Issue: Administrative Review of Hearing Officer's decision in Case No. 10735; Ruling Date: June 1, 2016; Ruling No. 2016-4345; 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 2016-4345
June 1, 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 10735. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant was employed as an Adult Instructor by the Department of Corrections ("agency").[1] On October 27, 2015, the grievant was issued a Group III Written Notice, with termination, for "violat[ing] OP 135.1, Standards of Conduct and OP 130.1, Rules of Conduct Governing Employee Relationships with Offenders based on . . . fraternization with an offender."[2] The grievant timely grieved the disciplinary action and a hearing was held on March 14, 2016.[3] On April 9, 2016, the hearing officer issued a decision upholding the disciplinary action.[4] 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 . . . ."[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 her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with agency policy. She argues that she was not afforded appropriate due process during the investigation process and alleges that the agency violated her rights under the Fourth and Fourteenth Amendments to the United States Constitution. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision

[1] Agency Exhibit 2.
[2] Agency Exhibit 1.
[3] *See* Decision of Hearing Officer, Case No. 10735 ("Hearing Decision"), April 9, 2016, at 1.
[4] *Id.* at 1, 11-12.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

comports with policy.[7] The grievant has requested a review by DHRM. Accordingly, the grievant's policy claims will not be discussed in this ruling, except to the extent the issues are related to the grievance procedure and addressed below.

Due Process

The grievant argues that she was not afforded due process throughout the disciplinary procedure. She argues that the investigation into her alleged conduct was "irregular and incomplete," as she was not fully informed of the charges nor given a chance to respond during the investigation, and she states that her purse was searched on agency property without her permission. She also alleges that she was unable to obtain signed and dated statements from witnesses, nor was she allowed to provide such a statement herself. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[8] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[9] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue. Further, as discussed above, the grievant has requested administrative review from the DHRM Director. DHRM Policy 1.60, *Standards of Conduct*, contains a section expressly entitled "Due Process."[10] The DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow the due process provisions of state policy.

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]

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[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] *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).
[9] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[10] *See* DHRM Policy 1.60, *Standards of Conduct*, § E.
[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.

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]

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notice.[15] She 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 based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[16] 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.[17] Accordingly, EDR finds no due process violation under the grievance procedure.

Mitigation

The grievant asserts that the hearing officer did not properly consider potential mitigating factors in this case. She asserts that the discipline issued exceeds the limits of reasonableness given all the circumstances of her particular situation. In support of her position, she argues that 1) the agency did not apply discipline to her consistent with that of similarly situated employees, 2) the agency's investigation was flawed, including "tampered" evidence, 3) the agency engaged in violations of due process and other Constitutional rights, 4) she had been an excellent performer in her role prior to the conduct giving rise to the disciplinary action, and 5) her former principal had recommended she be eligible for re-hire within the agency.

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]."[18] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide

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[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 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 Virginia 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] *See* Agency Exhibit 1.

[16] *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.").

[17] *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).

[18] Va. Code § 2.2-3005(C)(6).

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,
>
> 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.

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[23] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[24]

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[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 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).
[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.*
[23] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).
[24] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency, as the agency "has legitimate and compelling business reasons to prohibit fraternization between employees and offenders."[25] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[26] Even considering those arguments advanced by the grievant in her request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the actual evidence in the record. The facts upon which the hearing officer relied support the finding that a Group III Written Notice was appropriate for the conduct of fraternization with inmates and did not exceed the limits of reasonableness. As such, EDR will not disturb the hearing officer's decision on this basis.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially 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"[27] and to determine the grievance based "on the material issues and grounds in the record for those findings."[28] 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.[29] 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.[30] 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.

In this instance, the grievant argues that the agency did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In support of this assertion, she denies authoring the "known" handwriting samples presented and compared to the handwriting on the letter to the offender. Further, the grievant challenges the credibility of the investigative report, which indicated that the offender in question had made a statement confirming the alleged relationship with the grievant. The grievant states that if the offender, as well as the special agent who interviewed him, had testified at the hearing, her counsel would have been able to cross-examine him. She also asserts that the forensic handwriting specialist

[25] Hearing Decision at 11.
[26] EDR Ruling No. 2014-3777 (citing *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[27] Va. Code § 2.2-3005.1(C).
[28] *Grievance Procedure Manual* § 5.9.
[29] *Rules for Conducting Grievance Hearings* § VI(B).
[30] *Grievance Procedure Manual* § 5.8.

who concluded she wrote the letter in question should have been present at the hearing, but he was not available.

Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the October 27, 2015 Written Notice and that the behavior constituted misconduct.[31] 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. Here, the hearing officer stated that she " based her finding on the evidence showing that Grievant wrote the love letter found on Offender's presence . . . after deliberat[ing] on the totality of the evidence."[32] The hearing officer determined that the agency met its burden of proof in this case by presenting the following evidence: 1) the letter found in the offender's possession,[33] compared to handwriting samples attributed to the grievant,[34] 2) the fact that the grievant frequently wrote in purple ink, including the notes she took at the Muslim seminar,[35] 3) the grievant's attendance at this seminar, and reference to it in the letter.[36] When the hearing officer considered this evidence alongside the grievant's testimony, she concluded that the grievant "engaged in an unprofessional relationship with Offender that was prohibited by Agency policies 135.1 and 130.1."[37] 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, EDR declines to disturb the decision on this basis.

To the extent that the grievant argues the special agent who wrote the investigative report and the forensic handwriting specialist should have been available at the hearing, a review of the hearing record reveals no witness order for the appearance of either. The *Rules* allow a hearing officer to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as ordered.[38] It is the duty of a party who wishes to question a particular individual at hearing to request that the hearing officer issue such a witness order, which apparently was not done here. In the absence of such an order, an adverse inference would not be appropriate.

The grievant's request for administrative review also asserts that the hearing officer erred by not allowing into evidence two letters from inmates written in support of the grievant. Upon the agency advocate's objection, the hearing officer determined that she would not admit the letters into evidence because they had not been provided to the agency prior to the deadline for the parties to exchange copies of their exhibits.[39] Receiving probative evidence is squarely

[31] Hearing Decision at 8-10.
[32] *Id.* at 10.
[33] Agency Exhibit 3 at 8-10, 68.
[34] Agency Exhibit 3 at 70, 77-79. The grievant did not dispute that these samples were in fact her handwriting. *See* Hearing Recording at Track 7, 11:35-12:10 (testimony of grievant).
[35] Agency Exhibit 3 at 70, 77-79.
[36] *Id.* at 9, 68.
[37] Hearing Decision at 9-10.
[38] *Rules for Conducting Grievance Hearings* § V(B).
[39] Hearing Decision at 1.

within the purview of the hearing officer.[40] Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.[41] To this end, the hearing officer has the authority to "[r]equire the parties to exchange a list of witnesses and documents . . . ."[42] An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.[43] In this instance, a review of the record indicates that there was no dispute that the documents had not been provided to the agency pursuant to the deadlines established by the hearing officer for the exchange of documents.[44] Under the *Rules*, the hearing officer may exclude evidence that is "not timely exchanged consistent with [his or her] orders . . . ."[45] Thus, EDR cannot conclude that the hearing officer exceeded her authority in refusing to admit the documents into evidence.

Alleged Bias of Hearing Officer

The grievant further alleges that the hearing officer was biased against her, stating that the hearing officer was "working for the agency" and thus had a financial interest in the case. She asserts that the hearing was not conducted in an equitable and orderly fashion as required by the *Rules* because the hearing officer interrupted her during her testimony, not allowing her to fully present her arguments and evidence.

The *Rules* provide that a hearing officer is responsible for:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[46]

The applicable standard regarding EDR's requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[47] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[48] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing

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[40] Va. Code § 2.2-3005(C).
[41] *Grievance Procedure Manual* § 5.7; *see also* Va. Code § 2.2-3005.
[42] *Grievance Procedure Manual* § 5.7(2).
[43] *See, e.g.*, EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.
[44] *See* Hearing Recording at Track 1, 7:55-12:46.
[45] *Rules for Conducting Grievance Hearings* § IV(D).
[46] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."
[47] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[48] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[49] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[50]

In this particular case, there is no such evidence. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. To the extent that the grievant claims that the hearing officer is "working for the agency," EDR cannot agree with this assertion. Hearing officers are appointed by EDR in accordance with the Code of Virginia.[51] While the Code further requires that the agency bear the cost of the hearing officer and expenses for the hearing,[52] the agency does not employ the hearing officer directly. Therefore, EDR will not disturb the decision of the hearing officer on this basis.

Further, the *Rules* state that hearings must be conducted in an "orderly, fair, and equitable fashion . . . .[53]" Here, EDR has reviewed the recording of the hearing in its entirety and is unable to conclude that the hearing officer improperly limited the evidence that the grievant wished to present at hearing. The grievant testified for approximately six minutes regarding the handwriting samples, during which she was asked several questions by both her counsel and the hearing officer.[54] The *Rules* provide that "the hearing officer may question the witnesses . . . ."[55] The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[56] Based on a review of the record, EDR finds the hearing officer's questions to be relevant and reasonable. At no time did the hearing officer advise the grievant that she needed to end her testimony; rather, the grievant's attorney concluded the questioning on the topic by stating "I think we can . . . move on."[57] Based on the totality of circumstances in this case, EDR cannot conclude that the hearing officer did not allow the grievant a fair opportunity to present her case through testimony at the hearing and will not disturb the 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.[58] 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

[49] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[50] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[51] *See* Va. Code § 2.2-3005(B).
[52] *See id.* § 2.2-3005.1(B).
[53] *Rules for Conducting Grievance Hearings* § IV(C).
[54] *See* Hearing Recording at Track 7, 12:30-18:13 (testimony of grievant).
[55] *Rules for Conducting Grievance Hearings* § IV(C).
[56] *Id.*
[57] *See* Hearing Recording at Track 7, 18:07-18:13 (testimony of grievant).
[58] *Grievance Procedure Manual* § 7.2(d).

arose.[59] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[60]

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[59] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[60] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).