Issue: Administrative Review of Hearing Officer's Decision in Case No. 10114; Ruling Date: August 5, 2013; Ruling No. 2014-3664; 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 2014-3664
August 5, 2013

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 10114. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10114 are as follows:[1]

> The Agency employed Grievant as a corrections officer, with approximately 3 years of service with the Agency. The Written Notice charged:
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> > That on or about 4/15/2013 you did pass notes between two offenders at the offenders' request. You admitted to this fact. Further, that you also took a CD player from one offender in order to give it directly to another offender, in violation of procedure and instructions given by a supervisor.
>
> The facility warden testified that the facility is medium security level, with a population of serious offenders, with known activity of five or six gangs. The warden testified that contraband and fights are a constant threat to the security of the facility, and that the facility personnel, including the Grievant, is given training on these policies. The warden testified that passing notes is a specific security concern because of unknown content and communication that can spread or cause disruption, damage or injury. The warden conducted a fact-finding meeting with the Grievant and others on April 19, 2013. At the fact-finding meeting, the Grievant admitted to the passing of a note from an offender confined to the segregated housing unit to another offender. The Grievant further admitted that he accepted a CD player from an offender for transfer directly to another offender. The warden testified that the offenders involved are known members of a gang.

[1] Decision of Hearing Officer, Case No. 10114 ("Hearing Decision"), July 12, 2013, at 2-3. Some references to exhibits have been deleted.

The warden testified that all fraternization offenses he has handled resulted in a Group III Written Notice with termination, save one. The one exception was a situation when an officer failed to report an incident when an offender shoved the officer. No contraband was involved in this one exception.

The institutional investigator testified to his investigation of the offenses. The investigator testified that the Grievant admitted to the charged behavior, and confirmed that the offenders involved in Grievant's conduct were known gang members. The investigator testified that offenders constantly test officers to see how far they can go, and that passing notes is a big security risk to the staff and offenders. The investigator also testified that he had received information that the gang was recruiting the Grievant, but such allegation was never substantiated.

The Grievant did not challenge the Agency's assertion that he was appropriately trained on the policies prohibiting the conduct charged. The Grievant challenged the conduct of the April 19, 2013, fact-finding meeting, asserting that he was forced to remove his shirt so his tattoos could be viewed. The warden testified that the Grievant's tattoos were questioned, but the Grievant voluntarily removed his shirt to show his tattoos.

In his July 12, 2013 decision, the hearing officer upheld the agency's issuance of a Group III Written Notice with termination.[2] The grievant 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."[3] 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 hearing officer correct the noncompliance.[4]

The grievant appears to contend that the hearing officer did not properly consider potential mitigating factors in this case such as his lack of previous disciplinary action and otherwise satisfactory work performance. 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]."[5] 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

[2] *Id.* at 4.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005(C)(6).

policy."[6] 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.[7]

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 difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[8] EDR will review a hearing officer's mitigation determination for abuse of discretion,[9] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Here, the facts upon which the hearing officer relied support the finding that termination for the Group III offense was appropriate and did not exceed the limits of reasonableness due to the severity of the offense, which constituted a breach in the agency's policies regarding safety and security. In reaching his conclusion that mitigation was unwarranted, the hearing officer explained:

> The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant and all security personnel must interact with a challenging population of inmates, and it is incumbent, for obvious security reasons, for staff conduct to adhere to strict expectations. The Grievant's conduct put the Agency at risk, and, while strict in its application, warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating

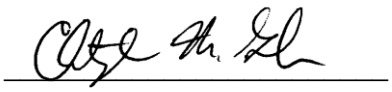
[6] *Rules* § VI(A).
[7] *Id.* at § VI(B) (citations omitted).
[8] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[9] "'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.*

> circumstances that allow the hearing officer to reduce the Agency's action regarding the Group III Written Notice as outside the bounds of reasonableness.[10]

We find unpersuasive the grievant's argument that his lack of previous disciplinary action and otherwise satisfactory performance should have been considered as mitigating factors. While it cannot be said that either a lack of previous disciplinary action or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[11] The weight of these factors 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, neither the grievant's previous lack of disciplinary action nor his otherwise satisfactory work performance are 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

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.[12] 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.[13] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[14]



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[10] Hearing Decision at 4.
[11] *See* EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[12] *Grievance Procedure Manual* § 7.2(d).
[13] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[14] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).