

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10729; Ruling
Date: March 4, 2016; Ruling No. 2016-4314; 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 2016-4314
March 4, 2016

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 10729. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed by the Department of Corrections (“agency”) as a Corrections Officer.¹ On July 22, 2015, the grievant was issued a Group I Written Notice for unsatisfactory performance.² The grievant timely initiated a grievance to challenge this disciplinary action.³ A hearing was held on February 2, 2016; and in a hearing decision dated February 16, 2016, the hearing officer upheld the disciplinary action.⁴ The grievant has now requested administrative review of the hearing 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.”⁵ 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.⁶

¹ See Decision of Hearing Officer, Case No. 10729 (“Hearing Decision”), February 16, 2016, at 2; Agency Exhibit 2 at 1.

² Agency Exhibit 1; see Hearing Decision at 1.

³ Agency Exhibit 2; see Hearing Decision at 1..

⁴ Hearing Decision at 1, 4.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

Agency Noncompliance during the Resolution Steps

The grievant argues that the agency did not comply with the grievance process during the management resolution steps. In particular, he asserts that the first step-respondent failed to respond within five workdays, as required by the grievance procedure.⁷

The grievance procedure requires both parties to address procedural non-compliance through a specific process.⁸ That process assures that the parties first communicate with each other about the non-compliance and resolve any compliance problems voluntarily without EDR's involvement. Specifically, the party claiming non-compliance must notify the other party in writing and allow five workdays for the opposing party to correct any non-compliance.⁹ The grievance procedure provides that "[b]y proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."¹⁰

In this case, the cited instance of alleged agency noncompliance occurred during the first management resolution step, yet the grievant continued to advance his grievance. Because the grievant continued to advance his grievance after becoming aware of the purported noncompliance, he has waived the opportunity to raise challenges to those acts (or omissions) now. Therefore, EDR will not address the grievant's claim of noncompliance occurring during the management resolution steps.¹¹

Timing of Hearing

The grievant also claims that the hearing officer's failure to schedule the hearing within 35 days of his appointment constitutes noncompliance with the grievance procedure. In this case, the hearing officer was appointed effective December 7, 2015, but the hearing did not take place until February 2, 2016.

Neither the *Grievance Procedure Manual* nor the *Rules for Conducting Grievance Hearings* mandates that a hearing must occur within 35 days of appointment.¹² Although Section III(B) of the *Rules for Conducting Grievance Hearings* provides that "[g]enerally, the hearing should occur within 35 calendar days after the hearing officer is appointed," this language does not impose a requirement that a hearing must be held within 35 days. While a hearing officer should generally try to schedule the hearing within the 35-day period, failure to do so is not an error or violation of the grievance procedure, particularly where, as here, the grievant has not shown that he has been prejudiced by any delay. Accordingly, EDR will not disturb the hearing officer's decision on this basis.

⁷ See *id.* § 3.1.

⁸ *Id.* § 6.

⁹ *Id.* §6.3.

¹⁰ *Id.*

¹¹ EDR's rulings on alleged noncompliance are final and nonappealable. Va. Code § 2.2-3003(G).

¹² To the extent agency policy or documents make other representations, the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* are controlling.

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]."¹³ 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."¹⁴ 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.¹⁵

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.¹⁶ EDR will review a hearing officer's mitigation determination for abuse of discretion,¹⁷ 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.¹⁸

Here, the grievant appears to argue that other employees engaged in the same conduct but were not disciplined. However, the grievant has not presented sufficient evidence to show that he was treated in a manner inconsistent with other similarly-situated employees, such that

¹³ Va. Code § 2.2-3005(C)(6).

¹⁴ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁵ *Id.* § VI(B)(1).

¹⁶ 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).

¹⁷ "'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.*

¹⁸ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

mitigation was required. While the agency could have chosen to address the grievant's conduct through a less severe form of disciplinary action, its decision was not outside the limits of reasonableness. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.¹⁹ Accordingly, EDR will not disturb the hearing officer's 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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁹ See Hearing Decision at 3-4.

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).