

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10435; Ruling
Date: October 6, 2014; Ruling No. 2015-4005; Agency: Department of Behavioral
Health and Developmental 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 Behavioral Health and Developmental Services
Ruling Number 2015-4005
October 6, 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 10435. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed by the Department of Behavioral Health and Developmental Services as a forensic mental health technician.¹ On July 22, 2014, the agency issued the Grievant a Group III Written Notice with removal for abuse of a client.² The grievant grieved the disciplinary action and on September 5, 2014, a hearing was conducted.³ In his hearing decision, issued September 10, 2014, the hearing officer upheld the disciplinary action.⁴ 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.”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

Findings of Fact

The grievant’s request for administrative review challenges the hearing officer’s findings of fact based on the weight and credibility that he accorded to evidence presented and testimony

¹ See Decision of Hearing Officer, Case No. 10435 (“Hearing Decision”), September 10, 2014, at 2.

² *Id.* at 3; see also Agency Exhibit 1 at 1.

³ Hearing Decision at 1.

⁴ *Id.* at 7-8.

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

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

given at the hearing. In particular, she asserts that the hearing officer erred in believing the testimony of one of the grievant's co-workers. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁷ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁸ 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.⁹ 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.¹⁰ 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.

Based on a review of the record, there is sufficient evidence to support the hearing officer's factual finding that the grievant engaged in conduct constituting abuse, including telling a client that she "could make sure that [he] would not go home on time."¹¹ Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group III offense for the grievant's conduct.¹² Because 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. Accordingly, we decline to disturb the decision on this basis.

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]."¹³ 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

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

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

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Hearing Decision at 3, 6-7; *see also* Agency Exhibit 2 at 3.

¹² Hearing Decision at 2-3, 7-8.

¹³ Va. Code § 2.2-3005(C)(6).

management that are found to be consistent with law and policy.”¹⁴ 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.¹⁵

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.¹⁶ EDR will review a hearing officer’s mitigation determination for abuse of discretion,¹⁷ and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

The grievant argues that the hearing officer should have mitigated the disciplinary action because she had no previous disciplinary action and prior satisfactory work performance. 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.¹⁸ 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

¹⁴ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁵ *Rules for Conducting Grievance Hearings* § 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).

¹⁶ *E.g., id.*


¹⁷ “‘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.*

¹⁸ *See* EDR Ruling No. 2014-3820; EDR Ruling No. 2013-3394; EDR Ruling No. 2009-2091; EDR Ruling No. 2008-1903.

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.¹⁹ EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.²⁰ Accordingly, 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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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¹⁹ In this case, the agency presented evidence showing that while the grievant did not have a prior disciplinary record, she has demonstrated a pattern of failure to follow agency policies and conflict with co-workers. *See* Hearing Recording, Disc 2, Track 1 at 27:18-28:40; 51:26-53:57 (testimony of Human Resources Manager and Facility Manager); Agency Exhibit 1, at 5; Agency Exhibit 4.

²⁰ *See* Hearing Decision at 6-7.

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).