Issue: Administrative Review of Case #8452/Hearing decision appeal; Ruling Date: February 27, 2007; Ruling #2007-1518; Agency: University of Virginia; Outcome: Hearing decision not in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of University of Virginia
Ruling Number 2007-1518
February 27, 2007

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 8452. For the reasons set forth below, the grievance is remanded to the hearing officer to correct errors in the decision.

FACTS

The grievant previously worked in a language lab at the University of Virginia (UVA or the University), where students were also employed.[1] On September 8, 2006, the grievant participated in a "going-away gathering for a student who was moving to the West Coast."[2] The event took place in the language lab at the University after closing at 5:00 p.m., and was described as a "Mojito toast."[3] The grievant brought a bottle of rum to the event, which was attended by the grievant and three student assistants. The student who was departing for the West Coast mixed and poured Mojito drinks, which contain rum, for all four participants. One of the students at the event who consumed alcohol was only nineteen years old.[4]

After the grievant's supervisor observed that alcohol was being consumed, she asked the ages of the students.[5] The underage student told the grievant's supervisor that he was twenty-one years old.[6] The grievant's supervisor, however, discussed the situation with the grievant in another room, later returning to instruct that the party must cease.[7] The grievant had not obtained approval to have alcohol served at an event on University property, as is required by University policy.[8] The grievant was given a Group III Written Notice and terminated the following Monday, September 11, 2006.[9] The two students who were not moving away resigned when given the option by the grievant's supervisor.[10]

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[1] Decision of Hearing Officer, Case No. 8452, Dec. 7, 2006 ("Hearing Decision"), at 2.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 2-3.
[6] *Id.* at 3.
[7] *Id.*
[8] *Id.* at 2-3.
[9] *Id.* at 3.
[10] *Id.*

The hearing officer found that the "grievant violated state policy by promoting and facilitating the unauthorized dispensation of alcohol, and by personally possessing and using alcohol in the workplace."[11] The hearing officer upheld the Group III Written Notice, but mitigated the discipline from termination to a 30-day suspension and reinstated the grievant based on the following grounds: a) the grievant's long state service (11 years); b) the grievant's satisfactory work performance, including receipt of an "In-Band salary adjustment in order to retain what his supervisor called an 'outstanding employee;'" and c) the fact that "there are certainly violations [of the Commonwealth's Alcohol and Other Drugs policy] far more serious and consequential than grievant's offense."[12]

The University asserts two arguments in support of its request for administrative review of the hearing decision. First, the University argues that the hearing officer either misapplied the standard or applied the wrong standard in mitigating the grievant's discipline. Second, the University contends that the hearing officer improperly disallowed rebuttal testimony concerning the grievant's in-band adjustment. The University seeks to have the termination reinstated, or, in the alternative, that the hearing be reopened for the consideration of additional evidence regarding mitigating factors.

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."[13] 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.[14]

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[15] EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work

[11] *Id.* at 4.
[12] *Id.* at 6-7. The hearing officer cited three examples of "more serious and consequential" offenses: "a teacher who frequently teaches in an inebriated or hung-over state; an employee who drinks alcohol to excess and wrecks a state vehicle causing injury or death; or, an employee who habitually keeps alcohol in his desk and drinks while at work." *Id.* at 6.
[13] Va. Code § 2.2-1001(2), (3), and (5).
[14] *See Grievance Procedure Manual* § 6.4(3).
[15] Va. Code § 2.2-3005(C)(6).

> performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.[16]

Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness.[17] This Department concludes that under the *Rules for Conducting Grievance Hearings*, and in light of the hearing officer's findings of fact and application of policy, the grounds for mitigation cited in the hearing decision do not support a finding that the discipline imposed by the agency exceeded the limits of reasonableness.

In this case, the hearing officer found that the agency established a Group III violation of the Commonwealth's Alcohol and Other Drugs policy (DHRM Policy No. 1.05).[18] Indeed, the hearing officer found that the conduct amounted to a Group III violation even though discipline under the Commonwealth's Alcohol and Other Drugs Policy can be a Group I, Group II, or Group III offense depending upon the severity of the conduct.[19] As with all Group III violations, the normal disciplinary action is termination.[20] This Department concludes, therefore, that a hearing officer's finding of a Group III violation effectively creates a rebuttable presumption that termination is a reasonable disciplinary action. Thus, absent evidence that the agency's discipline nevertheless exceeded the limits of reasonableness, the Group III with termination should have been upheld.

The hearing officer determined that the termination should be mitigated because of the grievant's eleven years of state service, satisfactory work performance, and because the hearing officer did not consider the grievant's conduct to be among the most serious types of violations of the Alcohol and Other Drugs policy. It is important to note, however, that the hearing officer also determined that the grievant had committed a terminable offense, a Group III violation. The analysis must be, then, whether the cited mitigation factors are sufficient to rebut the presumption that the agency's decision to terminate the grievant for a terminable offense was within the limits of reasonableness. Here, the facts upon which the hearing officer relied, under any reasonable interpretation, do not support a finding that termination for this Group III offense exceeded the limits of reasonableness.

Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct.[21] However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the

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[16] *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1 (alteration in original).
[17] Hearing Rules § VI.B.
[18] Hearing Decision at 4.
[19] *See* DHRM Policy No. 1.60, *Standards of Conduct*, § V.B.
[20] DHRM Policy No. 1.60, *Standards of Conduct*, § VII.D.3.a.
[21] DHRM Policy No. 1.60, *Standards of Conduct*, § VII.C.1.b.

Rules for Conducting Grievance Hearings, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, 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. 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 terminate the grievant for conduct that was determined by the hearing officer to be terminable, i.e., a Group III offense. Likewise, the receipt of the in-band adjustment does not support a finding that the agency exceeded the limits of reasonableness in terminating the grievant for the Group III offense.

In addition, despite the hearing officer's assertion that there are other more serious violations of the policy, he nevertheless found that the offense committed is normally disciplined by termination. Comparison of the hearing officer's hypothetical offenses might be more relevant to a question of whether the conduct should have been disciplined as a Group II rather than a Group III violation under the Commonwealth's Alcohol and Other Drugs Policy. If the hearing officer had considered the grievant's conduct not worthy of termination, he might have found that the offense only amounted to a Group II violation. However, the hearing officer found that a Group III violation had occurred, for which termination is the normal disciplinary action. Consequently, the hearing officer's discussion of these examples of "more serious" conduct is inapposite.

This ruling does not mean that a termination cannot be mitigated once an agency has prevailed at hearing in establishing a Group III violation. Hearing officers may consider many different circumstances as mitigating factors. However, to mitigate an offense, a hearing officer must find that because of the mitigating factors the discipline exceeded the limits of reasonableness. Such a situation might occur, for example, if the discipline is inconsistent with the manner in which other agency employees have been treated after committing the same misconduct.[22] Here, the factors cited by the hearing officer as grounds for reversing the agency-imposed discipline simply cannot overcome the presumption of reasonableness created by his finding that the conduct in this case constituted a terminable Group III offense. The hearing officer must therefore reconsider his mitigation determination in accordance with the *Rules'* mitigation standard, and consistent with this administrative review ruling.

[22] Indeed, there are other examples where mitigation might be properly based on factors not specifically listed in the *Rules for Conducting Grievance Hearings.* For example, if an employee failed to report to work because she was given medication in a hospital emergency room that caused her to sleep through work, the evidence could support a finding that any discipline given for failing to come to work would exceed the limits of reasonableness.

Exclusion of Rebuttal Evidence

Technical rules of evidence do not apply in a grievance hearing. Instead, most probative evidence is admitted. Probative evidence is "any evidence that tends to prove that a material fact is true or not true."[23] At hearing, after the grievant had presented evidence of his in-band adjustment, the University began to question the grievant's supervisor about the reasons that the in-band adjustment was given.[24] The hearing officer ruled *sua sponte* that the evidence was irrelevant and did not allow the University to present the rebuttal evidence.[25] While it is true that the in-band adjustment did not have anything to do with the grievant's conduct at issue in the Written Notice, it was relevant to the hearing officer on the issue of mitigation. Indeed, the hearing officer even relied upon the grievant's in-band adjustment evidence in making his mitigation determination. Therefore, because the rebuttal evidence concerning the in-band adjustment was relevant to this case as decided in the initial hearing decision, the hearing officer erred by not allowing the University to present it at hearing. However, given the conclusion in this ruling that the hearing officer improperly applied the *Rules'* mitigation standard, by relying, in part, on the in-band adjustment, the issue would appear at this point to be irrelevant.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

The hearing officer is ordered to reconsider his determination as to mitigation in accordance with this ruling. 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]

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Claudia T. Farr
Director

[23] Hearing Rules § IV.D.
[24] Hearing Tape 3, Side A, at Counter Nos. 265-70.
[25] *Id.*
[26] *Grievance Procedure Manual* § 7.2(d).
[27] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[28] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).