

Issue: Administrative Review of Hearing Officer's decision in Case No. 10083; Ruling
Date: July 30, 2013; Ruling No. 2014-3649; Agency: Department of Corrections;
Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2014-3649
July 30, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 10083. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10083 are as follows:¹

1. The Agency is a prison. It employed Grievant as a correctional officer prior to his termination on March 20, 2013.
2. On March 15, 2013, Grievant was on duty. About 1:15 p.m., he entered the control booth of the prison’s inmate housing unit. The Agency identifies the housing unit as POD 310. About 200 inmates reside there. While in the control booth, a heated verbal exchange erupted between Grievant and another correctional officer (“Other Correctional Officer”) who was already in the control booth upon Grievant’s arrival. A fight ensued. During the struggle, Grievant and Other Correctional Officer managed to lock themselves out of the control booth. This left the inmate housing unit unguarded, resulting in no one to control entry and exit into the housing unit. Further
3. The control booth remained without staff for several minutes.
4. At the time of this event, 196 inmates were in this area and there was mass movement of them. Several inmates observed the incident through the glass windows of the control booth. As the incident unfolded many inmates rushed to see what was happening. They were eventually deflected by Agency staff.

¹ Decision of Hearing Officer, Case No. 10083 (“Hearing Decision”), June 19, 2013 at 2-5 (some references to exhibits from the Hearing Decision have been omitted here).

5. Management collected statements from four (4) inmates about their observations.

6. Inmate 1's statement indicates that Grievant entered the control booth and confronted Other Correctional Officer. At this time the two correctional officers (Grievant and Other Correctional Officer) were yelling at each other. Other Correctional Officer moved to another side of the control booth while instructing Grievant to "leave him alone." At which time Grievant followed him and then pointed his finger in Other Correctional Officer's face. The two correctional officers then starting pushing each other. Yelling continued. On several occasions Other Correctional Officer told Grievant to leave him alone. Grievant continued to point his finger in the face of the other Correctional Officer. The two correctional officers moved to the breeze way and both ended up in the vestibule outside the control booth.

7. Inmate 2's statement denoted that while in the control booth, Grievant hit the Other Correctional Officer in his face. The two correctional officers argued and Grievant approached Other Correctional Officer and pushed him. When Other Correctional Officer tried to leave the control booth, Grievant attempted to exit before him, and the two of them ended up in the vestibule.

8. Inmate 3's statement revealed that he observed Grievant enter the control booth and when Grievant and Other Correctional Officer began to argue. Grievant then pushed Other Correctional Officer. There was no physical response to Grievant's pushing. Grievant then gestured Other Correctional Officer to enter the vestibule.

9. Inmate 4's statement indicates that he observed Grievant and Other Correctional Officer arguing in the control booth when Grievant pushed Other Correctional Officer's head. Other Correctional Officer continued operating the control panel as Grievant then walked to the entrance door of the control booth and motioned the Other Control Officer to enter the vestibule. Inmate 4's vision was then impaired because numerous inmates ran to the control booth window to observe the incident.

10. Cog Counselor was informed of the incident when an inmate came to him and stated Grievant and Other Correctional Officer were fighting. Upon arriving in the area of the control booth, Cog Counselor observed the two correctional officers arguing, but he did not see a physical altercation.

11. Treatment Officer observed Grievant and Other Correctional Officer arguing but did not see them fighting.

12. At the time of the fight, a civilian was visiting the inmates' housing unit for a meeting with Cog Counselor. The civilian's presence increased the need for adequate security.
13. The Warden thoroughly investigated the incident. This action included the Warden undertaking the following:
 - (i) interviewing Grievant and Other Correctional Officer separately and soon after the incident about what occurred;
 - (ii) viewing the surveillance footage of the incident and determining that Grievant was agitated before entering the control booth that Other Correctional Officer was occupying upon Grievant's entry;
 - (iii) considering Warden's review of the Master Pass List ("Pass List") that indicated the movement of inmates during the relevant time;
 - (iv) reviewing statements from several employees and inmates who were in the prison area during the time of the incident;
 - (v) recognizing that the source of the problem was Grievant's failure prior to the incident to review the Pass List and write down the names of the inmates who had passes to various areas of the prison. (This procedure was consistent with policy and Grievant's responsibility on the day of the incident.
14. Through his investigation, the Warden determined Grievant and Other Correctional Officer were equally responsible for the occurrence.
15. The Hearing Officer finds the evidence shows Grievant played a substantial role in starting the fight and that the incident resulted in a major security breach.
16. Management issued Grievant and Other Correctional Officer Group III Written Notices and terminated them.
17. Specifically, the Agency terminated Grievant for the violation of a safety rule.
18. Agency policy 135.1V(D) provides that violating safety rules where there is a threat of physical harm is a Group III Offense. Also, the policy provides that Group III Offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal.

The Agency policy also indicates that safety rules of major importance are those intended to prevent serious danger to the workplace or to other employees.

19. Agency policy also required the control booth to be attended by a correctional officer at all times to foster a secure environment in the housing unit.

The evidence is not sufficient to determine whether Grievant or Other Correctional Officer was in charge of the control booth at the time of the altercation. However, Grievant was aware of the requirement that the control booth must be attended at all times to secure the prison.

20. Grievant had received training regarding the Agency's safety procedures prior to the incident.

21. Grievant had accumulated no Written Group Notices for conduct infractions at the time of the incident. Also, in the past, the Agency had recognized Grievant as the employee of the month.

22. The Agency rated Grievant as a "contributor" on his most recent performance evaluation.

The agency issued the grievant a Group III Written Notice of disciplinary action with termination for a safety rule violation.² The grievant initiated a grievance challenging the disciplinary action,³ and on June 19, 2013, the hearing officer issued a decision upholding the Written Notice and termination.⁴ The grievant now requests an administrative review by EDR.

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

Findings of Fact

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact based on the weight and credibility that she accorded to evidence presented and testimony given at the hearing and the facts she chose to include in the decision.

² Hearing Decision at 1.

³ *Id.*

⁴ *Id.* at 1, 8.

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

⁶ *See Grievance Procedure Manual* § 6.4(3).

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰ 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 violated “a safety rule of major importance” warranting termination.¹¹ To make this finding, the hearing officer relied upon testimony by agency employees and documentation related to the agency’s investigation of the underlying incident.¹² The hearing officer specifically noted that she was “cognizant of [g]rievant’s claim that he did not instigate the altercation, that he was not responsible for operating the control room at the time, and, further, that the statements of 4 inmates are not credible as they are inconsistent,” but that based on the evidence presented, the agency had met its burden of showing that the grievant had engaged in the alleged misconduct.¹³ While the grievant disagrees with the hearing officer’s conclusion, that disagreement does not in itself constitute a basis for overturning the hearing officer’s decision. 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.

Mitigation

The grievant also appears to challenge 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 [EDR].”¹⁴ 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

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Hearing Decision at 7.

¹² See Hearing Decision at 2-5.

¹³ *Id.* at 7.

¹⁴ Va. Code § 2.2-3005(C)(6).

actions by agency management that are found to be consistent with law and policy.”¹⁵ 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.¹⁶

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.¹⁷ EDR will review a hearing officer’s mitigation determination for abuse of discretion,¹⁸ and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

The grievant appears to suggest in his request for administrative review that the hearing officer should have mitigated the disciplinary action because he had no previous disciplinary action and had previously performed well in the workplace. The hearing officer considered these factors in her decision,¹⁹ while also noting the aggravating factor that the incident for which the grievant was disciplined “took place in the presence of hundreds of inmates.”²⁰ Although it cannot be said that satisfactory work performance is *never* relevant to a hearing officer’s decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer’s finding that an agency’s disciplinary action exceeded the limits of

¹⁵ *Rules* § VI(A).

¹⁶ *Rules* § VI(B). 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).

¹⁷ *E.g., id.*

¹⁸ “‘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.*

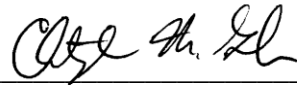
¹⁹ Hearing Decision at 7-8.

²⁰ *Id.* at 8.

reasonableness.²¹ The weight of an employee's 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, the grievant's otherwise satisfactory work performance is not so extraordinary as to justify mitigation of the agency's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination 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 that basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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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²¹ See EDR Ruling No. 2009-2091; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

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

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

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