Issue: Administrative Review of Hearing Officer's Decision in Case No. 11275;   Ruling Date: March 20, 2019;   Ruling No. 2019-4876;   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 2019-4876
March 20, 2019

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11275. For the reasons set forth below, EEDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11275, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employs Grievant as a Corrections Officer at Facility One. No evidence of prior active disciplinary action was introduced during the hearing. Grievant received annual performance evaluations of "exceeds contributor."
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> Facility Two experienced staffing shortages and needed to obtain staff from other facilities to ensure Facility Two could be operated safely. The Agency decided to assign some of its staff to work at Facility Two for two cycles.
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> On February 12, 2018, the Major, Captain, and Lieutenant met with Grievant in the conference room of Facility One. Grievant was told that his name had been selected as one of the corrections officers obligated to report for duty at Facility Two on March 4, 2018 for two cycles. The Agency would provide him housing near Facility Two. Grievant said he did not want to go to Facility Two because he had been there in several years ago. Grievant said that the housing near Facility Two was filthy. Grievant said Facility Two did not allow him to work in a control booth or go into a control booth when he worked there. Grievant was advised he would be working a "7/7 schedule" while at Facility Two.
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> Grievant said he would not go to Facility Two. He stated, "We always gotta work on the floor there and we weren't even allowed to go in the booth to ask a question." The Major told Grievant that if he refused to report to Facility Two he could receive disciplinary action under the Standards of Conduct. Grievant was advised that his name could be drawn again in the future if Facility

[1] Decision of Hearing Officer, Case No. 11275 ("Hearing Decision"), Feb. 19, 2019, at 2-3.

> One was needed to provide support to Facility Two. Grievant again said he would not go to Facility Two. The meeting concluded.
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> Grievant later asked the Major what would be the disciplinary action for refusing to work at Facility Two. The Major said refusing to work at Facility Two could result in issuance of a Group II Written Notice. Grievant said he would be grieving the disciplinary action.
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> The Assistant Warden met with Grievant and told him the Assistant Warden had spoken with the Regional Administrator and that the Assistant Warden had been assured that Grievant would not be treated badly at Facility Two. Grievant continued to refuse to work at Facility Two.
>
> The Agency issued Group II Written Notices to other employees refusing to work at Facility Two.

On or about April 3, 2018, the grievant was issued a Group II Written Notice for refusal to work overtime as required.[2] The grievant timely grieved the disciplinary action and a hearing was held on December 3, 2018.[3] In a decision dated February 19, 2019, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had failed to follow a supervisor's instructions to report to work at Facility Two and upheld the issuance of the Group II Written Notice.[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 hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer erred in upholding the Written Notice charging him with refusal to work overtime as required. More specifically, the grievant claims that his assignment to Facility Two would not have resulted in his working additional hours, and that he would have instead worked the same number of hours on a different schedule. Hearing officers are authorized to make "findings of fact as to the

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[2] *See id.* at 1.
[3] *See id.*
[4] *Id.* at 1, 3-4.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] 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.[10] 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.[11] 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer assessed the evidence and concluded that the "Grievant's name was selected as one of the employees to be reassigned temporarily to Facility Two," that the "Grievant was instructed by a supervisor to report to Facility Two on March 4, 2018," and that the grievant declined to do so.[12] The hearing officer further found that there was "no evidence showing the selection process was improper" and "the Agency was within its authority to instruct Grievant to report to Facility Two," even though it "created a hardship" for the grievant.[13] As a result, the hearing officer found that the grievant's conduct justified the issuance of a Group II Written Notice because he failed to follow a supervisor's instructions.[14]

While the grievant does challenge the hearing officer's findings about his conduct, he does contend that the agency improperly described his misconduct as "[r]efusal to work overtime as required."[15] However, the description of the offense in the Written Notice itself also states that "[the grievant's] name was randomly drawn as the selected officer to report to [Facility Two], to relieve the current staff from [Facility One] who were currently there. [The grievant] verbally refused to report to [Facility Two] beginning March 4, 2018."[16] The due process memorandum delivered to the grievant prior to the issuance of the Written Notice further explains that, because the grievant refused to work at Facility Two as assigned, his conduct would be considered failure to follow a supervisor's instructions.[17]

EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy.[18] In his decision, the hearing officer properly noted that "[t]he Agency incorrectly styled the Written Notice as a refusal to work overtime. Working the same number of

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[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 3-4.
[13] *Id.*
[14] *Id.*at 4.
[15] Agency Exhibit 1 at 1-2.
[16] Agency Exhibit 1 at 1.
[17] Agency Exhibit 5 at 2. In addition to failure to follow a supervisor's instructions, the due process memorandum also inaccurately describes the grievant's behavior as a "direct refusal to work overtime as required . . . ." *Id*
[18] *E.g.*, Agency Exhibit 2 at 5, 10-11; Agency Exhibit 5.

hours at a different facility is not working overtime."[19] EEDR agrees with this analysis; any technical error in this regard does not support a conclusion that the grievant did not engage in the misconduct otherwise described warranting the issuance of disciplinary action under the circumstances presented in this case. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR 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, as is the case here.[20]

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.[21]

Mitigation

In addition, the grievant contends that the hearing officer erred in not mitigating 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]."[22] The *Rules for Conducting Grievance Hearings* (the "*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."[23] 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

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[19] Hearing Decision at 3 n.4.

[20] *See*, *e.g.*, EDR Ruling No. 2014-3884.

[21] The grievant's arguments regarding the hearing officer's consideration of the evidence could also be understood as a claim that he did not receive adequate notice of the charges against him, with the result that the hearing officer's decision to uphold the Written Notice constitutes a deprivation of due process. State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations, 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). Having reviewed the hearing record, EEDR finds that the grievant had adequate notice of the charges against him and that the charges were sufficiently set forth on the Written Notice form and in the agency's due process memorandum, and thus the grievant's arguable process claim does not serve as a basis for remand in this case.

[22] Va. Code § 2.2-3005(C)(6).

[23] *Rules for Conducting Grievance Hearings* § VI(A).

> mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[24]

Thus, the issue of mitigation is only reached if the hearing officer 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 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.[25] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[26] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In support of his position that he was disciplined more harshly than other similarly situated employees, the grievant claims that other employees at Facility One refused to work at Facility Two and were either counseled or received no corrective action, while he was issued a Group II Written Notice. The grievant further asserts that he "should not have been selected" to work at Facility Two because he had "already worked a temporary shift change [there] once before . . . ." In his decision, the hearing officer considered the grievant's argument that "the level of disciplinary action was too harsh" and concluded that "[t]he level of discipline selected by the Agency [was] consistent with how it treated other employees engaging in similar behavior and was within its authority under the Standards of Conduct."[27]

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 any mitigating factors.[28] Upon conducting a review of the hearing record, it does not appear that the evidence is sufficient to demonstrate that the agency's treatment of the grievant was different from other employees who may have been similarly situated to him, or that its decision to select the grievant to work at Facility Two was unreasonable. At the hearing, for example, the grievant testified that he was aware of several other employees who had refused to work at Facility Two and received lesser or no disciplinary action.[29] The grievant further explained that he had worked at Facility Two in 2015 and it was unfair that he was selected to work there again while newer

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[24] *Id.* § VI(B)(1).

[25] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[26] "'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.*

[27] Hearing Decision at 4.

[28] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[29] Hearing Recording at 46:53-48:28 (testimony of grievant).

employees did not have to.[30] In response, the Assistant Warden testified that, to his knowledge, all employees who refused to work at Facility Two received Group II Written Notices.[31] There is also evidence in the record to show that agency employees may be reassigned or instructed to work at other facilities due to operational needs,[32] and the Assistant Warden testified that it used the random selection method that resulted in the grievant being chosen to work at Facility Two in an attempt to be more fair to employees who are required to temporarily work elsewhere.[33]

While the grievant may disagree with the hearing officer's mitigation analysis, there is nothing to indicate that it was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EEDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion here. 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.'"[34] In this case, there does not appear to have been sufficient evidence in the record regarding the mitigating factors cited by the grievant that the hearing officer may have relied upon to support mitigation. Accordingly, EEDR declines to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR 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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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[30] *Id.* at 42:58-44:36 (testimony of grievant).
[31] *Id.*at 48:55-50:51 (testimony of Assistant Warden).
[32] Agency Exhibit 4 at 37; Hearing Recording at 22:20- 26:23 (testimony of Major).
[33] Hearing Recording at 50:56-53:59 (testimony of Assistant Warden).
[34] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[35] *Grievance Procedure Manual* § 7.2(d).
[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).