

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10761; Ruling  
Date: April 29, 2016; Ruling No. 2016-4340; Agency: Virginia Department of Health;  
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 Virginia Department of Health  
Ruling Number 2016-4340  
April 29, 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 10761. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed as an environmental health specialist with the Virginia Department of Health (“agency”).<sup>1</sup> On September 10, 2015, the grievant was issued a Group II Written Notice for unsatisfactory performance and failure to follow instructions and/or policy.<sup>2</sup> The grievant timely grieved the disciplinary action.<sup>3</sup> A hearing was subsequently held on March 4, 2016.<sup>4</sup> On March 24, 2016, the hearing officer issued a decision upholding the disciplinary action.<sup>5</sup> 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 . . . .”<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup> See Decision of Hearing Officer, Case No. 10761 (“Hearing Decision”), March 24, 2016, at 2; *see also* Agency Exhibit 2 at 1.

<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> Agency Exhibit 2; *see* Hearing Decision at 1.

<sup>4</sup> *See* Hearing Decision at 1.

<sup>5</sup> *Id.* at 1, 7. The hearing officer concluded that given the significance of the grievant’s unsatisfactory performance, the agency had established a basis for elevating unsatisfactory performance to a Group II offense. Hearing Decision at 4-6. The hearing officer did not determine that the disciplinary action was warranted because of a failure by the grievant to follow instructions and/or policy. *Id.*

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

*Hearing Officer's Consideration of the Evidence*

Fairly read, the grievant's request for administrative review 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"<sup>8</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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 record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant failed to perform his work in a satisfactory manner.<sup>12</sup> 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 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 appears to challenge the hearing officer's decision not to mitigate the Written Notice. In particular, the grievant asserts that he was treated in an inconsistent manner with others who also made mistakes, and that his previous satisfactory performance and work history should have been taken into account by the agency.

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]."<sup>13</sup> 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

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<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>11</sup> *Grievance Procedure Manual* § 5.8.

<sup>12</sup> See, e.g., Agency Exhibits 4, 6, 7, 15; Grievant's Exhibit 1.

<sup>13</sup> Va. Code § 2.2-3005(C)(6).

that are found to be consistent with law and policy.”<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> EDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>17</sup> 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.<sup>18</sup> While inconsistent treatment between like employees can be a basis for mitigation, in this case, neither the grievant’s supervisors nor outside engineers appear to have been similarly situated to the grievant, in terms of conduct or responsibility.<sup>19</sup> 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

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<sup>14</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>15</sup> *Id.* § VI(B)(1).

<sup>16</sup> 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).

<sup>17</sup> “‘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.*

<sup>18</sup> Hearing Decision at 6.

<sup>19</sup> *See, e.g.*, Agency Exhibits 4, 6, 7.

action exceeded the limits of reasonableness.<sup>20</sup> 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 become. In this case, neither the grievant's length of service nor his otherwise satisfactory work performance is so extraordinary as to justify mitigation of the agency's disciplinary action.

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. 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 this 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.<sup>21</sup> 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.<sup>22</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>23</sup>



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<sup>20</sup> See, e.g., EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

<sup>21</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>22</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>23</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).