

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9171; Ruling
Date: December 10, 2009; Ruling #2010-2449; Agency: Department of Veterans
Services; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Veterans Services
Ruling Number 2010-2449
December 10, 2009

The grievant has requested administrative review of the hearing decision in Case No. 9171. For the reasons set forth below, this matter is remanded to the hearing officer for action consistent with this ruling.

FACTS

On or about June 11, 2009, the grievant was terminated from his employment with the Department of Veteran Services, in conjunction with the receipt of a second Group II Written Notice.¹ He timely grieved the disciplinary action and his termination, and a hearing was held in this matter on September 11, 2009.² During the hearing, the hearing officer “ruled that evidence of retaliation was not relevant and the Grievant did not proceed with evidence in that regard.”³

In a decision dated September 22, 2009, the hearing officer upheld the disciplinary action and termination.⁴ The grievant now asks this Department to administratively review the hearing officer’s decision on the ground that the hearing officer failed to consider the existence of mitigating circumstances.⁵

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.”⁶ 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. 9171, September 22, 2009 (“Hearing Decision”), at 3.

² *Id.* at 1, 3.

³ *Id.* at 3.

⁴ *Id.* at 1, 5.

⁵ The grievant also sought reconsideration by the hearing officer, which the hearing officer denied in a decision dated October 15, 2009. *See* Decision of Hearing Officer on Request to Reconsider or Reopen, Case No. 9171, October 15, 2009.

⁶ 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.⁷

The grievant argues that the hearing officer did not appropriately consider certain alleged mitigating circumstances—in particular, evidence of retaliation and inconsistent treatment. 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 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.⁹

Further, “a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness.”¹⁰

Therefore, for a hearing officer to mitigate a disciplinary action, the rules require a finding that, upon consideration of the record evidence, the agency’s discipline exceeded the limits of reasonableness. This Department will review a hearing officer’s mitigation determinations only for abuse of discretion.¹¹ 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, it appears from the language of the hearing decision that the hearing officer did not follow this standard appropriately. The hearing decision does not address the presence (or absence) or any mitigating or aggravating circumstances. Further, the hearing decision expressly notes that the hearing officer did not consider any evidence of retaliation because the

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3005(C)(6).

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

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B)(1) (alteration in original).

¹¹ “‘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.*

grievant admitted the underlying misconduct: in fact, the hearing officer rejected the grievant's attempts to introduce such evidence on the grounds that it was not relevant.¹²

The *Rules for Conducting Grievance Hearings* specifically provides that among the grounds for mitigating discipline are a showing by the grievant of an improper motive for the disciplinary action, such as retaliation or discrimination, or the inconsistent application of discipline among employees.¹³ These mitigating factors must be considered even where the grievant's culpability in the underlying conduct is not in question. Indeed, it is only in circumstances that the underlying misconduct is established by the agency that a hearing officer would consider mitigation.¹⁴

Accordingly, the hearing decision is remanded for consideration consistent with the "exceeds the limits of reasonableness" standard. We further note that, because evidence of retaliation and/or inconsistent treatment are expressly identified under the *Rules* as potentially mitigating circumstances, this remand will require the hearing officer to re-open the hearing for the limited purpose of allowing the grievant to present evidence relevant to these issues and the agency to present evidence in rebuttal.

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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷

Claudia T. Farr
Director

¹² Hearing Decision at 3, 5.

¹³ *Rules for Conducting Grievance Hearings* § VI(B)(1).

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

¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).