Issue: Administrative Review of Hearing Officer's decision in Case No. 10094; Ruling Date: November 6, 2013; Ruling No. 2014-3717; Agency: Department of State Police; 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 Virginia State Police
Ruling Number 2014-3717
November 6, 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 10094. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed as a Special Agent by the Virginia State Police ("agency").[1] On March 27, 2013, the grievant was issued a Group III Written Notice of disciplinary action for making a false official statement, a Group II Written Notice for failure to follow instructions and/or policy, a Group III Written Notice with removal for theft, and a Group III Written Notice with removal for damaging State property or records.[2] He initiated a grievance challenging the disciplinary action, as well as other conduct by the agency. On September 9, 2013, following a hearing, the hearing officer issued a decision upholding the Group II Written Notice for failure to follow instructions and/or policy, but rescinding the remaining disciplinary actions.[3] However, as the grievant had a previous Group II Written Notice, the hearing officer upheld the grievant's removal based on the accumulation of disciplinary action.[4] The grievant has requested administrative review of the hearing officer's decision by 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 action be correctly taken.[6]

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[1] Decision of Hearing Officer, Case No. 10094 ("Hearing Decision"), September 9, 2013 at 2. To the extent not set forth in this ruling, the hearing officer's findings of fact in Case No. 10094 are incorporated by reference.
[2] Hearing Decision at 2.
[3] *Id*. at 16.
[4] *Id*. at 14.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

Admission of Substituted Evidence

In his administrative review request, the grievant, through counsel, argues that the hearing officer erred in asking the agency to provide copies of the policies in effect during the relevant time periods after the conclusion of the hearing. At some point following the hearing, the hearing officer apparently noticed that several of the policies submitted by the agency were not those in effect during the relevant time periods. By letter to counsel for both parties, the hearing officer asked the agency to provide the appropriate policies and advised the grievant's counsel that he would be provided an opportunity for responsive argument if needed.

The grievant asserts that because the agency has the burden of proof in disciplinary matters, the hearing officer should not have allowed the agency to make belated submissions. While we appreciate the grievant's frustration with the agency's failure to provide the applicable documents at hearing, the hearing officer's actions in this case were not inconsistent with the grievance procedure. The hearing officer had the discretion to reopen the record for the limited purpose of requesting the applicable policies, and he provided the grievant with an opportunity to present responsive arguments. Further, the grievant has not shown that he has been prejudiced by the hearing officer's actions. Under these circumstances, we do not find the hearing officer erred in requesting and considering the policies.

Inconsistency with State and Agency Policy

The grievant's request for administrative review further asserts that the hearing officer's decision is inconsistent with state and agency policy. Specifically, the grievant argues that the hearing officer erred in considering the grievant's July 28, 2010 Group II Written Notice in the accumulation of discipline warranting removal and in failing to find that the agency had violated policy by not being "fair, objective and professional" toward the grievant. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Length of Employment

The grievant alleges that the hearing officer erred in stating that the grievant was "employed by the Agency for approximately 15 years and was promoted to Special Agent in 2010." He asserts that he was instead "promoted and assigned to the Bureau of Criminal Investigations High Tech Crimes Division in October 2008." The grievant argues that this finding "is important because it shows that Grievant has been required to handle damaging child pornography for a longer period of time, and that he received no discipline until nearly two years on this job…."

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

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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.[10] 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.[11] 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 finding that the grievant was promoted to Special Agent in 2010. The grievant argues that he was "promoted and assigned to the Bureau of Criminal Investigations High Tech Crimes Division in October 2008." In its response to the grievant's request for administrative review, the agency notes that the High Tech Crimes Division "was not formed until September 2009." The record evidence is somewhat contradictory. In several requests for transfer submitted by the grievant during his employment, he states that he had been assigned to the "Bureau of Criminal Investigations High Tech Crimes Division since October 2008."[12] In contrast, the Written Notices being challenged in this case state that the grievant was a 15-year veteran of the agency and had been promoted to Special Agent in March 2010,[13] and another agency document indicates that the grievant was transferred to the High Tech Crimes Division when it was created in 2009.[14] In light of this evidence, we cannot find the hearing officer's finding that the grievant had been employed by the agency for approximately 15 years and had been promoted to Special Agent in 2010 was without record basis.

Moreover, even if the hearing officer had erred with respect to the length of the grievant's employment in the High Tech Crimes Division, any error would have been harmless, as the length of time the grievant worked without discipline is immaterial to this case. The hearing officer's findings with respect to the single disciplinary action upheld were not dependent on the length of the grievant's employment with the High Tech Crimes Division, and his previous employment without incident would not constitute a basis for mitigation.[15] Accordingly, we will not disturb the hearing officer's decision on this basis.

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[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Grievant Exhibits 1-3.
[13] Agency Exhibits 1-4.
[14] Agency Exhibit 16 at 1.
[15] While it cannot be said that a lack of previous disciplinary action is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of these factors will

Testimony by the Federal Agent

The grievant further argues that the hearing officer erred by failing to give adequate weight to the testimony of the federal agent with whom the grievant conducted the "knock and talk." However, based on a review of the record evidence, it appears there was a sufficient basis in the record to support the hearing officer's determination that the grievant had failed to follow agency policy and instructions by his supervisor.[16] In particular, the agency presented evidence showing that the grievant was instructed to handle his own cases without undue reliance on the federal agent; that the grievant had been counseled regarding the need to have forensic analysis performed by the agency rather than the federal authorities; that the grievant in fact allowed the federal agent to participate significantly in the "knock and talk" and to take the computer for forensic analysis; that the grievant had not been given permission for these actions by his supervisor; and that the grievant's actions failed to comply with agency policy regarding the handling of evidence.[17] Although the grievant is correct that the federal agent's testimony, as well as other evidence presented by the grievant, contradicts at least part of the agency evidence apparently relied upon by the hearing officer, this does not in itself constitute a basis for overturning the hearing officer's decision.[18] The test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, 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.

Testimony by Other Witnesses

The grievant argues that the hearing officer further erred by failing to consider the testimony of "several important witnesses." These witnesses include the grievant's former attorney, who testified to Captain M's conduct at the termination meeting, and two special agents, who testified about the effects of child pornography on the grievant and his inability to transfer into another position. The grievant's apparent basis for his belief that the hearing officer did not consider the testimony by these witnesses is the hearing officer's failure to mention this testimony in his decision. The grievant similarly argues that the hearing officer also erred in failing to accept the proffered testimony of a witness who was excluded by the hearing officer because of the length of the hearing. In this example, as well, the grievant's apparent basis for

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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. In this case, the grievant's lack of disciplinary action over a two-year period is not so extraordinary as to justify mitigation of the agency's decision to issue a Group II Written Notice. *See, e.g.*, EDR Ruling No. 2014-3664.

[16] Hearing Decision at 12-14.

[17] *See, e.g.*, Hearing Recording at CD 1, Track 1, 59:25-1:01:59; 1:02:41-1:02:48; 1:08:00-1:08:27; Agency Exhibit 22 at 5, 21, 35-43, 55; Agency Exhibits 38-39.

[18] Among his other arguments regarding the federal agent's testimony, the grievant appears to argue that the hearing officer erred in stating "the Grievant is wrong about there being 'no images of child pornography [on the subject computer], only titles relating to child pornography." Our review of the cited language of the hearing decision indicates the hearing officer found the grievant's apparent argument that the computer was not evidence was without merit, not that the grievant was wrong regarding the images themselves. *See* Hearing Decision at 14.

his claim is the hearing officer's failure to address or rely upon this proffered testimony in his decision.

There is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to a witness's testimony does not constitute a basis for remand. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. In this case, the grievant has failed to present evidence showing that the hearing officer abused this discretion with respect to his consideration of this witness testimony. Rather, it appears that the witness testimony at issue was not discussed because the hearing officer found it cumulative of other evidence presented regarding the grievant's mental state and the agency's conduct toward the grievant at the time of his termination.[19] Accordingly, we will not disturb the hearing officer's decision on this basis.

Bias of Supervisors/Failure to Mitigate

The grievant additionally argues that the hearing officer erred in failing to mitigate the disciplinary action on the ground that the grievant's termination was motivated by a wrongful supervisory bias against him.[20] Although the grievant characterizes this challenge as one involving the hearing officer's interpretation of policy, because the hearing officer considered this factor in the context of mitigation,[21] we will interpret the grievant's request for administrative review as also challenging the hearing officer's failure to mitigate on this basis.

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]."[22] 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."[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,

[19] The grievant also notes that the actual or proffered testimony of two of these witnesses related to the grievant's attempts to transfer. The hearing officer's handling of the grievant's claims regarding the denial of his transfer requests is addressed separately below.
[20] In support of this argument, the grievant notes that state and agency policy mandates fair and objective treatment on employees, including on the basis of disability. As the grievant has not challenged the hearing decision on the basis that the hearing officer erred in failing to analyze his claim under the Americans with Disabilities Act, as incorporated by state and agency policy, we will not address that argument in this ruling.
[21] *Id.* at 15-16.
[22] Va. Code § 2.2-3005(C)(6).
[23] *Rules* § VI(A).

> 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.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[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.

Here, the grievant asserts that agency managers were biased against him, as evidenced by their unprofessionalism in "[l]aughing and boasting of the removal of a co-worker."[27] While improper motive could be a basis for mitigation, the hearing officer rejected this argument in his decision, finding that "there was insufficient evidence to support the conclusion that the Agency took disciplinary action against Grievant because of a dislike of Grievant rather than because of a legitimate objective of addressing Grievant's work performance."[28] Although reasonable minds could disagree regarding the evidence of improper motive presented by the grievant, the determinations of credibility and factual evidence of motive lie within the discretion of the hearing officer. Accordingly, as the grievant has not presented evidence sufficient to show that the hearing officer's decision regarding mitigation exceeds the limits of reasonableness, EDR will not disturb the hearing officer's decision on this basis.

Transfer

The grievant also argues, in effect, that the hearing officer erred in failing to address his claim that the agency wrongfully refused his transfer requests. It appears that this issue was part of the grievance qualified in its entirety for hearing and as such should have been addressed by the hearing officer in his decision. However, as the hearing officer upheld the grievant's

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[24] *Id.* at § VI(B)(1) (citations omitted).
[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] Hearing Decision at 16.
[28] *Id.*

removal from employment, this issue is now moot. Because the grievant was not returned to agency employment, there would be no effectual relief that could be granted by the hearing officer: the agency cannot be ordered to transfer an individual no longer in the agency's employ. We therefore will not direct the hearing officer to reconsider his decision on this basis.[29]

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.[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] In the event DHRM directs the hearing officer to reconsider his decision on any basis, the hearing officer is directed to then also address the grievant's claims regarding transfer. As the hearing officer will not previously have ruled on those claims, the parties will then have the right to appeal the hearing officer's decision on the transfer claims (but solely those claims) through the administrative review processes set forth in the *Grievance Procedure Manual*.
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).