Issue: Administrative Review of Hearing Officer's Decision in Case No. 10499; Ruling Date: March 5, 2015; Ruling No. 2015-4100; Agency: Department of Behavioral Health and Developmental Services; Outcome: AHO's decision upheld.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-4100
March 5, 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 10499. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10499, as found by the hearing officer, are as follows:[1]

> The Agency employed Grievant as an FMHT, with fifteen years tenure. The Grievant had two active Group II Written Notices and one Group I Written Notice, all pertaining to chronic tardiness. The current Group III Written Notice charged:
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> > Less than Alert (Sleeping during work hours): On 8/26/14, you were observed sitting in a chair in the hallway of ward 5 with your head against the wall, hand on your cheek, with eyes closed and mouth open. Upon extended observation, you did not move. This is considered to be less than alert (sleeping).
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> The Agency's registered nurse coordinator ("RNC") testified consistently with the charge in the Written Notice. The RNC testified that he personally made the observation of the Grievant as charged in the Written Notice. He testified that the Grievant's assignment in the maximum forensic security setting requires alertness at all times, for the safety and security of the inmate population and the staff, including the Grievant. The RNC testified that he observed the Grievant in this state for several seconds before speaking the Grievant's name and, thus, getting his attention. The RNC testified that the Grievant's lack of alertness in the maximum-security ward was contrary to the Agency's expectations and created a safety risk. Other staff members were in the general vicinity of the incident. A security camera digital video of the incident was shown at the hearing[.] The digital video is not conclusive, but it corroborates the RNC's testimony. The angle and distance of the camera rendered the video subject to interpretation. On cross-

[1] Decision of Hearing Officer, Case No. 10499 ("Hearing Decision"), February 4, 2015, at 3-5 (citations omitted).

examination, the RNC testified that he asked the Grievant whether he was asleep and the Grievant responded "no" almost immediately.

The RNC testified that two other employees were recently terminated for sleeping or being less than alert. The RNC testified that he does not have the unilateral power to issue discipline, and that he consulted with the human relations department before discipline was issued to the Grievant.

The assistant chief nurse executive testified that a state of being less than alert, including sleeping, is considered a Group III offense. He testified that the Agency trains on the importance of alertness, and that mitigation is always considered for the level of discipline. He clarified that the nursing department does not mitigate because that is within the purview of the human relations department.

The regional human resources director testified that her department is involved in all aspects of discipline, and that supervision staff consults with the human relations department for discipline. She testified that a Group III Written Notice does not always lead to termination; that mitigating factors are considered, such as prior disciplinary record, length of tenure, and relative seriousness of offenses. She testified that a record of active written notices weigh against mitigation. She also testified that the written statements from other witnesses submitted by the Grievant were given minimal consideration.

A FMHT testified on the Grievant's behalf. She was sitting the hallway working a 1:1 assignment about 30 feet from the Grievant's station. She testified that she observed the interaction [sic] between the RNC and the Grievant, and she heard the Grievant respond immediately to the RNC's question and was not asleep. She testified that the RNC does not listen adequately to the staff, she was told by her supervisor that the RNC was "on the warpath," and that she believed the Grievant has not been treated fairly.

Another FMHT testified that the Grievant successfully represented him in a grievance. A safety and security technician testified that she signed a petition seeking to improve working conditions, and that the Grievant is a good person, and that there has been a practice at the Agency for an allegation of sleeping to require a second witness. A direct care associate testified that everything at the Agency is punitive, that clocking-in for work is difficult, and there is a hostile working environment. On cross-examination, the direct care associate testified that she is currently under investigation for verbal abuse, and she confirmed that the patients at the facility are the most dangerous patients in Virginia. Another safety and security technician testified that working conditions need to improve, there is understaffing, and that the patients are very aggressive. On cross-examination, she admitted she had been disciplined within the last six months.

In his grievance Form A, the Grievant wrote:

> I was wrongfully terminated for a false allegation made by a supervisor for being "Less than alert – Sleeping during work hours". Because of recent changes in long standing policies and unfair supervisory practices & an unfair investigation, I was not given due process and the proper right to defend myself. In performing my duties as President and Shop Steward of Local 160, VA Public Service Workers Union, I among other employees, have witnessed or been effected by these unfair working conditions and mgt. practices. These practices have undermined confidence & morale and created a hostile work environment for us, as others will attest to.

The Grievant also submitted a written statement in response to the Agency's due process, in which he denied sleeping or having his eyes closed. The Grievant's testimony was consistent with his written accounts. He testified that he was sitting and turned around to look at a calendar on the wall and had his head resting on his hand when the RNC walked up to him. The Grievant testified that the RNC is an authoritative person. The Grievant also submitted three employees' written statements. The author of one of these statements is an FMHT who testified for the Grievant, who said the Grievant was not asleep. The other two written statements do not add much, but one states the Grievant "had his head against the wall as though he wasn't alert; but when [the RNC] called his name he answered him immediately."

On September 24, 2014, the grievant was issued a Group III Written Notice with termination for being "[l]ess than [a]lert ([s]leeping during work hours)" when he was observed by the RNC on August 26.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on January 26, 2015.[4] In a decision dated February 4, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant was not alert during work hours and upheld the Group III Written Notice and the grievant's termination.[5] The grievant now appeals the hearing decision to EDR.[6]

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

[2] Agency Exhibit 2 at 1.
[3] Agency Exhibit 1.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 5-6, 9.
[6] The grievant's request for administrative review directed to EDR did not raise specific grounds on which he challenged the hearing decision. However, the grievant's request for administrative review directed to the DHRM Director listed certain issues that are more properly addressed in an EDR ruling as compliance with the grievance procedure generally. Consequently, those questions will be addressed in this review.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[8]

Inconsistency with State and Agency Policy

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.[9] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this ruling.

Due Process

The grievant argues that he was not afforded due process throughout the disciplinary procedure, apparently on the basis that the agency failed to adequately consider statements provided by the grievant's co-workers "for purpose [sic] of refuting the false allegation against" the grievant. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[10] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[11] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue. Further, as discussed above, the grievant has requested administrative review from the DHRM Director. DHRM Policy 1.60, *Standards of Conduct*, contains a section expressly entitled "Due Process."[12] 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.[13] 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

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[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] *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).
[11] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[12] *See* DHRM Policy 1.60, *Standards of Conduct*, § E.
[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, 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."

reasonable grounds to believe that the charges against the employee are true and support the proposed action."[14]

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 the presence of counsel.[15] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[16]

Here, it is evident that the grievant had ample notice of the charges against him as set forth on the Written Notice and in the agency's Notice of Intent to issue disciplinary action.[17] Furthermore, the grievant has presented nothing to indicate that the agency's consideration of the grievant's due process response was inadequate. Based on the testimony of Manager S at the hearing, it appears instead that the agency simply determined that this information did not excuse the grievant's misconduct or justify mitigation of the disciplinary action.[18] It is within management's discretion to consider an employee's response to a charge and evaluate the effect that the response should have, if any, on the discipline.[19] Having reviewed the evidence in the record, there is nothing to suggest that the agency's consideration of the grievant's response in this case was deficient.

In addition, we further note that the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[20] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[21] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described

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[14] *Loudermill*, 470 U.S. at 546.

[15] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[16] 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, 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).

[17] *See* Agency Exhibit 2 at 1, 3.

[18] *See* Hearing Recording at 1:26:58-1:28:25 (testimony of Manager S).

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

[20] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[21] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

above cured any error. Accordingly, we find no due process violation under the grievance procedure.

Hearing Officer's Findings of Fact

Fairly read, the grievant's request for administrative review appears to argue that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[22] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[23] 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.[24] 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.[25] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case, the hearing officer assessed the evidence and determined that the grievant "was postured in a less than alert position," that the "Grievant and a witness both corroborate[d] the grievant's posture described by the RNC," and that this evidence demonstrated "he was inattentive to the point of being less than alert . . . ."[26] In his request for administrative review, the grievant broadly disputes the hearing officer's decision to uphold the discipline and argues that the evidence presented by the agency was not sufficient to show that he was less than alert or asleep during work hours.

There is evidence in the record to support the hearing officer's conclusion that the grievant engaged in the behavior charged on the Written Notice.[27] While there is some evidence in the record to show that the grievant may, in fact, have been alert and attentive immediately before he was observed by the RNC,[28] the hearing officer explicitly addressed this evidence in the hearing decision and concluded that it "[did] not directly rebut the Agency's evidence of being less than alert, if even for a few moments."[29] Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. 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

[22] Va. Code § 2.2-3005.1(C).
[23] *Grievance Procedure Manual* § 5.9.
[24] *Rules for Conducting Grievance Hearings* § VI(B).
[25] *Grievance Procedure Manual* § 5.8.
[26] Hearing Decision at 5.
[27] *E.g.*, Hearing Recording at 14:33-15:47, 32:33-33:29 (testimony of Manager W); Agency Exhibit 2 at 5. Whether the grievant's behavior constituted misconduct under the *Standards of Conduct* policy, or was otherwise consistent with policy, are questions for the DHRM policy review.
[28] *E.g.*, Agency Exhibit 2 at 4, 6-8.
[29] Hearing Decision at 5.

record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[30]

While the grievant may disagree, determinations of credibility as to disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case 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.

Mitigation

The grievant also appears to challenge the hearing officer's decision not to mitigate the agency's disciplinary action. He argues that there is no evidence of "any individual other than [the grievant] being terminated for allegedly being found 'less than alert'" except in cases where the employee either admitted to the misconduct or had no witnesses to support his explanation of events. In effect, he appears to claim that he was disciplined more harshly than other similarly situated employees who may have been less than alert while at work.

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]."[31] 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."[32] 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.[33]

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

[30] *See, e.g.*, EDR Ruling No. 2012-3186.
[31] Va. Code § 2.2-3005(C)(6).
[32] *Rules for Conducting Grievance Hearings* § VI(A).
[33] *Id.* § VI(B).

under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[34] EDR will review a hearing officer's mitigation determination for abuse of discretion,[35] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's request for administrative review alleges that the agency did not apply disciplinary action to him consistent with other similarly situated employees, and that the hearing officer erred by failing to consider this evidence in his mitigation analysis. 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.[36]

Upon conducting a review of the hearing record, it does not appear that the grievant presented any evidence regarding the agency's treatment of employees who may have engaged in similar misconduct and either were not disciplined or were disciplined less severely than the grievant. The grievant has not specifically identified any such evidence. Given that there does not appear to have been sufficient evidence in the record regarding inconsistent discipline that the hearing officer may have relied upon to support mitigation, we cannot conclude that his mitigation analysis was flawed in this respect.[37] Accordingly, we decline to disturb the 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.[38] 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.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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[34] 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).

[35] "'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.*

[36] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[37] *See* Hearing Decision at 7-9.

[38] *Grievance Procedure Manual* § 7.2(d).

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

[40] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).