

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10191; Ruling
Date: December 13, 2013; Ruling No. 2014-3778; 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
Ruling Number 2014-3778
December 13, 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 10191. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10191, as found by the Hearing Officer, are as follows:¹

The Department of Corrections employed Grievant as a Community Re-entry Specialist at one of its facilities. She began working for the Agency on May 25, 2011. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant met with Mr. W in the 1990s. They lived in the same town. They had a friendship that sometimes became a romantic relationship. For example, their relationship became romantic in 1996 and then became a friendship until 1999. The relationship became romantic from 1999 to 2001. They resumed dating in December 2012 and their relationship became “serious” in February 2013. Grievant continued a romantic relationship with Mr. W and eventually concluded she wished to marry Mr. W. On July 30, 2013, Grievant met with her Supervision regarding the relationship. On August 8, 2013, she sent the Supervisor a memorandum disclosing a “pre-existing relationship with an individual currently on DOC supervision.” Grievant and Mr. W were married on August 18, 2013.

Mr. W was under the Department’s supervision when Grievant’s relationship with him became romantic in February 2013. Although Grievant and Mr. W were in the same district, none of Grievant’s duties placed her in direct supervision of Mr. W.

¹ Decision of Hearing Officer, Case No. 10191 (“Hearing Decision”), November 18, 2013, at 2 (citations omitted).

On August 23, 2013, the agency issued the grievant a Group III Written Notice of disciplinary action with removal for fraternization.² The grievant timely grieved the disciplinary action and a hearing was held on November 13, 2013.³ On November 18, 2013, the hearing officer issued a decision upholding the disciplinary action.⁴ The grievant has now requested an 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 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁶

Inconsistency with State Policy

Fairly read, the grievant’s request for administrative review challenges the hearing officer’s finding that the grievant’s conduct constitutes a basis for a Group III Written Notice under the agency’s Operating Policy 130.1, *Rules of Conduct Governing Employees [sic] Relationships With Offenders*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Mitigation

In her request for administrative review, the grievant asserts that the disciplinary action taken against her should be mitigated because of her previous satisfactory service and the impact of the disciplinary action on her ability to visit her husband, who is now incarcerated. 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].”⁸ 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

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 5.

⁵ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁶ See *Grievance Procedure Manual* § 6.4(3).

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

⁸ Va. Code § 2.2-3005(C)(6).

be consistent with law and policy.”⁹ 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.¹⁰

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.¹¹

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.¹² EDR will review a hearing officer’s mitigation determination for abuse of discretion,¹³ and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

In this case, the grievant asserts that other agency employees have had “personal, romantic, marital relationships with offenders supervised or incarcerated by the [agency]” without having been terminated. 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.¹⁴ In this case, the grievant presented testimony that other employees were romantically involved or married to individuals within the agency’s supervision or custody, but she failed to provide evidence that those employees were similarly situated—that is, that they had engaged in romantic relationships for a period of time prior to making the agency aware of the relationship or any pre-existing relationships.¹⁵ While it would have been a better practice for the hearing officer to address the grievant’s claim of

⁹ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁰ *Id.* at § VI(B).

¹¹ *Id.*

¹² 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).

¹³ “‘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.*

¹⁴ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ *See* Hearing Recording at 59:30-1:01:42; *see also id.* at 37:24-38:04.

inconsistent treatment in his hearing decision, the evidence presented by the grievant was not sufficient for the hearing officer to rely upon it as a mitigating factor, and we cannot conclude that his mitigation analysis was flawed in this respect.

The grievant also argues that the disciplinary action against her should be mitigated because of its possible impact on her ability to visit her husband while he is incarcerated. The grievant failed to present this argument to the hearing officer at hearing, and it will therefore not be considered now. However, even had the grievant presented this argument during the hearing, the impact of the disciplinary action on her ability to visit her husband would not appear to be a basis for mitigation. For these reasons, we will not disturb the hearing decision on the basis of mitigation.

Findings of Fact

The grievant's request for administrative review also challenges the hearing officer's finding that she was employed at an agency facility.¹⁶ She states that she was employed through the Community Release Unit at Headquarters and used assigned office space within the geographic area to which she was assigned.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁷ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹⁸ 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.¹⁹ 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.²⁰ 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, it appears that the hearing officer's use of the term "facilities" was meant merely as a general characterization of the grievant's work assignment, rather than a finding that the grievant was employed at a specific correctional facility.²¹ Further, to the extent the hearing officer erred in finding that the grievant was employed at a specific correctional facility, such error was harmless. The hearing officer specifically found that the grievant did not have a supervisory relationship with her husband, and he did not consider the grievant's work location

¹⁶ Hearing Decision at 2.

¹⁷ Va. Code § 2.2-3005.1(C).

¹⁸ *Grievance Procedure Manual* § 5.9.

¹⁹ *Rules for Conducting Grievance Hearings* § VI(B).

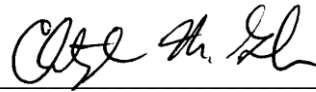
²⁰ *Grievance Procedure Manual* § 5.8.

²¹ See Hearing Decision at 2.

as a factor in his findings regarding the agency's disciplinary action.²² Accordingly, we decline to disturb the decision on this basis as well.

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵



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²² *See id.* at 2-5.

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).