

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8871; Ruling Date: September 15, 2008; Ruling #2009-2115; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2009-2115
September 15, 2008

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8871 concerning her grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency). The grievant originally submitted her request to the Department of Human Resource Management (DHRM). However, because the grievant raised issues concerning the hearing officer's evidentiary and mitigation determinations, DHRM properly referred the matter to this Department. Upon considering the grievant's request for review and for the reasons set forth below, there is no reason to disturb the hearing officer's decision.

FACTS

In this case, the grievant received a Group III Written Notice with removal for testing positive for a prohibited substance.¹ The grievant filed a grievance to challenge the disciplinary action and pursued it to a hearing.² In a decision dated July 25, 2008, the hearing officer upheld the disciplinary action.³ In rendering that decision, the hearing officer considered the grievant's length of service and determined that removal did not exceed the limits of reasonableness under the facts of the case.⁴

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."⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

¹ Decision of Hearing Officer, Case No. 8871, July 25, 2008 ("Hearing Decision"), at 1.

² *Id.*

³ *Id.* at 7.

⁴ *Id.* at 6.

⁵ 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.⁶

The grievant argues that her length of service warranted mitigation of the disciplinary action.⁷ 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.”⁸ 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.⁹

Therefore, for a hearing officer to mitigate a disciplinary action, he or she must first find from the record evidence that the agency’s discipline exceeded the limits of reasonableness. A hearing officer’s mitigation determination will be reviewed by this Department only for an abuse of discretion.¹⁰ 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.

In this case, this Department cannot find that the hearing officer exceeded or abused his authority in determining that no mitigating circumstances exist to justify reducing the disciplinary action.¹¹ This Department has stated previously that it will be an extraordinary case in which an employee’s length of service and/or past work experience could adequately support a finding that a disciplinary action exceeded the limits of reasonableness.¹² 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,

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ The grievant also argues that the “disputed nature” of the drug test should be considered on mitigation. 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. In this case, however, based on the hearing officer’s findings of fact it does not appear that the drug test had such a “disputed nature,” as the grievant argues. Hearing Decision at 5-6. Consequently, this issue need not be considered as a mitigating circumstance.

⁸ Va. Code § 2.2-3005(C)(6).

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

¹⁰ “‘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.*

¹¹ Hearing Decision at 6.

¹² EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518.

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.¹³ While the employee's reported service of over 29 years is not insignificant, the misconduct in this case was serious. Thus, the hearing officer's mitigation determination was not unreasonable, and the hearing officer's decision will not be disturbed.

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 have been decided.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Claudia T. Farr
Director

¹³ *Id.*

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).