

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10743; Ruling
Date: April 7, 2016; Ruling No. 2016-4322; Agency: Department of Alcoholic
Beverage Control; 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 Alcoholic Beverage Control
Ruling Number 2016-4322
April 7, 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 10743. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth by the hearing officer in Case Number 10743 are as follows:¹

The Department of Alcoholic Beverage Control employed Grievant as a Retail Manager II at one of its Stores. He began working for the Agency in 1998. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for the operations of his Store including maintaining and reporting the Store’s alcohol inventory. The Assistant Store Manager reported to Grievant.

On August 17, 2015, an employee found \$40 on the sales floor. Grievant and the Assistant Store Manager were not working that day. The employee gave the \$40 to the Lead Employee who put the money in the store safe. The Lead Employee notified the Assistant Store Manager of the found money. The Assistant Store Manager moved the \$40 from the safe to a drawer in a desk. When Grievant returned from vacation, the Assistant Store Manager told him about the \$40 in the drawer. The money remained in the drawer for several weeks.

Grievant was responsible for managing the inventory for his Store. He was evaluated based on how well he managed his Store’s inventory. He realized that he was two bottles “short” of vodka. On September 26, 2015, the Assistant Store Manager told Grievant that they would lessen the shortage by purchasing a bottle of vodka using the \$40 that was found on the floor. A bottle of vodka cost \$48.65. Grievant went to the shelf in the store containing vodka bottles and read

¹ Decision of Hearing Officer, Case No. 10743 (“Hearing Decision”), March 3, 2016, at 2-3.

aloud the inventory number for vodka. The Assistant Store Manager was standing at the cash register and entered the number into the cash register to identify the purchase of a bottle of vodka. Grievant purchased a bottle of vodka using his credit card to pay \$8.65 and the \$40 in the drawer. Grievant did not take a bottle of vodka with him when he left the store that day. Other employees noticed what Grievant and the Store Manager were doing and that a bottle of vodka was not removed from the shelf. The transaction was reported to Agency managers several days later.

Grievant completed an inventory on September 27, 2015. It showed a shortage of one bottle of vodka. The shortage was actually two bottles but because of Grievant's transaction, the inventory showed a shortage of only one bottle. Grievant sent a copy of the Inventory Adjustment Report to the Regional Manager.

The Agency investigated the transaction. Grievant provided truthful answers to the Agency's investigator.

On October 29, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating policy and falsifying records.² The grievant timely grieved the disciplinary action and a hearing was held on February 12, 2016.³ In a decision dated March 3, 2015, the hearing officer upheld the Group III Written Notice with termination.⁴ The grievant now appeals the hearing decision to EDR.

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 a party; the sole remedy is that the action be correctly taken.⁶

Inconsistency with Agency Policy

In his request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with state and agency policy. He argues that the level of discipline was inconsistent with policy because it violated his right under the U.S. and Virginia Constitutions to be free from "cruel and unusual punishment," and state policy is "required to be consistent with the [C]onstitution."⁷ The Director of DHRM has the sole authority to make a final determination

² See *id.* at 1.

³ See *id.*

⁴ *Id.* at 4.

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

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

⁷ EDR is not aware of court precedent that would support an argument that the prohibition against "cruel and unusual punishment" applies in the context of a grievance hearing regarding employment matters. Indeed, the analysis from some courts would suggest that the clause has no application in this context. See, e.g., *Simms v. D.C.*

on whether the hearing decision comports with policy.⁸ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this ruling.

Hearing Officer's Consideration of the Evidence

Fairly read, the grievant's request for administrative review also challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁹ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹⁰ Further, in cases involving discipline, the hearing officer reviews the evidence *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.¹¹ 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.¹² 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.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant falsified agency records by manipulating data for an Inventory Adjustment Report, and then presenting the report containing the inaccurate data to his manager.¹³ The grievant's supervisor testified that he discovered that the grievant had executed what appeared to be a normal cash register transaction for the sale of a bottle of vodka, but he did not actually remove the bottle from inventory, thus improperly changing the actual inventory of the store by the addition of one bottle.¹⁴ In his testimony, the grievant admitted that he had done so,¹⁵ and that he subsequently submitted an inventory report containing the falsified information to his supervisor.¹⁶ The hearing officer ultimately found that the grievant's actions constituted falsification of agency documents.¹⁷

Gov't, 587 F. Supp. 2d 269, 275 (D.D.C. 2008). However, this question is largely a legal issue that the grievant is free to raise in a circuit court review, should the grievant wish to pursue it once the hearing decision is considered final. See Va. Code § 2.2-3006(B); *Grievance Procedure Manual* §§ 7.2(d), 7.3(a). For purposes of EDR's review, the crux of the grievant's argument appears to be that his termination was too harsh for the infraction committed. EDR will address that point below as a potential issue of mitigation.

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Decision at 3-4.

¹⁴ See Hearing Recording at 24:29-25:30.

¹⁵ See *id.* at 1:53:14-1:54:55.

¹⁶ See Hearing Record at 02:06:19-02:06:38.

¹⁷ Hearing Decision at 4.

Determinations of witness credibility as well as disputed facts 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. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group III offense, with termination, due to the grievant's conduct.¹⁸ Because 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. Accordingly, we decline to disturb the decision on this basis.

Failure to Mitigate

The grievant's request for administrative review also challenges the hearing officer's decision not to mitigate the Written Notice, asserting that receiving a Group III with termination was too harsh for this offense. He argues that he received inconsistent treatment because the Assistant Store Manager, who engaged in the same misconduct at the same time, only received a Group II Written Notice for his actions. Thus, he argues that the hearing officer should have mitigated the Group III Written Notice to a Group II in his case. Under 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]."¹⁹ The *Rules for Conducting Grievance Hearings* ("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."²⁰ 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.²¹

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

¹⁸ *Id.* at 5.

¹⁹ Va. Code § 2.2-3005(C)(6).

²⁰ *Rules for Conducting Grievance Hearings* § VI(A).

²¹ *Id.* § VI(B)(1).

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.²² EDR will review a hearing officer's mitigation determination for abuse of discretion,²³ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that no mitigating circumstances exist that would warrant reduction of the disciplinary action.²⁴ While inconsistent treatment between like employees can be a basis for mitigation, here, the hearing officer concluded that the grievant and the Assistant Manager were not similarly situated, as the grievant "was responsible for the Store's operations and was in a position to reject the Assistant Store Manager's idea" to falsify the inventory.²⁵ The hearing officer found that the agency had properly considered potentially mitigating factors in this instance, but "ultimately concluded that it could no longer trust Grievant to operate a Store as a Store Manager."²⁶ The hearing officer was required to give deference to the agency's assessment of these mitigating factors.²⁷ 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 and, therefore, not subject to reduction by the hearing officer. As such, EDR cannot find that the hearing officer erred by not mitigating the disciplinary action on this basis.²⁸

To the extent that the grievant argues that his length of service with otherwise satisfactory performance should have been considered as a mitigating factor, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.²⁹ The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance

²² The Merit Systems Protection Board's approach to mitigation, while not binding on this Department, 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).

²³ "'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.*

²⁴ Hearing Decision at 4-5.

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Rules for Conducting Grievance Hearings* § VI(B)(2).

²⁸ Similarly, where, as here, the hearing officer has found that a grievant's conduct involved falsifying records, EDR cannot find the hearing officer's determination that the grievant's termination was within the limits of reasonableness is improper given that the *Standards of Conduct* specifically provide that falsification of state records is potentially a Group III offense, which normally warrants termination. DHRM Policy 1.60, *Standards of Conduct*, Attachment A.

²⁹ *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

become. In this case, neither the grievant's length of service nor his otherwise satisfactory work performance are so extraordinary as to justify mitigation of the agency's disciplinary action. 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

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.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³²



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³⁰ *Grievance Procedure Manual* § 7.2(d).

³¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).