Issue: Administrative Review of Hearing Officer's decision in Case No. 11272; Ruling Date: January 17, 2019; Ruling No. 2019-4823; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

*COMMONWEALTH of VIRGINIA*
***Department of Human Resource Management***
*Office of Equal Employment and Dispute Resolution*

# ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4823
January 17, 2019

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11272. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

## FACTS

The relevant facts as set forth in Case Number 11272 are as follows:[1]

> The Department of Corrections employs Grievant as a Corrections Officer at the Facility. She had been employed by the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.
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> When transporting offenders outside the Facility, Grievant carried a Glock 40 handgun. The gun was loaded. Grievant kept the weapon in a holster on a utility belt she wore.
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> On March 1, 2018, Grievant and three other officers were responsible for transporting three offenders using two vehicles. Grievant and Officer J were in the first vehicle carrying three offenders. Officer M and Officer L were in the second vehicle without offenders. The Officers in the second vehicle were to trail the first vehicle and provide oversight of the first vehicle.
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> The two vehicles travelled from the Facility to the Physician's Office. Their trip lasted approximately 45 minutes. The offenders were treated by the Physician and then returned to the first vehicle. Grievant went to the single stall restroom in the Physician's Office area. She entered the restroom. She removed the Glock 40 weapon from her holster and placed it between the hand rail and the wall. When Grievant left the restroom, she forgot to take her weapon with her. She entered the first vehicle with Officer J and they began driving back to the Facility. The second vehicle followed.

[1] Decision of Hearing Officer, Case No. 11272 ("Hearing Decision"), November 27, 2018, at 2-3.

The Medical Assistant who worked at the Physician's Office went into the restroom and observed Grievant's weapon. The weapon was placed between the hand railing attached to the wall and the wall. The weapon was faced down with the safety on. The Medical Assistant took the weapon out of the restroom and put it in a locked drawer. She called the local Sheriff's Office. A Deputy Sheriff came and took possession of Grievant's weapon.

The Medical Assistant was surprised but not scared when she observed the weapon. She was concerned that the weapon was in the restroom because the restroom was available to children, drug seeking patients, and other inmates who visited the Physician.

As the two vehicles approached the Facility, Grievant's vehicle pulled to the side of the road. Grievant realized she had forgotten her weapon and was panicking. Grievant tapped the side of her hip and Officer J realized what had happened. The second vehicle moved next to Grievant's vehicle. Grievant exited her vehicle and went to the second vehicle. She told Officer L to get out of the vehicle and into the first vehicle. Grievant got into the second vehicle with Officer M and told Officer M they had to go back to the Physician's Office. Grievant did not explain why they had to go back. Officer M made a "U-turn" and began driving back to the Physicians' Office. Grievant told Officer M that she had "messed up" and left her weapon at the Physician's Office.

Officer J returned to the Facility and told the Lieutenant what had happened.

When they returned to the Physician's Office, Grievant went inside to locate her weapon. Grievant met the Medical Assistant who told Grievant that they had turned the weapon over to the local Sheriff's office.

Grievant left the Physician's Office and went to the second vehicle. Officer M told her she needed to call someone. Officer M called the Facility and asked for the Lieutenant. Officer M was informed the Lieutenant was aware of the situation and was on her way to the situation. Grievant called the Lieutenant as well using Officer M's State cell phone. The Lieutenant was in route to the Sheriff's Office. The Lieutenant told Grievant she knew what had happened and for Grievant to return to the Facility.

The Lieutenant went to the local Police department to retrieve Grievant's weapon.

On May 30, 2018, the grievant was issued a Group III Written Notice of disciplinary action with a ten work day suspension for leaving her weapon in the restroom.[2] The grievant timely grieved the disciplinary actions and a hearing was held on November 7, 2018.[3] In a decision dated November 27, 2018, the hearing officer concluded that the agency presented sufficient evidence to support the disciplinary action and the suspension.[4] The grievant now appeals the hearing decision to EEDR.

## DISCUSSION

By statute, EEDR 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, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

*Failure to Mitigate*

The grievant challenges the hearing officer's decision not to mitigate the disciplinary action. 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 [EEDR]."[7] The *Rules for Conducting Grievance Hearings* ("*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."[8] 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.[9]

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.

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[2] Hearing Decision at 1.
[3] *Id.*
[4] *Id.* at 6.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005(C)(6).
[8] *Rules for Conducting Grievance Hearings* § VI(A).
[9] *Id.* § VI(B)(1).

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.[10] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[11] 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.[12] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, we also acknowledge that certain circumstances may require this result.[13]

Here, the grievant argues that the agency did not apply disciplinary action to her consistent with other similarly situated employees. Inconsistent discipline is one of those factors noted by the *Rules* that could support mitigation of a disciplinary action.[14] Analogous MSPB precedent on this type of issue provides that a grievant must show "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently . . . ."[15] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[16] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[17] Therefore, in making a determination as to whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have

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[10] *See, e.g.,* EDR Ruling No. 2011-2992.

[11] "'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.*

[12] 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).

[13] The Board views mitigation as potentially appropriate when an agency has knowingly and intentionally treated similarly situated employees differently. *See* Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991); Berkey v. United States Postal Service, 38 M.S.P.R. 55, 59 (1988).

[14] *Rules for Conducting Grievance Hearings* § VI(B)(2).

[15] *E.g.*, Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 (2010). Notably, the MSPB utilizes a "more flexible approach" in determining whether employees are comparators following the 2009 decision by the Court of Appeals for the Federal Circuit in *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009). *Lewis*, 113 M.S.P.R. at 663.

[16] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.

[17] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.

the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.

In this instance, the hearing officer found that no evidence existed to support the grievant's assertion that she was treated differently from similarly situated employees.[18] The hearing officer determined that three out of the four employees cited as examples by the grievant were not, in fact, similarly situated to her.[19] As to the fourth example, the hearing officer found that the retrieval of the weapon within fifteen minutes and the lack of involvement of outside entities justified the agency's imposing a lesser level of discipline on that employee.[20] Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's failure to mitigate based upon alleged inconsistent discipline was unreasonable or not based on the actual evidence in the record and thus, we will not disturb the decision on this basis.

*New Evidence*

The grievant's request for administrative review indicates that she discovered two additional pieces of information after the hearing that should be considered by the hearing officer as new evidence. First, she asserts that another officer left his weapon across a bathroom sink accessed by offenders, yet received a lesser level of discipline for doing so; and second, she indicates that new language has been added to agency's policy governing the handling of firearms. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[21] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[22] The party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[23]

Here, the grievant has provided no information to support a contention that the additional information she provides should be considered newly discovered evidence under this standard. It appears the grievant had the ability to obtain this evidence prior to the hearing. The grievant had the opportunity at the hearing to submit this evidence in support of her position and did not do

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[18] Hearing Decision at 5-6.
[19] *Id.*
[20] *Id.*
[21] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also, e.g.,* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).
[22] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[23] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

so. Consequently, there is no basis to reopen or remand the hearing for consideration of this additional evidence.

*Due Process*

The grievant argues in her request for administrative review that the agency did not provide her with appropriate pre-disciplinary due process, due to allegedly missing information on the referral form for disciplinary action she received. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[24] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[25] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EEDR 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.[26] 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."[27]

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.[28] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[29]

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[24] *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).

[25] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[26] 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."

[27] *Loudermill*, 470 U.S. at 546.

[28] 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

In this case, it is evident that the grievant had ample notice of the charges against her as set forth on the Written Notice.[30] 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.[31] Accordingly, EEDR finds no due process violation under the grievance procedure.

## 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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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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))).

[29] 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).

[30] *See* Agency Exhibit 1.

[31] *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).

[32] *Grievance Procedure Manual* § 7.2(d).

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

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