

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10399; Ruling Date: September 17, 2014; Ruling No. 2015-3992; Agency: Virginia Department of Health; 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 Virginia Department of Health
Ruling Number 2015-3992
September 17, 2014

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 10399. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On May 16, 2014, the grievant was issued a Group III Written Notice of disciplinary action for unsatisfactory performance and a failure to follow instructions.¹ She was terminated from employment based on the accumulation of discipline.² She timely initiated a grievance challenging the disciplinary action.³ On August 18, 2014, following a hearing, the hearing officer reduced the disciplinary action to a Group II Written Notice but upheld her termination based on the accumulation of discipline.⁴ The grievant 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.”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

¹ Decision of Hearing Officer, Case No. 10399, (“Hearing Decision”), August 18, 2014, at 1; *see* Agency Exhibit 2.

² *Id.* The grievant had a prior active Group I Written Notice and a prior active Group II Written Notice, both of which were issued for misconduct of the same type as that at issue in the Written Notice in this case. Agency Exhibit 18 at 1; Agency Exhibit 19 at 1.

³ *Id.*; Agency Exhibit 1.

⁴ *Id.* at 1, 4.

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

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

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state and agency policy. 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 and received such a review.⁸ Accordingly, the grievant's policy claims will not be addressed in this ruling.

Mitigation

Fairly read, the grievant's request for administrative review also claims that the hearing officer's mitigation analysis was flawed. Specifically, the grievant claims that the agency failed to show that it treated other similarly situated employees in a manner comparable to her treatment.

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]."⁹ 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."¹⁰ 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.¹¹

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.¹²

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

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

⁸ The DHRM Director concluded that the hearing decision was in accordance with policy. See Policy Ruling of the Department of Human Resource Management, Case No. 10399, Sept. 10, 2014.

⁹ Va. Code § 2.2-3005(C)(6).

¹⁰ *Rules for Conducting Grievance Hearings* § VI(A).

¹¹ *Id.* § VI(B).

¹² *Id.*

under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.¹³ EDR will review a hearing officer's mitigation determination for abuse of discretion,¹⁴ 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 argues that the agency has not shown that it applied disciplinary action to her in a manner consistent with the way it has disciplined other similarly situated employees. 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.¹⁵ However, the grievant does not argue that the hearing officer improperly failed to consider evidence she presented to show that the agency treated other employees in a more favorable manner; rather, she asserts that the agency failed to prove the lack of inconsistency. Although the grievant indicates that she believes the agency has not acted consistently, she identifies no record evidence that would support this assertion. As the grievant, not the agency, bore the burden of showing inconsistent treatment, we cannot find the hearing officer erred in concluding that mitigation was not warranted.¹⁶ Accordingly, we will not disturb the hearing decision on this basis.

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.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹



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¹³ 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).

¹⁴ "'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.*

¹⁵ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹⁶ See Hearing Decision at 4.

¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).