Issue: Administrative Review of Hearing Officer's Decision in Case No. 10559; Ruling Date: June 12, 2015; Ruling No. 2015-4157; Agency: Department of Corrections; 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 Corrections
Ruling Number 2015-4157
June 12, 2015

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10559. For the reasons set forth below, EDR has no basis to interfere with the decision in this case.

FACTS

The grievant was employed by the Department of Corrections ("agency") as a Senior Reentry Probation and Parole Officer.[1] On January 30, 2015, the grievant was issued a Group II Written Notice for failure to follow instructions, a Group II Written Notice for unauthorized use of state records, a Group III Written Notice for falsification of records, and a Group III Written Notice with termination for fraternization.[2] The grievant timely grieved the disciplinary actions.[3] A hearing was subsequently held on April 13, 2015 and April 29, 2015.[4] On May 8, 2015, the hearing officer issued a decision rescinding the Group II Written Notice for unauthorized use of state records and the Group III Written Notice for falsification of records, but upholding the Group II Written Notice for failure to follow instructions, the Group III Written Notice for fraternization, and the grievant's termination from employment.[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 a party; the sole remedy is that the hearing officer correct the noncompliance.[7]

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[1] Decision of Hearing Officer, Case No. 10559 ("Hearing Decision"), May 8, 2015, at 2; *see also* Agency Exhibit 2 at 1, 3.
[2] Agency Exhibits 1A, 1B, 1C, 1D.
[3] Agency Exhibit 2.
[4] Hearing Decision at 1.
[5] *Id.* at 8-12.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Agency's Production of Documents

The grievant asserts that the hearing officer failed to comply with the grievance procedure because he declined to order the agency to provide the grievant with requested documents. Specifically, he argues that the hearing officer erred by not directing the agency to produce the disciplinary records of another employee ("Employee X") who allegedly engaged in similar conduct as the grievant. Prior to the hearing, the grievant submitted an initial request for these documents to the agency. The agency refused to provide the documents on the ground that Employee X was not similarly situated to the grievant and was therefore not a proper comparator for purposes of mitigation. The grievant subsequently sought an order from the hearing officer for the production of the requested documents. The hearing officer sustained the agency's objections and denied the grievant's request.

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party . . . ."[8] EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.[9] As long as a hearing officer's order is consistent with the document discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.[10] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[11]

In this case, the agency argued that Employee X was not similarly situated to the grievant because that employee was supervised by a different unit head, worked in a different unit and did not hold the same position as the grievant. The grievant argues that because the agency policies under which the grievant was disciplined apply to all agency employees, regardless of reporting chain or position, the agency's alleged decision to take lesser disciplinary action against Employee X is relevant to the question of mitigation. However, the grievant has not proffered any evidence that would call into question the agency's assertions regarding the differences in supervision and work assignment between the grievant and Employee X. While reasonable minds could disagree regarding the relevancy of any disciplinary actions taken against Employee X to the grievant's claims, based on evidence in the record EDR cannot conclude that the hearing officer abused his discretion in this matter. Accordingly, the hearing decision will not be disturbed on this basis.

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[8] Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.
[9] *Rules for Conducting Grievance Hearings* § III(E).
[10] *See, e.g.*, EDR Ruling No. 2012-3053.
[11] *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation omitted)).

Due Process

The grievant further argues that the hearing officer erred by upholding the Group III Written Notice for fraternization based on conduct not identified on the Written Notice or its attachments. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[12] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[13] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

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.[14] 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 reasonable grounds to believe that the charges against the employee are true and support the proposed action."[15]

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.[16] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[17]

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[12] *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).

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

[14] 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 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."

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

[16] 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))).

[17] 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).

In this case, the grievant asserts that the hearing officer wrongfully considered the grievant's conduct relating to the "Tuesday Night Supper Club" in relation to the Group III Written Notice for fraternization. Although the grievant appears to be correct that neither the Written Notice nor its attachments identifies this conduct as a basis for the fraternization charge,[18] that conduct was only one of two incidents cited by the hearing officer in his decision.[19] The other incident, which involved the grievant assisting an offender in moving into a new residence, was cited in the Group III Written Notice for fraternization.[20] As the hearing officer found that this second incident constituted a violation of agency Operating Procedure 130.1, and that such a violation was a Group III level offense,[21] there is a sufficient basis for the hearing officer's decision to uphold the Group III Written Notice for fraternization even if the conduct relating to the "Tuesday Night Supper Club" is disregarded. EDR therefore cannot conclude that the grievant has been denied due process for purposes of the grievance procedure. Accordingly, the hearing decision will not be remanded on this basis.

Mitigation

The grievant also 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]."[22] 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."[23] 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.[24]

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

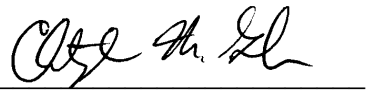
[18] *See* Agency Exhibit 1D.
[19] Hearing Decision at 11-12.
[20] *Id.* at 11; Agency Exhibit 1D.
[21] Hearing Decision at 11-12.
[22] Va. Code § 2.2-3005(C)(6).
[23] *Rules for Conducting Grievance Hearings* § VI(A).
[24] *Id.* § VI(B)(1).

totally unwarranted.[25] EDR will review a hearing officer's mitigation determination for abuse of discretion,[26] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[27]

Here, the grievant appears to argue that "since the Hearing Officer should only have considered" the grievant's conduct in assisting the offender in moving, "his evaluation of reasonableness was improper and violated Section VI.B.2 of the *Rules.*" Even if we determine that the hearing officer should not have considered the "Tuesday Night Supper Club" activity in determining whether to mitigate the disciplinary action, as explained above, the grievant's actions in helping the offender move were in themselves sufficient to warrant termination under Operating Procedure 130.1. EDR cannot find that the grievant has met the high burden of showing in this case that the agency's presumptively-reasonable decision to issue the penalty allowed by policy exceeded the limits of reasonableness.[28] Therefore, EDR will not disturb the decision on this basis.

APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's remand decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[29] 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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]



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[25] 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).

[26] "'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.*

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

[28] In addition to the Group III Written Notice for fraternization, the hearing officer also sustained a Group II Written Notice for failing to follow instructions. Hearing Decision at 8-9. As a consequence, even if there were a basis to mitigate the Group III Written Notice to a Group II Written Notice, termination would nevertheless have been appropriate under Section B(2)(b) of DHRM Policy 1.60, *Standards of Conduct*

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

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

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