Issue: Administrative Review of Hearing Officer's Decision in Case No. 9445; Ruling Date: January 26, 2011; Ruling No. 2011-2862; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2862
January 26, 2011

The Department of Corrections (the "agency") has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9445. For the reasons set forth below, this matter is remanded to the hearing officer for action consistent with this ruling.

FACTS

The relevant facts as set forth in Case Number 9445 are as follows:

The grievant is employed as a Corrections Officer with the Department of Corrections.[1] The purpose of the grievant's position is to "[p]rovide security and supervision of adult offenders."[2]

The hearing officer found that on April 25, 2010, the grievant told the Watch Commander he needed to take family personal leave. When the Watch Commander told the grievant that he could not afford to let anyone leave because the facility was short-staffed, the grievant became angry and began shouting. The hearing officer found that the grievant said "F--k you! Who the f--k you think you are? I don't give a f--k about the shift being short, f--k you!" The Watch Commander then instructed to the grievant to go to the administration building and wait until the he made a phone call. The hearing officer found the grievant then stated, "I don't give a f--k who you call. Call [the Warden] and you make sure you tell her what I said." The grievant's outburst was overheard by several other corrections officers.[3]

As a result, on May 4, 2010, the grievant was issued a Group III Written Notice for insubordination because the grievant used profane language towards the Watch Commander.

On June 3, 2010, the grievant timely filed a grievance to challenge the agency's action. On November 2, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this appeal to a hearing officer. On December 7, 2010, a hearing was held at the agency's

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[1] Decision of Hearing Officer, Case No. 9445, issued December 9, 2010 ("Hearing Decision") at 2.
[2] *Id.*
[3] *Id.*

location.[4] In a December 9, 2010 hearing decision, the hearing officer found the "use of obscene language" as a Group I offense which could be elevated to a Group II based upon the agency's Standards of Conduct.[5] Therefore, the hearing officer reduced the grievant's Group III Written Notice of disciplinary action to a Group II Written Notice.[6]

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."[7] 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.[8]

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."[9] 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.[10]

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

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."[11] However, 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.

In applying the framework set forth above, the hearing officer found the grievant did in fact engage in the conduct of using obscene language towards a superior.[12] Additionally, the hearing officer found that the comments made by the grievant were misconduct and amounted to insubordination.[13] However, in deciding whether the level of the agency's discipline for insubordination was consistent with policy, the hearing officer focused on the grievant's use of "obscene" language. The use of "obscene" language, however, does not appear to be the exclusive or perhaps even the primary focus of the charge set forth on the Written Notice.[14] Instead, it would appear that the agency is disciplining the grievant not merely for the utterance of obscenities but for the "unprofessional and insubordinate nature" of directing such language towards a superior.

The crux of the issue here is whether, under the particular facts of this case, the *insubordination* found by the hearing officer is properly characterized as a Group I, II, or III offense. Neither the Commonwealth's nor the agency's Standards of Conduct specifically characterize insubordination as a Group I, II, or III offense. The Standards of Conduct provide some guidance by assigning the "use of obscene language" as a Group I and "failure to follow a supervisor's instructions" as a Group II, but the term "insubordination" is not specified under the three levels of offense examples. Thus, consistent with the overarching principles of the Standards of Conduct, agencies are to determine where insubordination falls on the continuum of discipline. The hearing officer, in turn, must decide whether an agency's determination is consistent with the general principles of the Standards of Conduct, and if so, as discussed above under a mitigation analysis, whether the discipline is within the bounds of reasonableness.

The agency asserts the hearing officer inappropriately reduced the discipline issued by the agency because: (1) the agency charged the grievant with insubordination; (2) the use of profane language toward a superior officer is considered insubordinate in nature and a serious offense; (3) this type of insubordination is considered a Group III offense due to the maximum security, military style structure of this particular facility; and (4) this discipline was reasonable and consistent with agency policy.

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[11] Va. Code § 2.2-3005(C)(6).

[12] Hearing Decision at 3.

[13] *Id.*

[14] *Id.* Specifically, the grievant was charged with:

> On 4/25/10 after muster [the grievant] became angry with the Watch Commander (Lt. []). [The grievant] used profane language towards the Watch Commander (f[--]k you, f[--]k that s[--]t) in response to not being allowed to use family personal leave. [The grievant's] actions in this matter is of an unprofessional and insubordinate nature.

The Written Notice was coded as "56," which is the code for "insubordination."

As noted above, under the *Rules*, the hearing officer should give the appropriate level of deference to actions by agency management found to be consistent with law and policy.[15] 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.'"[16] Here, the agency has decided that, within its paramilitary structure, when an employee admittedly uses profane[17] language towards a superior officer, such misconduct "substantially exceed[s] agency norms" and the insubordination offense can be elevated to a Group III offense. Thus, given: (1) the lack of any specific guidance from the Standards of Conduct regarding the appropriate level of discipline for insubordination, and (2) the agency's concern that such behavior toward a superior in a paramilitary environment would undermine the authority of supervisors and potentially compromise the mission of the institution, the hearing officer should give appropriate deference to the agency's rationale for assigning such misconduct as a Group III offense.

Moreover, the hearing officer is cautioned to refrain from focusing solely on, or even primarily on, the fact that the grievant used "obscene" language, conduct which, *without more*, is only a Group I offense, especially in light of the finding of his "unprofessional and insubordinate" encounter with his superior, the Watch Commander. Indeed, the hearing officer found not only that the grievant had used "obscene language" in the workplace, but that he had directed this profanity at his superior, intentionally insulting him, behavior that the agency considers a Group III offense. Accordingly, the decision is remanded to the hearing officer for reconsideration to include (1) granting appropriate deference to the agency's assignment of the level of the offense, and (2) full consideration of the overall nature of the misconduct and its potential impact, not merely that the grievant uttered "obscene" words as he insulted his supervisor.

By remanding this decision, this Department does not mean to instruct the hearing officer to rule in any particular manner. Rather, the primary intent is to encourage the hearing officer to consider, in its entirety, the charge set forth on the written notice—insubordination—and not simply the use of "obscene" language during the encounter with his superior. [18] Furthermore, we recognize that the central issue here is one directly intertwined with policy and the Department of Human Resource Management ("DHRM") Director is the sole authority that can determine whether the hearing officer's conclusions regarding the appropriate level of discipline to be issued are consistent with policy.[19] Thus, either party may appeal to the DHRM Director the

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[15] *Rules* at VI(A).

[16] *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").

[17] The agency notes that there is a distinction between *obscene* language which it describes as "offensive to one's feelings or prevailing notions of modesty and decency," and *profane* language which it describes as "showing disrespect or contempt." The agency described grievant as having used "profane" language towards the Watch Commander.

[18] In its request for administrative review, the agency states that it "does not consider insubordination toward a superior officer to be a Group I offense. The agency asserts that "**Insubordination** *(not submitting to authority; disobedient)* is clearly a more serious offense, especially in the military style structure of a state prison."

[19] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

hearing officer's determination once it is issued on remand. Any such appeal must be initiated within 15 days of the remanded decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing officer is ordered to reconsider whether the agency's discipline for insubordination was consistent with agency policy and whether the insubordination charge is properly characterized as Group III offense.

The parties will have **15 calendar days** from the date of the remand decision, once issued, to raise, as a policy matter, whether the level of the misconduct as determined by the hearing officer in his remand decision is consistent with policy. Likewise, either party may appeal to this Department any alleged *new* grievance error that may appear in the remand decision within 15 days of the issuance of the remand decision. (No alleged errors with the original hearing decision will not be addressed, as they would be considered untimely.)

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] If neither party timely challenges the remand decision to either the EDR or DHRM Director, the remand decision will become final **15 calendar days** from the date of its issuance.

Once the decision becomes final, it may be appealed within 30 calendar days by either party 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]

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).