Issue: Administrative Review of Hearing Officer's Decision in Case No. 9446, 9465; Ruling Date: February 24, 2011; Ruling No. 2011-2866; Agency: Department of Veterans Services; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Veterans Services
Ruling Number 2011-2866
February 24, 2011

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9446, 9465. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts and holdings of this case, as set forth in the hearing decision in Case No. 9446, 9465, are as follows:

> Grievant was a certified nursing assistant for the Department of Veterans Services ("the Agency"), and she challenges two Written Notices. On April 22, 2010, the Agency issued the Grievant a Group I Written Notice for three absence occurrences (on 3/13/10, 3/18/10 and 4/20/10). On September 17, 2010, the Agency issued the Grievant a Group II Written Notice for five instances of tardiness and two unapproved absences. The Group II Written Notice resulted in termination, based on the accumulation of active Written Notices. The Grievant had two prior Group I Written Notices, one of which was for absences and tardiness.
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> The Agency's Policy HR-01 addresses attendance. It provides that
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> Regular attendance is a condition of employment. Once an employee exceeds eight (8) occurrences of unscheduled time away from work as defined by this policy, within a twelve (12) consecutive month period, or (3) occurrences in a 90 day period, or have established a pattern of absence as define [sic] by policy, their attendance will be considered unsatisfactory and will warrant appropriate corrective action. All disciplinary actions shall be taken in accordance with the Commonwealth of Virginia's Standards of Conduct Policy.

Agency Exh. 4. For multiple day absences, the policy states that a doctor's note does not eliminate the original occurrence of one to three days, but it may limit the number of occurrences to one for absences that extend beyond three days.

The Agency's Policy HR-02 addresses tardiness. It provides that

> Regular attendance as well as promptness in reporting to work is a condition of employment. Because non-exempt employees have assigned duties where they are frequently required to provide relief for other non-exempt employees and are eligible for overtime for any hours worked beyond the 40 hour workweek, the criteria for determining excessive tardiness for non-exempt employees is different from the criteria used for exempt employees.

The policy provides that "tardy" is "[m]ore than six (6) minutes late in reporting for work. Late arrivals of six (6) minutes to sixty (60) minutes constitutes a "tardy" by policy." The specific guidance and procedure provided in the policy for non-exempt employees is:

> If a non-exempt employee reports late for work six (6) minutes or more, but less than sixty (60) minutes they shall be considered tardy for work unless they were given prior approval by a supervisor before the end of their previous shift the preceding workday. When an employee is tardy for work for three (3) or more times over the course of ninety (90) days, he/she shall be deemed excessively tardy and eligible for a counseling or Group I Written Notice for "Excessive Tardiness" in accordance with the Commonwealth of Virginia's Standard of Conduct Policy.

Agency Exh. 4.

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as certified nursing assistant for over two years. A certified nursing assistant is responsible for providing direct care to residents during their shift and for maintaining the quality of services to fulfill the objective of the facility in accordance with the policies and procedures set forth by the facility administration and established nursing standards. The Certified Nursing Assistant is responsible for ensuring the needs of the residents

are met and or providing treatments and care as instructed. *See* Employee Work Profile, Agency Exh. 3.

The Agency operates a 160-bed long-term care facility. The Agency issued the Grievant an informal counseling for violating the attendance policy of three absences within a 90-day period. The Agency issued a Group I Written Notice on October 14, 2009, for violating the attendance and tardiness policies. The Grievant also has a Group I Written Notice for disruptive behavior from October 14, 2009. The Agency also issued the Grievant a Notice of Improvement Needed on February 12, 2010, for violating the tardiness policy of three tardies in a 90-day period.

The Standards of Conduct, DHRM Policy 1.60, provides that a Group I offense, such as tardiness or poor attendance, may be a Group II Written Notice for repeated violations of the same offense. The Standards of Conduct also provide that a fourth active Group I Written Notice normally results in discharge. Agency Exh. 4.

Group I (4/22/10)

The Grievant stipulates the occurrences of the absences noted in the Group I Written Notice issued on April 22, 2010. In the Agency's Notice of Improvement Needed issued on Feburary [sic] 12, 2010, the Agency put the Grievant on notice, in writing, as follows:

> Per policy, tardiness is anytime 6 minutes or more past her scheduled time of arrival (7am). Per policy, anything over 61 minutes is considered an occurrence and could be considered per HR 01 Attendance policy. Any further tardiness or occurrences over the next 90 days will result in further disciplinary action.

The Notice bears the Grievant's signature. Agency Exh 2. The Grievant did not factually dispute the three unscheduled absences contained in the Group I Written Notice of April 22, 2010, and they all occurred within 90 days of the Notice of Improvement Needed issued on February 12, 2010. The Grievant, however, asserts that the issuance of the Group I Written Notice was disparate treatment and retaliatory. The Grievant had challenged two previous Written Notices, and the prior Group II was reduced to a Group I. The Grievant, however, was successful in showing that the Agency engaged in a hostile work environment, and the Grievant asserts that the Agency is retaliating for that finding of a hostile work environment.

Group II (9/17/10)

The Grievant challenges the facts of the five tardies charged in this Group II Written Notice, for the following dates:

- June 15, 2010 six minutes late
- June 19, 2010 eight minutes late
- August 6, 2010 six minutes late
- August 16, 2010 six minutes late
- August 18, 2010 eleven minutes late

Grievant's Exh. 7. The Grievant does not challenge the accuracy of the clock-in times—she asserts that six minutes late is not tardy pursuant to applicable policy. The Grievant points to the drafting inconsistency in HR-02, stating in one place that *more than six minutes* is considered tardy. The Grievant also points to the timekeeping clock policy that includes the "more than six minutes" language. Grievant's Exh. 2.

The Grievant asserts that the issuance of the Group II Written Notice was disparate treatment and retaliatory for the same reasons stated above.

Other Agency employees testified that their understanding of the tardiness policy is that six minutes or more constitutes tardy, and they have been disciplined for tardiness. The Grievant's supervisor testified that the Grievant did a good job, but she had counseled the Grievant on tardiness issues and the importance of getting to work on time.

The Agency's human resources director testified that he had reviewed all nursing staff records and found 20 in violation of the tardiness and attendance policies. He testified that all had been disciplined in one form or another, depending on the specific circumstances of each case. He practiced progressive discipline with the Grievant and all employees. He also testified that he had specifically counseled the Grievant that the policy was that six minutes was considered tardy—not more than six minutes. The director testified that the Grievant only challenged the ambiguity of the tardiness policy for the first time in this grievance, although she had prior written notices and counseling for tardiness. The written policies ultimately were revised to remove the ambiguity created by the six minutes and more than six minutes language.

The Agency's director of nursing testified that all employees who have violated the attendance and tardiness policies have received counseling or other disciplinary action, depending on the circumstances specific to each case. She testified that some employees engage her in a plan of action to address any problems or circumstances, but that the Grievant never sought to address any concerns or special circumstances with her. The director of nursing testified that the Agency practices progressive discipline and takes into account the circumstances specific to each case. She denied that the discipline was

> retaliatory and explained that the discipline levied to all employees who violated the attendance and tardiness policies was tailored to each specific case.
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> The Grievant asserts that the discrepancy in the policy language that states both that tardiness is six or more minutes late or more than six minutes. The Grievant testified that the tardiness policy was confusing and she understood that more than six minutes late was considered tardy. The Grievant did not discuss her specific circumstances causing tardiness with the director of nursing because of privacy. The Grievant also asserts disparate treatment and retaliation. As discussed and addressed in this decision, I find no merit to the Grievant's claims of policy confusion, disparate treatment and retaliation.
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> The Agency's witnesses credibly testified that they specifically informed the Grievant that six minutes late was considered tardy under the policy. The Notice of Improvement Needed, issued to the Grievant on February 12, 2010, specifically stated in unambiguous terms that six minutes or more was considered tardy. The direct advice provided to the Grievant is the better evidence, and I do not find credible the Grievant's assertion that she was confused on the six-minute threshold for tardiness.[1]

Based on the foregoing, the hearing officer affirmed, in its entirety, the discipline issued by the agency, finding it neither excessive nor retaliatory.

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."[2] 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.[3]

I. Failure to Conduct a Fair Hearing

Bias:

The grievant asserts that the hearing officer did not conduct a fair hearing and that he was biased in favor of the agency. The EDR *Rules for Conducting Grievance Hearings (Rules)* address bias primarily in the context of recusal. The *Rules* provide that a hearing officer is responsible for:

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[1] Decision in the Matter of Case Nos. 9446; 9465 ("Hearing Decision"), issued December 17, 2010, at 1-5. Footnote from original Decision omitted here.
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).

> [v]oluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[4]

Similarly, EDR Policy 2.01 states that a "hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia."[5]

The EDR requirement of recusal when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Virginia Court of Appeals approaches the judicial review of recusal cases.[6] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[7] We find the Court of Appeals standard instructive and hold that in administrative reviews by the EDR Director of appeals asserting hearing officer bias, the appropriate standard of review is whether the hearing officer harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party claiming bias has the burden of proving the hearing officer's bias or prejudice.[8]

The grievant asserts that the hearing officer was inattentive at times and had to be directed to the correct document on several occasions. In addition, the grievant asserts that the hearing officer failed to mention certain testimony and important information pertaining to policies. The grievant notes that hearing officer issued his decision within three days of the hearing, apparently implying that he did give her case adequate consideration.

As to the charge of inattention, a review of the audio recording of hearing revealed no evidence of inattention. While it is true that on several occasions there were discussions regarding which document was the focus of testimony, those discussions did not appear to have been necessitated by the hearing officer's inattention. [9]

As noted, the grievant offers as potential evidence of bias the hearing officer's findings of fact, specifically asserting that certain testimony and important facts were omitted. The mere fact that findings align more favorably with one party than the other will rarely if ever standing

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[4] *Rules* at II.
[5] EDR Policy 2.01, p. 3.
[6] While not always dispositive for purposes of the grievance procedure, this Department has in the past looked to the Court of Appeals and found its holdings persuasive.
[7] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992). ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge." *See* Commonwealth of Va. v. Jackson, 267 Va. 226, 229; 590 S.E.2d 518, 520 (2004)).
[8] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[9] Testimony beginning at 1:24:00; 2:08:00; 3:10:00; and 3:50:00.

alone constitute sufficient evidence of bias.[10] This is not the extraordinary case where bias can be inferred from decision's findings of fact.[11] The hearing officer's findings are discussed further below in Section II.

Regarding the contention that the hearing officer's relatively prompt issuance of his decision serves as evidence of bias, we find this argument unpersuasive. While hearing officers sometimes take longer to issue their decisions, considerably so in certain instances, it does not stand to reason that decisions issued in a timelier manner are deficient. The hearing decision in this case can hardly be characterized as cursory. While the hearing officer may not have found persuasive the grievant's arguments or evidence, the hearing decision addresses the central issues raised by the grievant at hearing. Moreover, as discussed in Section II below, the decision is supported by record evidence.

In sum, this Department finds no evidence of bias. The grievant had previously requested that the hearing officer recuse himself, a request that he denied. The grievant subsequently asked this Department to remove the hearing officer, a request that EDR also denied. This Department found no evidence of bias in deciding EDR Ruling No. 2011-2848 nor has it observed any such evidence in reviewing the hearing decision and record here.

Document Issues:

The grievant has raised a number of objections based on the documents exchanged by the parties. It is not necessary to address each of these objections as this Department notes that, at the outset of the hearing, extensive time (approximately ½ hour) was spent on addressing these concerns.[12] Critically, the grievant appeared to have no unresolved issues remaining when the document discussions concluded. Any lingering issues should have been raised at hearing. This Department will not address document concerns which were: (1) raised, discussed and resolved at hearing; or (2) were never raised at hearing but could have been. To the extent that the grievant wishes to have this Department consider these documents as evidence supporting her case, we note (and discuss in Section II below) that the hearing officer, not this Department, serves as fact-finder.

II. Findings of Fact

The grievant challenges the findings of the hearing decision, asserting that the hearing officer omitted important testimony and information. Hearing officers alone are authorized to

[10] *C.f.*, Al-Ghani v. Commonwealth, No. 0264-98-4, 1999 Va. App. LEXIS 275 at *12-13 (May 18, 1999)("The mere fact that a trial judge makes rulings adverse to a defendant, standing alone, is insufficient to establish bias requiring recusal.")

[11] In past rulings, this Department has generally examined bias claims from the relatively limited perspective of whether the hearing officer had a pecuniary interest in the outcome of the case. *See Welsh*, 14 Va. App. at 314 ("As a constitutional matter, due process considerations mandate recusal only where the judge has "a direct, personal, substantial, pecuniary interest" in the outcome of a case.") We believe that a more expansive review of bias claims is appropriate and should not be limited solely to the question of whether a pecuniary interest was implicated. However, even when this case is reviewed for any actual bias, pecuniary or otherwise, none appears present.

[12] Hearing recording 3:00-33:00.

make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and grounds in the record for those findings."[14] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings. Based upon a review of the hearing record, sufficient evidence supports key findings that: (1) the agency informed the grievant of the pertinent policy (HR-02) and, more to the point, how it interpreted the policy; (2) the grievant violated that policy; and (3) others who violated the policy were also dealt with under the Standards of Conduct. These findings are discussed further below in Section III. Accordingly, this Department has no basis to disturb the decision based on purported errors regarding factual findings.

III. Failure to Mitigate

The grievant asserts that the hearing officer erred by not mitigating the discipline issued in this case on two bases: (1) lack of notice of the rule (here, Policy HR-02) and its interpretation; and (2) inconsistency in how other employees have been treated when excessively tardy or absent.

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."[15] The *Rules* provide 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."[16] 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.[17]

[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] Va. Code § 2.2-3005(C)(6).
[16] *Rules at* VI(A).
[17] *Rules at* 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*

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.[18] 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*.[19] 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,[20] abusive,[21] or totally unwarranted.[22] This Department will review a hearing officer's mitigation determination for abuse of discretion,[23] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Lack of Notice of the Rule:

Section VI(B)(1) of the *Rules for Conducting Grievance Hearings ("Rules")* provides that an example of mitigating circumstances includes "lack of notice" of the violated rule. Specifically the *Rules* describe this potential factor as follows:

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").

[18] 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.

[19] 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.

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

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

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

[23] "'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.*

> Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

The grievant asserts that she was unaware of how the agency interpreted its absence and tardiness policy. Based on the record evidence, however, the hearing officer found not credible the grievant's assertion that she was confused over the six minute threshold for tardiness.[24] The hearing officer noted that the February 12, 2010 Notice of Improvement Needed stated in unambiguous terms that six minutes or more was considered tardy.[25] The hearing officer further found that the Human Resources Director testified that "he had specifically counseled the Grievant that the policy was that six minutes was considered tardy—not more than six minutes."[26] The Hearing Decision also states that the HR Director testified that the Grievant challenged the ambiguity of the tardiness policy for the first time in this grievance, despite prior written notices and counseling for tardiness.[27] Because there is record evidence to support these findings, this Department cannot disturb them. Moreover, based on these findings, this Department cannot conclude that the hearing officer erred in determining that the grievant had sufficient notice of the agency's interpretation of the tardiness policy.

Inconsistent Discipline:

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.[28]

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 virtually all employees who had repetitions of tardiness or absences were disciplined in one form or another.

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[24] Hearing Decision at 5.
[25] *Id.*
[26] *Id.* at 4. This testimony is found at the hearing recording at 3:13:00-3:18:00.
[27] *Id.* at 4. This testimony is found at the hearing recording beginning at 3:14:00.
[28] *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).

This finding appears to be supported by record evidence.[29] Furthermore, the hearing officer found that the Director of Nursing testified that while other employees who have attendance or tardiness problems came to her to try to work out a plan of action to address any special concerns or circumstances, the grievant made no such effort.[30] 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.[31]

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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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Claudia T. Farr
Director

[29] Hearing Decision at 7. *See* hearing recording beginning at 3:42:00 (Director of Nursing testifying that all tardy or late employees received some form of counseling and/or disciplinary action, and that the agency considers in each case the factors listed in the Standards of Conduct when determining the appropriate level of discipline). *See also* hearing recording at 2:56:00-3:04:00 (Human Resources Director testifying that individual circumstances are considered when issuing discipline).

[30] Hearing Decision at 4. This testimony is found on the hearing recording beginning at 4:27:00.

[31] We are mindful that the grievant offered evidence purportedly showing that other employees may have been treated more favorably than she. But the agency offered evidence that it considered the case of each employee individually, essentially, considering the totality of the circumstance in each case, also noting the other employees came to management to explain extenuating circumstances and to develop a corrective plan. Where the hearing record contains evidence that could potentially support both parties' positions, this Department will not second guess the hearing officer as to his conclusions regarding the facts.

[32] *Grievance Procedure Manual* § 7.2(d).

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

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