Issue: Administrative Review of Hearing Officer's Decision in Case No. 10356; Ruling Date: November 3, 2014; Ruling No. 2015-4018; Agency: Department of Corrections; Outcome: Hearing Decision in Compliance.

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 2015-4018
November 3, 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 10356. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed by the Department of Corrections (the "agency") as a Corrections Lieutenant.[1] On March 14, 2014, the grievant received a Group III Written Notice with a twenty-day suspension for falsifying time records.[2] The grievant also received a second Group III Written Notice with termination for another incident of falsification.[3] The grievant grieved the disciplinary actions, and on August 25, 2014, a hearing was conducted.[4] In his hearing decision, issued September 28, 2014, the hearing officer rescinded the first Group III Written Notice but upheld the second Group III Written Notice with termination.[5] The grievant has now requested an administrative review.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."[6] 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.[7]

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[1] *See* Grievant Exhibit B at 1.
[2] Decision of Hearing Officer, Case No. 10356 ("Hearing Decision"), September 28, 2014, at 7; Agency Exhibit 1.
[3] Hearing Decision at 7; Agency Exhibit 2.
[4] Hearing Decision at 1.
[5] *Id.* at 1, 13.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *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. He asserts that contrary to the hearing officer's findings, the agency failed to timely issue disciplinary action to the grievant, as required by 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.[8] The grievant has requested such a review. Accordingly, his 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]."[9] The *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."[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 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

[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules for Conducting Grievance Hearings* § VI(A).
[11] *Id.* § VI(B)(1).

totally unwarranted.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant first asserts that the hearing officer should have mitigated the disciplinary action because of the delay between the time when the agency became aware of the grievant's conduct and the time the grievant was disciplined. In particular, the grievant challenges the agency's decision to postpone disciplinary action against him while he was on short-term disability.[14] While the determination of whether the agency's actions were in accordance with state and agency policy lies with the DHRM Director, EDR cannot conclude that the agency's actions warranted mitigation under the grievance procedure. Although it cannot be said that a delay in issuing disciplinary action 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.[15] In this case, the delay was at most a period of approximately seven months from the time the agency became aware of the grievant's conduct to the issuance of the disciplinary action. Under the facts and circumstances present here, EDR cannot conclude that a delay of this length renders the agency's disciplinary action outside the limits of reasonableness. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.[16]

The grievant further asserts that the hearing officer erred by not mitigating the disciplinary action on the basis of his "impeccable service record" and the agency's allegedly inconsistent treatment of other employees. The grievant argues that the hearing officer's "blanket statement" that the disciplinary action did not "exceed[] the limits of reasonableness" was insufficient.[17] In addition, the grievant asserts that the hearing officer erred in failing to provide sufficient analysis of his conclusion that the Group III Written Notice with termination should not be reduced, even though he rescinded the previous Group III Written Notice.[18]

Although we agree that the better practice would have been for the hearing officer to provide further explanation of his determination that mitigation was not warranted, the lack of

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[12] 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).

[13] "'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.*

[14] *See* Hearing Decision at 12.

[15] *See, e.g.*, EDR Ruling No. 2015-4015.

[16] *See* Hearing Decision at 7, 10-13.

[17] *Id.* at 13.

[18] The grievant appears to assert that because the agency listed the previous Group III Written Notice as a circumstance considered in the decision to terminate the grievant. *see* Agency Exhibit 2, the agency bears the burden of proof on this issue. However, as a Group III Written Notice presumptively supports termination under policy, the burden of establishing aggravating factors would only fall on the agency in the event the grievant had established a basis for mitigation. *See* DHRM Policy 1.60, *Standards of Conduct* § B(2)(c); *Rules for Conducting Grievance Hearings* § VI(B)(2).

such explanation does not require remand here. In this case, the evidence relied upon by the grievant was before the hearing officer. In reaching his conclusion that mitigation was not warranted, the hearing officer rejected the grievant's arguments. Based on EDR's review, there is nothing to indicate that the hearing officer abused his discretion in finding that mitigation was not warranted in this case. In addition, EDR cannot conclude that in light of the grievant's previous service, the agency's treatment of other employees, and/or the hearing officer's decision to rescind the previous Group III Written Notice, the agency's decision to issue the grievant a Group III Written Notice with termination exceeded the limits of reasonableness. Accordingly, EDR will not disturb the hearing decision on this basis.

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.[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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[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).