Issue: Administrative Review of Decision #5848; Ruling Date: March 12, 2004; Ruling #2004-583; Agency: Virginia Employment Commission; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of the Virginia Employment Commission
Ruling No. 2004-583
March 12, 2004

The grievant (by counsel) has requested a ruling from this Department (EDR) on whether the hearing officer's January 23, 2004 decision complies with the grievance procedure. The grievant claims that, based on his exemplary military and state service, the hearing officer's refusal to mitigate his discharge was not in compliance with the grievance procedure. For the reasons set forth below, this Department concludes that the hearing officer's determination to uphold the agency's discharge of the grievant did not violate the grievance procedure.

FACTS

The Virginia Employment Commission (VEC) hired the grievant on September 10, 2002 as an Assistant Commissioner for VEC Field Operations. His duties included administering the Job Search and Unemployment Insurance programs for the VEC. The grievant had responsibility for 39 field offices, four regional offices, and a central office program. Approximately 1200 employees were part of his chain of command.

On September 12, 2003, the grievant was issued a Group III Written Notice of disciplinary action for misuse of travel funds, work time, and state equipment including his computer, telephone, cell phone, and state car. He was also accused of having falsified state documents. In conjunction with the issuance of the Group III Notice, the grievant was discharged from employment.

On October 10, 2003, the grievant timely filed a grievance to challenge the agency's action. The outcome of the third resolution step was not satisfactory to the grievant and he requested a hearing. On October 30, 2003, this Department assigned a hearing officer to hear the grievance. In his January 23, 2004 hearing decision, the hearing officer held that the grievant used state property excessively and in an unauthorized manner. The hearing officer concluded that during the 47 week period from September 10, 2002 through July 31, 2003, the grievant spent over 13,000 minutes on the phone with a former female co-worker who works at the state agency where the grievant worked prior to joining VEC. VEC presented evidence that the phone charges stemming from the calls to this former co-worker exceeded $1,400. The agency contended that the number and time of calls to the former co-worker was so excessive as to justify the

issuance of a Group III Written Notice. The hearing officer concurred with the agency's position.

As to the charge of falsification of documents, the hearing officer found that the evidence did not support the charge. (The agency had based the claim of falsification on the grievant's alleged attempts to seek reimbursement for travel allegedly unrelated to agency business.)

The hearing officer concluded the ruling by noting that "[a]lthough the agency had presented sufficient evidence to support the issuance of a Group III Notice, the question arises regarding whether the Grievant's removal should be mitigated thereby reinstating him to his former position." The hearing officer conducted an "analysis independent of the *Rules for Conducting Grievance Hearings*," and held that based on the grievant's exemplary prior service at another state agency and his "war hero" status, he, the hearing officer, would have mitigated the discipline and returned the grievant to work.

Apparently recognizing that he was nevertheless bound by the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* (*Rules*), the hearing officer ultimately gave deference to the agency's decision to terminate the grievant's employment and upheld the agency action.

DISCUSSION

As an initial point, the hearing officer's decision to conduct an "analysis independent of the *Rules for Conducting Grievance Hearings*" is inexplicable. The hearing officer concluded that "[i]f the Hearing Officer considers the evidence as presented and <u>without</u> considering the decision-making standard set forth in the *Rules for Conducting Grievance Hearings*, Grievant has presented sufficient evidence to establish that his removal should be reversed."[1] His dicta regarding his personal opinion of what would have been equitable <u>outside</u> of the rules that bind him is wholly irrelevant given that the hearing officer, like any other judge, is bound by rules and may not simply elect to ignore them.

Framework for Determining Whether Discipline was Appropriate

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.[2] To do this,

[1] Hearing Decision, page 10 (emphasis added).
[2] *Grievance Procedure Manual*, § 5.8, page 14.

> the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had been made yet) to determine whether the cited actions occurred, whether they 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.[3]

Note that while the facts are viewed de novo, as discussed below, the determination of the appropriateness of the agency imposed discipline is viewed in a light giving deference to the agency. Significantly, the analysis cited above from EDR's *Rules* mirrors that used by the federal Merit System Protection Board (MSPB), which in many ways, is the federal equivalent of this Department. While MSPB decisions are in no way binding on this Department, they are nevertheless instructive and persuasive. Under well-settled MSPB law, the agency bears the burden of proving its charge by a preponderance of the evidence, which requires proving not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it.[4]

In this case, the hearing officer appropriately considered whether the cited actions occurred and whether they constituted misconduct. The hearing officer concluded that the grievant had not falsified documents. However, he determined that the grievant did misuse his time and state equipment by spending over 13,000 minutes on the phone with a former female co-worker, and that this abusive conduct did warrant a Group III Written Notice. Only after reaching the conclusion that the behavior occurred and amounted to misconduct, could the hearing officer move on to the final phase of the analysis: determining whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action, despite the existence of any mitigating factors.

Mitigation under the *Rules for Conducting Grievance Hearings*

A hearing officer's mitigation authority is derived from the Commonwealth's grievance statutes, the *Grievance Procedure Manual*, and the *Rules for Conducting Grievance Hearings (Rules)*. Virginia Code § 2.2-3005 confers upon hearing officers the authority to "order appropriate remedies" and to "[t]ake other actions as necessary or specified in the grievance procedure."[5] In accordance with Va. Code § 2.2-1001, this Department has promulgated (1) a grievance procedure, which is embodied in the *Grievance Procedure Manual*, and (2) rules governing grievance hearings, which are set forth in the *Rules*.[6] The *Grievance Procedure Manual* explicitly incorporates the *Rules* as a source of hearing officer authority under the grievance procedure.[7]

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[3] *Rules for Conducting Grievance Hearings* § VI (B), page 11, (emphasis added).
[4] *See* U.S.P.S v. Gregory, 534 U.S. 1, 5, 122 S. Ct. 431, 433-434 (2001), citing to Douglas v. Veterans Admin., 5 M.S.P.B. 313, 333-334, 5 M.S.P.R. 280, 1981 MSPB LEXIS 886 (1981).
[5] Va. Code §§ 2.2-3005 (C)(6) & (7).
[6] *See* Va. Code §§ 2.2-1001(2) & (3).
[7] *Grievance Procedure Manual*, § 5.1, page 13.

The *Rules* expressly state that in cases involving disciplinary action, a "hearing officer may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct," and that "[s]hould the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so."[8] The *Rules*, however, further explain that "[i]n considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters," and that "[t]he agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."[9] Furthermore, the *Rules* recognize that the hearing officer "is not a 'super-personnel officer'" and "management is reserved the exclusive right to manage the affairs and operations of state government."[10] Thus, while it is evident that a hearing officer *may* mitigate an agency's disciplinary action, his discretion to do so is narrower than that of the agency and must be exercised as described below.

Under the *Rules*, once the hearing officer has determined that the employee committed the charged act, that the action constituted misconduct, and that the agency's discipline was consistent with law and policy, the hearing officer may mitigate the agency's discipline only after giving due deference to the agency's right to exercise its good faith business judgment in managing employee matters and its operations. We believe this deference standard comports with that established in other merit system case law, which allows for mitigation only where the agency's penalty exceeds the tolerable limits of reasonableness.[11] In order to determine whether the agency's discipline has exceeded the tolerable limits of reasonableness, the hearing officer must examine all relevant factors. The *Rules* provide a non-exclusive list of factors for consideration by the hearing officer: (1) whether the employee had notice of the existence of the rule purportedly broken; (2) whether management has been consistent in the way it has dealt

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[8] *Rules for Conducting Grievance Hearings* § VI (B)(1), page 12.

[9] Id.

[10] *Rules for Conducting Grievance Hearings* § VI (A), page 10. Note that the *Rules* requirement that hearing officers give deference to agency actions is entirely consistent with federal MSPB law. In LaChance v. M.S.P.B., 178 F.3d 1246; 1999 U.S. App. LEXIS 9711 (Fed. Cir. 1999) the court noted that "it is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." La Chance 178 F.3d at 1251, citing Miguel v. Department of the Army, 727 F.2d 1081, 1083 (Fed. Cir. 1984). *See also* Beard v. General Serv. Admin., 801 F.2d 1318 (Fed. Cir. 1986) ("[T]he employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency . . .") Beard, 801 F.2d at 1321; Hunt v. Department of Health and Human Servs., 758 F.2d 608, 611 (Fed. Cir. 1985) ("Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency.").

[11] *See* Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5 (1981) citing to Douglas v. Veterans Admin., 5 M.S.P.R. 313, (1981). The MSPB "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'" Davis at 5-6. *See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.")

with similarly situated employees; and (3) whether the disciplinary action was prompted by an improper motive. If, after weighing all relevant factors, the hearing officer determines that the agency's action exceeded the bounds of reasonableness, the hearing officer may mitigate the disciplinary action.[12] Again, appropriate deference must be given to the agency[13] and the hearing officer may not serve as a "super-personnel officer" substituting his judgment for that of the agency.[14]

Under the facts of this case, this Department cannot conclude that the hearing officer erred by holding that, under the *Rules*, there were insufficient mitigating factors to warrant modifying the agency's discipline. Here, both the agency and hearing officer agreed that the grievant's $1,400 worth of phone calls on state time constituted the highest level of misconduct under state policy, a Group III offense. Under the Commonwealth's Standard of Conduct, the "normal disciplinary action for a Group III offense is the

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[12] *See*, e.g., Douglas v. Veterans Admin., 5 M.S.P.R. 280, 305-06 (1981), in which the MSPB provided an often cited but non-exclusive list of factors to be considered when assessing the reasonableness of an agency's disciplinary decision. These include:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> (3) the employee's past disciplinary record;
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
> (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> (7) consistency of the penalty with any applicable agency table of penalties;
> (8) the notoriety of the offense or its impact upon the reputation of the agency;
> (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
> (10) potential for the employee's rehabilitation;
> (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and
> (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employees or others.

[13] *Rules for Conducting Grievance Hearings* § VI (A), page 10. *See also* Guise v. Department of Justice, 330 F.3d 1376 (Fed. Cir. 2003) ("The choice of penalty is committed to the sound discretion of the employing agency and will not be overturned unless the agency's choice of penalty is wholly unwarranted in light of all the relevant factors.") Guise at 1380, citing to LaChance v. Devall, 178 F.3d 1246, 1251 (Fed. Cir. 1999).

[14] *Rules for Conducting Grievance Hearings* § VI (A), page 10. *See also*, Hayes v. Dep't of Navy, 727 F.2d 1535 (Fed. Cir. 1994). In reviewing an agency's penalty decision, the question is not what penalty the agency should have chosen. Hayes, 727 F.2d at 1540. Rather, the proper inquiry is whether the agency has selected a penalty within the tolerable bounds of reasonableness. Hayes at 1540; Mitchum v. Tenn. Valley Auth., 756 F.2d 82, 84 (Fed. Cir. 1985).

issuance of a Written Notice and discharge."[15] Consequently, the discipline meted out by the agency was certainly within the parameters allowed by state policy.

The hearing officer also considered the mitigating factors expressly set forth in the *Rules*. He concluded that grievant had adequate notice of the rule he violated (abusing state equipment and time).[16] He also determined that the grievant presented no evidence that the agency has applied disciplinary action inconsistently.[17] Finally, the hearing officer held that there was no evidence that the agency's actions were based on any improper motive.[18]

The grievant is correct that the hearing officer is not limited to considering only the three mitigating factors listed in the *Rules*. However, any factors considered by the hearing officer must be properly balanced against one another.[19] Moreover, the hearing officer's consideration of any factors must give deference to the agency's weighing of relevant factors.[20] Here, the agency notes that given the grievant's ranking within the agency, the third highest position within VEC, his spending over 13,000 minutes on the phone with a former co-worker set "a horrible example to his subordinates."[21] In this case, the agency appeared to view the grievant's high ranking within the agency, as well as the magnitude of the misuse,[22] as aggravating factors that more than negated any mitigating factors. While the hearing officer was impressed by the grievant's military service and prior achievements while employed with another state agency, VEC placed much less weight on these factors, concluding that they were insufficient to change the decision to terminate the grievant.[23] Given that the agency clearly attached more weight to the seriousness of the offense and to the grievant's status within the agency than to his military and prior state service, the hearing officer was bound to give deference to that weighing and could not have mitigated the discipline absent a showing, not present here, that the discipline was outside the bounds of reasonableness.

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[15] Department of Human Resources Management (DHRM) Policy 1.60 VII(D)(3)(a).
[16] Hearing Decision, p. 12.
[17] Id.
[18] Id.
[19] *See* Douglas v. Veterans Admin., 5 M.S.P.B. 313, 5 M.S.P.R. 280, 1981 MSPB LEXIS 886 (1981)("Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case.")1981 MSPB LEXIS 886, 41.
[20] "The [hearing officer's] role in this process is not to insist that the balance be struck precisely where the [hearing officer] would choose to strike it if the [hearing officer] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [hearing officer's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." Id.
[21] February 13, 2004, revised letter to EDR Director, page 5. The premise that, as one of the highest ranking members of the Commission, the grievant's misuse of state property and time sent the wrong message to other VEC employees appears to be reflected in the attachment to the grievant's Written Notice. The attachment states that "the weight of the evidence of the Internal Audit investigation, nature of offenses, and your senior position with the VEC justifies terminating your employment." Attachment, p. 1.
[22] Id., ("nature of offenses"). Also, the agency notes that the grievant's phone usage was the equivalent to spending two full eight-hour days per month on the phone.
[23] February 13, 2004, revised letter to EDR Director, page 4.

Finally, the grievant claims that because this and other hearings officers have found mitigating circumstances in other cases, the hearing officer should mitigate the discipline in this case. The point apparently overlooked by the grievant is that each case is unique and that factors that are relevant in one case may not be in another.[24] Moreover, the facts giving rise to mitigation in one case may not be found in another.[25] In sum, given the totality of circumstances in this case, this Department cannot conclude that the hearing officer erred by concluding that, under the *Rules*, there were insufficient mitigating factors to warrant modifying the agency's discipline.

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.[26] 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.[27] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28] This Department's rulings on matters of procedural compliance are final and nonappealable. [29]

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Claudia T. Farr
Director

[24] "Not all of these [the 12 Douglas] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances." Douglas v. Veterans Admin., 5 M.S.P.B. 313, 1981 MSPB LEXIS 886, at 41 (1981).

[25] For example in one of the cases cited by the grievant, a hearing officer appeared to base his mitigation, at least in part, on the agency's failure to mete out discipline in a consistent manner, that is, similar discipline for similarly situated employees. Case #5715. In contrast, the hearing officer concluded in this case that "no credible evidence was presented suggesting that the agency has not consistently applied disciplinary action." Hearing Decision, p. 12.

[26] *Grievance Procedure Manual,* § 7.2(d), page 20.

[27] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a), page 20.

[28] *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 444-446, 573 S.E.2d 319, 322-323(2002).

[29] Va. Code § 2.2-1001 (5).