Issue: Administrative Review of Hearing Officer's Decision in Case No.10124; Ruling Date: August 15, 2013; Ruling No. 2014-3667, 2014-3668; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Numbers 2014-3667, 2014-3668
August 15, 2013

The grievant and the Department of Corrections (the "agency") have both 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 10124. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10124 are as follows:[1]

> The Department of Corrections employed Grievant as a Corrections Sergeant at one of its Facilities until his demotion to Corrections Officer with a five percent disciplinary pay reduction effective April 20, 2013. The purpose of his position as Corrections Sergeant was to "provide security, custody, and control of adult offenders resulting in a safe and secure environment for staff, inmates and citizens of the Commonwealth of Virginia." He has been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Officer K lent Officer D money. Officer K sent Officer D several text messages that Officer K interpreted to mean that if she had sex with Officer K, Officer K would forgive the debt. In December 2012, Officer D told Grievant about the text messages and how she interpreted the messages.
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> In December 2012, Officer D told Grievant that Officer K approached her in the parking lot of the Facility and confronted her about having a relationship with him. Officer D believed Officer K's actions were sexual harassment.

[1] Decision of Hearing Officer, Case No. 10124 ("Hearing Decision"), July 22, 2013, at 2-3. Some references to exhibits from the Hearing Decision have been omitted here.

> Upon hearing from Officer D about the two incidents, Grievant advised Officer D to report Officer K to the Agency for further investigation. Two days later, Officer D informed Agency managers of her complaints against Officer K. Grievant did not separately report Officer D's allegations to the Agency.
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> At some point in time, Grievant began a romantic relationship with Officer D. He did not inform Agency managers that he had begun a romantic relationship with Officer D. The Agency received two anonymous letters indicating Grievant was in a relationship with Officer D. When the Agency investigated Officer D's allegations against Officer K, it began investigating whether Grievant and Officer D were in a relationship. On February 28, 2013, Grievant admitted to the Investigator and Warden that he was in a romantic relationship with Officer D.

On April 2, 2013, the agency issued the grievant a Group III Written Notice of disciplinary action with a demotion and pay reduction.[2] The Written Notice charged the grievant with a failure to report an incident of sexual harassment and failure to report his relationship with Officer D.[3] In his July 22, 2013 hearing decision, the hearing officer reduced the disciplinary action to a Group II Written Notice with a ten work-day suspension.[4] Both parties now seek 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."[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 hearing officer correct the noncompliance.[6]

Written Notice

The agency argues that the hearing officer erred in interpreting the Written Notice to include charges relating to the grievant's failure to report his romantic relationship Officer D and the alleged sexual harassment, but not to include the grievant's having engaged in the underlying romantic relationship. Rather, the agency contends the Written Notice "clearly cited" the grievant with engaging in a romantic relationship with a subordinate in violation of policy and failing to report sexual harassment.

As an initial matter, we note that the agency did not raise this argument at hearing. To the contrary, the warden who issued the Written Notice was questioned extensively during the

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[2] *Id.* at 1.
[3] *Id.;* Agency Exhibit 1 at 1.
[4] Hearing Decision at 6.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4.

hearing about whether the agency had in fact disciplined the grievant for merely a failure to report or for the romantic relationship itself. During this questioning, the warden agreed that the grievant had not been charged under the policy provision governing romantic relationships, but had instead only been charged for the failure to report.[7] Notwithstanding the agency's failure to raise this argument at hearing, we will address it here.

While we do not disagree that the Written Notice may be subject to more than one interpretation, we believe that the plain language of the Written Notice supports the hearing officer's reading.[8] Further, to the extent there is any ambiguity in the language of the Written Notice, the warden's testimony clearly indicates that the intent in issuing the Written Notice was merely to charge the grievant with a failure to report. Other record evidence also shows that when the Written Notice was issued, it was intended only to charge the grievant with his failure to report. First, the Written Notice includes an attachment which makes reference to the policy provision on reporting romantic relationships, but not to any other policy provisions.[9] In addition, during the second step of the grievance process, the warden stated, "I issued [grievant] a Group III Written Notice…for the about [sic] stated issues of failing to report an alleged harassment issue and failing to report a romantic relationship."[10] Given the plain language of the Written Notice, considered in conjunction with this other evidence of the agency's intent in issuing the Notice and the warden's direct testimony, we cannot find the hearing officer erred in his interpretation.

Inconsistency with State and Agency Policy

Both the grievant and the agency assert that the hearing officer erred in his application of state and agency policy. The grievant argues that the hearing officer erred in finding that agency policy required him to report an alleged harassment incident about which he learned while off-duty. He further alleges that the hearing officer erred in finding that he had a duty under policy to report his own romantic relationship. In contrast, the agency argues that the hearing officer

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[7] Hearing Recording at 1:28:55 through 1:29:52; 1:48:06 through 1:48:52.

[8] The Written Notice stated, "On February 28, 2013 during an investigation [] it was found that [grievant] failed to report a [sic] alleged harassment incident to any supervisor at [facility]. This is a violation of OP 101.2 section VII.D. Which states 'complaints should be reported by the manager or supervisor to the HR office.' Further [grievant] failed to report a consensual romantic relationship with a corrections officer at [facility]. This is a violation of OP 101.3 section VI E #2e. [Grievant] did admit to the above relationship." Agency Exhibit 1 at 1.

The agency attempts to argue that the reference to section "VI E #2 e" was in error, and that the correct citation should have been to "101.3(IV)(E)(2)(a)." While the agency is correct that there was a typographical error, in that the section apparently intended to be cited was (IV) rather than (VI), we do not agree, in light of the warden's testimony, that the agency's intent was to charge the grievant with a violation of subsection (a). The subsection (e) identified in the Written Notice provides that employees "should advise the work unit head of their involvement to address potential current or future employment issues." Agency Exhibit 7 at 4. In contrast, subsection (a) contains a prohibition on supervisors dating their subordinates and provides that violation of the subsection could be treated by the agency as a Group I, II or III offense. *See id*.

[9] Agency Exhibit 1 at 2. The following is the text of the attachment, in its entirety: "Policy 101.3 states 'Regardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential current or future employment issues.'"

[10] Agency Exhibit 2 at 8.

improperly found that the conduct charged on the Written Notice cannot sustain a Group III Written Notice under state or agency policy. With respect to this assertion, to the extent the agency argues that, as a matter of policy interpretation, the hearing officer should have upheld the discipline on the basis of a violation of Operating Procedure 101.3 Section IV(E)(2)(a), for the reasons previously stated, that issue was not before the hearing officer. The agency also asserts that the two separate, independent policy violations set forth on the Written Notice warranted elevation to a "higher level offense."[11]

The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] Both parties have requested such a review. Accordingly, their policy claims will not be addressed further in this review.

Pre-Disciplinary Due Process

Fairly read, the grievant's request for administrative review also argues that he was denied pre-disciplinary due process protections through the agency's use of a "false report" in issuing the Written Notice and because of typographical errors on the Written Notice form.[13] In *Cleveland Board of Education v. Loudermill*, the Supreme Court explained that, prior to certain disciplinary actions, the Constitution generally guarantees those with a property interest in continued employment absent cause (i) the right to oral or written notice of the charges, (ii) an explanation of the employer's evidence, and (iii) an opportunity to respond to the charges, appropriate to the nature of the case.[14] 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."[15]

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[11] While not necessarily dispositive, we note that DHRM has previously held in its administrative review in Hearing No. 8233 that an agency may not aggregate multiple Group II offenses and charge them as a single Group III.

[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

[13] The Written Notice charged the grievant with a violation of Operating Procedure 101.2 Section VII(D)in failing to report the alleged sexual harassment. Agency Exhibit 1 at 1. This reference was apparently to a previous version of Operating Procedure 101.2. Hearing Recording at 1:23:19-1:26:56. Comparable language appears in the current policy under Section IV(D)(4). The Written Notice also charged the grievant with violating Operating Procedure 101.3 Section VI(E)(2)(e). Agency Exhibit 1 at 1. The provision apparently intended to be cited was Section IV(E)(2)(e). *See* discussion *supra* note 8.

[14] 470 U.S. 532, 545-46 (1985). State policy requires that:

> Prior 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). In addition, 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."

[15] *Loudermill*, 470 U.S. at 545-46.

In this case, the grievant received a copy of the investigative report on June 13, 2013.[16] He was also aware of the substance of the charges against him, as described on the Written Notice, notwithstanding the typographical errors. The grievant then had a full hearing before an impartial decision-maker, an opportunity to present evidence, and an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker.[17] Indeed, there is no indication that the grievant has or could reasonably argue that he was not aware of the specifics of the charges against him prior to the hearing. 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. We recognize that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[18] However, we have long been persuaded by the reasoning of many jurisdictions that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[19] Accordingly, we cannot find that the hearing officer failed in not finding the grievant suffered a due process violation as a matter of the grievance procedure. We note, however, that these issues necessarily implicate questions of law. As such, the grievant may seek to appeal the final hearing decision to the appropriate Circuit Court on the basis that the decision is contradictory to law.[20]

Admission of Audio Recording

The grievant argues that the hearing officer erred in not admitting an audio recording of the grievant's interview with the investigator. A review of the record indicates that, contrary to the grievant's assertion, the hearing officer admitted the audio recording into evidence and advised the grievant that he would consider the recording in making his decision.[21] The grievant did not object at hearing to the admission of this evidence for the hearing officer's subsequent review.[22] In addition, the grievant had the opportunity to question the investigator extensively regarding the interview and the subsequent reports made by the investigator. Finally, the grievant has presented no evidence that would suggest that the hearing officer disregarded the recording in reaching his decision. Even assuming, however, that the hearing officer erred in his consideration of the tape, the error was harmless, as the "false statements" identified by the grievant do not contradict the evidence that the grievant did not in fact report the alleged harassment or his relationship. Accordingly, we find no basis to remand the hearing decision on this basis.

Hearing Officer's Consideration of the Evidence

In addition, the grievant's request for administrative review challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence

[16] Grievant's Exhibit A-7.
[17] *See, e.g.,* Detweiler v. Commonwealth of Virginia, 705 F.2d 557, 559-61 (4th Cir. 1983).
[18] *See* Cotnoir v. Univ. of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").
[19] *See* EDR Ruling No. 2013-3572 (and authorities cited therein); EDR Ruling No. 2011-2877.
[20] *See* Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[21] Hearing Recording at 2:05:37-2:06:02.
[22] *Id.* at 30:14-30:44; 2:05:37-2:06:02.

presented and testimony given at the hearing and the facts he chose to include in the decision. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[23] and to determine the grievance based "on the material issues and grounds in the record for those findings."[24] 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.[25] 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.[26] 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, there is sufficient evidence to support the hearing officer's findings that the grievant failed to report both his relationship with Officer D and her allegations of sexual harassment. In particular, testimony showed that the grievant did not advise the warden of his relationship until after the investigation of Officer D's sexual harassment complaints, and that he did not advise higher management of those complaints.[27] 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.

Mitigation

The grievant also 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 [EDR]."[28] 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

[23] Va. Code § 2.2-3005.1(C).
[24] *Grievance Procedure Manual* § 5.9.
[25] *Rules for Conducting Grievance Hearings* § VI(B).
[26] *Grievance Procedure Manual* § 5.8.
[27] The grievant notes that the hearing officer erroneously stated that the grievant had argued that he did not report his romantic relationship because doing so would render the complaint worthless and "introduce a disparaging element into the complaint." Hearing Decision at 4. While we agree with the grievant that he in fact argued that he did not report the sexual harassment complaints (rather than his own relationship) for this reason (*see* Hearing Recording at 1:39:42-1:47:17), any error on the hearing officer's part regarding this issue was harmless. The unrebutted evidence shows that the grievant did not report his relationship with Officer D until after her sexual harassment complaints were being investigated and that he did not report those complaints to higher management. Whether this conduct constitutes a violation of policy sufficient to sustain a Group II Written Notice is a policy issue which must be determined by DHRM.
[28] Va. Code § 2.2-3005(C)(6).

that are found to be consistent with law and policy."[29] 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.[30]

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 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.[31] EDR will review a hearing officer's mitigation determination for abuse of discretion,[32] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the hearing officer found that the agency had failed to meet its burden of proof and reduced the Group III Written Notice issued by the agency to a Group II with a ten-day suspension.[33] The grievant argues in his request for administrative review that the hearing officer should have mitigated the disciplinary action below the Group II level, based on his past service with this agency, his prior performance, and honesty in the investigation. Although it cannot be said that these factors are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which they could adequately support a hearing officer's finding that a disciplinary action exceeded the limits of reasonableness.[34] The weight of an employee's past work performance, length of service and conduct during an investigation will

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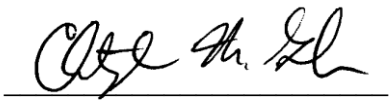
[29] *Rules* § VI(A).
[30] *Id*. at § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).
[31] *E.g.*, *id*.
[32] "'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.*
[33] Hearing Decision at 5-6.
[34] *See* EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

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 other conduct and performance-related factors become. In this case, these factors are not so extraordinary as to justify mitigation of a Group II Written Notice with a ten-day suspension. 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, we decline to disturb the hearing officer's decision. 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.[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]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

[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).