

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8728; Ruling Date: April 16, 2008; Ruling #2008-1896; Agency: Department of Conservation and Recreation; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Conservation and Recreation
Ruling No. 2008-1896
April 16, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8728. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

On July 20, 2007, the grievant, a Department of Conservation and Recreation (agency) accountant, was issued a Group III Written Notice disciplinary action based on his alleged unauthorized absences from work over the course of a year (2006).¹ The grievant was required to reimburse the agency for the unauthorized leave in the amount of \$9,697.75, based on over 397 hours of unaccounted leave.² He timely filed a grievance to challenge the agency's action.³ The outcome of the third resolution step was not satisfactory to the grievant and he requested a hearing.⁴ On October 31 2007, the hearing officer received the appointment from this Department.⁵ The hearing was held on December 4, 2007 and a hearing decision was issued on December 7, 2007, upholding the Group III Written Notice.⁶

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."⁷ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

¹ December 7, 2007 Hearing Decision, p.1

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id. at 1 and 6. The full decision in case 8728 is found on EDR's website at:

<http://www.edr.virginia.gov/searchhearing/2008-8728%20Decision.pdf>

⁷ Va. Code §§ 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁸

Hearing Officer Bias

The grievant asserts that the hearing officer in this case was biased against him. The grievant appears to base this assertion on the hearing officer's disclosure in his appointment letter that the hearing officer's father formerly worked for the agency, retiring in the 1980s.

The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has a "direct, personal, substantial, pecuniary interest" in the outcome of a case.⁹ While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.¹⁰ While the grievant claims that the hearing officer had a direct, personal, substantial or pecuniary interest in the outcome of this grievance, he has presented insufficient evidence to support that assertion. Accordingly, this Department cannot conclude that the hearing officer was biased.

Policy Question

The grievant asserts that the hearing officer and the agency improperly categorized his misconduct as a Group III offense. Under the *Rules for Conducting Grievance Hearings*, a hearing officer must determine whether: (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the discipline was consistent with law and policy.¹¹ In determining whether the discipline is consistent with policy, the hearing officer looks to DHRM Policy 1.60, the Standards of Conduct (SOC), to determine whether the misconduct has been appropriately designated as a Group I, II, or III offense under the SOC. Only after establishing that (1) the conduct occurred, (2) it constituted misconduct, and (3) the discipline conformed to law and was properly categorized as a Group I, II, or III offense, does the hearing officer move on to determine whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action.¹²

The grievant's objection regarding the level of the offense of the misconduct is appropriately viewed as a policy challenge, which is properly a question for DHRM to answer, rather than this Department under mitigation. The grievant has a pending request for administrative review with the DHRM Director which appears to make a similar objection. Thus, it is proper for the DHRM Director (or her designee) to address in her Administrative Review the question of whether the misconduct in this case was properly designated as a Group III offense.

⁸ *Grievance Procedure Manual* §§ 6.4; 7.2 (a) (3).

⁹ *Welsh v. Commonwealth*, 14 Va. App. 300, 314, 416 S.E. 2d 451, 460 (1992) (quoting *Ward v. Village of Monroeville* 409 U.S. 47, 60 (1972)).

¹⁰ *See, e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

¹¹ *See Rules for Conducting Grievance Hearings*, § VI(B).

¹² A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *See Rules for Conducting Grievance Hearings*, § VI(B)(1).

Mitigation

The grievant argues that the hearing officer failed to comply with the grievance procedure by not mitigating the disciplinary action. Specifically, the grievant asserts that the agency's discipline exceeded the bounds of reasonableness and that the hearing officer ignored his request for mitigation and supporting evidence. The grievant, however, does not specifically state any mitigating factors that warrant a reduction of the charges in this case, except that the hearing officer should have mitigated the discipline because the actions of the grievant did not constitute a Group III offense, which is discussed above. Notwithstanding, the grievant's failure to identify in his request for administrative review any other mitigating factors, this Department will address this objection.

In cases involving discipline, the hearing officer must determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.¹³ As discussed above, only after establishing that (1) the alleged conduct occurred, (2) it constituted misconduct, and (3) the discipline conformed to law and was properly categorized as a Group I, II, or III offense, does the hearing officer move on to determine whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action. For a hearing officer to mitigate a disciplinary action, the rules require a finding upon consideration of the record evidence that the agency's discipline exceeded the limits of reasonableness. This Department will review a hearing officer's mitigation determinations only for abuse of discretion¹⁴ and will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

Here, the hearing officer noted in his decision that the grievant offered at hearing evidence concerning his otherwise commendable performance and his tenure of good standing as potential mitigating factors warranting a reduction in the discipline. The hearing decision reflects that the agency testified credibly as to its decision to mitigate the discipline by not terminating the grievant for his misconduct. The hearing officer observed that this offense, while written up as a single Group III Written Notice, could conceivably support multiple Group offenses. He concluded that the agency exhibited measured restraint in issuing a single Written notice and that the Group III level was an appropriate designation given the extent of the hours missed (even considering the offense as one involving 100 unaccounted for hours rather than 397).

¹³ To do this, "the hearing officer reviews the facts *de novo*" to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law and policy and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances. *See Rules for Conducting Grievance Hearings*, § VI(B).

¹⁴ "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.*

Based upon the facts in this case, this Department cannot conclude that the hearing officer exceeded or abused his authority in determining that no mitigating circumstances existed that warranted a further reduction in the disciplinary action.¹⁵ The hearing officer recognized that the agency already mitigated the discipline by not terminating the grievant's employment.¹⁶ Consistent with the *Rules for Conducting Grievance Hearing's* admonition to "give due consideration to management's right to exercise its good faith judgment in employee matters," the hearing officer appears to have given appropriate deference to the agency's decision in this matter.¹⁷ Accordingly, under the facts of this case, we cannot conclude that the hearing officer's mitigation determination was erroneous.¹⁸

APPEAL RIGHTS AND OTHER INFORMATION

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 and any reconsidered hearing decisions following such 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 This Department's rulings on matters of procedural compliance are final and nonappealable.²²

Claudia T. Farr
Director

¹⁵ Hearing Decision at 5.

¹⁶ Group III offenses include: "acts and behavior of such a serious nature that a first occurrence normally should warrant removal." DHRM Policy 1.60, "Standards of Conduct."

¹⁷ See *Rules for Conducting Grievance Hearings*, § VI(B).

¹⁸ The grievant also asserts that he has been discriminated against because of his national origin in that others who arrived late were not disciplined. The hearing officer addressed this concern in his decision, holding that the discipline imposed by the agency "was not tainted by improper motive, such as retaliation or discrimination." Here, the grievant appears to contest the hearing officer's findings with regard to disputed facts, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, and the resulting inferences that he drew. Such determinations are within the hearing officer's authority. 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. Based upon a review of the hearing record, there is no indication in this case that the hearing officer abused his discretion or that his findings or conclusions were not supported by the hearing record.

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. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

²² Va. Code § 2.2-1001 (5).