Issue: Administrative Review of Hearing Officer's Decision in Case No. 10378; Ruling Date: February 11, 2015; Ruling No. 2015-4083; Agency: Department of Alcoholic Beverage Control; Outcome: Remanded to AHO for clarification; Outcome pending.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Alcoholic Beverage Control
Ruling Number 2015-4083
February 11, 2015

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 10378. 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 as a Special Agent by the Department of Alcoholic Beverage Control ("agency").[1] On April 3, 2014, the grievant was issued a Group III Written Notice with termination for failing to follow instructions and/or policy and for a violation of constitutional rights.[2] The grievant timely grieved the disciplinary action.[3] A hearing was subsequently held on November 12 and 13, 2014.[4] On December 28, 2014, the hearing officer issued a decision upholding the disciplinary action.[5] The grievant has now requested administrative review of the hearing officer's decision.

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."[6] 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.[7]

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[1] *See* Decision of Hearing Officer, Case No. 10378 ("Hearing Decision"), December 28, 2014, at 3.
[2] Agency Exhibit 1at 1-2.
[3] Agency Exhibit 2; *see* Hearing Decision at 1.
[4] Hearing Decision at 1.
[5] *Id.* at 23.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Burden of Proof

The grievant argues that the hearing officer erred in placing the burden of proving that misconduct did not occur on him, rather than requiring the agency to meet its burden of showing that misconduct in fact occurred. In a grievance involving a disciplinary action, the burden of proof at hearing is on the agency to show that the employee engaged in the behavior described in the Written Notice, that the conduct constituted misconduct, and that the disciplinary action was consistent with law and policy.[9] In this case, the agency asserted that the grievant violated law and policy by conducting a search of an applicant that violated the Fourth Amendment of the United States Constitution.[10] The grievant argues that the hearing officer erred in concluding that the agency had shown that either consent or a warrant was required under the Fourth Amendment, and in concluding that consent was not obtained.

To the extent the grievant's argument seeks a determination of whether the hearing officer erred in determining as a matter of law that consent or a warrant was required under the Fourth Amendment and that no valid consent was obtained, these claims are best addressed by the Circuit Court, rather than EDR. Accordingly, we will not address the legal merit of the hearing officer's findings with respect to the propriety of the grievant's actions under the Fourth Amendment.

With regard to the grievant's argument that the hearing officer improperly shifted the burden of proof to the grievant, we find this argument to be without merit. Although the hearing officer could perhaps have explained his conclusions in a different manner, it is clear that the hearing officer determined that the agency met its burden to show that the grievant had engaged in the conduct described in the Written Notice, that the conduct constituted misconduct, and that the disciplinary action was consistent with law and policy.[11] Further, a review of the evidence presented at hearing demonstrates that the hearing officer's conclusions were based on facts in the record.[12] For these reasons, the hearing decision will not be disturbed on this basis.

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[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[10] *See* Agency Exhibit 1.
[11] *See* Hearing Decision at 15-18, 23.
[12] *See*, *e.g.*, Agency Exhibits 13-17, 31. 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. The test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case.

Due Process

The grievant also argues that the hearing officer erred in upholding the disciplinary action on grounds not identified by the agency during the disciplinary process. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[13] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[14] 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, as discussed above, we note that the grievant has requested administrative review from the DHRM Director. DHRM Policy 1.60, *Standards of Conduct,* contains a section expressly entitled "Due Process."[15] If requested by the grievant, the DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow the due process provisions of state policy.

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.[16] 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 her 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."[17]

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 opportunity for the presence of counsel.[18] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[19]

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[13] *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).

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

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

[16] 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.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). 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."

[17] *Loudermill*, 470 U.S. at 545-46.

[18] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983).

[19] See Virginia Code Section 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

The grievant alleges that in this case, the hearing officer improperly relied on agency policies and procedures not identified by the agency during the course of the disciplinary action. A review of the hearing decision, however, indicates that while the hearing officer did identify and discuss specific policies and policy sections other than those identified by the agency in connection with the disciplinary action, he did so either as background information or for the purpose of determining whether the grievant was required, under the Fourth Amendment, to have obtained express consent or a warrant prior to performing the search at issue in this case.[20] Contrary to the grievant's argument, the hearing officer's finding that the grievant engaged in misconduct was based on his determination that the grievant's actions had violated the Fourth Amendment, not a determination that the grievant had violated specific, additional policies or policy sections not previously identified by the agency.[21] Accordingly, the hearing decision will not be remanded on this basis.

Investigation

The grievant further argues that the agency violated the grievance procedure by failing to train the Special Agent in Charge who performed the pre-disciplinary investigation of the grievant's conduct. While EDR agrees that training in internal investigations may be beneficial for managers in some circumstances, any failure to do so does not violate a requirement of the grievance procedure. The grievance procedure does not impose any obligations on agencies with respect to pre-disciplinary investigations. Therefore, the hearing decision will not be remanded on this basis.

Mitigation

The grievant also challenges the hearing officer's failure to mitigate the disciplinary action.[22] 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]."[23] The *Rules* provide that "a hearing officer is not a 'super-personnel officer.' Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[24] 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

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renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[20] *See* Hearing Decision at 7-18; Agency Exhibits 1, 16.

[21] Hearing Decision at 15-18.

[22] *See id.*at 22-23.

[23] Va. Code § 2.2-3005(C)(6).

[24] *Rules for Conducting Grievance Hearings* § VI(A).

> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[25]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[26] EDR will review a hearing officer's mitigation determination for abuse of discretion,[27] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The *Rules* provide that:

> By law, the hearing officer must "[r]eceive and consider evidence mitigation or aggravation of any offense charged by an agency. Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to: whether an employee had notice of the rule [or] how the agency interprets the rule . . . .[28]

In this case, the grievant asserts that there were a number of mitigating factors the hearing officer failed to consider, including, for example, the grievant's alleged lack of notice that he did not have the authority to perform the search. Although the grievant presented evidence at hearing that he contends supports these and other claims relating to mitigation,[29] the hearing officer did not address any of the grievant's evidence or arguments in relation to mitigation with any specificity.[30] While there is no requirement under the grievance procedure that a hearing officer discuss the testimony of each witness who testifies at a hearing or address each piece of

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[25] *Id.* § VI(B)(1) (citations omitted).
[26] 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).
[27] "'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.*
[28] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[29] *See*, *e.g.*` Grievant's Exhibits 51-52, 72; Agency Exhibit 33.
[30] *See* Hearing Decision at 22-23.

evidence presented by the parties, in this case it is impossible for EDR to determine whether the hearing officer considered all of the evidence relating to mitigation that was presented by the grievant.

It may be that the hearing officer did not discuss the evidence cited by the grievant in his request for administrative review because he did not find that it supported mitigation of the discipline. Certainly, some of the factors cited by the grievant, such as his long and satisfactory service, would rarely, if ever be a basis for mitigation.[31] On the other hand, if the hearing officer were to determine that the agency had failed to provide the grievant with notice regarding the limits of his authority when conducting searches, that lack of notice could potentially constitute a basis for mitigation.[32] However, this is a determination that must be made by the hearing officer, not EDR. As EDR cannot determine from the hearing decision whether the hearing officer considered the evidence presented as to potential mitigating factors in making his decision, the hearing decision must be remanded to the hearing officer for further consideration of the mitigating factors presented by the grievant.

CONCLUSION

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). Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[33]

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.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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[31] *See*, *e.g.*, EDR Ruling No. 2014-3777.
[32] *See Rules for Conducting Grievance Hearings* § VI(B)(2).
[33] *See Grievance Procedure Manual* § 7.2(a).
[34] *Id.* § 7.2(d).
[35] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).