Issue: Administrative Review of Hearing Officer's Decision in Case No. 10062; Ruling Date: September 16, 2013; Ruling No. 2014-3675; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2014-3675
September 16, 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 10062. For the reasons set forth below, EDR will not disturb the hearing decision.

Case Number 10062 involved two consolidated grievances, regarding two separate Group II Written Notices issued to the grievant on October 2, 2012 and January 9, 2013, designated by the hearing officer as (A) and (B), respectively. In the July 23, 2013 hearing decision, the hearing officer upheld the agency's issuance of both Group II Written Notices.[1] The grievant's request for administrative review challenges the hearing decision as to both matters.

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."[2] 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.[3]

Case 10062(A) – October 2, 2012 Written Notice

The relevant facts as set forth in Case Number 10062 (A) are as follows:[4]

> The Grievant is a long time employee for the Agency—a lieutenant and shift commander. The Written Notice charged:
>
> > On June 25, 2012, the Gang/Internal Management Unit conducted an investigation into the suicide attempt that occurred on your shift on June 23, 2012. The investigation found you in violation of a directive by Captain [D] written June 20, 2012. It stated that "Staff are to remain in the pod at all times." It also stated that supervisors would be held accountable under the

[1] Decision of Hearing Officer, Case No. 10062 ("Hearing Decision"), July 23, 2013, at 9, 12.
[2] Va. Code §§ 2.2-1202.1(2), (3), (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Hearing Decision at 4-7 (some references to exhibits from the Hearing Decision have been omitted here).

> Standards of Conduct if they had any knowledge of residents left unsupervised. The investigation revealed that on two occasions that 8 JCO's were on break at the same time, leaving pods unsupervised. This warrants the issuance of this Group II written notice. Any further disciplinary action could result in termination.

As for circumstances considered, the Written Notice referenced the Grievant's work performance and longevity.

During the Grievant's shift on June 23, 2012, there were 15 Juvenile Corrections Officers ("JCO's"), the Grievant, and three Officers in Training ("OIT's"). There were three buildings open, two with four pods, and one with three pods. This means that in the buildings, 11 pods were occupied and thus, there was a need for 11 JCO's to maintain supervision. In addition, there were two pods occupied in detention (a/k/a "ASU") and then at or about 11:00 p.m., there was also a resident housed in that same area in Isolation. Thus, there needed to be at least two JCO's at all times in this area, and possibly three. Finally, there needed to be one staff at all times in Master Control. Thus, while there were 15 JCO's working, there was an immediate need for 14 JCO's to comply with Agency policy and procedure that residents be supervised at all times.

Between 11:00 and 11:15 pm on the night of June 23, 2012, there were ten adults leaving the building. The exact identity of the individuals was not possible from the video, so assuming that all three OIT's took their breaks at this time, and one was the Grievant, that left six JCO's leaving the building at one time. JCO N testified that he might have been doing perimeter check, or he might have been taking a break, but the documented perimeter check indicated it was done about one hour later. JCO N was not certain about his whereabouts that night, but he agreed he was not assigned to any particular unit and, thus, was an available "floater" for the evening, and could have been used wherever leadership put him, including coverage for JCO's taking their breaks.

There were a total of 19 staff in the facility (15 JCO's, the Grievant, and three OITs) the night of June 23, 2012. To determine the number of JCO's left in the facility, the Agency asserts that one need only to look at the total number of adults in the facility and subtract the number leaving on video (while giving the Grievant the benefit of the doubt by not counting the 3 OIT's). Thus, the Agency submits, between 11:00 and 11:15, the following is shown:

> On video, 10 adults leave between 11:00 and 11:15. Assuming all 3 OIT's are on video leaving then and account for the Grievant leaving as well, at least, 6 JCO's leave the facility between 11:00 and 11:15
>
> . . . .
>
> There were 15 JCO's on duty that evening. Six (6) JCO's leave the facility. This left 9 JCO's in the facility.

> . . . .
>
> There were 14 spots to staff (11 in the buildings, 2 in detention and one in Master Control). If there were 2 JCO's in detention and 1 in master control, as everyone testified there had to be, it would leave 6 JCO's left to cover 11 pods.
>
> . . . .
>
> Thus, at best, 6 JCO's were supervising 11 pods, leaving, at least, 5 pods unattended.
>
> . . . .

This same scenario happened at the 2:00 hour when nine adults exited the front of the building. The Agency asserts it is highly unlikely and improbable that three of those leaving were OIT's again, and indeed the Grievant seemed to have been able to identify all of them as JCO's. But, even giving the Grievant the benefit of the doubt, the Agency asserts the following is shown:

> 9 adults leave minus 3 OIT's = 6 adults who left, minus the Grievant = 5 JCOs out of the building at or about 2:00 a.m. JCO N testified that he was a third man in detention at this time of the evening due to the resident being in isolation, although there is no evidence that a third man was required.
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> This means that of the 15 JCO's that night, three were stationed in detention and one was in master control.
>
> 15 JCO's - 4 JCO's (three in detention and one in master control) = 11 JCO's left to man the 11 pods in the three buildings. At least five of those eleven exited through the front door, leaving six JCO's to cover 11 pods in 3 buildings.
>
> . . . .
>
> This is without question, and unequivocally, a violation of the Agency's Standard Operating Procedures and policy, and Captain D's orders of June 20, 2012.

. . . . In addition, the Agency's Conditions of Employment states that, "Each staff member is required to follow the COC and all written and verbal instructions given by supervisors."

Post Order 1 states that the responsibility of the Shift Commander is to "Ensure staff and residents are in compliance with the [Facility] Program and

related security procedures, standards and expectations" and "Perform any and all duties as assigned by your supervisor or higher authority."

Agency Standard Operating Procedure and policy, IOP 212, states that the pods must be directly supervised at all times. The policy requires that all staff must maintain the sight and supervision of the areas assigned. In addition, and important to this case, is that staff cannot leave their assigned area without notifying the shift commander, the Grievant.

The Grievant was reminded of the policy and that the facility would, in the future, maintain strict compliance on February 29, 2012, April 25, 2012, and on June 20, 2012, in a memo from his direct supervisor, Captain D. The Grievant was aware of the supervisor's instructions since, on that very night, the Grievant read the June 20th memo to his staff.

The Asst. Superintendent admitted in the hearing that the concurrent breaks shown on the video demonstrated a violation of policy. He acknowledged that the math that night did not support compliance with the Agency's requirements and expectations for supervision of the pods and residents. Given there was a floater that night, the pods did not need to be left unattended for the JCO's breaks. However, the Agency asserts that mathematically there were not three JCO's in all the buildings at all times.

The Grievant asserted that he was unaware that pods were unattended and unsupervised. However, the evidence established that JCO's do not leave their assigned posts without the shift supervisor's (the Grievant's) permission. Agency There is no policy that allows an officer in master control to relieve a JCO from his or her post for breaks. Post Order 1 requires that the shift commander (the Grievant) "Be alert, attentive, and observant at all times." To the extent the Grievant asserts he was unaware of the breaks taken and number of staff on duty, such a contention is not credible.

A lieutenant and a sergeant both testified that they maintain coverage at all times, and only if there is no floater would they even consider leaving a pod unattended, and even then it would be one at a time and with the permission of the Administrator on Call. These witnesses corroborated the expectation that all pods will be covered at all times absent exceptional circumstances, and with exceptions only with approval from a higher authority, such as the Captain.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review of Case Number 10062(A) challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. He asserts that the hearing officer should not have upheld discipline received for failure to follow a directive that may not have been "valid and controlling" on the day in question and that the hearing officer incorrectly calculated the number of employees on duty while others were taking their breaks, thus essentially arguing that the agency did not bear its burden of proof to show that this disciplinary action was warranted and appropriate under the circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[5] and to determine the grievance based "on the material issues and grounds in the record for those findings."[6] 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.[7] 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.[8] 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 testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the October 2, 2012 Written Notice and that the behavior constituted misconduct.[9] The grievant admitted in his testimony that on the night in question no less than nine employees took breaks between 11:00 p.m. and 11:15 p.m., and accordingly 5 pods were left unattended.[10] The grievant testified that he believed that he did not have enough staff to relieve his employees when breaks were needed, and that a prior instruction had allowed for one employee to be able to supervise two pods at a time under that scenario.[11] However, the Superintendant of the facility testified that she had held a meeting to clear up any confusion on the issue, advising staff that the new directive requiring that one employee supervise each pod at all times should override any previous instruction to the contrary.[12]

The grievant argues that the directive he violated allows for no flexibility as to covering breaks for staff when there is a shortage due to emergencies or employees on leave and since a prior instruction did allow for greater flexibility, he essentially reverted back to following the prior directive.[13] However, the hearing officer found that the grievant's "justification for dismissing the validity of Captain D's directive is unpersuasive. Assuming a prior directive allowed leaving pods unsupervised while JCO's took breaks together, that is not justification for failing to follow a subsequent directive prohibiting such conduct."[14] Captain D, the grievant's immediate supervisor, testified that if the grievant thought he was short on staff on a particular night, his duties required that he should have been even more careful as to which employees took breaks at which times, never allowing so many employees to be all on break at once.[15] The hearing officer's decision discusses further testimony to this effect from a lieutenant and a

[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.
[7] *Rules for Conducting Grievance Hearings* § VI(B).
[8] *Grievance Procedure Manual* § 5.8.
[9] Hearing Decision at 7.
[10] *See* Hearing Record at CD 1, 27:15 through 27:31 and 30:03 through 30:12 (testimony of grievant).
[11] *See id.* at 31:28 through 32:15 (testimony of grievant).
[12] *See id.* at 03:07:26 through 03:08:41 (testimony of Superintendant P).
[13] *See id.* at 31:12 through 32:15 (testimony of grievant).
[14] Hearing Decision at 7.
[15] *See* Hearing Record at CD 1, 02:59:08 through 02:59:42 (testimony of Captain D).

sergeant "that they maintain coverage at all times, and only if there is no floater would they even consider leaving a pod unattended, and even then it would be one at a time and with the permission of the Administrator on Call," in finding the grievant's arguments to the contrary unconvincing.[16]

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. The hearing officer in this instance analyzed the evidence and testimony provided, found that the grievant was aware of his supervisor's directive, yet "knowingly allowed an excessive number of JCO's to take concurrent breaks and leaving pods unsupervised" and determined that his actions constituted misconduct under agency policy.[17] 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 further asserts that the hearing officer did not properly consider potential mitigating factors in this case. He argues that similarly situated employees received no discipline for violating the directive as he did and that he did not have adequate notice of the rule in question or potential penalties for its violation.

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]."[18] 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 policy."[19] 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.[20]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

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[16] Hearing Decision at 7.
[17] *Id.*
[18] Va. Code § 2.2-3005(C)(6).
[19] *Rules* at § VI(A).
[20] *Id.* at § VI(B).

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.[21] EDR will review a hearing officer's mitigation determination for abuse of discretion,[22] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer found that the grievant provided insufficient proof of any mitigating circumstances which would support a decision to reduce the discipline issued by the agency.[23] 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.'"[24] Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, we are unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the actual evidence in the record. The facts upon which the hearing officer relied support the finding that a Group II Written Notice was appropriate for the violation of a supervisor's directive regarding leaving pods unattended and did not exceed the limits of reasonableness. As such, EDR will not disturb the hearing officer's decision on that basis.

Case 10062(B) – January 9, 2013 Written Notice

The relevant facts as set forth in Case Number 10062 (B) are as follows:[25] The Written Notice charged:

> On November 23, 2012 at approximately 2010 hours, you were called by an officer to Special Housing Unit for assistance. After talking with officers via radio and telephone, you still failed to respond to the Unit to assist, assess, and de-escalate. This is a direct violation of Post Order 1 which states "Intervene in crisis or emergency situations," as well as your Employee Work Profile which states "Crisis Intervention—to control physical disturbances." Your failure to act allowed a resident time to cause damage in the amount of $2,225.64. This warrants the issuance of

[21] 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).

[22] "'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.*

[23] Hearing Decision at 8-9.

[24] Davis v. Dep't of Treasury, 8 M.S.P.R. 317, 320 (1981). *see also* Mings v. Dep't of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987) (stating that courts "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.")

[25] Hearing Decision at 9-11.

> the GP II written notice and your placement on suspension for 30 days. Any further disciplinary action could result in termination.

As for circumstances considered, the Written Notice referenced the Grievant's work performance and longevity. The seriousness of this offense for a shift commander was also considered, with reference to the Group II Written Notice issued on October 2, 2012, which grievance was addressed above.

On November 23, 2012, Resident F walked out of his room on Side B of his housing unit and found an unsecured door and entered into Side A, where he remained unsecured for approximately 65 minutes until the shield team finally was able to secure him. Resident F was considered a dangerous felon, and he was destroying property, breaking sprinkler heads and flooding the unit, passing glass to residents under their doors, and wielding a rod with a metal end as he stood in water on the floor with exposed electric wires in the ceiling. The incident and staff response was fully captured on video. The investigation concluded that the Grievant, the shift commander on duty, failed to provide direct supervision and guidance to staff and the sergeant during the incident. The Grievant failed to observe physically the situation to determine the most effective action plan to restrain the resident and provide guidance to staff. During the entire incident from 2010 to 2059, the Grievant was present in command alley for a total of approximately 5 minutes.

While this emergency was in its late stages, and still not under control, the Grievant was at the vending machine obtaining a drink. The Grievant testified that he was pre-diabetic and needed sugar. The Grievant admitted that he did not know during the emergency the extent of the situation. The Grievant delegated the direct response to a sergeant who did not effectively respond and who did not have the keys to the shield team equipment. The Grievant admitted that it took too long and that the video would be an embarrassment to the public if the video was revealed.

JCO N contacted the Grievant at least two times early on to seek assistance and to advise that the matter had escalated from the resident merely refusing to go back into his room to a resident out of control. The Grievant suggested in the initial investigation that he did not know about any of this until well after it was over, and this audio was played at the hearing. However, during the hearing the Grievant had notice that a dangerous resident was creating an emergency incident, and the resident needed to be taken into custody immediately.

While there were other incidents that night to which the Grievant responded directly during the shift, the Grievant admitted that Resident F was the most important and serious matter going on at that time. The investigation interview audio played during the hearing confirmed the Grievant's belief that no other responsibility trumped the heightened risk presented by Resident F's rampage. The only "incident" noted on the Supervisor's Daily Activity Report is the incident involving Resident F.

The Grievant's EWP requires that he, "Intervene in crisis to control physical disturbances and altercations initiated by juvenile offenders though the use of appropriate intervention techniques." The Grievant did not directly respond to the situation, assess it, intervene or exercise appropriate leadership over an emergency in the facility. The Standards of Conduct are clear. Employees must perform their assigned duties and responsibilities with the highest degree of public trust. They must make work related decisions and/or take actions that are in the best interest of the agency. They must comply with the letter and spirit of all state and agency policies and procedures.

Post Order 1 states that the shift commander, the Grievant, is responsible for the security of the facility and ensuring the institution operates in a secure, safe and sanitary manner. It requires that the Grievant "Be alert, attentive and observant at all times." It requires that the Grievant, "Intervene in crisis or emergency situations." It also requires that the Grievant "Perform any and all duties as assigned by your supervisor or higher authority." It also outlines "Emergency Procedures" for the Grievant, stating: "In the event of an institutional emergency (1) The shift Commander is the officer in charge until relieved by a higher authority; (2) Assess the situation to determine the course of action and proceed according to the Emergency Response Plan." Furthermore, IOP 209 states, "Shift commanders shall be designated as response coordinators – under direction of Administrators."

IOP 218 authorizes physical force "when necessary due to self-defense, the defense of others,….to protect a resident from harming himself and to prevent the commission of a crime." It also states that the "shift commander or Asst. Shift Commander shall attempt to reason with the disruptive resident and assess the situation." There was no need for the Grievant to delay, or even contact Captain D. This policy exists for these very situations, so that leadership can use its good judgment and handle an emergency on the spot. In this case, the situation became progressively more serious each minute, with Resident F unrestrained and more and more sprinklers broken and flooding the floor.

After Resident F went amok, no one spoke to him until over 50 minutes, after five sprinkler heads were broken, the area was flooding and residents were given shards of broken glass. The Grievant failed to respond or exert adequate leadership during a prolonged incident that continued to escalate. To the extent the Grievant asserts he was not aware of the seriousness of the incident, it is because of his lack of direct response.

JCO N also acknowledges that at no point did anyone come into the control room to assess the situation. He stated, "It was a while" before anyone came down there to assist. And, he admitted that he felt the response should have been more prompt. He said that from when he made the initial call, there was no turning back and they needed to get him.

Captain D testified that Resident F had multiple felony charges pending and was highly dangerous. The Captain testified that the Grievant did not

> perform his duties. Upon reviewing the Rapid Eye video, the facility superintendent testified that she was "dumbfounded" at the response and that the Grievant did not follow policy and instruction for the response to such an incident.

Hearing Officer's Consideration of the Evidence

In this case, the grievant contests the evidence presented by the agency, arguing that he acted within the parameters of any applicable policy, the "discretion" he was granted, and supervisory directives, and thus did not engage in misconduct. This position is fairly read as a challenge to the the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. The grievant's request for administrative review states that he had a "zone of discretion" in how he responded to the situation of November 23, 2012, and that he appropriately prioritized emergencies and delegated the response to the incident in question.

To this, the hearing officer found that "[t]he Grievant did not directly respond to the situation, assess it, intervene or exercise appropriate leadership over an emergency in the facility" and that his "lack of response" to the situation constituted misconduct.[26] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[27] and to determine the grievance based "on the material issues and grounds in the record for those findings."[28] Here, the hearing officer considered testimony from the facility's Superintendent, the grievant's supervisor, another officer on duty during the incident, and the grievant himself in order to render a determination that the grievant's actions during this situation constituted misconduct.[29] Where, as here, facts may be disputed or subject to varying interpretations, hearing officers have the sole authority to weigh the evidence, determine the witnesses' credibility, and make findings of fact. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group II offense with suspension.[30] Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR will not disturb the decision on this basis.

Level of Discipline

The grievant alleges that the January 9, 2013, Written Notice was improperly characterized as a Group II offense. This Written Notice states that the grievant violated the agency's Post Order 1 which obligates him to "[i]ntervene in crisis or emergency situations," and lists as the categories of offense unsatisfactory performance and failure to follow instructions and/or policy. The grievant argues that, assuming his actions constituted misconduct, at best, he committed the Group I offense of unsatisfactory performance.

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[26] *Id* at 10-11.
[27] Va. Code § 2.2-3005.1(C).
[28] *Grievance Procedure Manual* § 5.9.
[29] Hearing Decision at 11.
[30] *Id*. at 12.

In determining whether a disciplinary action is warranted and appropriate, the *Rules* require that the hearing officer must consider "whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). . . .".[31] DHRM Policy 1.60, *Standards of Conduct* (the "*Standards of Conduct*") specifically characterizes "failure to follow [a] supervisor's instructions or comply with written policy" as a Group II offense.[32] In this instance, the hearing officer found that the grievant violated Agency Standard Operating Procedure and policy, IOP 218, which "states that the 'shift commander or Asst. Shift Commander shall attempt to reason with the disruptive resident and assess the situation.' There was no need for the Grievant to delay, or even contact Captain D. This policy exists for these very situations, so that leadership can use its good judgment and handle an emergency on the spot."[33] Thus, the hearing officer found that the facts demonstrated the grievant's misconduct was appropriately characterized as failure to follow instructions/written policy, and was a Group II offense under the *Standards of Conduct.*[34]

Where the evidence may be subject to varying interpretations, hearing officers have the sole authority to weigh that evidence 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. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group II offense with suspension.[35] Here, the hearing officer's findings are based upon evidence in the record and the material issues of the case, and EDR cannot substitute its judgment for that of the hearing officer. Accordingly, we decline to disturb the decision on this basis.

Mitigation

The grievant challenges the hearing officer's decision not to mitigate the January 9, 2013 Written Notice, asserting that he had no reasonable way of knowing that his conduct was against policy. Section VI(B)(1) of the *Rules* includes "lack of notice" as an example of mitigating circumstances. Significantly, the *Rules* do not provide that each time there is a lack of notice the imposed discipline automatically "exceeds the limits of reasonableness." Even if the hearing officer finds that an employee lacked notice of the disciplinary consequences of breaking a rule, the hearing officer must still consider all facts and circumstances, including the lack of notice as a mitigating circumstance, to determine whether the imposed discipline "exceeds the limits of reasonableness."

Accordingly, the *Rules'* notice provision is not intended to require or permit a hearing officer to mitigate discipline simply on the basis that an agency had failed to provide the employee with prior notice that a particular offense could result in the specific discipline imposed, or indeed, with prior notice of the *Standards of Conduct* (although the latter would be a

[31] *Rules* at § VI(B).
[32] DHRM Policy 1.60, *Standards of Conduct* at Attachment A.
[33] Hearing Decision at 10-11.
[34] *Id*. at 11.
[35] *Id*. at 12.

good management practice).[36] The *Rules* provision on notice does not require that exact consequences be spelled out in advance; rather, this provision must be read to include an objective "reasonableness" standard. This provision is intended to require actual or constructive notice of the consequences for misconduct only in cases where the severity of the discipline imposed could not have been anticipated by a reasonable employee.

Here, the hearing officer found that "the Grievant's lack of judgment and/or supervision was in direct conflict with known, stated policy."[37] Thus, the hearing officer considered this mitigating factor as to the instant facts, yet found that the grievant had or should have had adequate notice of the operable rule. Further, the hearing officer noted that "with the suspension the Agency took a measured approach, and the matter has already been mitigated. There are no other bases giving the hearing officer authority to mitigate further."[38] We are unable to find that the hearing officer's mitigation analysis was an abuse of discretion.

Adverse Inference

The grievant asserts that the hearing officer erred in this case by failing to take an adverse inference with respect to the agency's alleged failure to produce documents relating to any input provided by the agency's human resources personnel regarding the discipline issued to the grievant. The *Rules* state that:

> Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered, or against an agency that has failed to instruct material employee witnesses to participate in the hearing process. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor.[39]

The grievant argues that an agency witness testified that there was no requirement that the agency's human resources approve all proposed discipline prior to its issuance, yet further testified that he did send an email regarding the proposed discipline issued to the grievant in this instance. The grievant points to an exhibit purportedly supporting his assertion that disciplinary measures must be approved by agency human resources and alleges that an adverse inference taken against the agency on this point would demonstrate that upper management may not have approved of the level of discipline received by the grievant. It does not appear that the hearing officer addressed this point in his decision; however, even assuming that the grievant's

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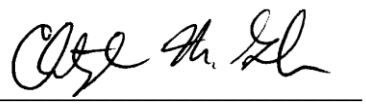
[36] *Cf.* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 674 S.E.2d 563 (2009) (declining to recognize "a new substantive [due process] right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").
[37] Hearing Decision at 11.
[38] *Id.*, at 12.
[39] *Rules* at § VI(B).

statements are accurate and an adverse inference to this point should have been taken, we believe that such a finding would nevertheless have no impact on the outcome of the hearing decision. As discussed above, the hearing officer considered all evidence presented at hearing to determine that the grievant's misconduct was appropriately characterized as failure to follow instructions/written policy, and a Group II offense. Thus, the hearing officer's failure to take an adverse inference to this point is harmless error, if error at all, and we decline to disturb the hearing decision on this 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.[40] 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.[41] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[42]



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Office of Employment Dispute Resolution

[40] *Grievance Procedure Manual* § 7.2(d).
[41] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[42] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).