Issue: Administrative Review of Hearing Officer's Decision in Case No. 10725; Ruling Date: February 12, 2016; Ruling No. 2016-4298; Agency: Department of Corrections; Outcome: Decision in Compliance.

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 2016-4298
February 12, 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 10725. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed as a Captain by the Department of Corrections ("agency").[1] On September 2, 2015, the grievant was issued a Group I Written Notice for unsatisfactory performance.[2] The performance problems identified in the Written Notice included failing to complete reports in a timely manner, failing to submit accurate and complete reports, mismanagement of his subordinates' schedules, restricting subordinates' ability to make decisions and build relationships with other staff, failing to manage and communicate with subordinates in a timely manner, and failing to be "available to" his subordinates.[3] The grievant timely grieved the disciplinary action.[4] A hearing was subsequently held on January 7, 2016.[5] On January 11, 2016, the hearing officer issued a decision upholding the disciplinary action.[6] 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."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

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[1] *See* Decision of Hearing Officer, Case No. 10725 ("Hearing Decision"), January 11, 2016, at 1; *see also* Agency Exhibit 2 at 1.
[2] Agency Exhibit 1.
[3] *Id.* at 2.
[4] Agency Exhibit 2; *see* Hearing Decision at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 6. The hearing officer found that the agency had failed to prove one of the "disciplinary points" cited in support of the Written Notice, but that the agency otherwise presented sufficient evidence to uphold the Written Notice. *Id.* at 5-6.
[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

Fairly read, the grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. In particular, the grievant appears to argue that the disciplinary action was inappropriate because the agency allegedly failed to use progressive discipline, failed to follow DHRM Policy 1.40, *Performance Planning and Evaluation*, and failed to resolve conflict at the lowest possible level. In addition, the grievant asserts that his supervisor failed to comply with 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 addressed in this review.

Admission of Exhibits

The grievant appears to assert that the hearing officer erred by failing to admit as evidence text messages sent by his supervisor to his subordinates and documents relating to an information technology work ticket submitted by his supervisor. EDR's review of the hearing recording indicates that these documents were rejected by the hearing officer because the grievant had failed to introduce sufficient testimony to adequately explain or identify the documents.[10] Although it is not always necessary in a grievance hearing for a party to lay a foundation prior to the admission of exhibits, having reviewed the record in this case, EDR concludes that the hearing officer's decision to exclude these documents was well within his discretion and in compliance with the grievance procedure.[11] Further, EDR has reviewed the rejected documents and has concluded that their admission would have had no impact on the outcome of the case, as the hearing officer was aware of the grievant's arguments regarding the supervisor's allegedly improper conduct and rejected the grievant's claim of an improper motive for the disciplinary action.[12] As such, the hearing decision will not be disturbed on this basis.

Witness

The grievant asserts that the hearing officer erred by "plac[ing] the burden of dismissal" of the witness on the grievant's representative, as his representative lacked authority to make such a determination. EDR's review of the hearing recording indicates that the agency advised

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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] These documents appear to have been introduced by the grievant as Grievant's Exhibits 9A and 9B. *See* Hearing Recording, Track 2 at 2:36:24-2:37:14; 2:40:49-2:43:16.
[11] The grievant also appears to argue that evidence regarding a requested meeting with his subordinates was not admitted. The grievant does not identify any specific evidence which was excluded. Further, from the record, it appears that both testimonial and documentary evidence addressing this meeting were admitted. *See, e.g.*, Agency Exhibit 2 at 1, 8; Grievant's Exhibit 11 at 3-4; Hearing Recording, Track 1 at 2:17:28-2:17:53; 3:01:39-3:02:45.
[12] *See* Hearing Decision at 6. The hearing officer also found that mitigation was not warranted in this case, and, as discussed below, there is no basis on which to conclude this determination was in error.

the hearing officer that the grievant's supervisor was experiencing medical problems during the afternoon of the hearing.[13] The supervisor had previously testified extensively on both direct and cross-examination. The hearing officer asked the grievant's representative if he needed the supervisor as a witness on recall and the grievant's representative agreed to excuse her.[14] The hearing officer's decision to ask the grievant's representative how he would like to proceed with the witness was entirely appropriate and in no way inconsistent with the grievance procedure. Although the grievant apparently disagrees with his representative's decision to release the witness, he is nevertheless now bound by that decision. In any event, even absent the representative's consent, the hearing officer had no power to compel the attendance of a witness in the case of illness. Accordingly, the hearing decision will not be disturbed on this basis.

Newly-Discovered Evidence

In conjunction with his request for administrative review, the grievant submitted several documents that were not included in the binder of exhibits submitted to the hearing officer. Although it is somewhat unclear why these documents were submitted by the grievant, EDR will construe the documents as an argument that the hearing record should be reopened to allow for the admission of "newly discovered evidence."

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[15] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[16] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[17]

As an initial matter, the grievant has not shown that he exercised due diligence to discover this alleged new evidence prior to hearing. However, even if EDR were to assume, for the sake of argument, that this information has only been recently discovered by the grievant despite his own due diligence, the grievant has not met his burden of showing that the evidence

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[13] Hearing Recording, Track 2 at 1:17:41-1:18:52.
[14] *Id.*
[15] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[16] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[17] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

is material or that it would likely produce a different outcome. Accordingly, there is no basis to re-open or remand the hearing for consideration of additional evidence on this issue.

Failure to Mitigate

Fairly read, the grievant's request for administrative review also arguably challenges the hearing officer's decision not to mitigate the Written Notice. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or in aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[18] 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."[19] 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,
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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.[20]

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 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.[21] EDR will review a hearing officer's mitigation determination for abuse of discretion,[22] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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[18] Va. Code § 2.2-3005(C)(6).
[19] *Rules for Conducting Grievance Hearings* § VI(A).
[20] *Id.* § VI(B)(1).
[21] The Merit Systems Protection Board's approach to mitigation, while not binding on this Office, 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).
[22] "'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.*

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that mitigation was not warranted.[23] Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that 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.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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[23] Hearing Decision at 6.
[24] *Grievance Procedure Manual* § 7.2(d).
[25] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[26] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).