Issue: Administrative Review of Hearing Officer's Decision in Case No. 10417; Ruling Date: October 28, 2014; Ruling No. 2015-4012; Agency: Virginia Department of Health; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Health
Ruling Number 2015-4012
October 28, 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 10417. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

The relevant facts in Case Number 10417, as found by the hearing officer, are as follows:[1]

1. The Grievant has worked for the agency for 9 years as a trainer and instructor. In February, 2013, her work site changed from County A ("old work site") to County B ("main work site"). When that occurred, the Grievant, who lives in County D, wanted to set up teleworking in County C ("telework site").

2. The Grievant received an email from her supervisor at the time, explaining that she was not to be working at the telework site until there was an approved and signed telecommute agreement.

3. On October 30, 2013, the Grievant had a signed an Agency Standard Telework Agreement. On page 1 of the agreement one of the terms under Section 3: Work Standards and Performance is as follows: "Employee agrees to perform telework at the agency-approved alternate work location(s) and times defined in this agreement unless they notify and receive explicit approval from a supervisor to temporarily shift telework to another alternate work location or time period. Failure to comply with this provision may result in loss of pay, termination of the telework agreement, and/or appropriate disciplinary action." The Grievant was approved to work at the telework site on Mondays, Tuesdays, Thursdays and Fridays. On Wednesdays, she was to report to the main work site.

[1] Decision of Hearing Officer, Case No. 10417 ("Hearing Decision"), September 16, 2014, at 2-5 (citations omitted).

4. Any changes to the schedule required approval from the Supervisor and were to be noted on the Grievant's Outlook Calendar, an on-line calendar that is accessible by the employee, other employees and the supervisor. A reminder of this policy was reviewed at January 14, 2014 training team meeting, which the Grievant attended.

5. On February 19, 2014, a Wednesday, the Grievant decided to work from the telework site instead of the main work site. Without approval from her supervisor, the Grievant went to the telework site and worked there for the day. Since she had to be at the main work site for teleconference training on Thursday, February 20, 2014, she "swapped" days.

6. In the Grievant's Response to the Due Process Memo on March 5, 2014, the Grievant explained that the reason she swapped days and reported to the telework site on Wednesday, February 19, 2014 was that "it would meet a business need" since she had to be at the main work site on February 20, 2014. In the Grievant's Response to the Written Notice on April 18, 2014, the Grievant explained that the reason she went to the telework site on February 19, 2014 was that she "could get to [the telework site] faster and the roads to [the telework site] figured to be in better condition than those near [the main work site]." In addition, she reiterated that there was a business need to be in the main work site on Thursday.

7. There is no evidence that the roads were better to the telework site than to the main work site. The National Weather Service data shows that the week before, on February 13, 2014 there was 11.7 inches of snow. On February 14: no snow, February 15: .3 inches, February 16: trace, February 17: .2 inches, February 18: .3 inches, February 19: no snow. The majority of the 28 mile commute of the Grievant from her home to the main work site is on a multilane major interstate highway. The 20 mile commute of the Grievant from her home to the telework site involves veering off the interstate to a secondary road. The Grievant admitted that either commute is a "reverse commute." That is, that the majority of the traffic is traveling the opposite direction. When asked what would make the secondary road safer to travel on that day, the Grievant said it was because the drivers on the interstate drove too fast.

8. The Grievant's Outlook Calendar showed that the Grievant and her Supervisor had a regularly scheduled (every other Wednesday) 10:00 phone conference, including the February 19th date. On February 19, 2010, the Supervisor called the Grievant at 10:00 a.m. at the main work site. When there was no answer, she left a message, and sent the Grievant several emails. It was later in the day that the two finally spoke on the telephone. The Grievant admitted that she forgot about the 10:00 phone conference and that she never asked for approval for the change in work site for that day.

9. Initially the Grievant's Outlook Calendar for February 19, 2014 showed only the 10:00 a.m. phone call with the Supervisor. The calendar was changed after that day started with the following addition: "9:00am 9:30am Work at [telework site] today. [Main work site] to[morrow]." In fact, the Grievant did not arrive at the telework site until 10:11 a.m. which was 11 minutes later than her 10:00 work start time. She did not report this late arrival to her Supervisor, as required by the Agency Hours of Work Policy.

10. Once she was at the telework site, the Grievant said that she had to change her computer password and that she was on the phone with the computer department for an hour and a half, so she did not see the Supervisor's emails until after 11:30 a.m. When the Supervisor checked with the computer department, their records show that the Grievant's phone call to them was at 11:22 a.m. on that day.

11. The Grievant testified that she did not believe that her being at the telework site, her late arrival, or the fact that she missed the Supervisor call had any impact on the agency. In fact, due to a late cancelation of the teleconference training scheduled for the next day and due to the Supervisor being unable to contact the Grievant at 10:00, the Supervisor had to do the Grievant's job to begin notifying the participants of the training and rescheduling the training.

12. The Grievant's Supervisor testified that she had counseled the Grievant verbally and in writing on several occasions in the last year regarding the Grievant's failure to follow the Supervisor's instructions. In addition, previous supervisors had counseled the Grievant for failure to follow instructions. In addition, the Grievant has an active Group II Written Notice issued on May 31, 2012 for failure to follow instructions.

13. The Grievant argued that there was no requirement to get approval from the Supervisor when changing the work location. She cites a "just let us know" policy that was in effect for her department. The evidence she produced was emails from other employees in which the employees let the Supervisor and others know that the employee was telecommuting that day. However, the Supervisor and Office Director testified that each of those employees had gotten approval from the Supervisor and the emails were simply courtesy notifications to others of their whereabouts. The Supervisor said that her statement to the employees of "just let us know" was not a change in policy but an attempt to seem less dictatorial to the employees. In any case, the Grievant did not even let the Supervisor know about her change to the other location until after the Supervisor was unable to locate her. She did not ask for approval for the change.

On March 21, 2014, the grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions.[2] In the hearing decision, the hearing officer assessed the evidence as to whether the grievant had failed to follow a supervisor's instructions, finding in the affirmative, and upheld the agency's issuance of the Group II Written Notice.[3] The grievant now appeals the hearing decision to 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[5]

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this review.

Agency's Production of Documents

The grievant asserts that the hearing officer failed to comply with the grievance procedure because she declined to order the agency to provide the grievant with requested documents. Prior to the hearing, the grievant submitted an initial request for documents to the agency. When the agency refused to provide the documents, the grievant submitted a revised request and sought an order from the hearing officer for the production of documents responsive to the revised request. The hearing officer ruled that the agency was not required to produce the documents sought by the grievant. The grievant then submitted a third request for documents to the agency. The agency again declined to provide the documents sought by the grievant.

Revised Request for Documents

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."[7] EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-

[2] Agency Exhibit 2; *see* Hearing Decision at 1.
[3] Hearing Decision at 5-7.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[7] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.[8] As long as a hearing officer's order is consistent with the document discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.[9] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[10] The *Grievance Procedure Manual* further provides that, if a party believe a pre-hearing order issued by the hearing officer is not in compliance with the grievance procedure, he or she must raise any claims relating to the alleged noncompliance in a request for administrative review, to be received by EDR no more than fifteen calendar days from the date of the hearing decision.[11]

The agency issued a Group II Written Notice to the grievant because she failed to follow her supervisor's instructions regarding the proper notification and approval procedures for modifying her telework schedule.[12] Some of the documents sought by the grievant, if they exist, could have been relevant at the hearing to demonstrate whether the grievant had notice of the agency's interpretation and enforcement of its telework policies and directives or whether the discipline imposed was consistent with the agency's treatment of other similarly situated employees.[13] Specifically, the following requests seem reasonably calculated to result in the disclosure of relevant information from the agency: (1) "documents showing any occasion between January 1, 2013 and the present of supervisor **pre-approval** for any employee under the supervision of [Officer Director] or [Training Supervisor] of . . . a telecommute or alternate work location site shift"; (2) "documents showing any occasion between January 1, 2013 and the present of any employee under the supervision of [Officer Director] or [Training Supervisor] . . . shifting a telecommute or alternate work location site shift"; and (3) "documents showing any occasion between January 1, 2013 and the present where any employee under the supervision of [Office Director] or [Training Supervisor] was disciplined or counseled for failure to follow

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[8] *Rules for Conducting Grievance Hearings* § III(E).
[9] *See, e.g.*, EDR Ruling No. 2012-3053.
[10] *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation omitted)).
[11] *Grievance Procedure Manual* § 6.4(2).
[12] *See* Agency Exhibit 2.
[13] *See Rules for Conducting Grievance Hearings*§ VI(B)(2). On the question of inconsistent discipline, EDR has previously stated the following:

> [C]omplaints of misconduct and, more to the point, all documents (or the lack of documents) relating to how an agency responded to complaints can be relevant. For example, if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum, or nothing at all, for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance.

EDR Ruling No. 2010-2376. Should the agency argue that it cannot produce counseling and/or disciplinary records of other employees without compromising those employees' confidentiality, we note that the grievance statutes specifically contemplate the exchange of documentation related to nonparties in a redacted format. Va. Code § 2.2-3003(E). State or agency policies that require otherwise are overridden to the extent that such protected materials are sought by a grievant in conjunction with the grievance process. *See, e.g.*, EDR Ruling No. 2014-3651; EDR Ruling No. 2007-1402; EDR Ruling No. 2006-1199.

instructions or for violation of the telecommuting policy." Having reviewed the information in the hearing record and claims raised by the grievant in her request for administrative review, we must conclude that the hearing officer erred in determining that the agency was not required to produce some documents responsive to these requests, if such documents exist.[14]

Accordingly, this case must be remanded to the hearing officer for a limited reopening of the hearing record. To the extent any documents that are responsive to the requests listed above exist, they must be provided to the grievant and the hearing officer within a reasonable time as determined by the hearing officer. If responsive documents do not exist, the agency shall inform the grievant and the hearing officer of that fact. If any responsive documents exist and are relevant, the hearing officer shall consider them as evidence and issue a revised decision that takes those documents into account. The hearing officer may allow the parties to submit briefs in conjunction with the submission and receipt of any such documents and may reopen the hearing to receive additional testimony or other evidence if necessary.

Third Request for Documents

The grievant does not appear to have requested a ruling from the hearing officer when the agency did not provide her with documents in response to the third request. The grievance procedure provides that "any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance."[15] If the grievant believed the agency's response to her third request for documents was inconsistent with document discovery provisions of the grievance procedure, she should have presented that issue to the hearing officer for a decision. Because the grievant chose not to do so, she has waived her claim of noncompliance regarding the agency's production of documents in response to the revised request.[16]

The grievant also appears to allege that the hearing officer failed to take an adverse inference against the agency for failing to produce the documents requested by the grievant. The *Rules for Conducting Grievance Hearings* (the "*Rules*") allow a hearing officer to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as ordered.[17] However, in the absence of such an order, an adverse inference would not be appropriate. As discussed above, the hearing officer did not order the agency to produce relevant documents in this case and, as such, there was no basis for the hearing officer to draw an adverse inference against the agency.

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[14] The grievant also requested several other categories of documents in the revised request. EDR's review of the hearing record, however, indicates that these requests either sought irrelevant information or were not likely to result in the production of documents that could have an impact on the outcome of this case.

[15] *Grievance Procedure Manual* § 6.3.

[16] *See id.* ("By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.")

[17] *Rules for Conducting Grievance Hearings* § V(B).

Hearing Officer's Findings of Fact

The grievant further asserts that the hearing officer failed to make findings of fact on a material issue in the case. She claims that she was disciplined for "failure to get *prior* approval" for the alteration in here telework schedule on February 19 and that the hearing officer did not "make a finding about whether instructions requiring prior approval had in fact been given to Grievant" before that date.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[18] and to determine the grievance based "on the material issues and grounds in the record for those findings."[19] 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.[20] 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.[21] 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.

The hearing officer assessed the evidence and determined that the grievant had signed a Standard Telework Agreement with the agency, which required her to "perform telework at the agency-approved alternate work location(s) and times defined in this agreement unless they notify and receive explicit approval from a supervisor to temporarily shift telework to another alternate work location or time period."[22] The hearing officer further noted that the grievant "had been counseled by her supervisors for failure to the agreement [sic]" in the past and that she had a "previous active Group II Written Notice for failure to follow instructions."[23] The hearing officer concluded that the grievant "never requested or received approval from her supervisor to be working from the telework site" on February 19, that her behavior violated the terms of her telework agreement, and that the grievant's "failure to follow instructions was a violation of Agency policy."[24]

Having reviewed the evidence presented by the parties at the hearing, we find that there is evidence to support the hearing's officer determination that the grievant did not obtain approval to telework on February 19, that "[a]ny changes to the schedule required approval from the

[18] Va. Code § 2.2-3005.1(C).
[19] *Grievance Procedure Manual* § 5.9.
[20] *Rules for Conducting Grievance Hearings* § VI(B).
[21] *Grievance Procedure Manual* § 5.8.
[22] Hearing Decision at 6 (internal quotation marks omitted); Agency Exhibit 8 at 1.
[23] Hearing Decision at 6; *see* Agency Exhibit 24.
[24] Hearing Decision at 6.

[grievant's] Supervisor,"[25] and the grievant did not obtain approval before reporting to the telework site on that date. The grievant's telework agreement, for example, specifically provides that she did not have approval to telework on Wednesdays.[26] The grievant's supervisor testified that the grievant was not permitted to modify her telework schedule without obtaining approval from her supervisor.[27] There is evidence in the record to show that the grievant did not contact her supervisor to obtain approval to telework either before reporting to the telework site or when she arrived at the telework site on February 19.[28]

The grievant's telework agreement further states that employees must "notify and receive explicit approval from a supervisor" before making any changes to their telework schedule.[29] The grievant's supervisor explained that the grievant was expected to obtain approval before making changes to her telework schedule[30] and that she had given the grievant a verbal instruction prior to February 19 that the grievant was required to obtain approval before modifying her telework schedule.[31] Furthermore, the agency presented evidence that the subject of obtaining approval for telework changes had been discussed in previous staff meetings that the grievant attended.[32] There is also evidence in the record to show that the grievant had been counseled about modifying her telework schedule without obtaining approval from her supervisor and that this behavior was unacceptable.[33] The grievant is correct that the phrase "prior approval" does not appear in the hearing decision. The hearing officer, however, clearly determined that the grievant had received multiple instructions to obtain approval before modifying her telework schedule before February 19 and that she failed to follow those instructions on February 19. There is evidence in the record to support the hearing officer's conclusion on this point.

At the hearing, the grievant argued that the agency followed a "just let us know" policy for changing telework schedules.[34] Agency witnesses, however, testified that employees were required to request approval either before making changes to their telework schedule or, at the latest, upon arriving at their telework site on an unscheduled telework day.[35] The grievant's supervisor stated that the "just let us know" policy cited by the grievant did not absolve employees of the need to obtain approval before changing their telework schedules, but that it was merely way of expressing the agency's flexible approach to modifying telework dates if necessary.[36] There is evidence in the record to show that other agency employees complied with

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[25] *Id.* at 3.
[26] Agency Exhibit 8 at 2.
[27] Hearing Recording at Track 1, 26:49-27:34 (testimony of Training Supervisor).
[28] *Id.* at 42:03-42:24 (testimony of Training Supervisor).
[29] Agency Exhibit 8 at 1.
[30] *See* Hearing Recording at Track 1, 39:27-40:34 (testimony of Training Supervisor).
[31] *Id.* at Track 1, 28:47-29:48, 1:39:27-1:40:15 (testimony of Training Supervisor).
[32] *Id.* at Track 1, 30:35-32:20, 32:43-33:32 (testimony of Training Supervisor); Agency Exhibit 20 at 1-2, Agency Exhibit 21 at 1.
[33] Hearing Recording at Track 1, 50:33-53:03 (testimony of Training Supervisor); Agency Exhibits 22, 23.
[34] *See* Hearing Decision at 4-5.
[35] *E.g.*, Hearing Recording at Track 1, 1:19:58-1:20:34 (testimony of Training Supervisor), 2:16:04-2:16:37 (testimony of Office Director).
[36] *See id.* at Track 1, 42:23-43:24 (testimony of Training Supervisor).

this directive and obtained approval prior to making changes to their telework schedules.[37] In contrast, the agency presented evidence that the grievant did not contact her supervisor on February 19 until almost ninety minutes after she had arrived at the telework site,[38] which did not comply with the agency's practices. While the grievant may disagree with the hearing officer's assessment of the evidence, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is nothing to indicate that the hearing officer's consideration of the agency's telework notification procedures was in any way unreasonable or not based on the actual evidence in the record.

With respect to the grievant's contention that the hearing officer must identify the reasoning for her factual determination that the grievant was given an instruction to obtain approval prior to modifying her telework schedule, we do not find that the lack of explanation, if any, is an error that warrants remanding this case to the hearing officer. The *Rules for Conducting Grievance Hearings* (the "*Rules*") state that "[i]f a case is decided on issues of disputed facts, the hearing officer must identify and explain his/her reasoning in resolving the dispute(s)."[39] Here, the hearing officer essentially found the agency witnesses' explanation that the grievant was required to obtain permission from a supervisor before modifying her telework schedule was credible and consistent with the terms of the telework agreement. Having reviewed the evidence presented by the parties and for the reasons discussed above, it was not unreasonable for the hearing officer to conclude that the testimony of members of agency management who were aware of and approved employees' telework schedules was more persuasive than the evidence presented by the grievant.

Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[40] Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer, and we decline to disturb the hearing decision on this basis.

Scope of Hearing Officer's Authority

The grievant further asserts that the hearing officer exceeded the scope of her authority under the grievance procedure by "making findings on issues not raised in the Written Notice." Specifically, she claims that the hearing officer determined the grievant's supervisor "had to do the Grievant's job"[41] as a result of the grievant's actions on February 19, and that "this allegation [was] not raised in the Written Notice."

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[37] *E.g.*, *id.* at Track 1, 2:11:28-2:12:22 (testimony of Office Director).
[38] *Id.* at 40:30-41:03, (testimony of Training Supervisor); Agency Exhibit 11 at 2.
[39] *Rules for Conducting Grievance Hearings*§ V(C).
[40] *See, e.g.*, EDR Ruling No. 2012-3186.
[41] Hearing Decision at 5.

While the grievant correctly points out that the hearing officer determined the grievant's decision to change her telework schedule on February 19 had an adverse impact on the agency, this conclusion was not outside the scope of the hearing officer's authority, as described in the *Rules*, or otherwise inconsistent with the requirements of the grievance procedure. The question of whether the grievant's action negatively affected business operations is necessarily connected to the overall assessment of whether the grievant engaged in the behavior described in the Written Notice, whether the behavior constituted misconduct, and whether the agency's discipline was consistent with law and policy. As such, the evidence presented to show the grievant's actions on February 19 disrupted agency operations was relevant and constituted part of the circumstances surrounding the incident.[42] The hearing officer did not err in assessing and making findings of fact on an issue that was clearly relevant to the charged misconduct, even though it may not have been listed on the Written Notice. For these reasons, we decline to disturb the decision on this basis.[43]

Mitigation

The grievant further asserts that the hearing officer's mitigation analysis was flawed. At the hearing, the grievant argues she presented evidence that: (1) "[t]here was a [business] reason" for the grievant"to be at the [main office site] the following day, and no reason to be there on February 19"; (2) she had "reasonable safety concerns" about driving conditions on February 19; (3) she "reasonably concluded that her first priority upon arriving" at the telework site "was to get assistance from IT support [] to change her password," which took longer than expected and prevented her from contacting her supervisor immediately; (4) the agency violated the terms of a previous agreement with the grievant to allow her to "self-correct" work-related issues; and (5) the grievant's previous work performance was satisfactory. The grievant claims that the hearing officer only considered evidence about whether road conditions were safe on February 19. She further asserts that the hearing officer's assessment of driving conditions was inconsistent with the *Rules*.

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]."[44] The *Rules* state "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."[45] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that

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[42] For example, there is evidence the grievant missed a scheduled meeting with her supervisor and her supervisor appears to have performed some work that would have been assigned to the grievant, had the supervisor been able to locate the grievant and inform her of the tasks to be completed. *See* Hearing Recording at Track 1, 36:12-38:30 (testimony of Training Supervisor); Agency Exhibit 15.

[43] Furthermore, Section B(2)(b) of DHRM Policy 1.60, *Standards of Conduct*, states that Group II offenses "significantly impact business operations . . ." Thus, it could be argued that, by nature of its categorization as a Group II offense, failing to follow a supervisor's instructions is presumed by DHRM to have a significant impact on agency operations.

[44] Va. Code § 2.2-3005(C)(6).

[45] *Rules for Conducting Grievance Hearings* § VI(A) (citation omitted).

> (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.[46]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

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 the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[47] EDR will review a hearing officer's mitigation determination for abuse of discretion,[48] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Driving Conditions

In the hearing decision, the hearing officer addressed the grievant's contention that driving conditions were unsafe at length and concluded that the evidence on this issue did not support mitigation.[49] The grievant contends that the hearing officer impermissibly "imposed on the Grievant the impossible burden to 'prove' that road conditions to the telework site were in fact better than those to the main site . . . ." The *Rules* provide that "[t]he grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the 'exceeds the limits of reasonableness' standard."[50] The hearing officer did not err in determining that the grievant had the burden to demonstrate whether road conditions to the main worksite on February 19 were so unsafe that she was justified in traveling to the telework site instead.[51] Furthermore, there is nothing to indicate that the hearing officer's consideration of

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[46] *Id.* § VI(B)(1) (citations omitted).
[47] 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).
[48] "'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.*
[49] Hearing Decision at 3, 7.
[50] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[51] *See* Hearing Decision at 3.

the evidence about driving conditions on February 19 was in error or that her conclusions are not supported by the evidence in the record.[52] We decline to disturb the decision on this basis.

Other Mitigating Factors

From EDR's review of the hearing decision, the hearing officer did not refer to every piece of evidence presented by the grievant that might have been offered as to mitigation. While there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing or address each piece of evidence presented by the parties, in this case it is impossible for EDR to determine whether the hearing officer considered all of the evidence relating to mitigation that was presented by the grievant. It may be that the hearing officer did not discuss the evidence cited by the grievant in her request for administrative review because she did not find that it supported mitigation of the discipline. EDR would have no basis to disagree with such a determination. However, there is evidence in the record relating to these issues that EDR cannot determine whether the hearing officer considered in making her decision.

Accordingly, the hearing decision must be remanded to the hearing officer for further consideration of the mitigating factors presented by the grievant. Specifically, the hearing officer must include in her remand decision a discussion of the following evidence and whether it supports mitigation of the discipline: (1) any alleged business reasons the grievant may have had for changing her telework schedule on February 19; (2) the grievant's decision to reset password upon arriving at the telework site on February 19 instead of contacting her supervisor; (3) the possible effect, if any, of the previous agreement; and (4) the grievant's prior satisfactory work performance.[53]

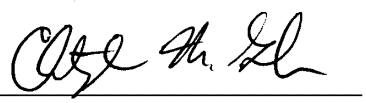
CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for a limited reopening of the hearing record and for further consideration of whether the evidence in the record may support mitigation of the discipline as further discussed above. The agency is required to provide the grievant and the hearing officer with documents responsive to the following requests, or notify them that no responsive documents exist,[54] (1) "documents showing any occasion between January 1, 2013 and the present of supervisor **pre-approval** for any employee under the supervision of [Officer Director] or [Training Supervisor] of . . . a telecommute or alternate work location site shift"; (2) "documents showing any occasion between January 1, 2013 and the present of any employee under the supervision of [Officer Director] or [Training Supervisor] . . . shifting a telecommute or alternate work location site shift"; and (3) "documents showing any occasion between January

[52] *E.g.*, Hearing Recording at Track 1, 1:03:01-1:03:22 (testimony of Training Supervisor); Grievant's Exhibit 15.
[53] Discussion and consideration of these points need not be lengthy. However, there must be sufficient discussion in the decision to demonstrate that these points were considered and whether they support mitigation, individually or collectively. Furthermore, nothing in this ruling is meant to indicate that mitigation of the discipline is warranted or necessary based on the arguments presented by the grievant, but only that the hearing officer must provide a sufficient discussion of these factors indicating whether they would or would not support mitigation in this case.
[54] *See Grievance Procedure Manual* § 8.2 ("A party shall not be required to create a document if the document does not exist.").

1, 2013 and the present where any employee under the supervision of [Office Director] or [Training Supervisor] was disciplined or counseled for failure to follow instructions or for violation of the telecommuting policy."[55] After receiving that information, the hearing officer is directed to issue a remand decision taking any responsive documents and other evidence that may be submitted into account and more fully considering the mitigating evidence presented by the grievant.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[56] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[57] 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.[58] 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.[59] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[60]



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[55] To the extent any of this information could be provided in an alternate form, such as a summary document rather than the original records, the hearing officer has the discretion to permit the agency to produce the information in such a fashion if appropriate.
[56] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[57] *See Grievance Procedure Manual* § 7.2.
[58] *Id.* § 7.2(d).
[59] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[60] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).