

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8975; Ruling
Date: February 6, 2009; Ruling #2009-2192; Agency: University of Virginia;
Outcome: Remanded to Hearing Officer.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia
Ruling Number 2009-2192
February 6, 2009

INTRODUCTION & PROCEDURAL NOTE

On December 11, 2008, this Department (EDR) received the grievant's request for administrative review of the hearing officer's decision in Case Number 8975 concerning the grievant's grievance with the University of Virginia (the University). Because this Department was aware that the grievant had also requested the hearing officer to reconsider the original decision, consistent with the *Grievance Procedure Manual*,¹ this Department delayed its administrative review of the case until the hearing officer issued a reconsideration decision. However, without this Department's knowledge, the hearing officer issued a Reconsideration Decision on December 23, 2008.² EDR was not made aware of this Reconsideration Decision by either party or the hearing officer until January 22, 2008. Upon discovering that the reconsideration phase was complete, EDR then commenced with its administrative review. For the reasons set forth below, the hearing decision is remanded to the hearing officer for clarification.

FACTS

In this case, the grievant received a Group III Written Notice with removal for falsifying records and leaving work without permission.³ The grievant filed a grievance to challenge the disciplinary action and pursued it to a hearing.⁴ In a decision dated November 26, 2008, the hearing officer found that, although the University charged the grievant with falsifying records on five separate dates, the evidence supported only one of those instances, which led the hearing officer to uphold the disciplinary action.⁵ In his request for reconsideration, the grievant challenged the hearing officer's findings regarding the grievant's misconduct and raised a number of arguments regarding mitigation. As to the latter point, while setting forth various grounds for mitigation, the grievant argued the hearing officer erred by not providing an

¹ *Grievance Procedure Manual* § 7.2(c).

² Reconsideration Decision of Hearing Officer, Case No. 8975, Dec. 23, 2008 ("Reconsideration Decision").

³ Decision of Hearing Officer, Case No. 8975, Nov. 26, 2008 ("Hearing Decision"), at 1.

⁴ *Id.*

⁵ *Id.* at 7-8.

“individualized assessment” of the mitigating factors in the case. The grievant raised this point, among others, in his request to EDR as well. In the Reconsideration Decision, the hearing officer declined to alter his original determinations.⁶ He also stated the following regarding his consideration of mitigating circumstances:

After considering the possible examples of mitigation set forth in his Decision, the Hearing Officer found that mitigation was not appropriate and, in such a case, the Hearing Officer is under no duty to state why he rejected each possible mitigating ground in not mitigating the Agency’s finding.⁷

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.”⁸ 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.⁹ The grievant has asserted arguments regarding the hearing officer’s mitigation determinations and the findings as to the grievant’s misconduct. These are each discussed below.

Factual Arguments

The grievant argues that he engaged in “much less serious and less culpable behavior” than charged in the Written Notice, which, according to the grievant, deserved a reduced sanction. Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹¹ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹² Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹³ 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

⁶ Reconsideration Decision at 3.

⁷ *Id.*

⁸ Va. Code § 2.2-1001(2), (3), and (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

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.

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.¹⁴ In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct.¹⁵ Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

Mitigation

The grievant argues that the hearing officer did not appropriately consider certain alleged mitigating circumstances. 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.”¹⁶ 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.¹⁷

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.¹⁸ 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.

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ DHRM Policy 1.60, *Standards of Conduct*, Attach. A.

¹⁶ Va. Code § 2.2-3005(C)(6).

¹⁷ *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).

¹⁸ “‘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.*

In this case, it is not clear from the language of the hearing decision that the hearing officer followed this standard appropriately. The hearing officer's limited discussion of mitigation appears to include the finding that the University's punishment in this case (Group III Written Notice) was permissible under the Standards of Conduct.¹⁹ Even assuming that is the case, the hearing officer must still assess the evidence of mitigating circumstances to determine if the disciplinary action nevertheless exceeded the limits of reasonableness.²⁰ The discussion in the Reconsideration Decision is not clear as to how the hearing officer assessed the argued mitigating circumstances put forth by the grievant.²¹ As such, the hearing decision must be remanded for this clarification and consideration consistent with the "exceeds the limits of reasonableness" standard.²²

In reconsidering the mitigation determinations, the hearing officer must also explain his findings as to those grounds asserted by the grievant. While this Department does not disagree that there is no express "duty to state why he rejected each possible mitigating ground,"²³ there are times when best practices require that the specific claims be addressed. For instance, in a case such as this, when the grievant has alleged a relatively limited set of grounds for mitigation, the hearing officer should discuss each point to demonstrate consideration of the grievant's arguments. Requiring such discussion is consistent with this Department's previous rulings.²⁴ However, there are certainly other cases in which a hearing officer would not need to respond individually to every argument raised and, for instance, could respond collectively, as long as consideration of all those grounds raised is demonstrated.²⁵ Due to the limited and specific claims raised by the grievant here, the hearing officer, in reconsidering and clarifying his mitigation analysis, should respond to and discuss his determinations as to the grievant's claims.

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.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

¹⁹ Hearing Decision at 7; Reconsideration Decision at 3.

²⁰ *Rules for Conducting Grievance Hearings* § VI(B).

²¹ See Reconsideration Decision at 3.

²² It may be that the hearing officer considered the evidence consistent with the steps provided in the *Rules for Conducting Grievance Hearings* and proper application of the "exceeds the limits of reasonableness" standard. However, the only discussion of the hearing officer's consideration of mitigation circumstances appears in the Reconsideration Decision. The original decision includes only a listing of potential mitigating grounds, which may or may not relate to this case. Because the hearing officer's considerations are not clear from the hearing decision, the matter must be remanded.

²³ Reconsideration Decision at 3.

²⁴ *E.g.*, EDR Ruling No. 2008-1903 (because the hearing officer failed to make an individualized assessment of the potential mitigating factors in the case, the hearing decision was remanded); *see also* EDR Ruling No. 2007-1716; EDR Ruling No. 2007-1481; EDR Ruling No. 2006-1188; EDR Ruling No. 2005-1073.

²⁵ For example, in responding to an extensive list of purported mitigating factors, a hearing officer would not err by fully discussing those which have any potential merit and responding to any remaining wholly meritless arguments in a summary fashion.

²⁶ *Grievance Procedure Manual* § 7.2(d).

arose.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸

Claudia T. Farr
Director

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, 322 (2002).