

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8752; Ruling  
Date: January 15, 2008; Ruling #2008-1903; Agency: Virginia Department of  
Corrections; Outcome: Remanded to Hearing Officer for clarification.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Transportation  
Ruling Number 2008-1903  
January 15, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8752. The grievance is remanded to the hearing officer for the reasons described below.

FACTS

This hearing involved the grievant's challenge to two Written Notices.<sup>1</sup> The grievant had received a Group I Written Notice for use of obscene language and a Group III Written Notice with removal for threatening and coercing a state employee.<sup>2</sup> In a December 14, 2007 decision, the hearing officer upheld the disciplinary actions.<sup>3</sup> The grievant has now requested administrative review from this Department regarding the hearing officer's mitigation determinations.

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."<sup>4</sup> 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.<sup>5</sup>

*Mitigation – Length of Service and Satisfactory Work Performance*

The grievant's first argument regarding mitigation asserts his length of service and otherwise satisfactory work performance as mitigating factors. The hearing officer stated in his decision that an employee's length of service and satisfactory work performance, "standing alone, do not provide a basis to mitigate under the *Rules for Conducting Grievance Hearings*."<sup>6</sup> This statement appears to indicate that these two factors will *never* be enough to mitigate a

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<sup>1</sup> Decision of Hearing Officer, Case No. 8752, Dec. 14, 2007 ("Hearing Decision"), at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 6.

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>6</sup> Hearing Decision at 5.

disciplinary action. If such a statement was intended, it contradicts prior EDR precedent and, thus, requires that the hearing officer clarify the decision.

In accordance with the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the discipline exceeded the limits of reasonableness. While it will be an extraordinary case in which these factors could adequately support a finding that a disciplinary action exceeded the limits of reasonableness, it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant. 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.<sup>7</sup> Because it appears that the hearing officer failed to make an individualized assessment of the grievant's length of service and otherwise satisfactory performance to the particular facts of this case, the hearing decision must be remanded for such consideration. Length of service and satisfactory work performance will very rarely be sufficient to mitigate a disciplinary action, but they are not irrelevant and must be considered if raised.

#### *Mitigation – Grievant's Testimony*

The grievant argues that the facts presented in his testimony warrant mitigation of the disciplinary action. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive 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."<sup>8</sup> 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 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.<sup>9</sup>

Therefore, for a hearing officer to mitigate a disciplinary action, the rules require a finding that the agency's discipline exceeded the limits of reasonableness upon consideration of the record evidence. This Department will review a hearing officer's mitigation determinations only for abuse of discretion.<sup>10</sup> Therefore, EDR 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.

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<sup>7</sup> EDR Ruling No. 2007-1518.

<sup>8</sup> Va. Code § 2.2-3005(C)(6).

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).

<sup>10</sup> "Abuse of discretion" is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6<sup>th</sup> 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.*

This Department cannot find (with the exception above regarding length of service and work performance), that the hearing officer in this case exceeded or abused his authority in determining that no mitigating circumstances exist to reduce the disciplinary action.<sup>11</sup> 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. The hearing officer's mitigation determination was not unreasonable. Consequently, this Department will not disturb the hearing officer's decision except to the extent already discussed above.

*Mitigation – Lack of Notice*

The grievant has also asserted that the hearing officer failed to consider an additional mitigating factor. The grievant argues he had no notice that he could be disciplined for behavior that occurred after hours of employment. He argues that Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, governs employee behavior at the workplace only. Based on a review of the record, it does not appear that the grievant raised this issue at the hearing. As such, the hearing officer committed no error in failing to address this point. However, the grievant's argument necessarily raises both legal and policy concerns. As such, the hearing decision could be challenged on these grounds to both DHRM, as inconsistent with policy,<sup>12</sup> and as a due process challenge in the circuit court, if the grievant chooses.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this grievance is remanded to the hearing officer for further consideration. 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.<sup>13</sup> 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.<sup>14</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>15</sup>

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Claudia T. Farr  
Director

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<sup>11</sup> Hearing Decision at 5.

<sup>12</sup> The grievant has already submitted such a request for administrative review to DHRM.

<sup>13</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>14</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a). To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal, in other words, the basis for its position that the hearing decision is "contradictory to law." *Grievance Procedure Manual* § 7.3(a).

<sup>15</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).