

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10781; Ruling
Date: May 24, 2016; Ruling No. 2016-4360; Agency: Department of Veterans
Services; 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 Veterans Services
Ruling Number 2016-4360
May 24, 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 10781. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant is employed as a unit secretary with the Department of Veterans Services.¹ On January 14, 2016, the grievant was issued a Group I Written Notice for failure to follow instructions and/or policy regarding 30-minute lunch breaks.² In particular, the grievant was charged with clocking out on January 4, 2016 for only an eleven minute period.³ The grievant timely grieved the disciplinary action and a hearing was held on April 15, 2016.⁴ On May 3, 2016, the hearing officer issued a decision upholding the disciplinary action.⁵ 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”⁶ 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.⁷

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 neither law nor policy specifically required her to clock out for a thirty-minute lunch break. The Director of DHRM has the sole

¹ See Decision of Hearing Officer, Case No. 10781 (“Hearing Decision”), May 3, 2016, at 2; Agency Exhibit 2 at 1.

² Agency Exhibit 1 at 1-3.

³ Agency Exhibit 1 at 1.

⁴ See Hearing Decision at 1; Agency Exhibit 2.

⁵ Hearing Decision at 1, 5.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

authority to make a final determination on whether the hearing decision comports with policy.⁸ The grievant has requested a review by DHRM. Accordingly, the grievant's policy claims will not be discussed in this ruling.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review also appears to challenge 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.

In this instance, the grievant appears to argue that her actions were approved by her supervisor and therefore did not constitute misconduct. The hearing officer concluded that although her supervisor approved some lunches shorter than 30 minutes, she was not approved to do so on January 4, 2016 and therefore failed to comply with management instructions when she clocked out for less than 30 minutes.¹³ EDR's review of the hearing record indicates that the hearing officer's finding is supported by record evidence.¹⁴ 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 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 also appears to challenge the hearing officer's decision not to mitigate the Written Notice. In particular, the grievant appears to argue that she was treated in a manner inconsistent with the way other employees were treated.

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, e.g.*, Agency Exhibit 1 at 8-10; Agency Exhibit 2 at 3-4.

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].”¹⁵ 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.”¹⁶ 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.¹⁷

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.¹⁸ EDR will review a hearing officer’s mitigation determination for abuse of discretion,¹⁹ 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 found that the grievant had failed to show that any similarly situated employees were treated in a manner inconsistent with how she was treated.²⁰ Specifically, the hearing officer concluded that the grievant had not shown that any other employee had repeatedly taken lunches of less than 30 minutes in violation of policy after having been previously and repeatedly counseled.²¹ 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

¹⁵ Va. Code § 2.2-3005(C)(6).

¹⁶ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁷ *Id.* § VI(B)(1).

¹⁸ 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).

¹⁹ “‘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.*


²⁰ Hearing Decision at 4-5.

²¹ *Id.*

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.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴



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²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).