Issue: Administrative Review of Hearing Officer's decision in Case No. 10756; Ruling Date: May 3, 2016; Ruling No. 2016-4332; 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 2016-4332
May 3, 2016

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10756. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10756, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Senior Probation Officer at one of its facilities. She had been employed by the Agency for approximately 22 years. Grievant received training regarding the Agency's fraternization policy. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Virginia Correctional Enterprises (VCE) is a unit of the Department of Corrections. One of its facility's Buildings has a Print Shop and Warehouse. The Print Shop is located in the front of the Building. The Warehouse is located in the back of the Building.
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> Inmates were transported daily from a local DOC prison to the VCE facility to perform work duties. Inmates working in the Print Shop wore blue jeans with blue shirts and a logo on the front of the shirt. Inmates working in the Warehouse wore orange T-shirts. On the back of the orange T-shirt were the words, "DOC Inmate Workforce." The front of the T-shirt did not contain words. Warehouse inmates wore blue pants with orange strips on the left and right side of the pants. The orange strips were more than an inch wide. The clothing worn by Warehouse inmates was consistent with the uniforms worn by inmates throughout DOC prisons.
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> Ms. C worked in the front of the Print Shop. Ms. C was once a DOC inmate but upon her release she was hired as a temporary worker. Inmate T

[1] Decision of Hearing Officer, Case No. 10756 ("Hearing Decision"), March 16, 2016, at 2-3.

worked in the Print Shop. Inmate L worked in the Warehouse. Inmate L was good at personal grooming including "doing eyebrows."

On May 5, 2015, Grievant went to the Print Shop to pick up promotional items and discuss items for a church project. She spoke with Ms. C. Grievant received a call from a salon where she had an appointment for personal grooming. Grievant was informed that her appointment had to be changed. Ms. C overheard the conversation and asked Grievant if she knew that "they did eyebrows here." Ms. C mentioned that there was a "girl in the back" who was "good at eyebrows". Ms. C said they did "this here all the time." Grievant agreed to receive personal grooming at that time. Ms. C spoke with Ms. T and asked her if they had anyone who could do eyebrows. Ms. T said yes. Ms. T walked to the back of the Building and into the Warehouse area. She asked Inmate L to come to the front with her. Ms. T and Inmate L walked to the front. Ms. T asked Inmate L if she would be willing to do a customer's eyebrows. Inmate L said yes. Ms. C rolled a chair into the restroom in the Print Shop. The restroom had one toilet, sink, and mirror. Grievant and Inmate L went into the restroom. Inmate L then "threaded/arched" Grievant's eyebrows. Grievant and Inmate L were in the restroom for approximately five minutes.

Another inmate walked past the restroom and observed Grievant and Inmate L. This inmate believed what she observed was inappropriate and she complained to a Facility employee. The Agency began an investigation.

Grievant met with the Investigator on June 16, 2015. The Investigator told Grievant to be truthful in answering questions. Grievant admitted to the Investigator that she had her eyebrows arched while at the Print Shop. She told the Investigator that she was unaware that Inmate L was an inmate.

On or about December 3, 2015, the grievant was issued two Group III Written Notices with termination for fraternizing with an offender and making a false statement to the Investigator in violation of agency policy.[2] The grievant timely grieved the disciplinary actions[3] and a hearing was held on February 25, 2016.[4] In a decision dated March 16, 2016, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant engaged in fraternization and made a false statement to the Investigator and upheld the issuance of the Written Notices.[5] 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."[6] If the hearing

[2] Agency Exhibits 1, 2.
[3] Agency Exhibit 3; *see* Hearing Decision at 1.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 3-6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

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]

Due Process

In her request for administrative review, the grievant asserts that the agency did not provide her with procedural due process prior to the issuance of the disciplinary action. As a result, she claims that the Written Notice is "null and void" and that the "hearing does not address this matter." In the hearing decision, the hearing officer considered the evidence on this issue and found that any deficiency in due process had "been cured by the hearing process" because the "Grievant was provided with all of the Agency's evidence against her and given an opportunity to present her defenses during the hearing."[8] Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[9] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[10] 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.[11] 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."[12] 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.[13] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[14]

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Hearing Decision at 5.
[9] *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).
[10] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[11] 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 any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, 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."
[12] *Loudermill*, 470 U.S. at 546.
[13] 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

In support of her assertion that she was not afforded due process, the grievant claims the Written Notice charging her with fraternization contains "[e]rroneous information" that she "knowingly allowed an offender to wheel her in a chair into the bathroom . . ."[15] The evidence in the record, however, shows that Ms. C rolled the chair into the bathroom and the grievant sat in the chair while the service was performed by Inmate L.[16] While the grievant thus appears to be correct that the Written Notice's description of the incident is not precisely accurate, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notices and the agency's notice of intent to issue disciplinary action.[17] Indeed, the Written Notices clearly indicate that the grievant was disciplined for engaging in an "unprofessional" association by allowing "an offender working at the print shop to thread/arch her eyebrows"[18] and for making a false statement to the Investigator "that she was not aware that the workers in the print shop were offenders."[19] Any factual error in the Written Notice regarding the details of how the incident occurred was not sufficient to deprive the grievant of adequate pre-disciplinary due process as a matter of the grievance procedure.[20]

In addition, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that the extensive post-disciplinary due process provided to the grievant cured any lack of pre-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[21] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[22] Therefore, even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error. Accordingly, we find no due process violation under the grievance procedure.

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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))).

[14] See Va. Code Section 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).

[15] Agency Exhibit 2.

[16] *E.g.*, Agency Exhibit 7 at 3; Hearing Recording at 1:04:58-1:05:07 (testimony of Investigator).

[17] *See* Agency Exhibits 1, 2; Grievant's Exhibit 2.

[18] Agency Exhibit 2.

[19] Agency Exhibit 1.

[20] The grievant appears to further argue that did not receive adequate due process because the Investigator failed to provide her with appropriate forms before questioning her about the incident. Even assuming the Investigator's actions were inconsistent with agency policy, EDR finds no due process violation as a matter of the grievance procedure for the same reasons as those discussed above with regard to the inaccurate description of the incident on the Written Notice charging the grievant with fraternization.

[21] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[22] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

Hearing Officer's Consideration of Evidence

The grievant further asserts in her request for administrative review that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[23] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[24] Further, in cases involving discipline, the hearing officer reviews the facts *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.[25] 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.[26] 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.

Evidence Regarding Fraternization

The grievant argues that the hearing officer erred in concluding that "[i]nmates working in the Print Shop wore blue jeans with blue shirts" and that the "clothing worn by Warehouse inmates was consistent with the uniforms worn by inmates throughout DOC prisons."[27] The grievant further claims that there is no evidence to show how Inmate L was dressed on May 5, 2015 when the incident occurred.

Witness testimony at the hearing established that offenders in the Print Shop wore blue jeans, sneakers, and gray shirts.[28] EDR has not identified evidence to show that offenders who worked in the Print Shop wore blue shirts. While it appears the grievant is correct that the hearing decision contains a factual error regarding the dress of offenders in the Print Shop, EDR cannot conclude that this error impacted the outcome of this case. Hearing officers must make "findings of fact as to the *material issues* in the case"[29] and to determine the grievance based "*on the material issues* and grounds in the record for those findings."[30] The dress of offenders in the Print Shop was not a material issue in this case, as the grievant was disciplined for engaging in fraternization with Inmate L, who worked in the Warehouse. Remanding this case to the hearing officer for reconsideration on this issue would have no effect on the outcome, as it is clear that the evidence regarding the attire of offenders in the Print Shop had no effect on his decision.

[23] Va. Code § 2.2-3005.1(C).
[24] *Grievance Procedure Manual* § 5.9.
[25] *Rules for Conducting Grievance Hearings* § VI(B).
[26] *Grievance Procedure Manual* § 5.8.
[27] Hearing Decision at 2.
[28] Hearing Recording at 20:47-21:16 (testimony of Production Foreman).
[29] Va. Code § 2.2-3005.1(C) (emphasis added).
[30] *Grievance Procedure Manual* § 5.9 (emphasis added).

Furthermore, there is ample evidence in the record to support the hearing officer's description of the clothing worn by offenders in the Warehouse at the time of the incident, including Inmate L.[31] Though the grievant disagrees with the hearing officer's characterization of the Warehouse offenders' attire as "consistent with the uniforms worn by inmates throughout DOC prisons," there is also witness testimony to support this conclusion.[32] Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer,[33] as is the case here.

In addition, the grievant alleges that the evidence does not show she engaged in fraternization because she had not been informed that offenders worked in the Print Shop and was not aware that Inmate L was an offender. The grievant further disputes the hearing officer's conclusion that she "did not pay for the service she received" or "inquire about the cost of the services" and that she "would likely have had to pay for" the service if she believed it had been provided by a non-offender.[34] The grievant claims she believed Ms. C's representation that personal grooming services were a common practice at the Print Shop and that Ms. C had the "authority to offer services" to customers.

Having reviewed the hearing record, EDR finds that the agency presented evidence to show that the grievant knew or should have known that Inmate L was an offender and that her conduct in accepting services from Inmate L constituted fraternization. For example, witnesses testified that the clothing worn by Inmate L identified her as a member of the "DOC Inmate Workforce."[35] Though the grievant claims she accepted services from Inmate L based on Ms. C's representation that personal grooming services were a part of the business performed at the Print Shop, witnesses also testified that those services are outside of the acceptable professional business relationship that agency employees may have with offenders.[36] While there is evidence in the record to suggest that the grievant was unaware Inmate L was an offender or that offenders worked at the Print Shop,[37] conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. EDR finds no basis to disturb the hearing officer's conclusion that the evidence in the record was sufficient to demonstrate that the grievant knew or should have known that Inmate L was an offender and that her actions constituted an unprofessional association with an offender.

Finally, the grievant asserts that the hearing officer did not consider her testimony that she did not see Inmate L while she performed the personal grooming service. EDR's review of the hearing decision, however, clearly indicates that the hearing officer considered and, indeed,

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[31] *E.g.*, Agency Exhibit 8; Hearing Recording at 21:20-22:43 (testimony of Production Foreman), 43:43-44:03, 51:37-51:45 (testimony of Senior Supervisor).
[32] *E.g.*, Hearing Recording at 2:19:57-2:20:22, 2:39:49-2:40:33 (testimony of Supervisor).
[33] *See, e.g.*, EDR Ruling No. 2012-3186.
[34] Hearing Decision at 5.
[35] *See supra* note 31 and accompanying text.
[36] Hearing Recording at 45:41-46:37 (testimony of Senior Supervisor), 1:14:57-1:16:01 (testimony of Investigator), 1:54:27-1:57:11 (testimony of Supervisor).
[37] *E.g., id.* at 3:23:11-3:26:41, 3:48:58-3:51:06 (testimony of grievant).

explicitly addressed the grievant's argument that "Inmate L stood behind the chair and, thus, the chair blocked Grievant's view of Inmate L's uniform."[38] The hearing officer found that the grievant's testimony regarding her knowledge of Inmate L's status as an offender was not credible[39] and, as discussed above, there is evidence in the hearing record to support that conclusion. Furthermore, to the extent any aspect of the grievant's testimony was not specifically addressed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to a witness's testimony does not necessarily constitute a basis for remand. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. It would appear that the hearing officer did not address all of her testimony specifically because he did not find it to be credible and/or persuasive on the issue of whether she knew Inmate L was an offender.

In summary, determinations of credibility as to 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. Because the hearing officer's findings in this case 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 hearing decision on the bases raised by the grievant in her request for administrative review.

False Statement to the Investigator

In the hearing decision, the hearing officer found that the "Grievant falsely informed the Investigator that she did not know the person performing grooming services was an inmate," and that she "knew or should have known that her statement was false . . . ."[40] The grievant disputes this conclusion and argues that the evidence did not show she made a false statement to the Investigator. The grievant asserts that the Investigator did not conclude she was dishonest when she told the Investigator she did not know Inmate L was an offender.

While the grievant is correct that the Investigator testified she did not determine whether the grievant had made a false statement when questioned,[41] there is also evidence in the record to show that the Investigator was tasked only with determining what occurred on May 5, 2015, and specifically whether the grievant had engaged in fraternization with Inmate L.[42] In other words, the Investigator did not make any conclusion as to whether the grievant had been untruthful or recommend disciplinary action to address any false statements the grievant may have made in the course of the investigation. The Supervisor, on the other hand, explained that he evaluated the information disclosed by the grievant during the investigation and concluded she had made a false statement when she denied that she knew Inmate L was an offender.[43] As discussed more fully above, there is evidence to support the hearing officer's finding that the grievant knew or should have known Inmate L was an offender. As a result, EDR cannot conclude that the hearing

[38] Hearing Decision at 5.
[39] *Id.*
[40] Hearing Decision at 5.
[41] *E.g.*, Hearing Recording at 1:23:15-1:24:21 (testimony of Investigator).
[42] *E.g.*, *id.* at 1:00:05-1:01:58, 1:28:22-1:28:50 (testimony of Investigator); *see* Agency Exhibit 7.
[43] *Id.* at 1:57:17-1:58:39, 2:05:57-2:07:26 (testimony of Supervisor).

officer erred in determining that the grievant made a false statement regarding her knowledge of Inmate L's status as an offender. If the grievant knew or should have known that Inmate L was an offender, then she knew or should have known that she was providing a false statement when she told the Investigator otherwise.

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the information that the grievant provided to the Investigator was in any way unreasonable or not based on the actual evidence in the record. The hearing officer's findings with respect to the grievant's statement to the Investigator are based upon evidence in the record and the material issues of the case, and 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.

Evidence of Retaliation

The grievant further asserts that the hearing officer erred in concluding that the discipline was not issued as a form of retaliation based on her request to use leave pursuant to the Family and Medical Leave Act ("FMLA"). In the hearing decision, the hearing officer assessed the evidence regarding the grievant's use of FMLA leave and the agency's stated reasons for issuing the disciplinary action, concluding that, while the "Grievant engaged in protected activity," there was not a "sufficient connection between her protected activity and the Agency's decision to take disciplinary action."[44] The grievant disputes this determination and appears to claim that the agency was prohibited from issuing any disciplinary action after the grievant "came under the protection of the [FMLA]" by informing the Supervisor of her intention to use FMLA leave.

Although state agencies may not discipline an employee because she engaged in protected activity, including the use of FMLA leave,[45] an employee's exercise of protected activity does not serve to insulate her from disciplinary action that is warranted and appropriate if the discipline does not have a causal connection to the protected activity.[46] In this case, the hearing officer determined that "the Agency took disciplinary action based on Grievant's inadequate behavior and not her protected activity."[47] As discussed above, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is evidence in the record to support the hearing officer's conclusion that the agency's decision to issue the discipline did not have a retaliatory motive,[48] and there is nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motive for the discipline was in any way unreasonable or not based on the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR cannot conclude that the hearing officer's decision constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

[44] Hearing Decision at 5.
[45] *E.g.*, 29 C.F.R. § 825.220(c) (prohibiting retaliation against an employee "for having exercised or attempted to exercise FMLA rights"); *see also* Va. Code § 2.2-3004(A) (providing that grievances alleging retaliation because the employee has exercised a right protected by law may qualify for an administrative hearing).
[46] *E.g.*, Laing v. Fed. Express Corp., 703 F.3d 713, 719-22 (4th Cir. 2013).
[47] Hearing Decision at 5.
[48] *E.g.*, Hearing Recording at 2:26:51-2:28:09, 4:12:58-4:13:30 (testimony of Supervisor).

Mitigation

Fairly read, the grievant's request for administrative review alleges that the hearing officer erred in not mitigating the agency's disciplinary action. Specifically, the grievant claims that the agency did not apply disciplinary action to her consistent with other similarly situated employees because Ms. C and Inmate L, who were involved in the incident for which the grievant was terminated, were not terminated. 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]."[49] 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."[50] 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.[51]

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.[52] EDR will review a hearing officer's mitigation determination for abuse of discretion,[53] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish

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[49] Va. Code § 2.2-3005(C)(6).
[50] *Rules for Conducting Grievance Hearings* § VI(A).
[51] *Id.* § VI(B)(1).
[52] 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).
[53] "'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.*

any mitigating factors.[54] Upon conducting a review of the hearing record, it does not appear that the evidence in the record is sufficient to support a conclusion that the agency's treatment of the grievant was different from other employees who may have been similarly situated to her. While the grievant asserts Ms. C has been "promoted" since the incident, the evidence in the record is not clear on this issue, although witness testimony does indicate that Ms. C now works for VCE in a permanent position at a different office location.[55] One witness testified at the hearing that he did not know whether Ms. C had been disciplined,[56] and EDR has identified no other evidence in the record that would establish whether Ms. C was subject to corrective action for her role in the incident. Moreover, Ms. C, as a VCE employee, reported to a different supervisor in a different chain of management and agency operations than the grievant. The record does not indicate whether the Investigator's report or any other information about the incident was shared with Ms. C's supervisor or VCE management. Likewise, Inmate L, who performed the service for the grievant, was an inmate worker, not an employee of the agency, and thus would not properly be considered as a comparator to the grievant.

Even if Ms. C would be considered similarly situated to the grievant for purposes of mitigation, the agency's handling of Ms. C's role in the incident would only be relevant to one of the two Group III Written Notices. Given that there was a separate Group III for a false statement, which also carried the sanction of termination, we cannot conclude that the grievant's arguments regarding mitigation and the agency's allegedly more-favorable treatment of Ms. C warrants remand to the hearing officer for further consideration. The grievant has identified no evidence in the record that suggests Ms. C engaged in falsification or making a false statement. Accordingly, we decline to disturb the decision on this basis.

Alleged Improper Conduct at the Hearing

Finally, the grievant appears to assert that the hearing officer and/or the agency's advocate acted improperly and violated the grievant's "right to privacy and confidentiality" by allowing an offender to "appear at the hearing" and display the attire worn by workers in the Warehouse. While the *Rules for Conducting Grievance Hearings* do not directly address this specific situation, they do state that hearings must be conducted in an "orderly, fair, and equitable fashion."[57] At the hearing, the agency's advocate offered to have an offender enter and display his attire for the hearing officer as a demonstration of the clothing worn by Inmate L and other offenders who worked in the Warehouse when the incident occurred.[58] Based on EDR's review of the hearing recording, the offender entered the room, displayed his uniform, and exited.[59] The hearing officer and the parties did not speak to the offender, other than to direct him to display his clothing, nor did he speak to anyone in the room.[60] There is nothing in the hearing record to suggest that the offender knew the grievant or any other participant in the hearing or, indeed, that he was even aware the proceeding was a grievance hearing. Moreover, there is no indication that the grievant objected to the involvement of the offender at any point during the hearing, which could have allowed the hearing officer to address the issue to the

[54] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[55] Hearing Recording at 30:55-31:23, 33:51-34:18 (testimony of Production Foreman).
[56] *Id.* at 47:08-47:24 (testimony of Senior Supervisor).
[57] *Rules for Conducting Grievance Hearings* § IV(C).
[58] Hearing Recording at 1:41:45-1:42:37.
[59] *Id.* at 1:51:57-1:52:39.
[60] *See id.*

extent there were any concerns to address.[61] EDR has thoroughly reviewed the recording of the hearing and we are unable to conclude that allowing the offender to display his attire was improper to the extent that the grievant may have been prejudiced by any alleged misconduct in this regard.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's 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.[62] 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.[63] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[64]

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[61] *See Grievance Procedure Manual* § 6.4 (stating that if "noncompliance arises . . . in the conduct of the hearing, . . . [a]n objection should be made to the hearing officer at the time the noncompliance occurs").
[62] *Id.* § 7.2(d).
[63] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[64] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).