Issue: Administrative Review of Hearing Officer's Decision in Case No. 9102; Ruling Date: December 2, 2009; Ruling #2010-2388; Agency: Department of State Police; Outcome: Hearing Decision In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2010-2388
December 2, 2009

The grievant has requested that this Department ("EDR") administratively review the hearing officer's decision in Case Number 9102. The grievant was presented a single Group III Notice with demotion for: (1) making a false statement; and (2) failing to take appropriate action against two troopers on two separate occasions. The hearing officer upheld the discipline, and the grievant now challenges that decision. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The salient facts of this case as gleaned from the Hearing Decision in Case No. 9102, are set forth below.

1. False Statement

The grievant has been an employee of the Department of State Police ("Department") for approximately 38 years. From approximately 1981 until approximately November 26, 2007, the grievant was a Sergeant in Area A, where as part of his duties he weighed state troopers under his supervision pursuant to the Department's weight control program (the "Program"). The grievant was promoted to First Sergeant or the Area Commander for Area B and moved to Area B. When grievant assumed his position as First Sergeant, he became responsible for weighing his immediate subordinates who were on the Department's weight program. These subordinates were all three (3) Sergeants under his supervision in Area B, including Sergeant MX and Sergeant E. The grievant, as First Sergeant, was responsible for familiarizing himself with and implementing all Department practices, policies and procedures, including complying with the Program, in the new area to which he was assigned.

When the grievant came to the Area B office, he was assisted by a non-sworn Department secretary, an experienced clerical secretary ("Secretary O") who had also worked for the grievant's predecessor. Up until the grievant came to Area B, Secretary O had assisted the previous First Sergeant with the Program by receiving from the Sergeants (who weighed the state troopers on the Program) and from the previous First Sergeant (who weighed the Sergeants on

the Program) the required Weight Control Program Progress Reports (Form SP-92-A) (the "Weight Reports"). Secretary O would then forward the Weight Reports to Division headquarters by e-mail or by house mail. Secretary O would also file the Area B office copy of the Weight Reports in the appropriate personnel file, replacing the previous report.

Secretary O, in an effort to assist the grievant, prepared a system for the grievant to use so he would not forget to weigh the Sergeants monthly as required by policy. As part of this system, Secretary O created a template form for Sergeant E, placed it on a clipboard and left the clipboard on the grievant's desk. Secretary O filled in all parts of the form (including the weigh dates) other than the column concerning "Weight" and "Pounds lost or gained." Accordingly, the template form and clipboard left by Secretary O on the grievant's desk served as a visual reminder to the grievant to weigh Sergeant E monthly and when the grievant weighed Sergeant E monthly, in accordance with policy, all the Sergeant would have to do is handwrite in the weight and the corresponding weight loss/gain. Under the system devised by Secretary O to assist her boss, Secretary O would then type in what was handwritten and submit electronically to Division headquarters the Weight Report. During the grievant's tenure as First Sergeant at Area B (the "Period"), the Weight Report for Sergeant E was electronically sent to Division headquarters after weights and weight calculations were handwritten on the template form for Sergeant E on December 22, 2007, January 22, 2008, and February 14, 2008.

Secretary O testified that the grievant knew that Sergeant E was overweight. The hearing officer found this consistent with the grievant's verbal response to Sergeant F of the Department's Professional Standards Unit, Internal Affairs Section ("IA"). Secretary O testified that on occasions, when required by his immediate supervisor, Sergeant E would weigh himself and complete the Weight Report, handwriting in his weight and pounds lost or gained. This is consistent with Sergeant E's verbal response to Sergeant F of IA. The grievant admits that he never weighed Sergeant E.

Captain C is the division commander for Area B (the "Division Commander"). The Division Commander is the supervisor of Lieutenant B ("Lt. B"), who was the grievant's immediate supervisor in Area B. On Thursday, September 18, 2008, Lt. B met with the grievant in Lt. B's office at Division B Headquarters. The purpose of the meeting was for Lt. B to review all performance evaluations which the grievant had prepared for his subordinates in Area B. In reviewing Sergeant E's performance evaluation, Lt. B saw that the grievant had rated Sergeant E as a "Marginal Contributor" in Core Responsibility "B." Lt. B had participated in field operations with Sergeant E and had seen Sergeant E perform well in the field. Lt. B and the grievant discussed the matter and it was determined based on the paucity of information on hand and the discussion that this rating should be changed to "Contributor." Lt. B asked the grievant whether Sergeant E was complying with the Program and losing the required two (2) pounds per month toward his target weight because this was a necessary component of receiving a "Contributor" rating under paragraph 32(B) Part VI of the Performance Evaluation. The grievant replied, "I believe he is. He is to the best of my knowledge." Lt. B specifically asked the grievant to check whether Sergeant E was in compliance with the Program and to make the necessary corrections to the evaluations. Lt. B said they would meet the following week to finalize the evaluations.

As planned, the grievant and Lt. B met the next week on Tuesday, September 23, 2008 in the front parking lot of the Department's Training Academy, after the grievant informed Lt. B that the grievant had finalized the evaluations and needed Lt. B's approval as the reviewer. Lt. B saw that Sergeant E's rating had been changed to "Contributor" in Core Responsibility "B" and Lt. B again specifically asked the grievant if Sergeant E was making satisfactory progress under the Program, as required by Department policy. The grievant answered Lt. B "He is." The hearing officer found that by so stating, the grievant knowingly made a false official statement.

II. Failure to Take Appropriate Corrective Action

The grievant and Sergeant MX had a strained working relationship in Area B. As First Sergeant for Area B, the grievant was Sergeant MX's direct supervisor and on July 9, 2008, the Department received a SP-103 Complaint filed by the grievant against Sergeant MX raising various issues, including a time discrepancy on a SP-106 filed by Sergeant MX, failing to file a SP-66 and failing to notify the grievant that he was leaving the area.

On approximately July 15, 2008, the Division Commander received an anonymous complaint letter which alleged, among other things, that the grievant had caused Area B to be in a state of turmoil and listed certain specific items. (Complaints, regardless of source, are required to be investigated by Department policy.) The specific allegations described below were referred to Sergeant M of IA for investigation:

> Between November 28, 2007, and December 14, 2007, but not limited to, you failed to have a criminal offense investigated and failed to complete an SP-103, when [Sergeant MX] advised you of Standards of Conduct violations by [Trooper T], in that he did not conduct a thorough criminal investigation.
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> You failed to complete an SP-103, when [Sergeant MX] advised you of Standards of Conduct violations, in that on February 4, 2008, [Trooper L] was unprofessional, when he made negative comments about troopers to a General District Court Judge in open court.

By letter dated August 27, 2008, Captain P, acting for and on behalf of the Department, informed the grievant that the allegations referenced in the above paragraph were being investigated. By letter dated November 10, 2008, Captain P advised the grievant that two additional allegations would be investigated:

> Between November 28, 2007 and December 14, 2007, after being advised of a Standards of Conduct violation, you failed to take appropriate action regarding a criminal investigation conducted by [Trooper T].
>
> You failed to take proper action regarding an allegation of improper and unprofessional conduct by [Trooper L]. [Trooper L] was alleged to have conducted himself in an unprofessional and unacceptable manner when he made negative comments about Troopers to a General District Court Judge in open court.

(The November 10, 2008 allegations are substantially the same as those in the Written Notice that is the subject of this ruling.)

On January 6, 2009, the Division Commander personally hand-delivered the November 10, 2008 letter to the grievant. The letter informed the grievant that Major T and the Division Commander would meet with the grievant at the Department's headquarters on January 23, 2009. (The purpose of the meeting was to provide an explanation of the evidence supporting the charge against the grievant and to allow him the opportunity to make an oral response.)

Major T dropped the allegations against the grievant regarding his failure to complete SP-103 Forms regarding Trooper T's and L's actions because there was no evidence that the grievant was the Department employee who received the complaint and, accordingly, the grievant has no corresponding obligation to file a SP-103. However, the grievant was charged with failing to take appropriate action regarding: (1) the criminal investigation conducted by [Trooper T]; and (2) unprofessional conduct by [Trooper L] when he made negative comments about Troopers to a General District Court Judge in open court. On February 18, 2009, the Department issued a single Group III Written Notice with demotion to the grievant combining the two failure to act charges with the falsification charge.

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."[1] 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.[2]

The grievant objects to the hearing decision on several bases each of which is addressed below.

I. Failure to Properly Classify the Level of Offense

The first set of objections to the hearing decision relate to issues regarding the level of discipline and factual findings. In his decision, the hearing officer held that he was precluded from addressing the level of discipline assigned because the grievant had not expressly challenged the level of discipline on the Grievance Form A.[3] The grievant asserts that he fairly raised the issue but even if he had not, the hearing officer had an independent duty to determine

[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *Grievance Procedure Manual* § 6.4.
[3] The hearing officer found that "because the issues concerning the naming and level of the offenses and the asserted conflict with DHRM Policy No. 1.60 were not raised on the Form A, the hearing officer declined to take up these issues in any greater detail." July 23, 2009 Decision of the Hearing Officer in Case 9102 ("Hearing Decision") at 15.

whether the level of discipline issued comports with policy. We agree that the hearing officer had an independent duty to assess the level of discipline. *The Rules for Conducting Grievance Hearings ("Rules")* state that:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) 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 (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) 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.[4]

Thus, a hearing officer must always determine whether the level of discipline issued conforms to policy, that is, was properly characterized as a Group I, II or III.[5]

Here, despite his stated reluctance to decide whether the level of the offense was proper, the hearing officer nevertheless determined that the Group III Written Notice issued for three separate offenses was appropriate under the facts. The grievant asserts that the hearing officer did not independently determine the level of each offense contained on the Written Notice Form. 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.[6] Here, the agency elected to charge the grievant with a single Group III. Accordingly, the hearing officer was required to determine whether any portion of the charged misconduct rose to the Group III level. The hearing officer did just that, finding the "Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances."[7] Thus, while the hearing officer erred when he asserted that he was not required to determine the level of offense because the grievant did not raise this concern on the Grievance Form A, the

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[4] *Rules* at VI(B), (emphasis added).

[5] The hearing officer's holding that he had no authority to examine the level of discipline is understandable but not reflective of the manner in which this Department views claims raised under the grievance procedure. In 2006, this Department modified its position regarding the requirement to list on the Grievance Form A all theories as to how a particular management action may have been deficient. In EDR Ruling 2007-1444, we held that a Form A need not expressly list each theory as to why a particular management action is improper. Rather, the "issue(s)" grieved are appropriately viewed as the particular management actions under challenge as opposed to any theories of how such actions may have been deficient or improper.

[6] *Grievance Procedure Manual* § 5.8.

[7] Hearing Decisions at 22. *See also* Hearing Decision at 21 ("Here, the Division Commander testified that each of the three (3) offenses could in and of itself constitute a Level III offense. The hearing officer agrees.")

error was harmless as it is evident that he did consider whether the sustained charges supported the Group III Notice and demotion.

Finally, we find no merit in the grievant's assertion that the hearing officer erred by failing to recognize the Department of Human Resources Management's ("DHRM's") holding that under the Standards of Conduct ("SOC") an agency may not aggregate lesser level offenses into a single higher level offense. Here, the grievant was charged with making a false statement which, as the grievant appears to concede, is an offense that could support a Group III standing alone. Thus, it cannot be said that the agency combined lesser level offenses to yield a higher level offense, which we agree, based on DHRM administrative review language, would appear to be improper.

In sum, because the hearing officer did, in fact, determine the appropriate level of the discipline imposed against the grievant, this Department has no basis to disturb the decision.

II. Findings of Fact

The grievant challenges the decision based on several findings of fact (and the hearing officer's failure to make other findings). Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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.[10] 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.[11] 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 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.

First, the grievant objects to the hearing officer's findings regarding the veracity of alleged statements by the grievant for which he was not charged on the Written Notice. Because the finding that the grievant knowingly made a false official statement is based solely on the grievant's comments regarding Sergeant E's weight (a charge expressly stated on the Written Notice form attachment),[12] the relevance of purported discrepancies in the grievant's statements about issues other than those associated with Sergeant E's weight, is difficult to assess. It is possible that such findings were included because the hearing officer viewed them as relevant to the grievant's veracity in the broadest sense, thus potentially relevant to the charge of making a

[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] *See* Hearing Decision at 13 and 18; Agency Exhibit 1.

false statement regarding Sergeant E's weight. Whatever the purpose for the inclusion of such findings, however, we cannot conclude that the hearing officer committed any sort of reversible error by including such findings.[13]

The grievant asserts the hearing officer erred by not discussing an agency policy that requires the agency to notify an employee if an investigation will take longer than 90 days. The grievant points to Issue Five in the Attachment to the Grievance Form A as having raised this issue. Issue Five states:

> Even if Grievant were guilty of any the charge against him in this case, which he adamantly denies, were any of Grievant's alleged wrongdoings done in a knowing, intentional manner so as to, in theory, justify a Group III level offense or a Group II level?[14]

Although the grievant asserts that the policy issue was raised at hearing, hearing officers are not required to address in their decision every point raised during the grievance hearing. This is particularly true of an issue where the grievant proffers no evidence that the omission (i) would have changed the outcome of the decision; or (ii) prejudiced the grievant in the presentation of his case.[15] Further, in reviewing Issue Five, we are unable to find that either the Grievance Form or the Attachment (Issue Five) remotely raises the issue of the policy in question.

III. Failure to Conduct a Fair Hearing

A. Bias

The grievant asserts that the hearing officer did not conduct a fair hearing and that he was biased in favor of the agency. In support of his claim, the grievant points to the hearing officer's findings of fact. Essentially, the grievant contends that because the hearing officer's factual findings tend to support the agency's position in this case, he was biased against the grievant.

The EDR *Rules for Conducting Grievance Hearings (Rules)* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

> voluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or

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[13] To the extent that the grievant is objecting to the inclusion of these findings as a violation of the *Rules for Conducting Grievance Hearings*, such an argument must fail. EDR rulings on administrative review have held that only the charges set out in the Written Notice may be considered by a hearing officer. *See* EDR Ruling No. 2010-2412. However, the grievant was not charged with making any false statements other than the one regarding Sergeant E's weight in this case. Thus, there can be no error regarding any purported failure to provide notice of charges relating to other instances of alleged falsifications.

[14] Attachment page 2. The grievant answers this question in the negative.

[15] Here, the grievant asserts solely that if the agency had engaged in a good faith investigation, the policy would not have been violated. The grievant does not point to any inability to defend against the charges set forth on the Written Notice because of the delay.

> (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[16]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[17]

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Virginia Court of Appeals approaches the judicial review of recusal cases.[18] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[19] We find the Court of Appeals standard instructive and hold that in administrative reviews by the EDR Director of appeals asserting hearing officer bias, the appropriate standard of review is whether the hearing officer harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[20]

Here, the grievant offers as evidence of bias the hearing officer's findings of fact. The mere fact that findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient evidence of bias.[21] This is not the extraordinary case where bias can be inferred from decision's findings of fact.[22]

B. Appearance of Bias

The grievant objects to the manner in which the hearing officer allegedly shaped witness testimony through his questioning of witnesses. The general conduct of the hearing and the manner of questioning witnesses is within the sound discretion of the hearing officer.[23] Thus, noncompliance with the grievance procedure and *Rules for Conducting Grievance Hearings* on such grounds will only be found if the hearing officer has abused that discretion. Based on this

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[16] *Rules* at II.
[17] EDR Policy 2.01, p. 3.
[18] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.
[19] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).
[20] Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).
[21] *C.f.,* Al-Ghani v. Commonwealth, 1999 Va. App. LEXIS 275 at 12-13 (1999)("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")
[22] In past rulings, this Department has generally examined bias claims from the relatively limited perspective of whether the hearing officer had a pecuniary interest in the outcome of the case. *See* Welsh v. Commonwealth, 14 Va. App. 300, at 314 (1992)("As a constitutional matter, due process considerations mandate recusal only where the judge has "a direct, personal, substantial, pecuniary interest" in the outcome of a case.") We believe that a more expansive review of bias claims is appropriate and should not be limited solely to the question of whether a pecuniary interest was implicated. However, even when this case is reviewed for any actual bias, pecuniary or otherwise, none appears present.
[23] *E.g.*, EDR Ruling No. 2009-2091.

Department's review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in conducting the hearing such that a new hearing would be warranted. Both parties were able to present their cases adequately and neither was materially prejudiced. However, given the importance of avoiding the appearance of bias during the hearing process, the following is offered as guidance.[24]

The *Rules for Conducting Grievance Hearings* provides that "the hearing officer may question the witnesses."[25] The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[26] The frequency of the hearing officer's questions alone is not problematic if the questions are relevant and helpful to consideration of the facts of the case,[27] but the manner in which hearing officer interjections are made must be appropriate to an adjudicative forum.

Hearing officers must attempt to avoid leading questions or statements. While there may be times when a leading question could be the only way to determine a witness's testimony or an advocate's position, such times should be rare. Clarification of muddled testimony is an appropriate reason to pose questions. However, open-ended questions should be utilized, not leading questions unless absolutely necessary and as a last resort.

IV. Failure to Properly Analyze Mitigation

The Grievant asserts that the hearing officer failed to properly consider mitigating circumstance in this case.

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."[28] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") 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.

[24] The following guidelines, which were set forth in EDR Ruling 2010-2157, 2010-2174, are provided as general guidance and their inclusion here is not indicative that the hearing officer in this case abused his discretion in questioning witnesses.
[25] *Rules for Conducting Grievance Hearings* § IV(C).
[26] *Id.*
[27] *See* EDR Ruling No. 2009-2091.
[28] Va. Code § 2.2-3005(C)(6).

> 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.[29]

The *Rules* further state that:

> Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[30]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[31] 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.

Here, the hearing officer considered the following potential mitigating circumstances:

1. the absence of any prior discipline;

2. the Grievant's exemplary service to the Agency over 38 years;

3. concerning the Trooper T offense, the fact that the vehicle accident, which was the subject of the investigation, occurred about a month before the Grievant arrived in Area B;

4. concerning the Trooper T and Trooper L offenses, the strained working relationship between the Grievant and Sergeant MX;

5. concerning the Trooper T and Trooper L offenses, the fact that Sergeant MX did not testify at the hearing (neither the Department nor the Grievant named Sergeant MX as a witness);

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[29] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[30] *Id.*
[31] "'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.* *See also* Bynum v. Cigna Healthcare of NC, Inc., 287 F.3d 305, 315 (4th Cir. 2002) quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)("[A]n abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; United States v. General, 278 F.3d 389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).

6. the fact that certain other individuals referenced herein who are still Department employees did not testify at the hearing (none of these witnesses were sought by the Grievant);

7. concerning the Trooper T and Trooper L offenses, the fact that the complaint referred to in finding paragraph 38 was anonymous;

8. concerning the Trooper T and Trooper L offenses, the pre-disciplinary revision of the Department's allegations concerning Trooper T and Trooper L;

9. concerning the Trooper L offense, the fact that Trooper L prevailed in his grievance against the Department;

10. concerning the Trooper T offense, the fact that Sergeant E approved Trooper T's SP-102 on approximately November 28, 2007;

11. concerning the Trooper T offense, the fact that Sergeant MX apparently was the supervising officer at the Trooper T accident scene;

12. concerning the Trooper T offense, the resignation of Trooper T from the Department on December 7, 2007; and

13. the fact that AE 10/GE 1(b) is very confusing.

After considering these factors, the hearing officer determined that:

> The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).
>
> Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

> In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.[32]

We cannot conclude that the hearing officer erred by not mitigating in this case. As grievant appears to recognize, the falsification claim alone could have supported a Group III.[33] Moreover, the normal discipline for a Group III is discharge.[34] Yet in this case, the agency elected not to terminate the grievant's employment. Thus, the agency not only considered mitigating factors, it mitigated the discipline. Where the agency establishes by a preponderance of the evidence the charged misconduct and elects to mitigate the discipline, it is a rare case indeed where the hearing officer will find that the agency's discipline nevertheless exceeds the bounds of reasonableness, such that the hearing officer may mitigate the discipline further. This is not such a case.

APPEAL RIGHTS AND OTHER INFORMATION

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[32] The hearing officer offered the following additional justification for his determination not to mitigate:

> Here, the Division Commander testified that each of the three (3) offenses could in and of itself constitute a Level III offense. The hearing officer agrees. Obviously, the Grievant was only charged and found liable for one Group III offense but the hearing officer nevertheless undertook his mitigation analysis both (1) separately for each of the potential offenses, and (2) for all of the combined offenses.
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> EDR has previously ruled 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 by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518. 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. *Id.*
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> Here all three (3) offenses were very serious and could separately stand as Group III offenses. Even were this not the case, any one on its own, if proven, would be extremely serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.
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> Concerning the Trooper T and Trooper L offenses, the Grievant also asserts that before he received the Written Notice, he never understood the charges and never had an opportunity to respond. Again this issue was not raised on the Form A and the hearing officer's findings of fact regarding the Grievant's pre-disciplinary notice and opportunity to be heard dispose of this matter, in any event. EDR has recognized that under the *Loudermill* standard only limited due process protections must be afforded an employee prior to the disciplinary action. EDR Ruling No. 2007-1481 at page 4 and EDR Ruling No. 2009-2231 at page 8. The Department clearly met such minimal pre-disciplinary due process standards.

[33] Grievant's Request for Administrative Review by the Director of EDR of the Original Hearing Decision Issued on July 23, 2009, at 4.

[34] The Department of Human Resources Management ("DHRM") Policy 1.60, Standards of Conduct ("SOC"), (B)(2)(c).

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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Claudia T. Farr
Director

[35] *Grievance Procedure Manual* § 7.2(d).
[36] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).