Issue: Administrative Review of Hearing Officer's Decision in Case No. 10463, 10464; Ruling Date: December 22, 2014; Ruling No. 2015-4055; Agency: Virginia Department of Transportation; Outcome: Hearing Decision in Compliance.

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

## ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2015-4055
December 22, 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 10463, 10464.[1] For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

### FACTS

The relevant facts as set forth by the hearing officer in Case Numbers 10463, 10464 are as follows:[2]

> The Virginia Department of Transportation employed Grievant as a Transportation Operations Manager II, Superintendent, at one of its residencies. He had been employed by the Agency for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Mr. T worked as one of two superintendents reporting to Grievant. Mr. T sought employment at another of the Agency's facilities. He received an offer of employment subject to a reference check. Grievant and Grievant's supervisor, Mr. C, gave references for Mr. T. Grievant's reference was "glowing". Grievant told the HR Manager that Mr. T had received an offer of employment at another facility. She was unaware of the offer. She contacted Ms. B at the other location and learned of the offer. The HR Manager said she was surprised at the references given for Mr. T because Mr. T had received disciplinary action and had been counseled several times by Grievant. The offer of employment made to Mr. T was retracted because of the discrepancies between Mr. T's application and his reference checks. This angered Mr. T so he went to the HR Manager and began complaining about Grievant's use of the word ni--er.
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> Mr. S reported to Grievant for five months. On one occasion in the Fall of 2013, Mr. S, Grievant and Mr. T were at a work site and observed bi-racial

[1] The grievant's request was submitted to the DHRM Director. Upon review by this Office, it was determined that certain of the issues raised fell under the jurisdiction of EDR to review. While there will be a separate review issued on the questions of compliance with state and/or agency policy, *see infra*, this review will address whether the hearing decision and the hearing officer complied with the grievance procedure. *See Grievance Procedure Manual* § 7.2(a) (indicating the difference between administrative reviews by DHRM and administrative reviews by EDR).

[2] Decision of Hearing Officer, Case Nos. 10463, 10464 ("Hearing Decision"), November 7, 2014 at 2-4 (citations omitted).

children playing in a yard at a house. Later in the day, Mr. S questioned why children would be out playing on a school day. Grievant said that the children were Mr. Co's "ni—er grandkids." Mr. Co was also an employee in Grievant's chain of command. Mr. S was shocked and upset by Grievant's statement although he took no action to report the incident.

In April 2014, a basketball team owner made racially offensive comments that became public. Stories about his comments appeared on television.

Mr. L began reporting to Grievant on April 10, 2014. He replaced Mr. S. Grievant, Mr. L, and several employees were gathered near a television in the office. A news reporter began discussing the basketball team owner's comments. Mr. L was not familiar with the incident and said, "I don't know what that fellow done, but he is on TV a lot." Grievant replied that the basketball team owner "did not want his girlfriend associating with ni—ers." Mr. L leaned forward and said, "Excuse me?" Grievant said, "he did not want his girlfriend hanging around ni—ers." Mr. L was surprised at Grievant's comment and sat back in his chair. A picture of a famous basketball player appeared on the television and Grievant commented that the basketball player did "not want his girlfriend hanging around with that ni—er right there." Mr. L was offended by Grievant's use of racially offensive language.

The Agency decided to remove Mr. T from Grievant's residency sometime after Mr. T complained to the HR Manager and before June 18, 2014.

On June 17, 2014, the Residency Administrator met with Grievant to present him with the due process allegation letter. The letter expressed the Agency's allegations against Grievant and afforded him the opportunity to respond prior to the Agency's decision whether to issue disciplinary action. The Residency Administrator discussed the letter with Grievant. The Residency Administrator discussed the allegations about Grievant's use of "ni—er", his denial of equal opportunities, and failure to report damage to equipment. Grievant asked if he could tell his employees about the letter and ask if they had ever heard him use the offensive words. The Residency Administrator told Grievant that was not a good idea and that the Residency Administrator did not think Grievant should do so.

On June 18, 2014, Grievant assembled his subordinate employees. He said he had something to announce. Grievant's demeanor showed that he was upset. Grievant told his employees that apparently he had offended someone when he made comments about a basketball team owner and ni—er basketball players. Grievant said he was in trouble for inconsistently calling people to work overtime and hiding damage to vehicles. He asked if anyone had heard him say "ni—er" or say anything about Mr. Co's 'ni—er grandchildren." Grievant stated that if employees wanted to write letters to support him he would be glad to take them. Grievant said he had spoken with a lawyer and the lawyer said "how many people do you want me to embarrass." Mr. L interpreted Grievant's description of the lawyer's comments as a threat against employees saying something

> Grievant did not wish to hear. Grievant said that whatever they did they should tell the truth.

On or about June 27, 2014, the grievant was issued a Group II Written Notice for workplace violence, workplace harassment, and failure to follow policy, principally related the grievant's use of a racial slur in the workplace.[3] On or about August 25, 2014, the grievant was issued a Group III Written Notice with termination for unsatisfactory work performance, violation of equal employment opportunity policy, workplace harassment, and disruptive behavior, principally related to his conduct at a work meeting on June 18, 2014.[4] In his November 7, 2014 hearing decision, the hearing officer upheld the agency's issuance of the first Group II Written Notice, but reduced the Group III Written Notice to a Group II Written Notice.[5] Based upon the accumulation of two Group II disciplinary actions, the termination was upheld.[6] The grievant now seeks administrative review from 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 . . . ."[7] 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.[8]

*Inconsistency with Agency Policy*

The grievant argues that the hearing officer's decision is inconsistent with various state and agency policies. The Director of DHRM has the sole authority to interpret all policies affecting state employees, and to make a final determination on whether the hearing decision comports with policy.[9] The grievant has requested such a review. Accordingly, EDR will not address these claims further.

*Due Process*

The grievant argues that his due process rights were violated due to the agency's denying him the right to speak to his employees as a group about the allegations against him (and subsequently issuing discipline to him based upon so doing), as well as failing to make available one of the agency's complaining witnesses at hearing.

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[3] Agency Exhibit 1 at 1-2.
[4] *Id.* at 5-6.
[5] Hearing Decisionat 7.
[6] *Id.*; *see* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[10] is a legal concept which may be raised with the circuit court in the jurisdiction where the grievance arose.[11] However, the grievance procedure incorporates the concept of due process and therefore we address the issue upon administrative review as a matter of compliance with the grievance procedure's *Rules for Conducting Grievance Hearings* (the "*Rules*"). Further, DHRM Policy 1.60, *Standards of Conduct* (the "*Standards of Conduct*"), contains a section expressly entitled "Due Process."[12] As mentioned above, the DHRM Director will have the opportunity to respond to any objections based on the allegation that the agency failed to follow state policy., including the due process provisions within the *Standards of Conduct*.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[13] Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[14]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[15] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[16]

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[10] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).

[11] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[12] *See* DHRM Policy 1.60, *Standards of Conduct*, § E.

[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[14] *Loudermill*, 470 U.S. at 546.

[15] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[16] See Va. Code § 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an

With respect to the grievant's receipt of disciplinary action for discussing the charges against him at meeting with his subordinates, we are unable to find that the hearing officer's upholding of the Written Notice violates the grievant's right to due process as a matter of the grievance procedure.[17] Even to the extent it would have applied to the conduct at issue, nothing in the grievance procedure explicitly guarantees a grievant the right to discuss disciplinary action against him with other employees in the workplace. However, whether any alleged due process violation supports a contention that the hearing decision is contrary to law is a question that can be raised in a legal appeal to the appropriate circuit court.

Furthermore, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[18] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure pre-disciplinary deficiencies.[19] Accordingly, we find no due process violation as a matter of the grievance procedure.

The grievant also argues that his due process rights were violated because he did not have the opportunity at the hearing to confront and cross-examine a former agency employee who had complained about the grievant, Mr. T. Pursuant to the *Rules*, it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.[20] Failure on the agency's part in this regard can lead to the hearing officer taking an adverse inference against the agency.[21] However, in this instance Mr. T was no longer an agency employee at the time of hearing, nor was he ordered by the hearing officer to attend the hearing.[22] If the grievant desired the opportunity to question Mr. T at the hearing, he should have requested that the hearing officer issue a witness order for his appearance.[23] As he did not do so,[24] we cannot find that the hearing officer's failure to take an adverse inference against the agency due to the non-appearance of Mr. T was improper under the grievance procedure.

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appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[17] The hearing officer's findings of fact regarding this Written Notice will be further discussed below.

[18] *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").

[19] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).

[20] *Rules for Conducting Grievance Hearings* § III(E).

[21] *Id.* § V(B).

[22] Hearing Recording at 20:27-21:13.

[23] It should be noted that the hearing officer does not have subpoena power. *See* Va. Code § 2.2-3005(C); *Rules for Conducting Grievance Hearings* § V(B). As such, even if Mr. T's attendance had been requested by the grievant, the hearing officer has limited options to compel a non-employee witness to appear for and to testify at a grievance hearing.

[24] *See* Grievant's Witness and Exhibit List.

*Burden of Proof*

The grievant also asserts that the hearing officer failed to apply the correct burden of proof in rendering his decision. As the grievant correctly notes, the agency was required to show by a preponderance of the evidence that the disciplinary actions issued to him were warranted and appropriate under the circumstances.[25] It appears that the grievant's position is based upon language used by the hearing officer in his decision, stating that the "[a]gency has presented a sufficient basis to support the issuance of disciplinary action . . . ."[26] We find the grievant's argument to be without merit.

The hearing decision sets forth in no uncertain terms that "[t]he burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not."[27] The hearing officer concluded that the agency met this burden on the basis of the evidence presented at the hearing.[28] The use of the phrase "sufficient evidence" in the hearing decision is not enough, in itself, to indicate that the hearing officer imposed a different burden of proof in this matter. Thus, we cannot conclude that the hearing officer failed to comply with the grievance procedure and we decline to disturb the decision on that basis.

*Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review challenges the hearing officer's findings of fact in several areas based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Essentially, he asserts that the agency did not bear its burden of proof to show that the disciplinary actions at issue were warranted and appropriate under the circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[29] and to determine the grievance based "on the material issues and grounds in the record for those findings."[30] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[31] 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.[32] 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

[25] *Grievance Procedure Manual* § 5.8.
[26] Hearing Decision at 5.
[27] *Id*. at 2 (citations omitted).
[28] *Id*. at 5, 7.
[29] Va. Code § 2.2-3005.1(C).
[30] *Grievance Procedure Manual* § 5.9.
[31] *Rules for Conducting Grievance Hearings* § VI(B).
[32] *Grievance Procedure Manual* § 5.8.

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 grievant advances several arguments regarding the initial complaint against the grievant, which ultimately led to the issuance of the June 27, 2014 Group II Written Notice, wherein it was alleged that the grievant had used a racial slur in the workplace. Specifically, he argues that the hearing decision does not mention the nonappearance of Mr. T, one of the initial complainants, at the hearing or the testimony of several witnesses about Mr. T's character and motivations for making a complaint against the grievant, and incorrectly states that an employment offer made to Mr. T was retracted based upon the grievant's actions.

Based on a review of the testimony at hearing and the facts in the record, there is evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the Group II Written Notice.[33] The hearing officer upheld the discipline issued by the agency on facts independent of any information that Mr. T may have provided;[34] in particular, the hearing officer relied primarily upon the testimony of two other agency employees, Mr. S and Mr. L.[35] Both of these witnesses testified that they heard the grievant use a racial slur on at least one occasion,[36] and the hearing officer found their testimony to be credible.[37] The hearing officer also found that this behavior created an offensive work environment and constituted misconduct.[38] 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 this instance, the hearing officer's factual findings were based upon record evidence and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant also challenges the hearing officer's findings of fact as they pertain to the August 25, 2014 Group III Written Notice. He alleges that the hearing officer improperly relied solely on the testimony of one complaining witness, Mr. L, in making a determination that the grievant's behavior justified the issuance of the disciplinary action.[39] He also argues that the hearing officer's determination that the grievant engaged in misconduct by discussing the first Group II allegations at a meeting was not supported by the evidence.

To the extent that the grievant argues that the hearing officer did not address every piece of evidence presented, including the testimony of several other agency employees offering information that would support the grievant's position, we find no basis to disturb the decision. It is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented, and there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Here, the hearing officer found Mr. L's testimony persuasive and accordingly held that grievant's actions

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[33] *See* Hearing Decision at 4-5.
[34] Thus, any alleged discrepancy in the hearing officer's findings regarding Mr. T's allegations against grievant would constitute harmless error, if indeed error at all.
[35] Hearing Decision at 3, 5.
[36] Hearing Recording at 26:19-29:21 (testimony of Mr. S), 49:53-51:37 (testimony of Mr. L).
[37] Hearing Decision at 5.
[38] *Id*.
[39] Hearing Decision at 6.

were improper because "[a]t least one employee in the group, Mr. L, interpreted Grievant's comments as threatening employees about saying anything Grievant did not wish to hear."[40] Mere silence as to other witnesses' testimony does not constitute a basis for remand in this case.

While the grievant takes the position that there is "not a scintilla" of evidence to support a determination that the grievant engaged in misconduct at the meeting, the hearing officer's findings as to the perceived threat were not invented, but rather are consistent with the testimony of Mr. L.[41] Further, and perhaps more importantly, the hearing officer determined that the grievant had disregarded his supervisor's warning that it was "not a good idea" to discuss the allegations with his employees, "thereby justifying the Agency's decision to take disciplinary action."[42] Based on the totality of the allegations, the hearing officer determined that the grievant's misconduct rose to the level of a Group II violation of the *Standards of Conduct*.[43]

While the grievant contends that the evidentiary record supports his case, as already stated above, determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. There may be some evidence in the record to support the grievant's theory of the case. However, there is evidence in the record that also supports a contrary position. 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 this instance, the hearing officer's factual findings were based upon record evidence and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

*Alleged Bias of Hearing Officer*

The grievant alleges that the hearing officer demonstrated bias against the grievant by (1) not including in his decision details of the testimony given by certain witnesses testifying in the grievant's favor, (2) asking the grievant why certain witnesses might have motivation to give false testimony, but failing to ask the agency witnesses the same question, and (3) failing to discuss in the decision an alleged business relationship between one of the agency's witnesses and human resource analyst.[44] Essentially, the grievant contends that because the hearing officer's factual findings tend to support the agency's position in this case, he was biased against the grievant.

The *Rules* provide that a hearing officer is responsible for:

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[40] *Id*.
[41] *E.g.*, Hearing Recording at 56:00 – 56:43 (Testimony of Mr. L).
[42] Hearing Decision at 6. The grievant does not appear to clearly contest this determination factually, but only as a violation of due process, discussed separately above, and of Section2.2-3004 of the Code of Virginia. While any question of law in this regard is properly the consideration of a court review, EDR finds no apparent violation in the hearing officer's determinations here.
[43] *Id.* To the extent the grievant is arguing this conduct did not rise to the level of misconduct at a Group II level or misconduct at all, such a determination is a question of policy for review by DHRM.
[44] While there was limited testimony on this point at the hearing, it appears that Mr. L operates a kennel and trained the dogs of one of the agency's human resource officers through that business. Hearing Recording at 1:11:36 – 1:13:13 (testimony of Mr. L).

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[45]

The grievant has not identified any applicable rules or requirements to support his position that the hearing officer demonstrated bias against him, nor are we aware of any. As to the EDR requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," the applicable standard is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[46] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[47] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[48] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[49]

In this particular case, there is no such evidence. The mere fact that a hearing officer's findings align more favorably with one party than another will rarely, if ever, standing alone constitute sufficient evidence of bias. This is not the extraordinary case where bias can be inferred from a hearing officer's findings of fact. Therefore, EDR finds no reason to disturb the hearing officer's decision for this reason.

Furthermore, the *Rules* expressly provide that "the hearing officer may question the witnesses . . . ."[50] The *Rules* further caution, however, that "[t]he tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[51] Based on a review of the record, we find the hearing officer's questions to be relevant and reasonable in both tone and substance. Counsel for both parties had the opportunity to further inquire of witnesses on the topics raised by the hearing officer. Consequently, we find nothing inappropriate with the hearing officer's conduct in questioning certain witnesses about pertinent issues in this case.

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[45] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

[46] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

[47] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

[48] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

[49] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

[50] *Rules for Conducting Grievance Hearings* § IV(C).

[51] *Id.*

*Mitigation*

The grievant asserts that the hearing officer did not properly weigh potential mitigating factors in this case. In support of his position, he points out several statements from the grievant's subordinate employees attesting to the grievant's strong performance as a supervisor.

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]."[52] 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."[53] 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.[54]

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 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.[55] EDR will review a hearing officer's mitigation determination for abuse of discretion,[56] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer considered the grievant's potentially mitigating evidence and found that no mitigating circumstances exist that would warrant reduction of the

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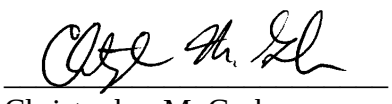
[52] Va. Code § 2.2-3005(C)(6).
[53] *Rules for Conducting Grievance Hearings* § VI(A).
[54] *Id.* § VI(B)(1).
[55] The Merit Systems Protection Board's (the "Board's") approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[56] "'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.*

disciplinary action.[57] To the extent that the grievant argues that his length of service and otherwise satisfactory performance, including the positive reviews from other employees, should also have been considered as mitigating factors, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[58] The weight of an employee's length of service and 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, neither the grievant's length of service nor his otherwise satisfactory work performance are 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 due to its severity. As such, EDR will not disturb the hearing officer's decision on this basis.

## CONCLUSION AND APPEAL RIGHTS

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.[59] 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.[60] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[61]



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[57] Hearing Decision at 7.
[58] *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[59] *Grievance Procedure Manual* § 7.2(d).
[60] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[61] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).