Issue: Administrative Review of Hearing Officer's Decision in Case No. 9191; Ruling Date: May 20, 2010; Ruling #2010-2474; 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 2010-2474
May 20, 2010

The Department of Corrections ("agency") has requested an administrative review of the hearing decision in Case No. 9191. For the reasons set forth below, this matter is remanded to the hearing officer for action consistent with this ruling.

FACTS

On June 12, 2009, the grievant received two Group II Written Notices and a Group III Written Notice with termination.[1] The two Group II Written Notices were for allegedly failing to follow a supervisor's instructions, perform assigned work, or otherwise comply with policy by not performing inmate counts and security checks on May 8, 2009.[2] The Group III Written Notice was for allegedly falsifying state documents on May 8, 2009, by documenting that uncompleted security checks had been done.[3] The grievant timely grieved the disciplinary actions; and on October 14, 2009, a hearing was held.[4]

In a hearing decision issued November 13, 2009, the hearing officer made the following findings of fact:

1. On May 8, 2009, Grievant, a Corrections Officer, was working as a Floor Officer in the institution's C Building. As Floor Officer on May 8, 2009, Grievant was required to perform formal inmate counts at 8:30 a.m. and 1:30 p.m. On that date Grievant was also required to comply with written policy by performing security checks every thirty (30) minutes.

2. Grievant admitted that he did not make the formal count he logged in the official log book.

3. From the evidence, Grievant did not make all of the required security checks that he documented.

4. Grievant, while admitting not making formal counts and security checks which he documented, maintained that he was in an understaffed area and had other duties

[1] Hearing Decision in Case No. 9191, dated November 13, 2009 ("Hearing Decision"), at 1.
[2] *Id.*
[3] *Id.*
[4] *Id.*

which kept him from making the counts and checks he logged as having been made.

5. He did not log that he had been unable to comply with written procedures, post orders and instructions of his post assignment.

6. Grievant, as Floor Officer, had various duties; i.e. supervising feedings, escorting inmates to other areas, inmate recreation ..., which interfered with his performing his security checks and count duties. He and other witnesses testified that it was a long-standing custom to get the paper work done and the count cleared, whether such had been done or not.

7. Rapid eye video footage for May 8, 2009, 4:00 a.m. through 4:15 p.m., for C Building showed no security rounds made by Grievant between 6:00 a.m. and 12:00 p.m., and 12:00 p.m. and 4:16 p.m. on May 8, 2009.

8. On the day in question, a Counselor was interviewing inmates in the pod office, and Grievant had been told not to leave the female Counselor by herself during these interviews.

9. Testimony from a Corrections Officer who had been a Field Training Officer for five (5) years, was that the facility was short handed and Corrections Officers could not do all that Post Orders required, as well as the paper work, and assignments from supervisors.

10. In addition to having been told not to leave the Counselor alone with the inmates in the pod office, Grievant admitted to having trouble with his girlfriend and talking with the Counselor about this while on duty.

11. The facility has just had a Security Assessment and passed with a good rating.

12. Grievant was afforded full due process.[5]

Based on these findings, the hearing officer concluded that the agency had established its burden of showing that the charged misconduct had occurred, but also held that mitigating factors existed warranting the reduction of the charged discipline to three Group II Written Notices with suspension.[6] The agency has requested an administrative review by this Department of the hearing officer's decision.[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 …

[5] Hearing Decision at 1-2.
[6] Hearing Decision at 3-4.
[7] The agency also asked the hearing officer to reconsider his opinion. The hearing officer issued a reconsideration decision, affirming his earlier decision, on December 8, 2009. *See* Reconsideration Decision of Hearing Officer, Case No. 9191 issued December 8, 2009 ("Reconsideration Decision") at 1.

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]

Findings of Fact

The agency argues that the hearing officer exceeded his authority under the grievance procedure by finding that the facility was understaffed and that lower ranking Corrections Officers were pushed to finish paperwork regardless of whether the duties were performed. The agency asserts that the hearing officer must give deference to the agency's testimony that the facility was not under-staffed.

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] 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.

Here, the agency does not appear to contend that the hearing record is devoid of record evidence (testimony) supporting the grievant's position that the agency was understaffed or that the lower ranking Corrections Officers were pushed to finish paperwork regardless of whether the duties were performed. Rather, the agency argues that the hearing officer should have accepted the agency's version of the facts, essentially that the facility was not understaffed and that the officers were not "pushed." As discussed above, 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. Furthermore, as to the issue of giving deference to the agency, the *Rules for Conducting Grievance Hearings ("Rules")* state that "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."[12] What this provision means is that the hearing officer must give deference to the agency's selection of the discipline imposed, not to the agency's version of the facts. Contrary to the agency's apparent position that the hearing officer must give deference to the agency's version of the facts, the *Rules* expressly state that the hearing officer reviews the facts "de novo (afresh and independently, as if no determinations had yet been made)."

Mitigation

The agency argues in this case that the hearing officer erred in mitigating 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

[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* at VI (A).

accordance with rules established by the Department of Employment Dispute Resolution."[13] EDR's *Rules for Conducting Grievance Hearings* provide 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."[14] 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,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[15]

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.[16] 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.[17] This is a high standard to meet, and

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[13] Va. Code § 2.2-3005(C)(6).
[14] *Rules for Conducting Grievance Hearings* VI(A).
[15] *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) (internal citations omitted). *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 Court "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 the factors").
[16] 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.
[17] 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"

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,[18] abusive,[19] or totally unwarranted.[20] This Department will review a hearing officer's mitigation determination for abuse of discretion,[21] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, it appears that the hearing officer found that the grievant was unable to perform the counts and checks due to other assigned duties. [22] While such a finding could be relevant to the issue of whether to mitigate the two individual Group II Written Notices for failure to conduct counts and checks,[23] its relevancy to the mitigation of the Group III Written Notice for falsification is not clear. Moreover, under the Standards of Conduct, termination is normally supported by only two Group II Written Notices.[24] Thus, even accepting the hearing officer's mitigation of the Group III Written Notice to a Group II, [25] it is unclear why the hearing officer, having sustained a total of three Group II Written Notices in the aggregate, concluded that termination nevertheless exceeded the limits of reasonableness.

Accordingly, the hearing decision is remanded for the hearing officer to reconsider the grieved discipline in accordance with the standards for mitigation set forth in this Ruling. In doing so, the hearing officer must consider each grieved disciplinary action separately, to determine if mitigation is appropriate for the individual action, and then consider the disciplinary actions, as mitigated (if mitigation on an individual basis is warranted) in the aggregate, to determine if the result nevertheless exceeds the limits of reasonableness.[26] While the hearing officer is free to determine that a penalty permitted under the Standards of Conduct exceeds the limits of reasonableness in a particular case, he must clearly explain his reasons for doing so.[27]

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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.

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

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

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

[21] "'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.*

[22] Hearing Decision at 3, Reconsideration Decision at 1.

[23] Indeed, failure to follow an instruction that truly no individual could perform (genuinely impossible as opposed to even extraordinary difficult), may not constitute misconduct at all. Thus, there would be no need to even consider mitigation in conjunction with such a charged offense.

[24] DHRM Policy No. 1.60, Standards of Conduct.

[25] The hearing officer also appears to mitigate the Group III to a Group II on the basis that the supervisor knew that log books were being completed regardless of whether the action was actually taken, and that management "pushed" lower ranking Corrections Officers "to finish paperwork regardless of whether the duties were performed." Hearing Decision at 2-4, Reconsideration Decision at 1. Managerial authorization of charged misconduct has been found, in certain contexts, to constitute a mitigating circumstance. *See* Crane v. Dept. of the Air Force, 240 Fed. Appx. 415; 2007 U.S. App. LEXIS 16122 (Fed. Cir. 2007)(unpublished decision).

[26] EDR Ruling No. 2010-2483, note 11.

[27] The agency notes that in a similar, related case, another hearing officer reached a different conclusion. In this case, the agency did not seek to have these two cases consolidated for a single hearing before one hearing officer, and indicated that they did not desire such consolidation when asked by this Department prior to hearing.

Moreover, on remand, the hearing officer must specify, with some particularity, the record evidence underlying his conclusions.[28]

This ruling should not be read as a directive to mitigate or not to mitigate. Rather this ruling simply directs the hearing officer to utilize the mitigation standard and analysis discussed above in rendering a reconsidered decision that is consistent with the grievance procedure.

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).[29] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[30]

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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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Claudia T. Farr
Director

[28] For example, where the hearing officer relies on an exhibit introduced at hearing, that exhibit should be identified in the hearing decision.
[29] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[30] *See Grievance Procedure Manual* § 7.2(a).
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).