Issue: Administrative Review of Hearing Officer's Decision in Case No. 10104; Ruling Date: July 26, 2013; Ruling No. 2014-3656; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2014-3656
July 26, 2013

The Department of Behavioral Health and Developmental Services (the "agency") 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 10104. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts in Case Number 10104, as found by the hearing officer, are as follows:[1]

> The Agency employed Grievant as a [forensic mental health technician ("FMHT")], and she was working with two other FMHTs when patients were being moved from one ward to another building. The Grievant was assigned the bathroom post, and that post includes the responsibility for "sweeping" the building to make sure no patients are left behind. The Grievant relied on another FMHT whom she understood would make the sweep of one hallway while the Grievant swept the other hallway to make sure no patients were left behind. A patient was left behind in his room on the hallway the Grievant thought was secured by her co-worker. As a result, the Grievant was issued a Group III Written Notice with termination.
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> The current written notice for the Grievant charged:
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> Violation of DI-201: Patient Neglect; While assigned to the bathroom monitor posts, you were found to be negligent when you failed to conduct a complete check of the bathrooms, timeout room, seclusion room, corners of the dayrooms, porches, group rooms, and bedrooms to assure that all patients scheduled to leave were accounted for. A patient was left unsupervised for approximately four (4) minutes as a result of your negligence.

[1] Decision of Hearing Officer, Case No. 10104 ("Hearing Decision"), June 27, 2013, at 4-6 (citations omitted).

As for circumstances considered, the Written Notice, in Section IV, stated:

> DHRM Policy 1.60: Standards of Conduct, states that Group III level offenses "include acts of misconduct of such severe nature that a first occurrence normally should warrant termination." You currently have an active Group III written notice for Violation of DI-201 on your record, therefore, the Facility Director was unable to find justifiable reason to mitigate this disciplinary action.

The Agency's witnesses testified consistently with the charge in the Written Notice and the Grievant confirmed the essential facts.

The abuse and neglect investigator testified to his investigation and report. The hospital director testified that the Grievant's record of an active Group III Written Notice weighed against mitigation of the offense to less than termination. For a founded occurrence of neglect, the director is required to issue a Group III Written Notice with termination unless she first obtains permission to issue a lesser level of discipline. In this case, the director did not request permission to levy lesser discipline under CSH Policy RTS-15a, described above. The hospital director emphasized the high risk patients involved and pointed to the Grievant's record of an active Group III Written Notice as aggravating factors outweighing any mitigating factors. The hospital director also testified that another staff member was disciplined for this incident, but, based on the specific case and disciplinary record, the policy "default" discipline of Group III and termination was mitigated to a lesser level. The hospital director testified, consistent with the indication on the Written Notice, that the level of the Grievant's prior Written Notice was a consideration in the mitigation analysis.

The Regional Human Resources Director testified that Written Notices are not removed from employees' records when the Notices become inactive. The Standards of Conduct, at G.1.b., states:

> Written Notices that are no longer active shall not be considered in an employee's accumulation of Written Notices; ***however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated****. For example, misconduct which if a "first" offense would normally be addressed through counseling may warrant a Written Notice when the employee has an inactive Notice on file for the same misconduct.*

Emphasis in original.

The Grievant testified that she was aware of CSH Policy P-11 and her responsibility to check the building to make sure no patient was left behind. The

> Grievant testified that she was trained to work as a team, and she understood from her co-worker, L.H., that the co-worker was sharing the responsibility. L.H.'s written statement confirmed that she "had precautions at the time and was doing a round to make sure all patients were in the front to go to opposite ward. As I was walking down the hallway to do a round I was called by someone on the ward. I do not remember if it was a staff or patient but I went back to the dayroom."
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> Regarding the prior Written Notice (issued January 25, 2010), the Grievant testified that she was notified that the Notice was mitigated down from a Group III to a Group II with three days suspension. Her copy of the Written Notice stated such. The inactive date on the Notice was three years later—consistent with a Group II Written Notice. However, the Notice was later corrected by the Agency in handwriting to show that it remained a Group III Written Notice but only the termination was mitigated down to three days suspension. The hand written change, however, did not change the inactive date from three to four years. The Grievant denied receiving the letter, dated February 3, 2010, describing the January 25, 2010, Written Notice as a Group III. The Grievant testified that her understanding was that her record showed only a Group II Written Notice, and that she was surprised to learn during the course of the present discipline that the Agency considered the prior Written Notice a Group III.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant failed to follow agency policy, finding in the affirmative.[2] He also considered the evidence regarding the agency's mitigation of the Written Notice issued in 2010 and concluded that the record did not "support [the existence of] a prior, active Group III Written Notice."[3] The hearing officer further determined that the agency's mitigation consideration was "flawed" because the Group III Written Notice at issue "specifically [relied] on" the existence of an active, Group III Written Notice in upholding the grievant's termination.[4] As a result, he determined that the agency's mitigation analysis "[exceeded] the bounds of reasonableness" and reduced the Group III Written Notice with termination to a Group II Written Notice with ten days' suspension and ordered the grievant reinstated with full back pay, less the ten-day suspension.[5] The agency now seeks administrative review from 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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not

[2] *Id*. at 6.
[3] *Id*. at 7-8.
[4] *Id*.
[5] *Id*. at 8-9.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[7]

Inconsistency with State Policy

The agency's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy, specifically DRHM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed here.

Mitigation

The agency challenges the hearing officer's decision to mitigate its disciplinary action from a Group III Written Notice with termination to a Group II Written Notice with ten days' suspension. By 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]."[9] The *Rules for Conducting Grievance Hearings* (the "*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."[10] 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,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[11]

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.

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

[7] *See Grievance Procedure Manual* § 6.4(3).
[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(C)(6).
[10] *Rules* at § VI(A).
[11] *Id.* at § VI(B).

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.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The hearing officer concluded that the agency's mitigation analysis exceeded the limits of reasonableness because the present Written Notice "specifically [relied] on a prior, active Group III Written Notice," and that because of the inconsistencies in the prior Written Notice, the agency's mitigation determination was "tainted."[14] He also noted that "the circumstances of the [g]rievant relying on a co-worker's representations" and evidence of the grievant's prior satisfactory work performance were mitigating factors.[15] The agency argues that, whether the 2010 Written Notice was considered an inactive Group II or an active Group III, its decision not to mitigate did not exceed the limits of reasonableness.

DHRM Policy 1.60, *Standards of Conduct* (the "*Standards of Conduct*"), states that while inactive Written Notices cannot ordinarily be used for accumulation of disciplinary action, an "inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated."[16] In other words, an inactive Written Notice always remains in an employee's personnel file and, in cases of repeated conduct, may be used to aggravate subsequent disciplinary action. The agency presented testimony at the hearing that it considers inactive Written Notices for repeated behavior in determining whether to mitigate disciplinary actions consistent with these provisions of the *Standards of Conduct*.[17] Considering, for purposes of this analysis only, the prior Written Notice as an inactive Group II Written Notice, the agency could have appropriately considered it as an aggravating factor because it represented a prior incident of similar conduct.

Although not stated in this manner, the hearing officer has essentially concluded that, had the agency considered the prior 2010 Written Notice as a Group II, it would have mitigated her disciplinary action from termination to some lesser punishment. Indeed, without such a finding, EDR is unclear as to the justification of the hearing officer's ruling in this case.[18] Where an

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[12] 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).

[13] "'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.*

[14] Hearing Decision at 7-8.

[15] *Id*. at 8-9.

[16] *Standards of Conduct* at § G(1)(b).

[17] Hearing Record at 34:45 through 36:20.

[18] Whether the agency may have handled the documentation of the prior Written Notice properly is not relevant in and of itself to whether the disciplinary action at issue in this case should be mitigated. The impact of the documentation is only relevant in determining the status of the prior Written Notice as part of the grievant's prior disciplinary history in the case at hand.

agency is found to have had a "flawed" mitigation analysis, the hearing officer does not have authority to mitigate unless the Written Notice can be shown to be unsupported by the record or the resulting disciplinary action exceeded the limits of reasonableness.[19] In short, there would need to be record evidence to support a finding that, upon removal of the "flaw" from consideration, the disciplinary action taken was inconsistent with the agency's normal practice in other similarly situated cases, i.e., inconsistent disciplinary action. However, the evidence in the record does not support such a finding in this case.

EDR's review of the record finds no evidence to support a finding that the agency would have issued a Group II Written Notice with a ten-day suspension had the 2010 Written Notice been viewed as a Group II. Rather, a witness confirmed that the agency always considers prior founded incidents of abuse or neglect in determining whether to mitigate, and that consequently the prior Written Notice would have been taken into account regardless of its severity or status as active or inactive.[20] Furthermore, the grievant has presented no evidence that the agency failed to appropriately consider the existence of any other mitigating circumstances, such as the details of the incident for which she was disciplined and her prior satisfactory performance. While the factual record in this case may reflect that the agency's mitigation decision was fairly debatable, particularly with respect to the reliance on and severity of the prior Written Notice, such a decision is, by definition, within the bounds of reason and thus not subject to reversal by a hearing officer.[21]

While the agency "undeniably could have justified or exercised lesser discipline" in the event that the prior Written Notice was an inactive Group II and not an active Group III, a hearing officer "must give due weight to the agency's discretion in managing and maintaining employee discipline" and recognize that his function is only to "assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."[22] EDR does not agree that the facts cited by the hearing officer, by themselves, place the agency's mitigation decision outside the "tolerable limits of reasonableness."[23] For the reasons stated above, EDR concludes that the hearing officer abused his discretion in mitigating the disciplinary action. Accordingly, the hearing decision must be remanded for reversal of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling.

Hearing Officer's Consideration of the Evidence

The agency has also essentially argued that the hearing officer's consideration of the evidence was deficient, asserting that he made improper findings of fact and based his decision on "[i]nvalid [a]ssumptions that were not [p]art of the [r]ecord." EDR agrees that the 2010 Written Notice was not a qualified matter before the hearing officer and, thus, any factual findings related to that Written Notice are limited only to and for the purpose of the hearing

[19] *See* EDR Ruling No. 2010-2465 at n.9.
[20] *Id*. at 23:45 through 25:10, 29:30 through 30:30.
[21] *See*, *e.g.*, EDR Ruling No. 2010-2465.
[22] *Rules* at § VI(B)(2).
[23] *See id.*

officer's consideration of mitigating factors as to the Written Notice actually at issue.[24] Because this hearing decision is being remanded for reversal of the hearing officer's mitigation determinations and, based on EDR's analysis above, whether the 2010 Written Notice was a Group III or a Group II is essentially irrelevant to that analysis (the result appears to be the same in either instance), this issue is moot and need not be further addressed in this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing decision must be remanded for reversal of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling. 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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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[24] *See, e.g., Rules for Conducting Grievance Hearings* § I.
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).