Issue: Administrative Review of Hearing Officer's Decision in Case No. 9383; Ruling Date: November 16, 2010; Ruling No. 2011-2817; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2011-2817
November 16, 2010

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9383. 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. 9383 are as follows. The Department of Behavioral Health and Developmental Services ("agency") employed the grievant as a Direct Service Associate II at one of its facilities. A patient at a facility rolled his wheelchair through a propped open door and outside to the facility grounds. Continuing on, he began down a hill but ultimately tipped his wheel chair over onto its side. The patient, who was strapped inside the wheelchair, was unable to extricate himself. The grievant and another employee, Ms. M, attempted to upright the patient's wheelchair with the patient still strapped in but their attempt failed. Ms. SC held the wheelchair as the grievant and Ms. M unhooked the patient's seat belt. The patient rolled out of the wheelchair onto the ground without support.

Ms. M grabbed the patient under his arms and shoulders from behind and the grievant grabbed the patient's legs underneath his knees. Together they carried him back up the hill and placed him in his wheelchair. Ms. M watched staff as they wheeled the patient inside the building he had left. Ms. M did not report the incident to her supervisor or notify anyone that the incident occurred.

After an inquiry by a citizen who had observed the mishandling of the grievant, the agency began an investigation into the matter. The grievant made several statements. In her second statement the grievant stated:

> I am truly sorry for lying to the investigator. If I had it all over again I would tell the truth. Truly, I am sorry. I had to clean up the shower room after bathing the guys. I went to the laundry room to put clothes in the washer and take a load out of the washer. [Ms. C] came to the door of the laundry [room] and yelled for help. That's when I came out to assist with the client. The client was mid ways on the grass. I went down to assist with him. I took both of his legs and [Ms. M] got his back and began to take him up the hill. I took

> him back up and put him in the chair. I was scared so that is why I said what I said. [The Police Officer] told us "to cover our own ass." [The Med Aide] brought the chair back up the hill after I got through assisting with the client. I went back to doing my chores. I had some bibs in my hand at the time of the incident.

The hearing decision finds that several other employees who were involved in the incident failed to report it. Two of those employees were not discharged but were instead suspended. Like the grievant, a second employee who gave a false statement was discharged.[1]

The hearing officer found that the grievant was not responsible for the patient getting outside but that she had been trained that when she observed a fallen patient, she was to call the emergency medical services. The hearing officer found that the grievant had been trained to refrain from moving an individual who had fallen and that by failing to call for an EMT, nurse, or doctor, she denied necessary services for a person receiving care at the facility, which was tantamount to client neglect.

The hearing officer found that as a result of the grievant's failure to accurately state the facts of the incident, the Charge Aide, Registered Nurse, and Shift Supervisor were making decisions regarding the patient's medical treatment based on false assumptions. According to the hearing decision, they were assuming that the injuries caused to the patient were from a circumstance less serious than the actual event. The hearing officer found that the grievant knew the truth and was in a position to reveal the truth but failed to do so, and her failure to do so constituted client neglect. Accordingly, the hearing officer found that the agency presented sufficient evidence to support the issuance of a Group III Written Notice for client neglect and he upheld the grievant's discharge.[2]

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."[3] 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.[4]

Mitigation: Inconsistent Discipline

[1] This second individual grieved her discharge but her termination was ultimately upheld by a hearing officer in Case No. 9384. A fifth individual involved in the incident, Ms. C, was also discharged but she did not grieve her discharge.
[2] Decision of the Hearing Officer in Case No. 9383 ("Hearing Decision"), issued September 13, 2010, pp. 2-8.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

The grievant essentially contends that the hearing officer erred on due process grounds by not mitigating the discipline in this case to a suspension, the discipline issued to employees who failed to report the incident.

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."[5] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") 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."[6] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[7]

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.[8] Rather, mitigation by a hearing officer under

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[5] Va. Code § 2.2-3005(C)(6).

[6] *Rules for Conducting Grievance Hearings* VI(A).

[7] *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 domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Court "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors").

[8] 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

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*.[9] 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,[10] abusive,[11] or totally unwarranted.[12] This Department will review a hearing officer's mitigation determination for abuse of discretion,[13] 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* provides that an example of mitigating circumstances includes "Inconsistent Application," which is defined as discipline "inconsistent with how other similarly situated employees have been treated." As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[14]

The grievant argues that the hearing officer erred by not appropriately considering evidence of inconsistent discipline among agency employees. The grievant has asked for 45 days to have a copy of the audio recording of the hearing transcribed. We believe that no such transcription is required in order for us to address this objection. We will assume the facts to be as the grievant describes: the grievant gave a false statement to investigators and other employees did not report the incident in question.

A review of the hearing record indicates that the grievant raised the issue of potential inconsistent discipline with the hearing officer and the hearing officer addressed that objection in his Hearing Decision and in his Reconsidered Decision. In the orginial Hearing Decision, the hearing officer found that:

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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.

[9] 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.

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

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

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

[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] *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).

> The Agency concluded that five employees had engaged in client neglect. Those employees included: Grievant, Ms. SC, Ms. C, Ms. M, and the Med Aide. Ms. M and the Med Aide were not removed from employment. They received a Group III Written Notice and a 10 work day suspension. The two employees who were not terminated were not similarly situated with Grievant. For example, the Med Aide was truthful in her statements regarding what occurred. In her statement to the Investigator, she indicated that the Individual was found down the hill laying on his side. Ms. M also told the Investigator that she observed the Individual turned over on the hill.[15]

In the Reconsideration Decision, the hearing officer explained:

> This issue was addressed in the original hearing decision. The key difference between Grievant and Ms. M and the Med Aide is that Grievant participated in a cover-up of the events surrounding the Individual's leaving the Building. This distinction is sufficient to enable the Agency to give Grievant a harsher degree of discipline. From the moment the Individual was returned to the Building, Grievant was untruthful regarding what she had observed. Her actions placed the Individual at risk regarding what medical services were appropriate for him to receive and subsequently jeopardized the Agency's ability to investigate what happened. No evidence was presented to show that Ms. M and the Med Aide misrepresented the circumstances of the injury to the Individual thereby undermining the Agency's ability to assess the medical needs of the Individual. Although Ms. M and the Med Aide failed to immediately report the event, no evidence was presented to show that their failure to report served to jeopardize the Agency's ability to find out the truth. Grievant was not similarly situated to Ms. M and the Med Aide.[16]

We cannot conclude that the hearing officer abused his discretion by finding a distinction between the grievant, who gave a false statement, and the employees who did not report the incident. We note, for example, that under DHRM Policy 1.60, the Standards of Conduct ("SOC"), falsification of state documents is a Group III offense, whereas failure to comply with a written policy is a Group II offense. Thus, it would not appear unreasonable for an agency to conclude (and the hearing officer to uphold) that making a false statement is of a different character than a failure to offer a statement. While reasonable minds might disagree over whether there is a substantive difference between the two, we cannot conclude that the hearing officer abused his discretion in upholding the agency's apparent determination that a sufficient difference exists to warrant a different and higher level of discipline in the grievant's case.

Failure to Order the Production of Documents

[15] Hearing Decision at 8.
[16] Reconsideration Decision of the Hearing Officer, Case No. 9383-R ("Reconsideration Decision"), issued October 18, 2010 at 2.

The grievant asserts that the hearing officer erred by not ordering the agency to produce a supplementary report after receipt of new evidence at hearing. The grievant contends that the "evidence established that [the grievant and another employee] were promised by [agency Investigator C] that their jobs would be protected if they gave a full statement."[17] The grievant argues that if it is true that the investigator advised "their jobs would be 'protected' if they gave a full recitation of the accident and their conduct," the grievant's due process rights would be affected.[18] The grievant contends that "[i]t would be inconsistent with state policy or agency policy to advise employees to take steps to assist an agency investigation (and representing that their employment would be protected, in the process), then to terminate these employees despite representations from the agency to the contrary."[19]

We find no error with the hearing officer not requiring production of any documents or reports that might detail any promise by Investigator C to the grievant. Such documents might certainly have been relevant, but under the facts of this case any such documents would not qualify as newly discovered evidence. 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.[20] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant 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]

Moreover, because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[22]

Here, the grievant has provided no information to support the position that the evidence referenced in her administrative review should be considered newly discovered evidence under this standard. The grievant argues in her request for administrative review that the parties were "surprised" by "new evidence" at hearing. That "new evidence,"

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[17] Grievant's Request for Administrative Review of Hearing Officer's Reconsideration Decision, dated October 25, 2010.
[18] September 28, 2010 Grievants' Response to Agency's Reply to Grievant's September 20, 2010 Motion [request for documents].
[19] *Id.* (emphasis in original).
[20] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).
[21] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[22] *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).

however, came from the grievant in the form of her testimony.[23] In other words, the new evidence upon which the grievant bases her request for documents is not new at all, at least to the grievant. While the agency may have been surprised by the grievant's testimony, as clearly inferred from her own testimony, the grievant had been aware the investigator's proposed bargain or promise for months prior to the hearing. Thus, she had ample time to request any documents relating to the purported bargain well in advance of the hearing. Moreover, even if the grievant did not have documents that supported her contention that she had been offered such a bargain, clearly she had the opportunity to question the investigator about any such bargain at the hearing. Perhaps most importantly, as the hearing officer found:

> "Grievant's decision to cover up the incident was made prior to any statements by the Police Officer [or the agency investigator]. The Police Officer [and agency investigator] had not yet arrived when the Charge Aide first asked what had happened to the Individual. Grievant failed to express the actual circumstances that had occurred."[24]

Thus, under the particular facts of this case, any failure to order documents relating to any such promise of job protection would not constitute an abuse of discretion.

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]

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Claudia T. Farr
Director

[23] Hearing transcript beginning at 3:10:00.
[24] Hearing Decision at 8.
[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).