

Issue: Administrative Review of Hearing Officer's Remand Decision in Case No. 9171;
Ruling Date: August 10, 2010; Ruling #2010-2677; Agency: Department of Veterans
Services; Outcome: Hearing Decision In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Veterans Services
Ruling Number 2010-2677
August 10, 2010

The grievant has requested administrative review of the hearing decision on remand in Case No. 9171. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

On or about June 11, 2009, the grievant was terminated from his employment with the Department of Veterans Services, in conjunction with the receipt of a second Group II Written Notice.¹ He timely grieved the disciplinary action and his termination, and a hearing was held in this matter on September 11, 2009.² During the hearing, the hearing officer "ruled that evidence of retaliation was not relevant and the Grievant did not proceed with evidence in that regard."³

In a decision dated September 22, 2009, the hearing officer upheld the disciplinary action and termination.⁴ The grievant subsequently sought an administrative review from this Department on the ground that the hearing officer failed to consider the existence of mitigating circumstances.⁵ In a December 10, 2009 decision, this Department remanded the decision back to the hearing officer and ordered that the hearing be re-opened for the limited purpose of allowing the grievant to present evidence of potential mitigating circumstances and in particular, evidence of retaliation and inconsistent discipline.⁶

The re-opened hearing took place on April 29, 2010. In a decision dated May 26, 2010, the hearing officer upheld his earlier determination that the disciplinary action and termination was warranted based upon the following findings of fact and conclusions:

¹ Decision of Hearing Officer, Case No. 9171, September 22, 2009 ("Hearing Decision"), at 3.

² *Id.* at 1, 3.

³ *Id.* at 4.

⁴ *Id.* at 1, 6.

⁵ The grievant also sought reconsideration by the hearing officer, which the hearing officer denied in a decision dated October 15, 2009. *See* Decision of Hearing Officer on Request to Reconsider or Reopen, Case No. 9171, October 15, 2009.

⁶ EDR Ruling No. 2010-2449.

FINDINGS OF FACT

The Grievant called five witnesses and directed questions to each witness regarding the witness' knowledge of any improper motives for the disciplinary action taken against the Grievant, such as retaliation or discrimination, or the inconsistent application of discipline among employees. None of the Grievant's five witnesses recalled any acts of retaliation against the Grievant. In addition, none of the five witnesses were aware of any inconsistent treatment of employees who committed the same or a similar violation as that committed by the Grievant. None of the five witnesses testified as to any action on the part of the Agency that indicated improper motives in disciplining and terminating the Grievant.

Upon the conclusion of the Grievant's case, the Agency called the Grievant to testify. When asked to describe what constituted the retaliation alleged by the Grievant, the Grievant said it was the act of a fellow employee "threatening to write me up." However, the fifth witness called by the Grievant stated that the employee in question did not "write up" the Grievant and further stated that she was not aware of any retaliation against the Grievant by that particular employee.

APPLICABLE LAW AND OPINION

For a Hearing Officer to mitigate a disciplinary action, EDR's Rules For Conducting Grievance Hearings require a finding that, upon consideration of the record evidence, the Agency's discipline exceeded the limits of reasonableness.

The Rules specifically provide that among the grounds for mitigating discipline are a showing by the Grievant of an improper motive for the disciplinary action, such as retaliation or discrimination, or the inconsistent application of discipline among employees. Section VI (B)(1).

It is the Hearing Officer's opinion that the Agency's discipline did not exceed the limits of reasonableness and that no mitigating circumstances exist. The Grievant presented no evidence of an improper motive for the disciplinary action.⁷

The grievant subsequently sought a reconsideration of the Remand Decision from the hearing officer. In a July 22, 2010 decision, the hearing officer denied the grievant's request for reconsideration.⁸ The grievant also sought an administrative review from the Director of the Department of Human Resource Management (DHRM). In a letter dated July 30, 2010, the DHRM director's designee declined to administratively review the hearing officer's decision because the grievant failed to identify a policy that had been misinterpreted or misapplied by the

⁷ Decision of Hearing Officer Upon Remand, Case No. 9171, May 26, 2010 ("Remand Decision"), at 2-3.

⁸ See Decision of Hearing Officer, Case No. 9171, July 22, 2010.

hearing officer. The grievant now asks this Department for administrative review of the hearing officer's May 26, 2010 Remand Decision.

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.”⁹ 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.¹⁰

Here, the hearing was re-opened for the limited purpose of allowing the grievant to present evidence of retaliation and inconsistent discipline, two possible mitigating factors.¹¹ As with all mitigating factors, the grievant has the burden to raise and establish them.¹² In his request for administrative review to this Department, the grievant argues that he met his burden of establishing retaliation and inconsistent discipline through witness testimony and that the hearing officer failed to properly apply the “exceeds the limits of reasonableness standard” and therefore, erred in his mitigation analysis and determination.

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.”¹³ 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.”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,

⁹ Va. Code § 2.2-1001(2), (3), and (5).

¹⁰ See *Grievance Procedure Manual* § 6.4(3).

¹¹ *Rules for Conducting Grievance Hearings* § VI(B)(1)

¹² See, e.g., EDR Ruling No. 2010-2473; EDR Ruling No. 2010-2368; EDR Ruling Nos. 2009-2157, 2009-2174. see also *Bigham v. Dep't Of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) (citing *Kissner v. Office of Pers. Mgmt.*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (“Once the agency has presented a prima facie case” of proper penalty, however, the burden of going forward with evidence of mitigating factors shifts to [the employee])).

¹³ Va. Code § 2.2-3005(C)(6).

¹⁴ *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.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 "exceeds the limits of reasonableness" standard set forth in the *Rules*.¹⁷ 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,¹⁸ abusive,¹⁹ or totally unwarranted.²⁰ This Department will review a hearing officer's mitigation determination for

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 quotation omitted); see also *Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (stating that 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) (stating that 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 limits 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" 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.

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 his request for administrative review, the grievant asserts that he put on extensive evidence of retaliation by Ms. O at the reopened hearing and as such, the hearing officer erred by not finding retaliation as a mitigating circumstance. During the reopened hearing, the grievant called five witnesses to testify regarding alleged retaliatory actions by Ms. O. Witness testimony indicated that there was some "tension" between the grievant and Ms. O and that Ms. O had threatened to discipline the grievant even though she did not have the authority to do so. However, as noted by the hearing officer in his Remand Decision and as testified to by one of the grievant's witness as well as the grievant himself, Ms. O was not the individual that issued the Group II Written Notice that resulted in the grievant's termination and was the subject of his grievance.²² Accordingly, any alleged retaliatory actions by Ms. O would appear to have little bearing on the disciplinary action at issue in this case.²³ As such, this Department cannot find that the hearing officer abused his discretion in failing to mitigate the discipline based on the grievant's evidence of retaliation by Ms. O.

Likewise, the grievant asserts that he demonstrated inconsistent discipline and the hearing officer erred by failing to mitigate the discipline on this basis. 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 Remand Decision. The hearing officer found that "none of the five witnesses were aware of any inconsistent treatment of employees who committed the same or a similar violation as that committed by the Grievant."²⁴ As noted by the hearing officer, the grievant did put forth evidence of other instances of alleged misconduct by employees; however the alleged instances of misconduct were not similar to the grievant's violation. For example, the grievant put forth evidence that several employees were excessively absent from work yet were allegedly not disciplined in accordance with policy.²⁵ In contrast, the grievant was disciplined for leaving a resident unattended. Accordingly, 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 situations and other instances of alleged misconduct offered at hearing were sufficiently similar to warrant a reduction in discipline or that the hearing officer's decision not to mitigate the discipline on this basis constitutes an abuse of discretion.

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 Re-Opened Hearing Recording at 1:01:45 – 1:01:53 and 1:04:04 – 1:04:29.

²³ Moreover, a review of the hearing record did not reveal any evidence that the decisionmaker in this case was influenced by Ms. O in her decision to issue the disciplinary action. *See McDonald v. Rumsfeld*, 166 F. Supp. 2d. 459, 464-465 (E.D. Va. 2001) ("This Court will follow suit [of other circuit courts] and hold that it will look beyond who officially made the adverse employment decision to determine who actually made the decision or caused the decision to be made. Under circumstances indicating that the decisionmaker's determination may have been tainted by another supervisor or employee's discriminatory animus toward the plaintiff, it is appropriate to infer the causal connection if the evidence demonstrates that the supervisor or employee possessed leverage, or exerted influence, over the decisionmaker.")

²⁴ Remand Decision at 2.

²⁵ Re-Opened Hearing Recording at 55:02 – 56:28.

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.²⁶ Because all timely requests for administrative review have been decided, 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸

Claudia T. Farr
Director

²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).