Issue: Administrative Review of Hearing Officer's Decision in Case No. 10159; Ruling Date: October 30, 2013; Ruling No. 2014-3732; Agency: Department of Corrections; 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 Corrections
EDR Ruling Number 2014-3732
October 30, 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 10159. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 10159, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately 19 and a half years prior to his removal effective July 10, 2013. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on February 26, 2013.
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> Employees may not bring food into the Facility. They receive one free meal per day. Inmates may eat in the inmate dining area but may not take food from the dining area to their living units. When inmates leave the dining area to return to their housing units, they go through a "shake down" to ensure that they are not taking food from the dining area to their housing units.
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> On June 23, 2013, Officer M was in the staff dining area with the Inmate. Officer M asked the Inmate to make him a sandwich "to go." The Inmate asked Officer M if the Inmate could make a sandwich for himself. Officer M said the Inmate could do so. The Inmate made a sandwich for Officer M and for himself. The Inmate placed his sandwich in a brown paper bag. The Major entered the dining area. Both the Inmate and Officer M knew they were not supposed to take food out of the dining area. Officer M ate his sandwich while he was in the dining area instead of taking it to his work area. The Inmate waited until the Major left and gave the brown paper bag to Officer M and asked Officer M to take the bag to Housing Unit 6. The Inmate did not reside in Housing Unit 6, but Officer M was not aware where the Inmate resided so he did not question the Inmate's request to

[1] Decision of Hearing Officer, Case No. 10159 ("Hearing Decision"), September 25, 2013, at 2-3.

> take the bag to Housing Unit 6. Officer M took the bag to Housing Unit 6. Once Officer M took the bad out of the dining area, the bag became contraband. Officer M gave the bag to Grievant who was working inside the control booth with Officer H. Officer M told Grievant that the bag contained a sandwich for the Inmate and asked Grievant to give the bag to the Inmate when the Inmate came to the Control Booth in Housing Unit 6. After the Inmate finished working in the dining area, he passed through "shake down" and walked to Housing Unit 6. He approached Grievant and asked Grievant if he was "holding something" for the Inmate. Grievant said "yea, yea" and then passed the brown paper bag containing the sandwich through the tray slot to the Inmate. The Inmate took the bag and walked out of the Housing Unit.
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> Officer H was in the control booth with Grievant and recognized that it was inappropriate to give the bag to the Inmate. Officer H reported the incident to a Facility manager.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant fraternized with an offender, 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]

Mitigation

In his request for administrative review, the grievant argues that the hearing officer's mitigation analysis was flawed. Specifically, he claims that the hearing officer failed to consider that the agency's treatment of the grievant was inconsistent with other similarly situated employees and evidence about the grievant's prior satisfactory work performance. He also asserts that the hearing officer applied an incorrect standard in determining whether to mitigate the 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]."[5] 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

[2] *Id*. at 4-5.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005(C)(6).

hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[6] 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.[7]

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.[8]

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.[9] EDR will review a hearing officer's mitigation determination for abuse of discretion,[10] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's request for administrative review alleges that the agency did not apply disciplinary action to him consistent with other similarly situated employees, and that the hearing officer erred by failing to consider this evidence in his mitigation analysis. Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "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.[11] Upon conducting a review of the hearing record, it does not appear that the grievant presented any evidence regarding the agency's treatment of employees who may have been similarly situated to him. The grievant has not specifically identified any such evidence. While the grievant's attorney argued that the agency had inconsistently enforced policies related to fraternization, we cannot identify any evidence in the record that would support this claim.[12] In

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[6] *Rules for Conducting Grievance Hearings* § VI(A).
[7] *Id*. at § VI(B).
[8] *Id*.
[9] 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).
[10] "'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.*
[11] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[12] Hearing Recording at 7:04-7:37, 1:58:35-1:58:45. While there was some evidence showing that Officer H was not disciplined for his involvement, if any, in the incident, the grievant's attorney did not present evidence sufficient to show that Officer H may have been similarly situated to the grievant. *See* Hearing Recording at 50:28-50:48,

addition, we note that Officer M was terminated for his role in this incident.[13] Given that there does not appear to have been sufficient evidence in the record regarding inconsistent discipline that the hearing officer may have relied upon to support mitigation, we cannot conclude that his mitigation analysis was flawed in this respect. Accordingly, we decline to disturb the decision on this basis.

Likewise, we are not persuaded by the grievant's argument that his length of service should have supported mitigation. While it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[14] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, the grievant's length of service is not so extraordinary that it justifies mitigation of the agency's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity.

While the grievant's reported service of over nineteen years is not insignificant, he had an active Group II Written Notice, issued February 26, 2013, and the agency apparently determined that the misconduct in the present case was serious.[15] Furthermore, the hearing officer was cognizant of the grievant's length of service in light of his impending eligibility for retirement. The hearing officer noted that the grievant was "only six months away from having the option to retire," and found that "possible retirement is not a circumstance that would make disciplinary action exceed the limits of reasonableness."[16] Based upon a review of the evidence in the record, there is nothing to indicate that this determination was in any way unreasonable, an abuse of discretion, or otherwise not based upon evidence in the record, and we will not disturb the hearing officer's decision on this basis.

The grievant also argues that the hearing officer should not have upheld the disciplinary action because the agency did not consider any mitigating factors before issuing the Written Notice. The grievant claims that, as a consequence of the agency's decision not to consider any mitigating circumstances in this case, the "exceeds the limits of reasonableness" standard discussed above does not apply and the disciplinary action must be overturned. In cases where the agency does not consider mitigating circumstances, the hearing officer shows no deference to the agency's mitigation analysis because there is no such analysis to which he may defer.[17] Regardless of whether or not the agency considered mitigating factors, "the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness."[18] EDR is unaware of any requirement under law or policy

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2:01:17-2:01:31. EDR cannot find the hearing officer's failure to mitigate based on consideration of this evidence alone as abuse of discretion.

[13] *See* Grievant's Exhibit 12.

[14] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

[15] *See* Agency Exhibit 10.

[16] Hearing Decision at 5.

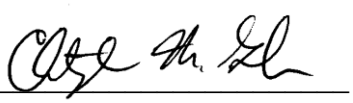
[17] *See* EDR Ruling Nos. 2008-1749, 2008-1759.

[18] *Rules for Conducting Grievance Hearings* § VI(B).

that mandates an agency to consider mitigating circumstances before disciplining an employee. While such consideration would be a best practice, there is no mandatory requirement. Consequently, this is not a basis on which an agency's disciplinary action would be shown to exceed the limits of reasonableness. We decline to disturb the decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21]



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