Issue: Administrative Review of Hearing Officer's Decision in Case No. 10642; Ruling Date: October 2, 2015; Ruling No. 2016-4226; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2016-4226
October 2, 2015

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 10642. 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 Number 10642 are as follows:[1]

> The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. He has been employed by the Agency for approximately 20 years.
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> Grievant was experiencing stress resulting from the closing of his former facility. He was concerned about staffing at the new facility.
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> On December 12, 2014, the Captain met with approximately 20 to 25 security staff prior to the start of their shifts. He addressed staffing concerns. Grievant became argumentative and expressed his opinion about staffing at the Facility. The Captain attempted to respond to Grievant's concerns but Grievant appeared to the Captain not to be satisfied by the Captain's comments. The Captain told Grievant he would continue to address Grievant's concerns after the meeting was concluded. The Captain continued to speak to the employees but Grievant again interrupted the Captain. The Captain again told Grievant that they would discuss the matter after the meeting. The Captain resumed speaking to the group. The Captain said he had spoken to the Warden about the issue. Grievant interrupted and said, "Mr. [Warden's last name]? Now that's an arrogant motherf—er right there."
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> Grievant spoke with the Captain in the Watch Office following the meeting. Grievant admitted what he had done was wrong and said that when the former facility closed he had lost his family. He asked to meet with the Warden

[1] Decision of Hearing Officer, Case No. 10642 ("Hearing Decision"), August 24, 2015 at 2.

> to apologize to him and to speak to the employees on the following day to apologize to them. Grievant apologized to the Warden and the employees.

On or about February 18, 2015, the grievant was issued a Group I Written Notice for using obscene or abusive language.[2] The grievant timely grieved the disciplinary action and a hearing was held on August 20, 2015.[3] In a decision dated August 24, 2015, the hearing officer upheld the Group I Written Notice.[4] 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 . . . ."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and grounds in the record for those findings."[8] Further, in cases involving discipline, the hearing officer reviews the 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.[9] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[10] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this instance, the grievant contests the hearing officer's determination that the language he used was "obscene or abusive." The grievant argues that he did not intend his statement to be obscene or abusive, but rather, suggests he was describing an "annoying person or thing." Based on a review of the testimony at hearing and the record evidence, there is

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[2] *Id.* at 1.
[3] *Id.*
[4] *Id.* at 4.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] *Grievance Procedure Manual* § 5.8.

sufficient evidence to support the hearing officer's findings in this matter. While the hearing officer characterized the grievant's language as "obscene" because it could be considered as "language relating to sex in an indecent or offensive way," the hearing officer also determined that the grievant's statement was intended in this instance as an insult.[11] Where the evidence may be subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

Failure to Mitigate

Fairly read, the grievant's request for administrative review also challenges the hearing officer's decision not to mitigate the Written Notice, asserting that the discipline was too harsh for a first offense. 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 ("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 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.[15] EDR will review a hearing officer's mitigation determination for abuse of

[11] Hearing Decision at 3.
[12] Va. Code § 2.2-3005(C)(6).
[13] *Rules* § VI(A).
[14] *Rules* § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on this Department, 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).
[15] *E.g., id.*

discretion,[16] 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 disciplinary action.[17] To the extent that the grievant argues that his length of service with otherwise satisfactory performance should have been considered as a mitigating factor, 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.[18] 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 disciplinary action. Based upon EDR's review of the record, there is nothing to indicate that the hearing officer's mitigation determination in this instance was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that 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.[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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[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] Hearing Decision at 3-4.
[18] *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[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).