

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10412; Ruling  
Date: September 30, 2014; Ruling No. 2015-3999; Agency: Department of Motor  
Vehicles; 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 Motor Vehicles  
Ruling Number 2015-3999  
September 30, 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 10412. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10412 are as follows:<sup>1</sup>

The Department of Motor Vehicles employed Grievant as a CSC Generalist at one of its branches. No evidence of prior active disciplinary action was introduced during the hearing.

Tellers at DMV branches receive payments from customers including dollars and checks. At the end of the day, tellers are supposed to total their customer transactions including the amount of checks and cash they received. They print out an adding machine tape showing their addition. They record this information on an FS 54 form. The FS 54 and machine tape are given to a senior employee or supervisor who verifies that the numbers balance.

During the week of January 6, 2014, the Agency learned that the Bank had determined that a bank deposit made on November 2, 2013 was short \$62.75. The shortage originated from a transaction conducted by Grievant. The Customer gave Grievant \$62.75 in cash but Grievant keyed the transaction as having been paid by check. The Agency was unable to locate a check in the amount of \$62.75. After additional investigation, the Agency was unable to determine what happened to the cash given by the customer.

On January 16, 2014, the Agency learned that a bank deposit made on December 2, 2013 was short in the amount of \$68.87. The shortage originated

---

<sup>1</sup> Decision of Hearing Officer, Case No. 10412 (“Hearing Decision”), issued September 3, 2014, at 2-3.

from two customer transaction conducted by Grievant. Grievant received \$88.77 in cash from a customer and posted the transaction as cash. She then changed the transaction to indicate the transaction was made in two parts -- \$28.12 by check and \$60.63 in cash. The Agency was unable to locate a check in the amount of \$28.12. Grievant received \$40.75 in cash from another customer. She later changed the transaction to show receipt of a check in the amount of \$40.75. The Agency was unable to locate a check in the amount of \$40.75. The two missing checks totaled \$68.87.

On January 31, 2014, the Agency learned that a bank deposit on December 20, 2013 was short in the amount of \$62.75. The shortage originated from two transactions conducted by Grievant. Grievant received \$10 and originally posted the transaction as cash. She later changed the transaction to be by check. Grievant received \$50.75 in cash and originally posted the transaction as cash. She later changed the transaction to check. The Agency was unable to locate a check for \$10 or \$50.75. The two missing checks totaled \$62.75.

On January 28, 2014, an employee at Grievant's facility reported that the total checks for the day did not balance by \$50.75. Grievant had reported on her FS 54 and adding machine tape that she received a check in the amount of \$50.75. The missing check was from one of Grievant's transactions. Grievant received cash from the customer in the amount of \$50.75. Those funds were not located by the Agency.

On June 17, 2014, the agency issued the Grievant four Group II Written Notices for failure to follow policy and terminated her employment.<sup>2</sup> The grievant timely grieved the disciplinary actions, and on August 15, 2014, a grievance hearing was conducted.<sup>3</sup> In his hearing decision, issued September 3, 2014, the hearing officer reduced the four Group II Written Notices to four Group I Written Notices, but he upheld the termination based on the accumulation of disciplinary actions.<sup>4</sup> The grievant has now requested an administrative review.

### 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."<sup>5</sup> 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.<sup>6</sup>

---

<sup>2</sup> *Id.* at 1; *see also* Agency Exhibit 1.

<sup>3</sup> Hearing Decision at 1.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>6</sup> *See Grievance Procedure Manual* § 6.4(3).

*Inconsistency with State and Agency Policy*

The grievant appears to challenge the hearing officer's application of 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. The grievant has requested such a review. Accordingly, her policy claims will not be addressed in this review.

*Mitigation*

The grievant also challenges the hearing officer's decision not to mitigate the disciplinary action. 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]."<sup>7</sup> 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."<sup>8</sup> 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.<sup>9</sup>

Thus, the issue of mitigation is only reached if the hearing officer 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 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.<sup>10</sup> EDR will review a hearing officer's mitigation determination for abuse of

---

<sup>7</sup> Va. Code § 2.2-3005(C)(6).

<sup>8</sup> *Rules* § VI(A).

<sup>9</sup> *Rules* § VI(B). 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).

<sup>10</sup> *E.g.*, *id.*

discretion,<sup>11</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant appears to suggest in her request for administrative review that the hearing officer should have mitigated the disciplinary action because she had no previous disciplinary action over her lengthy employment with the agency. Although it cannot be said that satisfactory work performance 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.<sup>12</sup> The weight of an employee's 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 previous work performance is not so extraordinary as to justify mitigation of the agency's decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable.

The grievant also asserts that the agency's decision to issue the four Written Notices simultaneously, without giving her previous notice of her conduct or an opportunity to improve, constitutes a basis for mitigation. This argument appears to have been considered and rejected by the hearing officer, and we cannot conclude this determination was in any way an abuse of discretion.<sup>13</sup> Further, with respect to the grievant's argument that the agency failed to show that it treated her in a manner consistent with other employees, the grievant has the burden to raise and establish any mitigating factors.<sup>14</sup> Although the grievant indicates that she believes the agency has not acted consistently, she identifies no record evidence that would support this assertion. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.<sup>15</sup> Accordingly, for all the foregoing reasons, EDR will not disturb the hearing officer's 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.<sup>16</sup> Within 30 calendar days of a final hearing decision, either party may appeal the

---

<sup>11</sup> "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6<sup>th</sup> 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.*

<sup>12</sup> See EDR Ruling No. 2014-3820; EDR Ruling No. 2009-2091; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

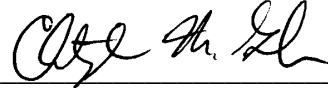
<sup>13</sup> Hearing Decision at 3-5.

<sup>14</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>15</sup> See Hearing Decision at 5.

<sup>16</sup> *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>



---

Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>17</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>18</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).