agency certainly could have justified or imposed lesser discipline based on the mitigating factors discussed above, a hearing officer nevertheless "must give due weight to the agency's discretion in managing and maintaining employee discipline" and recognize that his function is only to "assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."[39] We must conclude that the factors cited by the hearing officer, by themselves, do not demonstrate that the agency's mitigation decision was outside the tolerable limits of reasonableness. As a result, EDR finds that the hearing officer abused his discretion in mitigating the disciplinary action. The hearing officer has not applied the mitigation standard set forth in the *Rules* appropriately. Thus, the hearing decision must be remanded for reversal of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling.

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[32] Hearing Decision at 8.
[33] *Id.* at 6 (stating that "the conduct as described in the Written Notice occurred" and "the offense is considered properly Group II—failure to follow established policy.").
[34] Agency Exhibit 2.
[35] *See* Agency Exhibit 7 at 11, 24.
[36] Hearing Recording at 20:03-21:10, 21:53-22:06 (testimony of Supervisor S).
[37] Hearing Decision at 4.
[38] *See, e.g.*, EDR Ruling No. 2010-2465.
[39] *Rules for Conducting Grievance Hearings* at § VI(B)(2).

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, we remand the decision for further consideration consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[40] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[41]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[42] 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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

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[40] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056. In order to avoid unnecessary confusion, challenges to the hearing officer's interpretation of policy related to the Group II Written Notice in his reconsidered decision will be considered new matters, even if such challenges could have been raised with respect to the initial decision as well.
[41] *See Grievance Procedure Manual* § 7.2.
[42] *Grievance Procedure Manual* § 7.2(d).
[43] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[44] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).