Issue: Administrative Review of Hearing Officer's Decision in Case No. 9915-S; Ruling Date: August 22, 2013; Ruling No. 2014-3680; Agency: Department of Military Affairs; 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 Military Affairs
Ruling Number 2014-3680
August 22, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's Supplemental Decision in Case Number 9915-S. For the reasons set forth below, EDR will not disturb the hearing decision.

PROCEDURAL HISTORY

The hearing officer's findings in his October 22, 2012 decision in Case Number 9915,[1] as recounted in EDR's first administrative review in this case (EDR Ruling Number 2013-3469), are hereby incorporated by reference. Following the issuance of the Hearing Decision, the matter was appealed to Circuit Court and the case record transmitted accordingly. Thereafter, the parties discovered that some of the grievant's exhibits were missing from the record. On June 12, 2013, the Circuit Court remanded the case to the hearing officer "for the purposes of giving the Appellant the opportunity to supplement the record with exhibits containing those personnel records and to argue what effect, if any, that supplementation should have on the hearing officer's decision in this matter."[2]

On July 26, 2013, counsel for the grievant and counsel for the agency appeared on the record by telephone before the hearing officer. The hearing officer admitted 25 of the grievant's exhibits, indicating that should an exhibit be irrelevant, he would give that exhibit little to no weight in his reconsideration of the matter.[3] In his July 31, 2013 Supplemental Decision, the hearing officer upheld the agency's issuance of the Group III Written Notice with removal.[4] 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

[1] Decision of Hearing Officer, Case No. 9915 ("Hearing Decision"), October 22, 2012.
[2] Decision of Hearing Officer, Case No. 9915-S ("Supplemental Decision"), July 31, 2013, at 1.
[3] *Id.*
[4] *Id.* at 5.

matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Here, the grievant's request for administrative review of the Supplemental Decision challenges the hearing officer's findings of fact in determining that there exists no basis to mitigate the discipline issued to the grievant. He argues that the agency did not apply disciplinary action consistent with another similarly situated employee, Mr. P., and thus, the hearing officer erred by finding that no mitigating circumstances exist to reduce the disciplinary action issued. The grievant asserts that the exhibits presented show that Mr. P. was similarly situated to him, in that Mr. P. also engaged in the unauthorized removal of radiators from the agency. However, the grievant contends that Mr. P. was given counseling sessions and opportunities to correct his behavior, whereas the grievant was immediately removed from employment without the benefit of counseling or second chances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[9] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[10] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In assessing these arguments raised by the grievant, the hearing officer stated:

> To establish the inconsistent application of disciplinary action with respect to Mr. P's removal of radiators, Grievant must establish that Mr. P's first counseling was in lieu of disciplinary action. Grievant must also establish that Agency managers (not a lower level supervisor) were aware of and agreed to the counseling in lieu of disciplinary action.
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> Grievant argued that Mr. P stole radiators prior to October 2011 and was counseled in lieu of termination. Only after Mr. P continued to steal radiators in

[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] *Grievance Procedure Manual* § 5.8.

October through December 2011 did the Agency choose to terminate Mr. P's employment, under Grievant's theory. Grievant argued that Grievant and Mr. P were similarly situated. Mr. P was first given counseling and then removed from employment only after Mr. P failed to abide by the counseling, according to the Grievant. Grievant argued that Grievant, in contrast, was immediately removed from employment without having been counseled and given the opportunity to correct his behavior as Mr. P was permitted to do.

. . . . [On a counseling notice issued], Mr. P's Supervisor wrote, "Require a written statement that the heating radiators were given to him and were or were not to be taken to the scrap metal area on post."

Mr. P did not provide a written statement to the Supervisor. . . . [T]he Supervisor explained, "I never got that statement and **it slipped my mind** to get it from him." (Emphasis added).

. . . .

. . . . Mr. P was arrested on December 30, 2011 for stealing radiators from the Agency. On January 6, 2012, Mr. P was placed on pre-disciplinary leave without pay for alleged criminal conduct by removing government property. On April 3, 2012, Major M recommended Mr. P be removed from employment for misuse of State time and for removing government property (radiators) without permission. On May 9, 2012, Mr. P was convicted of petit larceny. Mr. P was removed from employment by the Agency.

[Grievant has not shown that] the Supervisor concluded Mr. P had stolen radiators and then counseled Mr. P regarding taking those radiators. The Supervisor's comment "Require a written statement that the heating radiators were given to him and were or were not to be taken to the scrap metal area on post" shows the Supervisor suspected Mr. P had stolen radiators but the Supervisor was giving Mr. P an opportunity to establish some legitimate reason for having the radiators.

. . . [N]o evidence was presented to show that the Supervisor's failure to timely follow up with Mr. P was anything other than oversight.

. . . .

When the supplemental exhibits are considered as a whole, it appears that the Supervisor questioned Mr. P's taking of radiators, provided Mr. P with an opportunity to explain, and then failed to follow up to determine the validity of Mr. P's claims about the radiators. No evidence has been presented to show that the Supervisor informed Agency Managers of Mr. P's behavior and then decided Mr. P should be counseled in lieu of disciplinary action. Mr. P was ultimately

> removed from employment just as was Grievant. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action such that his removal should be reversed.[11]

The grievant's request for administrative review alleges that the hearing officer erred by failing to conclude that inconsistent application of discipline occurred in this instance and that the discipline issued to the grievant should thus be mitigated. Section VI(B)(2) of the *Rules for Conducting Grievance Hearings* (the "*Rules*") provides that an example of mitigating circumstances includes "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[12]

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]."[13] The *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."[14]

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.[15] EDR will review a hearing officer's mitigation determination for abuse of discretion,[16] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Here, the grievant challenges the hearing officer's findings of fact with regard to alleged inconsistency of discipline by the agency. However, 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. While the documents may support the grievant's interpretation, they also support the hearing officer's analysis. Because the hearing officer's determinations are supported by the facts in the record, we are unable to

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[11] Supplemental Decision at 3-5 (internal citations omitted).
[12] *Grievance Procedure Manual* § 5.8; *Rules* at § VI(B).
[13] Va. Code § 2.2-3005(C)(6).
[14] *Rules* at § VI(A).
[15] 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).
[16] "'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.*

disturb these determinations. Further, the 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."[17] In this instance, the hearing officer properly considered the evidence presented and concluded that no inconsistent application of discipline occurred. EDR cannot conclude that the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard, nor can EDR substitute its judgment for that of the hearing officer. Accordingly, we decline to disturb the 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.[18] 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.[19] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[20]

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