Issue: Administrative Review of Hearing Officer's decision in Case No. 10422, 10423, 10447; Ruling Date: November 17, 2014; Ruling No. 2015-4027; Agency: Old Dominion University; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2015-4027
November 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 Numbers 10422/10423/10447. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed by Old Dominion University (the "University") as an Information Technology Specialist II.[1] On April 17, 2014, the grievant was directed to participate in a fitness for duty evaluation.[2] After the grievant failed to attend the evaluation, he was issued a Group II Written Notice for failing to follow an instruction.[3] The University rescheduled the evaluation, and the grievant again failed to attend.[4] On July 14, 2014, the grievant was issued a Group II Written Notice with termination for again failing to follow the instruction to attend the evaluation.[5] He grieved the disciplinary actions, and on September 22, 2014, a hearing was conducted.[6] In his hearing decision, issued October 10, 2014, the hearing officer denied the grievant's request for relief from the requirement that he participate in a fitness for duty evaluation and upheld the disciplinary actions and termination.[7] 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

[1] *See* Agency Exhibit 2 at 5.
[2] Decision of Hearing Officer, Case Nos. 10422/10423/10447 ("Hearing Decision"), October 10, 2014, at 1; *see* Agency Exhibit 4 at 2, 5.
[3] Hearing Decision at 1; Agency Exhibit 1 at 1-2. The evaluation had apparently been previously rescheduled more than once. Agency Exhibit 1.
[4] Hearing Decision at 1; Agency Exhibit 6 at 1-2.
[5] Agency Exhibit 6 at 1-2.
[6] Hearing Decision at 1.
[7] *Id.* at 20.

matters related to . . . procedural compliance with the grievance procedure."[8] 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.[9]

Inconsistency with State and Agency Policy

The grievant appears to challenge the hearing officer's application of state and agency policy—in particular, the hearing officer's conclusion that the University had the authority to require him to participate in a fitness for duty evaluation.[10] The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] 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]."[12] 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."[13] 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.[14]

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.

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[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Hearing Decision at 16-18.
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] Va. Code § 2.2-3005(C)(6).
[13] *Rules for Conducting Grievance Hearings* § VI(A).
[14] *Id.* § VI(B)(1).

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.[15] EDR will review a hearing officer's mitigation determination for abuse of discretion,[16] and will reverse only where the hearing officer clearly erred in applying the *Rules for Conducting Grievance Hearings*' "exceeds the limits of reasonableness" standard.

The grievant asserts that the hearing officer should have mitigated the disciplinary action because the University failed to provide him with notice of its authority to require the fitness for duty evaluation and therefore "it was unreasonable for the [University] to expect him to submit to an examination . . . ." Assuming, for purposes of this ruling, that the hearing officer was correct in his conclusion that the University's actions were permitted by policy, the grievant's lack of awareness of the University's authority does not constitute a basis for mitigation. In issuing instructions to its employees, an agency is not required to specify the source of its authority.[17] While an employee may elect not to follow an instruction by management he or she believes is unwarranted or inappropriate, the employee bears the risk that a hearing officer may ultimately disagree and uphold disciplinary actions resulting from the employee's choice. 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.[18] 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

[15] 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] "'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.*

[17] While the *Rules for Conducting Grievance Hearings* provide that in some cases, lack of notice may be a mitigating circumstance, the lack of notice must relate to the rule under which the grievant is being charged, not the agency's authority to issue an instruction. *Rules for Conducting Grievance Hearings* § VI(B)(2).

[18] *See* Hearing Decision at 19.

[19] *Grievance Procedure Manual* § 7.2(d).

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]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[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).