Issue: Administrative Review of Hearing Officer's Decision in Case No.10133; Ruling Date: September 20, 2013; Ruling No. 2014-3701; Agency: Virginia Department of Transportation; Outcome: Hearing Officer's Decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2014-3701
September 20, 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 decision in Case Number 10133. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10133, as found by the hearing officer, are as follows:[1]

> The Virginia Department of Transportation ["VDOT" or the "agency"] employed Grievant as a Transportation Operator II at one of its facilities. He had been employed by the Agency for 26 years prior to his removal effective May 24, 2013.
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> When the Agency performs roadside maintenance or construction, it sometimes needs to remove dirt and debris from the construction site and move it temporarily to its Facilities. The Agency then transports the dirt from its facilities to approved dump sites for reclamation or disposal. The Agency enters into agreements with property owners to dump dirt on their property only after considering the environmental impact of doing so. The Agency sometimes enters into contracts with vendors it trusts to properly dispose of and reclaim the dirt and debris.
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> On September 10, 2009, Grievant entered into a Property Owner Agreement Maintenance Disposal Site with the Agency granting the Agency authority to dispose of material which consisted of topsoil, direct, and gravel from a VDOT maintenance project. Approximately 50 or 60 truckloads of dirt were dumped on his property. The Agreement did not have an expiration date. The Agency believed its authorization under the Agreement ended after Grievant dumped dirt in 2009. Grievant did not believe the Agreement had an expiration date and that his property continued to be an adequate dump site.

[1] Decision of Hearing Officer, Case No. 10133 ("Hearing Decision"), August 6, 2013, at 2-3.

> On May 17, 2013, the Supervisor instructed Grievant to take dirt from the Facility to the Pit. The Agency had an agreement with the Pit for the Pit to receive dirt from the Agency's Facility because of the Pit's ability to reclaim and dispose of the dirt properly. Grievant's property was located between the Facility and the Pit. Grievant loaded dirt from the Facility into the Agency's dump truck and drove it in the direction of the Pit. He took a short detour to his home and dumped the dirt on his property. His dump truck became stuck in a soft part of his property. Grievant called another employee to come pull out the dump truck. Once the dump truck was pulled out, Grievant went to the Facility and obtained a second load of dirt and took it to his property and dumped the dirt on his property.
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> The Manager valued the dirt at approximately $200 based what it would cost to have dirt delivered to a homeowner. He testified that if Grievant had asked permission to dump the dirt on his property, the Agency likely would have denied the request because the Agency had a business need to deliver dirt to the Pit. The Pit was authorized for mine and mineral reclamation.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant failed to follow a supervisor's instructions, left his worksite without permission, engaged in theft of state property, and used state property without authorization, finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice with removal.[2] The grievant now appeals the hearing decision to 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[4]

Agency's Production of Documents to the Grievant

The grievant's request for administrative review seems to argue that he was prejudiced as a result of the agency's delay in producing a certain document to him prior to the hearing. Specifically, the grievant asserts that the agency produced the document, a Property Owner Agreement entered into by the grievant and the agency in 2009, only one business day prior to the hearing because of difficulty in locating the document. In cases where a party fails to produce relevant documents, hearing officers have the authority to draw an adverse inference against that party if it is warranted by the circumstances.[5] The grievant, however, ultimately received the Agreement in advance of the hearing, did not notify the hearing officer of the delay in receiving the document, and, based on a review of the hearing recording, did not object to the

[2] *Id*. at 3-5.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] *Rules for Conducting Grievance Hearings* § V(B).

agency's request to enter the document into evidence at the hearing. Furthermore, the grievant has not raised any question as to whether he was prejudiced at the hearing by the agency's not disclosing the Agreement further in advance of the hearing. The Agreement was discussed extensively at the hearing by multiple witnesses, including the grievant, and it does not appear that his opportunity to present evidence about or cross-examine agency witnesses as to the content and/or interpretation of the Agreement was affected in any way by the delay. Accordingly, EDR will not disturb the decision on this basis.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Specifically, he claims that: (1) there was not a written contract between the agency and the Pit regarding the disposal of dirt; (2) the grievant deposited fifty to sixty loads of dirt on his property after the agency approved it as a disposal site in 2009, contrary to testimony by one witness that he only deposited two to three loads of dirt during that time; (3) the value of the dirt that is the subject of the Written Notice does not appear to be significant; and (4) the 2009 disposal permit carried no expiration date.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[7] 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.[8] 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.[9] 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 this case, the hearing officer found that "[t]he Agency had an agreement with the Pit for the Pit to receive dirt from the agency's facility . . . ."[10] Furthermore, two witnesses testified at the hearing that there is an agreement with the owner of the Pit, but did not characterize the agency's relationship with the Pit as contractual in nature.[11] This supports the grievant's argument that there was not any written contract stating the terms of this agreement. It appears, therefore, that the hearing officer's decision supports the position advanced by the grievant that there was no contract between the agency and the Pit. However, it is not clear how a lack of a written contract would alter the analysis made by the hearing officer.

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[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] Hearing Decision at 3.
[11] Hearing Recording at 11:15-11:40 (testimony of Manager L), 43:04-43:37 (testimony of Manager T).

As to the grievant's second claim about the amount of dirt he took in 2009, the hearing officer found that "[a]pproximately 50 or 60 truckloads of dirt were dumped on [the grievant's] property" after the agency approved it as a disposal site in 2009.[12] A witness stated the same at the hearing, and the grievant testified that, while he was not certain of the total amount, it was more than 20 truckloads of dirt.[13] Again, it appears that the hearing officer's decision supports the grievant's position as to the volume of dirt deposited at the grievant's property after the 2009 Property Owner Agreement.

While the hearing officer noted that "[t]he Manager valued the dirt at approximately $200 based what [sic] it would cost to have dirt delivered to a homeowner,"[14] he also found that VDOT Policy 1.02, *Disposal of Materials*, prohibits employees from taking state-owned materials, including residue materials such as excess dirt from agency projects, regardless of their value.[15] He further stated that the grievant "knowingly took Agency property without first obtaining permission to do so. His removal of the Agency's property was unauthorized."[16] The hearing officer's determination did not rely on the value of the dirt, and agency policy does not require that property removed authorization have any value. The hearing officer's finding was instead based on the grievant's removal of the dirt without permission. Because the hearing officer's finding that the grievant engaged in theft of agency property, regardless of the value of the property in question, is supported by evidence in the record, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

With regard to the grievant's assertion that the 2009 Property Owner Agreement approving the grievant's property as a disposal site, the hearing officer stated that "[t]he Agreement did not have an expiration date. The Agency believed its authorization under the Agreement ended after Grievant dumped dirt in 2009. Grievant did not believe the Agreement had an expiration date and that his property continued to be an adequate dump site."[17] In determining that the grievant engaged in theft of agency property, the hearing officer further concluded that "Grievant knew he had to have the Agency's authority to remove the dirt because in 2009 he followed the appropriate procedure to obtain the Agency's permission to remove the dirt. On May 17, 2013, Grievant knowingly took Agency property without first obtaining permission to do so."[18]

While the hearing officer's decision does not clearly state that the Agreement was no longer in effect on May 17, 2013, it is clear from his findings that he found that it had ended at some point prior to that date. Evidence presented at the hearing indicates a factual dispute between the grievant and the agency as to whether the Agreement had ended or was still in effect at the time of the events in question. The grievant's supervisor indicated that the agency believed the Agreement was only in effect for a limited purpose and time.[19] Another witness stated that the grievant was notified in 2009 that his original agreement was concluded and that

[12] Hearing Decision at 2.
[13] Hearing Recording at 1:25:45-1:26:30 (testimony of grievant), 1:07:15-1:07:48 (testimony of Employee S).
[14] Hearing Decision at 3.
[15] *Id*. at 3-4; *see* Agency Exhibit 5.
[16] Hearing Decision at 4.
[17] *Id*. at 2.
[18] *Id*. at 4.
[19] Hearing Recording at 19:22-19:48, 28:06-28:17 (testimony of Manager L).

he no longer had approval to take dirt to his property.[20] The grievant, on the other hand, maintained that he was unaware the Agreement had expired and thought his property was still an approved disposal site.[21] 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's conclusion that the grievant removed dirt without authorization, and knew that he needed authorization to do so, indicates that he found the Agreement was no longer in effect on May 17, 2013. While the decision could have stated this finding more clearly, the hearing officer's determination on this issue was based upon evidence in the record 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 also appears to challenge the hearing officer's decision not to mitigate the agency's disciplinary action. 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]."[22] 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."[23] 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.[24]

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 the 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

[20] *Id*. at 39:13-40:06, 44:10-45:00 (testimony of Manager T).
[21] *Id*. at 1:19:30-1:21:07 (testimony of grievant).
[22] Va. Code § 2.2-3005(C)(6).
[23] *Rules for Conducting Grievance Hearings* § VI(A).
[24] *Id*. at § VI(B).

totally unwarranted.[25] EDR will review a hearing officer's mitigation determination for abuse of discretion,[26] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant argues that the agency did not apply disciplinary action to him consistent with another similarly situated employee and, thus, the hearing officer erred by finding that no mitigating circumstances exist to reduce the disciplinary action issued. At the hearing, the grievant presented testimony from Employee F regarding his receiving a Group I Written Notice for dumping dirt at a location without his supervisor's permission.[27] The hearing officer evaluated Employee F's testimony and concluded that the "Grievant and [Employee F] were not similarly situated. Grievant moved dirt for his own benefit. [Employee F] dumped dirt in a different location and with the objective of helping the Agency. [Employee F] did not dump dirt for his own benefit."[28]

The hearing officer clearly considered the evidence presented by the grievant and found that his claim of inconsistent discipline did not constitute a mitigating circumstance. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is nothing to indicate that the hearing officer's mitigation decision was in any way unreasonable or not based on the actual evidence in the record, and, as such, EDR will not disturb the hearing officer's decision on this basis.

The grievant further claims that he did not have notice of VDOT Policy 1.02, *Disposal of Materials*, or the potential consequences of violating the policy. Section VI(B)(2) of the *Rules* states that mitigating circumstances may include "whether an employee had notice of" a rule or policy, as well as "the possible consequences of not complying with the rule." A review of the hearing record indicates that the grievant did not raise the issue of his knowledge of the policy at the hearing. The grievant had the opportunity at the hearing to submit any such evidence in support of his position and did not do so. Consequently, there is no basis to re-open or remand the hearing for consideration of this issue, and EDR will not disturb the hearing officer's decision on this basis.

Alleged Ex Parte Communications

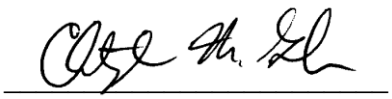
Finally, the grievant claims that the hearing officer and the agency advocate "met directly after the hearing for 15 to 20 minutes and were still in conference when [the grievant] left the site of the hearing," and possibly discussed matters related to the hearing while the grievant was not present. The *Rules* states that "[h]earing officers should bear in mind . . . that . . . an *ex parte* conversation can be perceived as partiality, no matter how necessary and proper such

[25] 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).
[26] "'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.*
[27] *See* Hearing Recording beginning at 51:07 (testimony of Employee F).
[28] Hearing Decision at 5.

communication may have been."[29] If the hearing officer had dismissed the grievant to have an ex parte conversation with the agency advocate, that would be highly inappropriate. Simply because the hearing officer engaged in conversation with the agency advocate after the conclusion of the hearing, however, does not indicate that anything improper occurred. The grievant has not identified any statements in the record or presented any new information that would indicate the hearing officer has acted improperly. Further, there is no indication from the record evidence and resulting hearing decision that any improper influence or conversations affected the outcome. EDR declines to disturb the decision on this 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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]



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[29] *Rules for Conducting Grievance Hearings* § III(D).
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).