Issue: Administrative Review of hearing decision #518; Ruling Date: March 25, 2004; Ruling #2004-613; Agency: Department of Corrections; Outcome: hearing officer did not violate the grievance procedure

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-613
March 25, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 518. The grievant claims that the hearing officer's February 11, 2004 hearing decision does not comply with the grievance procedure. For the reasons discussed below, this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

Until his transfer and demotion effective November 25, 2003, the grievant was employed as a Treatment Program Supervisor with the Department of Corrections (DOC or the agency). On November 15, 2003, the grievant challenged the agency's issuance of a Group III Written Notice for "[p]roviding false information, including but not limited to vouchers, reports, insurance claims, time records, leave records, or other official state documents." The November 15, 2003 grievance proceeded to hearing on January 28, 2004. In a February 11, 2004 decision, the hearing officer upheld the Group III Written Notice with demotion, transfer and a five percent pay reduction.[1]

DISCUSSION

By statute, this Department 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."[2] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[3]

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[1] *See* Decision of Hearing Officer Case Number 518 issued February 11, 2004.
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3), page 18.

Weighing Evidence/Alleged Errors in Findings of Fact

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[4] and to determine the grievance based "on the material issues and grounds in the record for those findings."[5] Moreover, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[6] Accordingly, the technical rules of evidence do not apply.[7] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[8] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the present case, the grievant challenges the hearing officer's consideration of witness testimony and documentation presented by the grievant at hearing. Specifically, the grievant alleges that the hearing officer failed to consider witness testimony by Dr. C regarding a conversation between the grievant and Dr. C on September 30, 2003. The grievant further alleges that the hearing officer's decision fails to address a November 11, 2003 letter from the grievant's primary care physician regarding the grievant's care and ability to work. These challenges simply contest the hearing officer's findings of disputed fact, weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority. Moreover, in his reconsideration decision, the hearing officer, relying upon credible testimony of the grievant's supervisor regarding the grievant making false statements, states that even if "the Hearing Officer disregards the testimony of Dr. C altogether, the outcome of the decision does not change."[9]

Failure to Consider Mitigating Circumstances

The grievant claims that the hearing officer erred by not finding mitigating circumstances which could presumably have resulted in his Group III Written Notice with demotion, transfer, and five percent pay reduction being reduced or removed altogether. Specifically, the grievant claims that evidence submitted at the grievance hearings in Case Numbers 517 and 519 revealed that the grievant was not afforded a list of panel physicians to choose from as required by DOC Policy and Virginia law.

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[4] Va. Code § 2.2-3005(D)(ii).
[5] *Grievance Procedure Manual* § 5.9, page 15.
[6] *Rules for Conducting Grievance Hearings*, § IV(D), page 7.
[7] *Id.*
[8] Va. Code § 2.2-3005(C)(5).
[9] Reconsideration Decision of Hearing Officer Case Number 518 issued March 8, 2004.

The *Rules for Conducting Grievance Hearings (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."[10] 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."[11] 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."[12] 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. 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."[13] To determine whether the agency's discipline has exceeded the tolerable limits of reasonableness, the hearing officer must examine all relevant factors.[14]

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

[11] Id.

[12] *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.").

[13] *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.B. 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.")

[14] 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 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.[15]

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 false statements 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 issuance of a Written Notice and discharge."[16] Here, the agency chose not to discharge the grievant, but demoted and transferred him with a five percent pay reduction. As such, it cannot be concluded that the agency's discipline has exceeded the tolerable limits of reasonableness. Consequently, the hearing officer did not violate the grievance procedure by failing to mitigate such discipline.

Inconsistency with Policy

The grievant also challenges the hearing officer's conclusion that statements made during a telephone conversation can constitute the provision of false information under the *Standards of Conduct.* This is an issue of policy interpretation, which is not appropriate for this Department to address upon administrative review. The Director of

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[15] *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.

[16] Department of Human Resources Management (DHRM) Policy 1.60 VII(D)(3)(a).

DHRM has the authority to assure that hearing decisions are consistent with state human resource policies.[17]

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department finds that the hearing officer did not abuse his discretion under the grievance procedure in deciding Case Number 518. Further, it would not be appropriate for this Department to determine whether the hearing officer's February 11, 2004 decision is inconsistent with policy.

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.[18] 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.[19] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[20] This Department's rulings on matters of procedural compliance are final and nonappealable.[21]

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Claudia T. Farr
Director

[17] *See Grievance Procedure Manual* §7.2(a)(2), page 19.
[18] *Grievance Procedure Manual* §7.2(d), page 20.
[19] *See Grievance Procedure Manual* §7.3(a), page 20.
[20] *Id.*
[21] Va. Code § 2.2-1001(5).