

Issue: Administrative Review of Hearing Officer's Decision in Case No.10513; Ruling
Date: March 20, 2015; Ruling No. 2015-4113; Agency: Department of Behavioral
Health and Developmental Services; Outcome: AHO's decision affirmed.



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 2015-4113
March 20, 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 10513. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as a Medication Aide by the Department of Behavioral Health and Developmental Services (“agency”).¹ On November 5, 2014, the grievant was issued a Group III Written Notice with termination for a violation of Departmental Instruction #201, *Reporting and Investigating Abuse and Neglect of Clients*.² The grievant timely grieved the disciplinary action.³ A hearing was subsequently held on February 2, 2015.⁴ On February 19, 2015, 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

¹ See Decision of Hearing Officer, Case No. 10513 (“Hearing Decision”), February 19, 2015, at 2.

² Agency Exhibit 1.

³ Agency Exhibit 2; see Hearing Decision at 1.

⁴ Hearing Decision at 1.

⁵ *Id.* at 3-4.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

The grievant challenges the hearing officer's decision not to mitigate the agency's disciplinary action. 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]."⁸ 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."⁹ 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.¹⁰

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.¹¹ EDR will review a hearing officer's mitigation determination for abuse of discretion,¹² 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 asserts that the hearing officer erred in failing to rule explicitly on whether the disciplinary action exceeded the limits of reasonableness. EDR's review of the hearing decision indicates that the grievant is correct that the hearing officer did not explicitly state that the agency's decision did not exceed the limits of reasonableness. However, such an express finding is not required by the grievance procedure, so long as it is apparent that the hearing officer considered whether sufficient mitigating circumstances existed

⁸ Va. Code § 2.2-3005(C)(6).

⁹ *Rules for Conducting Grievance Hearings* § VI(A).


¹⁰ *Id.* § VI(B)(1).

¹¹ 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).

¹² "'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.*

to warrant mitigation.¹³ In this case, the hearing officer found that no such mitigating circumstances exist, and the grievant has not presented evidence to show that this determination was an abuse of the hearing officer's discretion. Accordingly, we decline to disturb the decision on this basis.

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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶



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¹³ We note that before considering mitigation, a hearing officer must necessarily have concluded that the agency's disciplinary action was consistent with law and policy. Such an action is considered presumptively reasonable.

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).