Issue: Administrative Review of Hearing Officer's Decision in Case No. 9297; Ruling Date: June 30, 2010; Ruling #2010-2656; Agency: College of William & Mary; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of College of William and Mary
Ruling Number 2010-2656
June 30, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9297. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts of this case, as set forth in the hearing decision in Case No. 9297, are as follows:

> The College of William and Mary employs Grievant as a Housekeeper Worker. She began working for the Agency in April 2007. The purpose of her position is to, "maintain the upkeep and cleanliness of campus buildings and to ensure a clean environment is maintained for all faculty, staff, students and visitors." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
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> On September 23, 2009, Grievant attended a seminar offered by the Agency entitled "Preventing Workplace Violence." The definition of workplace violence was discussed and the consequences of engaging in workplace violence were discussed during the seminar.
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> On October 29, 2009, Grievant and Ms. H attended a staff meeting held in the Supervisor's office. Approximately seven people attended the meeting. Grievant and Ms. H were sitting side by side on a small couch. Grievant complained about Ms. H. Ms. H told Grievant she was jealous of Ms. H. Grievant said to Ms. H, "That's why your friend is going around saying you are sucking men's penis on campus." Grievant also said, "you think you cute, but you not cute walking around like you're nine months pregnant." Grievant's intent at the time of her statements to Ms. H was to insult Ms. H and embarrass her in front of the group. As Ms. H was speaking, Grievant raised her arm and hand and placed her hand in front of Ms. H's face, a few inches away. Ms. H told Grievant to take her hand out of Ms. H's

> face. The Housekeeping Manager asked Grievant to take her hand away from Ms. H's face. Grievant responded by keeping her hand in front of Ms. H's face and moving that hand closer to Ms H's face. Ms. H and Grievant stood up and turned towards each other as part of a heated exchange. The Housekeeping Manager moved between Ms. H and Grievant because she believed Grievant was going to hit Ms. H. The Supervisor also moved between Grievant and Ms. H because he believed a fight would occur. The Housekeeping Manager asked the Supervisor to move Ms. H away from the area. The Supervisor and Ms. H moved away from Grievant and the incident de-escalated.[1]

Based on the preceding *Findings of Fact*, the hearing officer reached the following *Conclusions of Policy*:

> Grievant engaged in threatening behavior contrary to DHRM Policy 1.80 because she placed her hand within a few inches of Ms. H's face and moved her hand back and forth as if she were going to hit Ms. H. Grievant engaged in verbal abuse because she criticized Ms. H's weight and suggested Ms. H engaged in sexual behavior with men on campus. The Agency has presented sufficient evidence to show that Grievant acted contrary to DHRM Policy 1.80 governing workplace violence.
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> Failure to follow policy is a Group II offense. Grievant acted contrary to DHRM Policy 1.80 because she engaged in workplace violence. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy, namely DHRM Policy 1.80 governing workplace violence.
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> Grievant argued that several of the Agency's witnesses described the events differently and, thus, the Agency's case was unreliable. It is not unusual for several people witnessing the same event to have varying accounts of what happened. The question is whether the variance is so material as to render it too difficult to determine what happened. In this case, the variance of accounts is not significant. For example, one witness testified that Ms. H stood up first. Other witnesses testified that Grievant stood up first. Who stood up first is not material. What is material is that Grievant stood up, was in a position to fight Ms. H, and displayed behavior suggesting she was about to fight Ms. H. All Agency witnesses agreed that Grievant stood up, was in a position to fight Ms. H, and they believed Grievant needed to be separated from Ms. H otherwise a fight would begin.
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> Grievant argued that she did not take any aggressive action towards Ms. H and that she had her hand up to block the intrusion into her personal

[1] Decision of the Hearing Officer in Case No. 9297 issued April 30, 2010 ("Hearing Decision") at 2-3. Footnotes from the original decision are omitted here.

space from Ms. H's arm movement. The evidence presented does not support this assertion. The Agency presented several credible witnesses to support its assertion of how Grievant behaved. One of those witnesses was Ms. H whose testimony was credible. Grievant did not testify and, thus, the Hearing Officer was not able to evaluate Grievant's behavior from Grievant's perspective. When the testimony of all witnesses is considered individually and as a whole, the Agency's contention that Grievant engaged in threatening behavior and verbal abuse is the most logical conclusion.

Grievant argued that the Housing Manager and Supervisor should have taken action sooner to diffuse the confrontation. The evidence does not support this assertion. Even if the Hearing Officer were to assume that the Housing Manager and Supervisor should have responded more quickly, it would not excuse Grievant for failing to govern her own behavior.

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.

During the Step Process, Grievant suggested a medical condition may have influenced her behavior on October 29, 2009. No credible evidence was presented to support this assertion. Grievant suggested that the Agency inconsistently disciplined its employees. She asserted that she had been the victim of a conflict with another employee but the Agency took no action against that employee. Insufficient details were presented to support this allegation. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant raised as an issue that her transfer to another work location might inhibit her access to medication that had to be refrigerated. The Agency has taken steps to ensure Grievant has access to her medication and it appeared that Grievant no longer considered this an issue during the hearing.[2]

[2] Hearing Decision at 3-5.

Based on the above *Conclusions of Policy*, the hearing officer upheld the discipline issued by the agency.[3] The hearing officer subsequently upheld his Hearing Decision in a June 1, 2010 reconsidered decision.[4]

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]

Mitigation: Inconsistent Discipline

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,
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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.[9]

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[3] *Id. at* 6.
[4] *See* Reconsideration Decision in Case 9297, issued June 1, 2010 ("Reconsideration Decision").
[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).
[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 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

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 "exceeds the limits of reasonableness" standard set forth in the *Rules*.[11] This is a high standard to meet, and has been described in analogous Merit Systems 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] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Section VI(B)(1) of the *Rules for Conducting Grievance Hearings ("Rules")* provides that an example of mitigating circumstances includes "Inconsistent Application," which is defined as discipline "inconsistent with how other similarly situated employees have been

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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 the 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 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.

[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 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.*

treated." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[16]

The grievant argues that the hearing officer erred by not considering evidence of inconsistent discipline among agency employees. A review of the hearing record indicates that the grievant raised the issue of potential inconsistent discipline with the hearing officer and he addressed this concern in his Hearing Decision. The hearing officer found that "[i]nsufficient details were presented to support this allegation." Based on this Department review of the hearing record, we cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion. The grievant pointed to an incident that occurred in November of 2008 in which the grievant was involved in an altercation with another employee, which apparently resulted in no disciplinary action being taken against the other employee.[17] While the grievant appears to characterize the incident as threatening, the agency characterized it as a "misunderstanding between two employees," and the agency witness who was questioned about the incident testified that he had no knowledge that the employee displayed threatening behavior toward the grievant.[18] Based on the record evidence, we cannot conclude that the hearing officer erred in apparently determining that there was inadequate evidence to show that these two situations were sufficiently similar to warrant a reduction in discipline.

New Evidence

In a related objection, the grievant presented evidence to this Department, and apparently in her request for reconsideration, to the hearing officer, which she seems to assert reflects inconsistency in the treatment of employees. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[19] 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 hearing ended.[20] The party claiming evidence was "newly discovered" must show that

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[16] *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bigham 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).

[17] Grievant's Exhibit B-1 and hearing testimony beginning at approximately 51:00.

[18] Hearing testimony at 52:00-54:00. Also, the police report offered as Grievant's Exhibit B-1, was in parts illegible and contained inconsistencies between the employee's versions of the facts and the grievant's version. In contrast, we note that the grievant has not challenged in her request for administrative review pertinent findings such as that she made the offensive statements to her co-worker or that she placed her hand near the co-worker.

[19] *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, e.g.*, EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).

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

> (1) the evidence was newly discovered since the judgment was entered; (2) due diligence…to discover the new evidence has 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.[21]

As correctly determined by the hearing officer in his Reconsideration Decision, the documents provided are not newly discovered because this potential evidence was in existence at the time of the hearing and presumably could have been obtained by the grievant before the hearing.[22] Consequently, there is no basis to re-open the hearing for consideration of this evidence.

Decision Inconsistent with Law

The grievant contends that the hearing decision is inconsistent with law because her transfer (and the hearing officer's upholding of the transfer) violates the Americans with Disabilities Act. As the hearing office noted in his Reconsidered Decision, it appeared as though issues relating to any necessary reasonable accommodation for any potential disability had been resolved at the hearing.[23] He is correct that if the issue had not been settled, any such remaining issues should have been raised at that time.[24]

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.[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

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[21] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[22] The documents were copies of social networking posts made the day before the hearing and earlier.
[23] Reconsideration Decision at 1. *See also* cross examination of the Director of Equal Opportunity (EOD) beginning at approximately 1:16:30 during which the following exchange occurs: Grievant's Advocate (GA): "But she has the right to bring all of her care supplies into the workplace for her personal care, [EOD: "That's exactly right.] : And that's what we were concerned about. [EOD: "That's right."] GA: So that issue has been resolved, and I have no other questions."
[24] Also, legal appeals are directed to the circuit court in the jurisdiction in which the grievance arose rather than this Department. *See Grievance Procedure Manual* §7.3(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).