Issue: Administrative Review of Hearing Officer's Decision in Case No. 9253; Ruling Date: May 18, 2010; Ruling #2010-2538; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2010-2538
May 18, 2010

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9253. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in Case No. 9253.

FACTS

On September 15, 2009, the grievant was issued a Group III Written Notice with demotion for violating Department of Corrections (DOC) Policy 130.1 and more specifically, for failing to be courteous and respectful by yelling at a superior officer.[1] The grievant challenged the disciplinary action by filing a grievance on October 13, 2009.[2] After the parties failed to resolve the grievance during the management resolution steps, the grievance proceeded to a hearing on January 25, 2010.[3]

In a January 27, 2010 decision, the hearing officer upheld the Group III Written Notice with demotion and in his decision concluded:

> During the shift beginning on September 1, 2009, Grievant was not courteous, respectful, or polite to the Captain. The Department of Corrections is a quasi-military organization where employees hold rank. Subordinate ranking employees are expected to show greater deference to employees holding superior rank than might be expected between superior and subordinate employees working in other State agencies. Grievant yelled at the Captain for several minutes. She ignored the Captain's instruction to calm down. Grievant's actions were contrary to DOC Policy 130.1.

[1] *See* Decision of Hearing Officer in Case No. 9253 issued January 27, 2010 ("Hearing Decision") at 1-4.
[2] *Id.* at 1.
[3] *Id.*

Group III offenses include, "violation of DOC Operating Procedure 130.1". Because Grievant's actions were contrary to DOC Policy 130.1, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may end an employee's employment with the Agency. In lieu of removal, the Agency may demote, transfer, and impose a disciplinary pay reduction. In this case, Grievant's demotion with a disciplinary pay reduction must be upheld.

Grievant argues that she was courteous and respectful to the Captain but was merely expressing her disagreement. Grievant was not disciplined for what she said; she was disciplined for how she said it. There is sufficient evidence to show that Grievant was loud, argumentative and disrespectful to the Captain. The Captain's testimony was credible.

Grievant argues that DOC Policy 130.1 does not govern interaction between employees -- it only governs interaction between employees and offenders. Grievant's argument fails. Although the primary purpose of DOC Policy 130.1 is to address employees' relationships with offenders, the Policy also specifically mentions interactions between employees.

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. 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, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the discipline is excessive. The Hearing Officer is not a "super personnel officer" who can impose his preference for the appropriate level of discipline as long as that level does not exceed the limits of reasonableness. In this case, the Agency's level of discipline does not exceed the limits of reasonableness. It is supported by the Agency's

> policies. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[4]

The grievant now seeks administrative review of the hearing officer's January 27, 2010 decision. In her request for administrative review, the grievant asserts that the hearing officer failed to address the grievant's claim that the level of discipline (i.e., a Group III with demotion) was too severe, and failed to consider evidence of inconsistent discipline as a mitigating circumstance. In addition, the grievant's request for administrative review challenges the hearing officer's interpretation of policy.

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]

Severity of the Discipline

The grievant asserts that the hearing officer erred by failing to consider and/or discuss her argument that the discipline imposed was too severe. This Department concludes that the hearing officer clearly considered and discussed the grievant's contention that the discipline imposed was excessive. More specifically, in his decision, the hearing officer finds that the grievant's actions were contrary to DOC Policy 130.1.[7] As noted by the hearing officer, violations of Policy 130.1 can warrant a Group III level of offense.[8] Accordingly, the hearing officer concludes that the discipline in this case was within the bounds of reasonableness and as such, was not excessive.[9] This Department finds no reason to disturb the hearing officer's decision.

Mitigation

The grievant also argues that the hearing officer erred by not considering evidence of inconsistent discipline. Inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.[10] However, as with all mitigating factors, the grievant has the burden to raise and establish any

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[4] *Id*. at 4-5.
[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Hearing Decision at 5.
[8] *Id*.
[9] *Id*.
[10] *Rules for Conducting Grievance Hearings* § VI(B)(1).

mitigating factors.[11] In this case, a review of the hearing record indicates that she did not present this argument to the hearing officer at hearing. Accordingly, the hearing officer cannot be found to have erred in failing to consider this allegedly inconsistent discipline.[12]

Further, this Department will review a hearing officer's mitigation determinations only for an abuse of discretion.[13] 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. Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, this Department will not disturb the hearing officer's decision.

Moreover, in support of her claim of that the discipline imposed was inconsistent, the grievant cites to several previous hearing decisions. Assuming for the purposes of this ruling only that these hearing decisions are relevant to the grievant's claim, these prior decisions cannot be considered at this point because, due to the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[14] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[15] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party claiming evidence was "newly discovered" must show that

> (1) the evidence was newly discovered after the judgment was entered; (2) due diligence to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[16]

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[11] *See e.g.,* EDR Ruling 2009-2157, 2009-2174; EDR Ruling #2010-2366 and EDR Ruling #2010-2368. *See also* Bingham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

[12] *See e.g.* EDR Ruling #2010-2473.

[13] "'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.*

[14] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

[15] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

[16] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

Here, the previous hearing decisions the grievant cites to are neither new nor newly discovered as all of these decisions were issued prior to the hearing in the grievant's case. Consequently, there would be no basis to re-open the hearing for consideration of these documents.

Policy Interpretation

In her request for administrative review to this Department, the grievant also alleges that the hearing officer misapplied policy by finding that the grievant's behavior was properly characterized as a Group III offense. The Director of DHRM (or her designee), not this Department, has the authority to interpret all policies affecting state employees, and has the authority to assure that hearing decisions are consistent with state and agency policy.[17] Only a determination by that agency could establish whether or not the hearing officer erred in his interpretation of state and agency policy.

On February 11, 2010, the grievant submitted a request for administrative review to the DHRM Director identical to the administrative review received by this Department. On April 5, 2010, the DHRM Director's designee issued an administrative review ruling and declined "to interfere with the [hearing] decision" on the basis that the grievant's appeal involved an evidentiary issue and not a policy issue.[18]

The grievant's appeals to both this Department and DHRM appear to clearly raise an issue of policy misapplication; however, as noted above, this Department has no authority to assess whether the hearing officer's decision as to the appropriate level of offense under his findings of fact as to the grievant's conduct in this case, was in accord with DHRM Policy. Moreover, the DHRM Director's designee has issued an administrative review ruling in this case and as we have ruled in other prior cases, the plain language of the *Grievance Procedure Manual* precludes the issuance of multiple administrative review rulings by the EDR and DHRM Directors.[19] Thus, this Department's ruling here, as the last of the pending administrative review decisions, renders the January 27, 2010 hearing decision a final decision. Accordingly, neither the hearing officer, DHRM nor this Department have any authority to review the hearing decision again, absent perhaps an order from the circuit court remanding the decision for further clarification or consideration. Thus, any remaining appeal must be directed to the circuit court in the jurisdiction in which the grievance arose. Such appeal must assert that the decision is contradictory to law.

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[17] Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).
[18] *See* Policy Ruling of the Department of Human Resource Management in Case No. 9253 issued April 5, 2010.
[19] *See* EDR Ruling Nos. 2004-859; 2006-1289; 2006-1348; 2009-2328. Moreover, if the administrative review process were open-ended, allowing for multiple (revised) opinions, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer's decision. 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.[20] The hearing decision is now a final decision. 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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Claudia T. Farr
Director

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