Issue: Administrative Review of Hearing Officer's Decision in Case No. 9205; Ruling Date: March 4, 2010; Ruling #2010-2465; Agency: Department of Corrections; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2465
March 4, 2010

The Department of Corrections ("agency") has requested an administrative review of the hearing decision in Case No. 9205. For the reasons set forth below, this matter is remanded to the hearing officer for action consistent with this ruling.

FACTS

The salient facts of this case, as set forth in the hearing decision in Case Number 9205, are as follows:

> The grievant served the agency as a corrections officer, beginning employment on September 10, 2007. In May of this year he worked the evening shift in a segregation unit of a penitentiary operated by the agency. Among his duties was the task to count the inmates in his unit at regularly scheduled intervals. He was to properly note, for each cell, whether the inmate was present or absent or if the cell was not assigned at that time. The officer responsible for performing the count is required to make the appropriate notations on a written record.
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> At some point in May the warden received word that the counts were not being properly performed in a particular unit. He reviewed the surveillance tapes to determine whether these violations of policy involved only a single employee or if it was a "culture" problem. Upon his reviewing the tapes the warden discovered that seven correctional officers, including the grievant, and one corrections sergeant had been failing to count or submitted falsified count sheets.
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> The tapes showed that on May 4, 5, 6, 8, and 9 the grievant failed to count, or improperly counted the inmates in the pod. He has not disputed those offenses. He was given the opportunity to review the tapes with the Warden and the Warden withdrew or amended certain charges he had planned on bringing against the grievant. On May 22 the Warden issued a Group III Written Notice for submitting falsified count sheets (5 charges) and for failing to follow instructions or policy (3 charges). The Warden terminated the grievant from employment on that date.
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> One of the other six corrections officers voluntarily resigned from employment after being confronted with ten charges of falsifying count sheets in

five days. Another officer (referred to as Employee B) received a Group III Written Notice and was suspended for 30 days. He had received three charges of falsifying count sheets and two charges of failing to follow count procedures. The other four corrections officers (Employees C, D, E, and F) each received a Group III Notice and were suspended for no greater than seven days. One of those four officers was suspended for seven days based on one count of a falsified count sheet and two charges of failing to follow procedure. Each of the other three had only a single charge of a falsified count sheet.

The sergeant who was disciplined received a Group III Notice for failing to follow instructions that could have resulted in a security threat. He was suspended for 40 hours. His discipline was based on eight falsified count sheets being submitted under his supervision and two improper counts while he was physically present in the pod.[1]

Based upon the above findings of fact, the hearing officer reached the following decision in his "Analysis of Law and Opinion":

Chapter _____ of Title 2.2 of the Code of Virginia of 1950, as amended, provides certain protections to employees of the Commonwealth. One of those protections is the right to grieve termination from employment for disciplinary reasons. Under Section 5.8 of the Grievance Procedural Manual promulgated by the Department of Employment Dispute Resolution, in disciplinary grievances the agency has the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate. In a disciplinary grievance a hearing officer "reviews the facts e [sic] novo…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…and policy…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." Rules for Conducting Grievance Hearings Section V (B). In this case, the grievant admitted the allegations were true. Based on this stipulation, I have no choice but to conclude that the misconduct occurred.

The agency issued the written notice pursuant to Operating Procedure No. 135.1, the Standards of Conduct. That policy provides that Group III offenses are those acts or behavior of such a serious nature that a first offense normally should warrant removal. Specifically listed as a Group III offense is the falsification of any record, including count sheets. Also listed is the "refusal to obey instructions that could result in a weakening of security." The admitted actions of the grievant clearly qualify as Group III offenses.

[1] Decision of Hearing Officer in Case 9205 issued October 26, 2009 ("Hearing Decision") at 1-3.

The agency was warranted in giving the grievant and the other officers this level of notice.

The crux of the argument of the grievant is that he should not have been terminated because of the other officers receiving only suspensions. Employee B is the other officer whose number of charges is closest to that given to the grievant. Employee B was given a Group III Notice and suspended for 30 days. He had 14.9 years of service with the agency at the time of the offenses.

The Warden testified that Employee B was not terminated because of his length of service with an otherwise blemish-free work record. The Warden saw those factors as being mitigating reasons to not terminate Employee B. Section IX of agency Operating Procedure 135.1 allows as consideration in mitigation "those conditions related to an offense that would serve to support a reduction of corrective action in the interest of fairness." The same section also allows a disciplinary action to be mitigated upon consideration of the good service record of an employee. The Warden testified under cross-examination by the grievant that had Employee B been found to have committed the same number and type of offenses as the grievant he would have still only been suspended for 30 days and not terminated.

The Warden contrasted the nearly 15 years of service by Employee B with the two years of service by the grievant. This concession by the Warden is troublesome. Assuming that the inmate count violations constituted a serious safety threat, as argued by the agency, the length of good service by one employee is a slim thread on which to base the imposition of a significantly lighter punishment. One can reasonably argue that a more seasoned employee should be more aware of the potential risk involved in such violations. A more experienced officer should lead by example, not be part of a "culture" that tolerates a threat to security. By discriminating between the grievant and Employee B, the agency has acted unfairly toward the grievant. This is highlighted by the testimony of the Warden that Employee B would not have been terminated even had he been found to commit the same number of violations as the grievant.

I am mindful that I must give due deference to the discretion of the agency in managing its affairs. Section VI (B), Rules for Conducting Grievance Hearings. I cannot find, however, that the agency acted reasonably in this instance.[2]

Based on the forgoing, the hearing officer upheld the Group III Written Notice but reinstated the grievant awarding him full back pay less 30 days of pay.[3]

[2] Hearing Decision 3-5.
[3] *Id.* at 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."[4] 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.[5]

The agency argues in this case that the hearing officer inappropriately mitigated the discipline it issued to the grievant. Under statute, hearing officers have the power and 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."[6] EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[7] More specifically, the *Rules* provide that in disciplinary grievances, 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,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[8]

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[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3005(C)(6).
[7] *Rules for Conducting Grievance Hearings* VI(A).
[8] *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also* Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Board "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors").

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management.[9] Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard.[10] This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate,[11] abusive,[12] or totally unwarranted.[13] This Department will review a hearing officer's mitigation determination for abuse of discretion,[14] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the hearing officer mitigated the discipline on the basis that another employee, Employee B, had been treated more favorably than the grievant for similar misconduct. The hearing officer noted that Employee B had not been terminated because of his length of service (14.9 years) with an otherwise blemish-free work record. As reflected in the hearing decision, the Warden had contrasted Employee B's nearly 15 years of service with the just under two years of service by the grievant. Based on the grievant's relatively few years of service (1.8 years), the Warden elected to not mitigate the discipline in the grievant's case. The hearing officer found the "concession" to Employee B was "troublesome," and that "length of good service by one employee is a slim thread on which to base the imposition of a significantly lighter punishment."

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[9] Indeed, the *Standards of Conduct ("SOC")*gives to agency management greater discretion in assessing mitigating or aggravating factors than the *Rules* gives to hearing officers. An agency is relatively free to decide how it will assess potential mitigating and aggravating circumstances. Thus, as long as such decisions are consistent, based on legitimate agency concerns, and not tainted by improper motives, an agency's weighing of mitigating and/or aggravating circumstances must be given deference by the hearing officer, and the discipline imposed left undisturbed, unless, when viewed as a whole, the discipline exceeds the bounds of reasonableness.

[10] While hearing officers make *de novo* fact-findings under the *Rules*, a hearing officer's power to *mitigate* based on those fact-findings is limited to where his or her fact-findings support the "exceeds the limits of reasonableness" standard established by the *Rules*. Also, where more than one disciplinary action is being challenged in a hearing, the hearing officer's mitigation analysis should consider both whether each individual disciplinary action exceeds the limits of reasonableness and whether the challenged disciplinary actions, in the aggregate, meet this standard.

[11] *See* Parker, 819 F.2d at 1116.

[12] *See* Lachance, 178 F.3d at 1258.

[13] *See* Mings, 813 F.2d at 390.

[14] "'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.*

As reflected above, under the *Standards of Conduct (SOC)*, an agency is relatively free to decide how to assess length of service in determining whether to mitigate discipline, and a hearing officer must uphold agency discipline unless the discipline exceeds the limits of reasonableness. Here, the agency mitigated discipline to some degree in every case except the grievant's. As the hearing decision appears to reflect[15] (and the Warden's testimony[16] and Agency Exhibit 2 appear to affirm), the Warden examined each employee's particular circumstance, considering the number of individual instances of misconduct and length of service of each employee.

That other reasonable minds might have determined the appropriate level of discipline for involved employees using a different methodology does not render the agency's process and the discipline subsequently issued beyond the bounds of reason. The hearing officer observes that "[o]ne can reasonably argue that a more seasoned employee should be more aware of the potential risk involved in such violations," and that one can further reasonably argue that "[a] more experienced officer should lead by example, not be part of a 'culture' that tolerates a threat to security."[17] However, the fact that one could reasonably reach a different conclusion than the agency's as to the relative importance of an otherwise long record of satisfactory service, does not render the agency's view of length of service, or mitigation based on that factor, as beyond the bounds of reasonableness.[18] When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[19]

It is understandable that the hearing officer might believe that the *Rules* not only authorized him to mitigate in this case but perhaps even required mitigation. After all, the *Rules* expressly list as an example of a mitigating circumstance "inconsistent discipline," which is defined as "discipline that is inconsistent with how other <u>similarly situated</u> employees have been treated."[20] The critical point here is that the grievant and Employee B are not "similarly situated." Employee B has a considerably longer length of service. Further, policy appears to allow the agency to distinguish the involved employees on the basis of the undisputed difference

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[15] Hearing Decision at 2-3.
[16] Hearing Tape 1, side 1, beginning at 260.
[17] Hearing Decision at 5.
[18] The fact that the Warden conceded under cross-examination that he still would have discharged the grievant but not Employee B had the number of offenses committed by both been identical, does not render the agency's analysis or ultimate decision beyond the bounds of reason. It merely confirms that the Warden considered Employee B's otherwise satisfactory service to be a significant factor. It is also noted that when the grievant asked the Warden about the outcome if the charges had been reversed between the grievant and Employee B, that is, the grievant had been charged with three counts of falsification and two failure to follow counts procedures and Employee B had been charged with five counts of falsification and three failure to follow count procedures, the Warden testified that both would have been discharged. Hearing Tape 1, Side 1, at approximately 460.
[19] *See Rules* at VI(B)(1) note 10 citing to Davis v. Department of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981). *See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.")
[20] Emphasis added.

in their length of service and in the number offenses.[21] Although one might reasonably view length of service differently than did the agency,[22] management nevertheless determined that length of service and number of offenses were appropriate criteria upon which to distinguish the involved employees. Moreover, there appears to have been no allegation that this methodology was based on a wrongful motive, such as discrimination or retaliation.

Conclusion

For the reasons set forth above, the basis upon which the hearing officer relied to reduce the discipline in this case is insufficient to warrant mitigation. Based on the facts set forth in Case # 9205 and the factor relied upon for mitigation, the discipline issued by the agency in this case cannot be viewed as unconscionably disproportionate, abusive, totally unwarranted, or otherwise beyond the bounds of reasonableness. Accordingly, the hearing officer is ordered to reconsider his decision in accordance with this ruling.

APPEAL RIGHTS AND OTHER INFORMATION

This case is remanded to the hearing officer for further clarification and consideration as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[23] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[24]

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

Claudia T. Farr
Director

[21] The SOC expressly states that an agency may mitigate on the basis of an "employee's otherwise satisfactory work performance." SOC (B)(3)(a)
[22] For example, as the hearing officer notes, one might be inclined to hold an employee with significantly more years of service to a higher standard. *C.f.* EDR Ruling 2010-2483 agency held a supervisor to a higher standard. Another agency might, particularly with serious offenses, give no weight to length of service.
[23] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.
[24] *See Grievance Procedure Manual* § 7.2(a).
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).