Issue: Administrative Review of Hearing Officer's Decision in Case No. 9214; Ruling Date: March 2, 2010; Ruling #2010-2483; Agency: Department of Motor Vehicles; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Motor Vehicles
Ruling Number 2010-2483
March 2, 2010

The Department of Motor Vehicles ("agency") has requested an administrative review of the hearing decision in Case No. 9214. 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 9214, are as follows:

Procedural History:

The Grievant was issued a Group II Written Notice on July 9, 2009 for:

> You did not require teller to follow CSCOM 205.3 when brought to your attention. And you did not notify CSC (Customer Service Center) manager of overage at the time it was found. You also allowed teller to store money in the CSC lockers until he returned to work on April 8, 2009 in case the customer returned and you knew of additional money left in locker to cover overages and shortages which is against policy or otherwise referred to as a slush fund.

Pursuant to the Group II Written Notice, and a prior active Group I Written Notice and a prior active Group II Written Notice, the Grievant was terminated on July 9, 2009. On August 5, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.

* * * * *

Findings of Fact:

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing twenty-three (23) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1, with one (1) exception. An objection was made to the contents at Tab 8, regarding the conclusions that could be drawn from that exhibit. The Agency advocate indicated that exhibit was offered only for purposes of establishing times and dates and not for purposes of any legal or factual conclusions drawn therein. Accordingly, Agency Exhibit 1, Tab 8 was accepted by the Hearing Officer for the sole purpose of establishing times and dates and not for any other factual or legal conclusions contained in that Tab.

The Grievant provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.

A Customer Service Representative ("CSR") for this Agency on a regular basis will receive checks, credit cards and/or cash from the public. In the course of so doing, particularly with cash, the CSR may need to make change. As used in the Written Notice, the word "teller" is the same as a CSR. At the end of the day, each CSR is responsible for seeing to it that his or her cash drawer properly balances with regards to the initial balance at the beginning of the day and all receipts that may have come in during the course of the day. To the extent that there may be an overage or a shortage, the CSR must follow the provisions of the Customer Service Center Operations Manual ("CSCOM"). CSCOM 205.3, Customer Service Representative (CSR) Responsibilities, states in part as follows:

1. Count and verify that assigned petty bag contains the correct teller cash allocation. Complete and sign (initials not allowed) the Receipts Verification form (FS 54) according to guidelines in CSCOM-701.

2. Post revenue collections to the system accurately so cash drawer totals verify against CSC Net totals. When revenue entry errors are discovered, corrections must be made as soon as possible to bring the cash drawer in balance.

3. Collect revenue for each transaction correctly.

4. Reconcile cash, checks, and charges with system totals regularly throughout the day. CSR cash drawers are required to balance as consistently as possible.

5. Safeguard all state assets and revenues collected.

6. Properly record any overages and shortages on CSC Net and the Accountability worksheets (refer to CSCOM-208) and report to management.

7. At the end of the business day, verify cash, coin, check, charge, and pickup totals and record on the appropriate fields on the FS 54 (refer to CSCOM-706).

At the end of the business day, the cash drawers must balance. In this particular grievance, at the end of the day on April 6, 2009, one CSR discovered that he had a $20.00 cash overage in his drawer. This CSR was a witness for the Agency. He notified his fellow employees as well as the Grievant of the overage. The Grievant's position was that of Office Operations Coordinator ("OOC") which essentially amounted to an assistant manager of the office. Rather than going through the procedures set forth in CSCOM-205.3(6) and (7), the CSR testified that he thought he would recognize the person who he thought was due the money and he decided to not enter the $20.00 overage into the system but rather put it in his locker in hopes that the customer would return on April 7, 2009 requesting a refund. As it turns out, April 7, 2009 was this particular CSR's Rest Day. Further, one of the CSR's co-workers notified the manager on the evening of April 6, 2009 about what she had been told about this $20.00 by the CSR. On the morning of April 7, 2009, the manager e-mailed her superior, the District Manager, requesting advice. Her superior called and told her to go to the CSR's locker and determine if the $20.00 was inside. Her superior also advised her to take witnesses with her. The manager, the Grievant, and another employee went to the CSR's locker and determined that indeed the $20.00 was therein and an additional $12.00 was found in the locker.

All three (3) of these people returned to the manager's office and a conference call was initiated with the District Manager. The District Manager testified that she was quite upset when it was confirmed that there was money found within the CSR's locker. She testified that she said that she was, "tired of being lied to," and that comment was addressed to the Grievant. The totality of the District Manager's testimony was that she deemed a policy violation to be a lie. Inasmuch as the Grievant tolerated a policy violation, then the Grievant lied to her District Manager.

The Grievant testified that the CSR did tell her about the $20.00 and that she did know he was placing it in his locker overnight. She testified that the intent was to hold it overnight to see if someone claimed it on April 7, 2009 and if not then to enter it into the State's accounting system.

CSCOM 205.3 provides in part the following regarding Management Responsibilities:

> 1. CSC management is responsible to review, monitor, and follow up on all revenue collection discrepancies in their CSC following the disciplinary guidelines provided in this procedure. Management's non-compliance with these requirements may result in disciplinary action.
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> 2. Review the Over/Short policy and performance expectations with each employee.
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> 9. Daily, submit any significant overages or shortages ($20.00 or more) by completing the Overage/Shortage Notification form (CSMA 45) and attaching it to an email and send to District Office. Keep the original notification, signed and dated by both management and the responsible CSR, in the employee's file (refer to CSCOM-1101).

> The Grievant testified that she did not notify her manager of the overage at the time it was found. It is clear that the Grievant did not follow the policies set forth in CSCOM 205.3.
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> The Written Notice alleges that the Grievant allowed the CSR to keep the $20.00 in his locker until he returned to work on April 8, 2009. In point of fact, the testimony was that the money was in the locker until the morning of April 7, 2009. The CSR's testimony and the Grievant's testimony was that the intent was to bring the money into the system if the person to whom it belonged did not come and make a claim on April 7, 2009. While the Agency's language is in artfully [sic] drawn, it is clear that the Grievant allowed the CSR to retain the funds in his locker at least overnight in violation of policy.[1]

Based on the above facts, the hearing officer held that the agency "has bourne its burden of proof regarding that portion of the Group II Written Notice that deals with the Grievant's failure to require a CSR to comply with CSCOM 205.3, to notify her manager of the overage, and to allow the CSR to place the overage in his locker."[2] However, the hearing officer found

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[1] Decision of the Hearing Officer in Case Number 9214 issued November 23, 2009 ("Hearing Decision") pp. 1-5 (footnotes omitted).

[2] *Id.* at 8. The Agency had alleged in its Written Notice that the grievant, "knew of additional money left in the locker to cover overages and shortages." *Id.* at 5. The Hearing Officer held that "the Agency has not borne its burden of proof regarding the additional funds found in the CSR's locker." *Id.* at 8. He explained:

> The grievant testified that she was not aware of these funds. Further, the Agency entered as one of its own exhibits a memo from the Grievant to her immediate manager which was dated July 1, 2009. In that memo, the Grievant clearly stated that she was only aware of the $20.00 and that she was not aware of any slush fund for overages and shortages. Both in that memo and through her testimony, the Grievant indicated that she was aware of a "coffee fund" that had been discontinued some time earlier and that the "coffee fund" had been funded by those people who used coffee from their personal funds. The Agency introduced this as its own document and the Agency did not offer any testimony to contradict its validity. The District Manager, who was the author of the Written Notice, admitted in her testimony that she had no independent evidence which she could present at the hearing to show that the Grievant was aware of the additional $12.00 in the locker.

that the discharge of the grievant for the established failure to follow agency policy "while permissible under the Standards of Conduct, was not proper in this matter as it exceeded the limits of reasonableness."[3] The hearing officer explained his reasoning as follows:

> *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." Under the Rules for Conducting Grievance Hearings, "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.** (Emphasis added)
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> The issue of mitigation is only reached if the Hearing Officer finds the Agency has sustained its burden of showing that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the Agency's discipline was consistent with law and policy.
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> If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.
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> CSCOM 205.3 states, under Examples of Mitigating Circumstances for CSR, as follows:
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> > With approval from District Office, in situations where compelling conditions exist, CSC management may reduce the level of a corrective action taken to promote the interests of fairness and objectivity based on an employee's otherwise dependable, accurate and efficient work performance.
>
> On the Written Notice before this Hearing Officer, under Circumstances considered, the Agency stated as follows:

Accordingly, the Hearing Officer finds that so much of the Written Notice as deals with additional money left in the locker is not valid and that the Agency has not bourne its burden of proof regarding that portion of the Written Notice. *Id.* at 5.

[3] *Id.*

> Your years of service were considered however that does not lessen the severity of the actions when you chose not to follow policy and procedures.

During her testimony, the District Manager, who was the author of the Written Notice, indicated that she considered the Grievant's long term service with the Agency. The Grievant's immediate manager, the person who discovered the $20.00 in the locker, testified that the Grievant was a good employee, a hard worker, came in early, left late and was very conscientious. There is nothing contained in the Written Notice to indicate that the Grievant's quality of service was considered as a mitigating factor.

The CSR who precipitated this event by putting the $20.00 in his locker, testified that the Grievant was "conscientious to a fault." He further testified that he received a five (5) day suspension for failure to follow procedure by placing the money in his locker.

There was a stipulation entered into between the Agency and counsel for Grievant that two (2) further witnesses would testify on behalf of the Grievant that the Grievant was a good, hard working, conscientious employee of the Agency. The Grievant testified that she became a full-time employee of this Agency in 1996 and that she had worked as a contract agent for many years prior to that. This entire event was reviewed by the Special Investigations Unit for the State and no criminal activity was found. In her Employee Work Profile for the years 2006, 2007 and 2008, the Grievant was either deemed to be a Contributor or an Extraordinary Contributor. The Grievant was deemed to be a valued employee to the Agency.

Standards of Conduct Policy 1.60 states in part as follows:

> Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance.

The Hearing Officer understands that he must give deference to the Agency's consideration and assessment of mitigating circumstances and that he can only mitigate the Agency's discipline if he finds that the Agency's discipline exceeds the limits of reasonableness. In this matter, the Hearing Officer finds that the Agency's discipline does exceed the limits of reasonableness. The CSR who precipitated this entire grievance by putting $20.00 in his locker received a five (5) day suspension. The Grievant, with a previous Group II Written Notice, was terminated. The Agency offered no evidence to indicate that there was any fraudulent intent regarding the $20.00. The Agency introduced no evidence that the intent was anything other than to give the customer a chance to come back and claim her $20.00 the following day and, if the customer did not return, then to

> enter the $20.00 into the system. Other than the prior Group I Written Notice and Group II Written Notice, the Agency offered no evidence to indicate that the Grievant was anything other than a long-standing, outstanding and exemplary employee. Both Agency and Grievant witness testified to the Grievant's excellent work ethic and character. Giving deference to the Agency does not require the Hearing Officer to blindly follow the Agency's interpretation and use of mitigation. The Hearing Officer finds that this case warrants mitigation. While the Hearing Officer finds that mitigation is appropriate in this matter, he finds that the Grievant cannot return to a position where she supervises other employees. In this matter, she clearly did not properly supervise the CSR who had the overage.[4]

The agency now asks this Department to administratively review the hearing officer's decision on the ground that the hearing officer improperly mitigated the discipline by reinstating the grievant.

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."[5] 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.[6]

The agency argues that the hearing officer inappropriately mitigated the discipline issued by the agency in this case. 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."[7] 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."[8] 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,

[4] *Id.* at pp. 6-7 (footnotes omitted).
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005(C)(6).
[8] *Rules for Conducting Grievance Hearings* VI(A).

> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[9]

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.[10] 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.[11] 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,[12] abusive,[13] or totally unwarranted.[14] This Department will review a hearing officer's mitigation determination for abuse of discretion,[15]

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[9] *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 gives 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").

[10] 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 mitigation 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.

[11] 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.

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

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

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

[15] "'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

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 summarized his decision to mitigate the discipline on the basis that:

> The CSR who precipitated this entire grievance by putting $20.00 in his locker received a five (5) day suspension. The Grievant, with a previous Group II Written Notice, was terminated. The Agency offered no evidence to indicate that there was any fraudulent intent regarding the $20.00. The Agency introduced no evidence that the intent was anything other than to give the customer a chance to come back and claim her $20.00 the following day and, if the customer did not return, then to enter the $20.00 into the system. Other than the prior Group I Written Notice and Group II Written Notice, the Agency offered no evidence to indicate that the Grievant was anything other than a long-standing, outstanding and exemplary employee. Both Agency and Grievant witness testified to the Grievant's excellent work ethic and character.

The agency counters in its request for administrative review that: (1) the grievant and the CSR were not similarly situated; (2) the agency "made no attempt to make any claim that fraud was a factor in this case"; and (3) the fact that the grievant has two active Group Notices (both of which were issued for failing to follow policy) precludes a finding that the grievant's service was outstanding and exemplary. Each point is discussed below.

Similarly situated

Section VI(B)(1) of the *Rules* provides that an example of mitigating circumstances includes the inconsistent application of discipline, in other words instances where a grievant's discipline is inconsistent with that of other "similarly situated" employees. The agency asserts that the grievant and CSR were not "similarly situated" and therefore the hearing officer should not have mitigated on that basis. For the reasons explained below, we agree with the agency.

The agency contends that the CSR was a subordinate of the grievant and, as the CSR's manager, the grievant could be held to a higher standard and disciplined more severely. In this case, the hearing officer did not find that the CSR and grievant were in comparable positions. Indeed, from the hearing decision, it appears undisputed that the grievant was a member of management with supervisory authority over the CSR, a non-management employee. Thus, under the *Rules*, the CSR and the grievant were *not* similarly situated such that mitigation by a hearing officer could apply on that basis.[16]

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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.*

[16] We believe that this position is well supported by case law. *See* Ketema v. Midwest Stamping, Inc., No. 3:02-0502-JFA-JRM, 2005 U.S. Dist. LEXIS 42278, at *41 (D.S.C. June 17, 2005)("Courts generally hold that supervisors and management employees may be held to a higher standard than lower level employees"); McKnight v. Super America Group/Ashland Oil Co., 888 F.Supp. 1467, 1483 (E.D.Wis. 1995)("[A] manager sets the standard

We note that the issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as *Rules* issue.[17] The agency has requested an administrative review from the DHRM Director and the question of whether an agency can discipline a supervisor more harshly than a non-supervisor for the same misconduct appears to be sufficiently implicated by the agency's request such that the DHRM Director would not exceed the scope of her authority by answering this question. We presume the answer to the question of whether an agency may hold a supervisor to a higher standard to be affirmative, but acknowledge that this is ultimately a policy question.[18]

Assuming that state policy allows an agency to draw such a distinction between supervisory and non-supervisory employees, the *Rules* would require that where an agency considered the supervisory status of an employee in determining the appropriate level of discipline, a hearing officer must give deference to how the agency weighs that factor.[19] Here, the agency appears to have considered the grievant's supervisory status, and on that basis, held her to a higher standard.[20] Thus, if the DHRM Director determines that policy allows an agency to hold supervisory employees to a higher standard than non-supervisory employee, the hearing officer must give deference to the agency's weighing of that factor.[21]

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of conduct to which other employees are to adhere. . . his conduct could rightfully be subjected to a higher degree of scrutiny"); Castleberry v. Boeing Co., 880 F.Supp. 1435, 1441 (D.Kan. 1995)("[A]n employer may expect a higher level of conduct from management as compared to nonmanagement personnel"); Timm v. Illinois Dept. of Corrections, No. 05-1276, 2007 U.S. Dist. LEXIS 79206, at *16 (C.D. Ill. Oct. 11, 2007) (supervisor "was reasonably held to a higher standard"); *See also* Batten v. USPS 2006 M.S.P.B. 35; 2006 MSPB LEXIS 449 (2006)(same).

[17] Policy interpretation is ultimately reserved to the Department of Human Resources ("DHRM"). Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

[18] We note that in its request to the DHRM Director for administrative review, the agency has posed the question "when does the 'normal' discipline exceed the bounds of reasonableness?" While state personnel policy allows agency management to mitigate discipline, under statute, the grievance procedure also allows a hearing officer to mitigate discipline. A hearing officer's mitigation authority is not a question of state personnel policy. Rather, a hearing officer's authority to mitigate discipline that "exceeds the bounds reasonableness" is solely a grievance procedure matter and addressed in this ruling. *See* Va. Code § 2.2-3005(B)(6)(a hearing officer shall "receive 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.").

[19] *Rules* at VI(B)(1)("a hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances.)"

[20] In Agency Exhibit 1, Tab 2, the July 9th Written Notice that led to the grievant's discharge, the agency listed the following as mitigating circumstances:

> Your years of service were considered however that does not lessen the severity of the actions when you choose not to follow policy and procedures. In you role of Assistant Manager, you are expected to enforce polices and lead by example. You have an active Group I Written Notice and an Active Group II (with 3 day suspension) for failure to follow policy and procedure. An accumulation of 2 active Group II written Notices normally results in termination.

[21] The agency also contends that the CSR and grievant are not "similarly situated" because the grievant has two active Written Notices whereas the CSR had none. The record appears to be silent as to whether the CSR had any active notices. Indeed, there would have been little reason for the agency to introduce evidence to establish this point given that, based on this Department's review of the hearing record, the grievant did not appear attempt to argue that the CSR was an appropriate comparator. (The grievant clearly argued that the discipline should be mitigated on other grounds.) Because the grievant did not appear to attempt to introduce any evidence that the CSR was "similarly situated" to grievant in terms discipline (e.g., had two active written notices for failing to follow policy) the hearing officer could not reach the determination that they are "similarly situated" on that basis.

No Intent to Defraud

The hearing officer finds that the grievant had no intention of committing fraud in this matter. The agency counters that it "made no attempt to make any claim that fraud was a factor in this case." The Written Notice under which the grievant was disciplined makes no mention of fraud.[22] The grievant was disciplined for failure to follow policy, not for fraud or an attempt to defraud. Thus, the lack of an intent to defraud can have no bearing on the failure to follow policy charges that led to the grievant's termination.[23]

Otherwise Satisfactory Employment

The agency asserts that the fact that the grievant has two active Group Notices (both of which were issued for failing to follow policy) precludes the hearing officer from mitigating the instant Notice on the basis of otherwise satisfactory work performance. We agree. While otherwise satisfactory work performance can be grounds for mitigation by agency management under the Standards of Conduct, under the *Rules*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness.[24] Thus, while it cannot be said that otherwise satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[25] The weight of an employee's 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.[26] The more serious the charges, the less significant otherwise satisfactory work performance becomes.[27] A second Group II Notice for failing to follow policy is a serious charge that normally leads to discharge.

Most importantly, in examining an employee's work record, a hearing officer must consider the entire record and may not simply gloss over deficiencies in performance. The hearing officer held that: *"[o]ther than the prior Group I Written Notice and Group II Written Notice*, the Agency offered no evidence to indicate that the Grievant was anything other than a long-standing, outstanding and exemplary employee."[28] To this finding, the agency responds in its request for administrative review:

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[22] The closest the Written Notice comes to an assertion of fraud is the claim that the grievant was aware of a coffee can containing a "slush fund" used by employees to balance petty cash overages or shortages when balancing cash registers at day's end. Agency Exhibit 2.

[23] *C.f.* EDR Ruling No. 2010-2368 (where a Department of Corrections employee was disciplined for discussing personal matters with an inmate regarding the employee's children, unclear how the absence of a romantic relationship between the employee and inmate is a mitigating circumstance).

[24] EDR Ruling No. 2007-1518. Formerly, the *Standards of Conduct* expressly listed both length of service and otherwise satisfactory performance as mitigating circumstances. Ruling 2007-1518 thus addressed both length of service and otherwise satisfactory performance. Since the issuance of this ruling, the *Standards of Conduct* was modified by eliminating "length of service" as a mitigating circumstance.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Hearing Decision at 7 (emphasis added).

> The hearing Officer seems to conclude that that [sic] the active written notices are indicative of outstanding and exemplary service. The Agency has determined that previously issued written notices in this case shows that the grievant had been warned about the importance of following policy. Knowing this, a prudent employee would have been more diligent with regard to policy. The agency had mitigated both of the previously issued notices. The Group I notice was mitigated from a Group II notice, and the earlier Group II notice included a 5 day [sic][29] suspension, not 10 days of suspension. How many times is an employer to mitigate disciplinary action because of years of satisfactory service?
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> The Agency knows well that the Grievant has demonstrated the moral benefit and importance of work and its inherent ability to strengthen character. The Agency accepts that the grievant is a person of good quality. However, the grievant's excellent ethics and character do not excuse her actions and do not serve to mitigate the decision to terminate. It was the Agency's determination that the grievant's ethics and character did not outweigh her choice to ignore policy.

Again, under the *Rules*, the hearing officer must give deference to an agency's consideration of potentially mitigating and aggravating circumstances. 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.'"[30] Here, the agency considered the grievant's past performance.[31] Moreover, instead of issuing the grievant a Group II for her failure to follow policy in August 2008, the agency issued her a Group I Notice.[32] The agency mitigated this Notice on the basis of the grievant's "12 years of service in the CSC, [her] prior years of service as a license agent and otherwise satisfactory work performance." The agency also mitigated the second instance of failure to follow policy. The April 2009 Written Notice included a 3-day suspension, although the agency could have suspended the grievant for up to 10-days. [33]

In sum, the agency apparently decided that an employee who commits an infraction for which she has previously been issued two Written Notices, both of which are active and were mitigated, does not have a work record otherwise sufficient to warrant continued employment.

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[29] Agency Exhibit 1, Tab 13 indicates that the grievant was suspended for only three days, not five.

[30] *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").

[31] The July 9th Written Notice that terminated the grievant's employment stated that:

> *Your years of service were considered* however that does not lessen the severity of the actions when you choose not to follow policy and procedures. In you role of Assistant Manager, you are expected to enforce polices and lead by example. *You have an active Group I Written Notice and an Active Group II (with 3 day suspension) for failure to follow policy and procedure.* An accumulation of 2 active Group II written Notices normally results in termination. (Emphasis added).

[32] Agency Exhibit 1, Tab 14, August 12, 2008 Group I Written Notice issued for failure to follow policy.

[33] Agency Exhibit 1, Tab 13, April 17, 2009 Group II Written Notice issued for failure to follow policy.

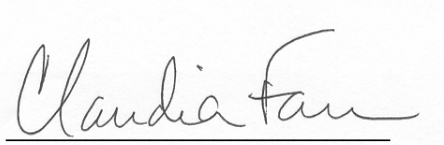
The hearing officer must give deference to this conclusion. While the hearing officer asserts that "there is nothing contained in the Written Notice to indicate that the Grievant's quality of service was considered as a mitigating factor," this finding is not supported by record evidence. It simply cannot be said that the agency did not consider the grievant's quality of service when the Written Notice terminating her employment expressly cites to two active Notices for the same offense that led to her discharge.

Conclusion

For the reasons set forth above, the bases upon which the hearing officer relied to reduce the discipline in this case are insufficient to warrant migration. Based on the facts set forth in Case # 9214 and the factors relied upon for mitigation, the discipline issued by the agency in this case cannot be viewed as unconscionable, 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

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 any reconsidered decisions issued.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]



Claudia T. Farr
Director

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