Issue: Administrative Review of Hearing Officer's Decision in Case No. 10389; Ruling Date: September 2, 2014; Ruling No. 2015-3971; Agency: Department of Social Services; Outcome: AHO's decision affirmed.

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 2015-3971
September 2, 2014

The Department of Social Services ("agency") 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 10389. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On April 15, 2014, the grievant was issued a Group III Written Notice with removal for sleeping during work hours.[1] He timely initiated a grievance challenging the disciplinary action.[2] On July 25, 2014, following a hearing, the hearing officer issued a decision mitigating the disciplinary action to a Group III Written Notice with a ten work day suspension.[3] The agency has now requested administrative review 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."[4] 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.[5]

The agency alleges that that the hearing officer abused his authority in mitigating the disciplinary action. In support of its position, the agency asserts that the grievant was not similarly situated to another employee ("Employee 123") who was caught sleeping but was not terminated. The agency notes that unlike the grievant, Employee 123 expressed remorse after receiving a Notice of Intent to terminate her employment. In addition, the agency asserts, Employee 123, unlike the grievant, also disclosed that she was seeking treatment for medical conditions and taking prescription medication that could result in drowsiness.

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[1] Decision of Hearing Officer, Case No. 10389, ("Hearing Decision"), July 25, 2014, at 1; *see* Agency Exhibit 1.
[2] *Id.*
[3] *Id.* at 1, 5.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).

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 the Department of Human Resource Management."[6] EDR's *Rules for Conducting Grievance Hearings* (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."[7] 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,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[8]

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 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.

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the

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[6] Va. Code § 2.2-3005(C)(6).
[7] *Rules for Conducting Grievance Hearings* § VI(A).
[8] *Id.* § VI(B).
[9] The Merit Systems Protection Board's (the "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.*

issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[11] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, we also acknowledge that certain circumstances may require this result.[12]

One of the mitigating factors expressly listed in the *Rules* is "whether the discipline is consistent with the agency's treatment of similarly situated employees."[13] In this instance, the hearing officer essentially determined that the agency's discipline was unconscionably disproportionate compared to situations involving similarly situated employees as the grievant. In reaching his decision to mitigate the disciplinary action, the hearing officer explained:

> Grievant argued that the Agency inconsistently disciplined its employees based on how the Agency treated Employee 123. Employee 123 worked in the same division as did Grievant but they had different supervisors. In March 2014, Employee 123 was observed sleeping while at work. On March 14, 2014, the Program Supervisor observed Employee 123 sitting at her desk with her eyes closed. The Program Supervisor sent Employee 123 an email advising her:
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> > I have witnesses several times, the most recent being on Tuesday morning and again this morning that you are sitting at your desk with your eyes closed. *** You know this is unacceptable and this cannot continue."
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> On March 19, 2014, the Program Supervisor sent Employee 123 a formal counseling memorandum stating, in part:
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> > The other issue that has been identified as a problem is your concentration while at work. I have witnesses on numerous occasions you sitting at your desk with your eyes closed. I recently sent you an email about this issue on Friday March 14, 2014. I witnessed this happening while you were not on break on March 11, 2014 and on Thursday March 13, 2014. It was also reported to me on March 13, 2014 that this occurred on March 12, 2014 while I was out of the office …. This is unacceptable and will not be tolerated.
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> On April 28, 2014, the Program Supervisor presented Employee 123 with a Notice of Intent to Issue Standards of Conduct Group III with removal. Employee 123 was asked to provide a response. Employee 123 responded that

[11] Comparable case law from the Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration [] but not outcome determinative . . . ." Lewis v. VA, 113 M.S.P.R. 657, 664 n.4 (M.S.P.B. 2010).
[12] The Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (M.S.P.B. 1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (M.S.P.B. 1988).
[13] *Rules for Conducting Grievance Hearings* § VI(B).

> she had an "unstable family situation" and had been working with medical and counseling professions. She attached a note from her doctor indicating that she was being treated for depression and Grievant was taking medication that caused fatigue, drowsiness and lightheadedness. After considering Employee 123's response, the Agency decided to issue to her on May 5, 2014 a Group III Written Notice with a ten workday suspension. On May 21, 2014, Employee 123 fell asleep again and was issued a Group III Written Notice with removal.
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> The Agency has not consistently disciplined its employees thereby justifying mitigation in this case. Grievant and Employee 123 were similarly situated. They worked in the same division of the Agency. The both fell asleep while at work in the spring of 2014 but were treated differently by the Agency. Employee 123 received an email and a written counseling advising her not to repeat her behavior. She fell asleep for what was at least the third time and received a Group III Written Notice with a ten work day suspension. Only after Employee 123 received a Group III with suspension and then fell asleep again did the Agency remove Employee 123 from employment. Grievant, however, was removed the first time he was observed by a manager sleeping during work hours. He received no prior warnings. This inconsistent treatment is sufficient for the Hearing Officer to mitigate the disciplinary action from a Group III with removal to a Group III Written Notice with a ten work day suspension.
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> The Agency argued that Grievant and Employee 123 were not similarly situated. For example, Grievant denied being asleep and did not express remorse for being asleep. Employee 123, however, admitted to being asleep, expressed sorrow for being asleep and promised to refrain from repeating her behavior. Employee 123 was taking prescription medication and suffering from an illness while Grievant was taking over-the-counter medication and had yet to be diagnosed with sleep apnea. The differences identified by the Agency, however, are not sufficiently material to show that Grievant and Employee 123 were not similarly situated. In light of the standard set forth in the Rules, the Hearing Officer finds mitigating circumstances exist to reduce the disciplinary action.[14]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and grounds in the record for those findings."[16] 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.

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[14] Hearing Decision at 4-5 (citation omitted).
[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.

In this case, evidence in the record supports the hearing officer's conclusion that Employee 123 was warned by agency management multiple times regarding sleeping in the workplace before being terminated, whereas the grievant was terminated the first time he was observed by management.[17] Further, the record indicates that when the agency elected to give Employee 123 two warnings prior to attempting to take any disciplinary action, it was not aware of her medical issues or use of prescription medication.[18] Based on EDR's review of the record, the hearing officer's conclusion that the grievant was disciplined more harshly than a similarly situated employee was based on record evidence. Given these factual findings, EDR cannot find that the hearing officer abused his discretion in mitigating the disciplinary action or otherwise failed to apply the "exceeds the limits of reasonableness" standard appropriately.

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.[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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[17] Agency Exhibit 1; Grievant's Exhibits 5-9.
[18] Grievant's Exhibits 5-7.
[19] *Grievance Procedure Manual* § 7.2(d).
[20] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[21] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).