Issue: Administrative Review of Hearing Officer's Decision in Case No. 9428, 9429, 9430, 9431; Ruling Date: February 23, 2011; Ruling No. 2911-2879; Agency: Department of Corrections; Outcome: Hearing Officer In Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2879
February 23, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9428 / 9429 / 9430 / 9431. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9428 / 9429 / 9430 / 9431 are as follows:

Prior to his termination, the grievant worked for the Department of Corrections as a Probation Officer for four years.[1]

Since 2009, the grievant received five Written Notices and one Notice of Improvement Needed. On March 4, 2009, the grievant received a Group I Written Notice for inappropriate language and threatening behavior towards a peer. Then, on January 5, 2010, he received a Group I Written Notice for failure to comply with a supervisor's instructions. On March 18, 2010, the grievant received a Notice of Improvement Needed/Substandard Performance regarding his inability to proficiently navigate the agency's database system. The grievant was told his performance needed to be in compliance by April 19, 2010, or else the agency would issue a Group Notice for his unsatisfactory job performance.[2]

On April 2, 2010, the agency closed two hours early and the grievant was instructed by his supervisor to leave at 3 p.m.; the grievant did not leave. Therefore, the agency issued a Group II Written Notice for failure to follow a supervisor's instructions on April 12, 2010. Then, on April 19, 2010, the grievant's performance was re-evaluated and determined to be unsatisfactory. Hence, the agency issued a Group I Written Notice for the grievant's unsatisfactory job performance. When the grievant's performance was re-evaluated in July, the

[1] Decision of Hearing Officer, Case No. 9428/9429/9430/9431, issued January 6, 2011 ("Hearing Decision") at 2.
[2] *Id*. at 4.

agency found the grievant's job performance unsatisfactory and issued a Group I Written Notice on July 9, 2010. Due to the accumulation of disciplinary actions, the grievant was terminated.[3]

The grievant filed grievances to challenge the April 12th, April 19th, and the July 9th management actions. In addition, on May 15, 2010, the grievant filed a grievance alleging his supervisor was retaliating, discriminating, and creating a hostile work environment.[4] On September 21, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this appeal to a hearing officer.[5] On October 15, 2010, a hearing was held at the agency's location.[6] In a January 6, 2011 hearing decision, the hearing officer upheld the April 12th, April 19th, and July 9th Written Notices and upheld the agency's decision to remove the grievant based upon the accumulation of disciplinary actions. The hearing officer denied the grievant's request for relief from discrimination.[7]

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."[8] 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.[9]

Findings of Fact

The grievant's request for administrative review primarily challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[12] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[13] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine

[3] *Id*. at 1.
[4] *Id*.
[5] *Id*
[6] *Id*.
[7] *Id*. at 9-10.
[8] Va. Code § 2.2-1001(2), (3), and (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.

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.

Here, the grievant simply contests whether the hearing officer's findings of fact justify the grievant's termination. Such determinations of disputed facts are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[14] This Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case. Specifically, the grievant's supervisor testified that she had instructed the grievant to leave by 3:00 p.m. on three separate occasions on April 2, 2010,[15] and after the supervisor left for the day, a second acting supervisor once again instructed the grievant to leave.[16] Despite the two supervisors' instructions, the grievant did not leave work early.[17] Furthermore, the grievant's supervisor testified that the grievant received significant training on the agency's database system, including a two day training prior to implementation, individual office training in April 2009, and two hours of training each Friday in September and October of 2009.[18] Also, the grievant's supervisor said she had many informal conversations and counseling sessions with the grievant regarding his performance before the formal counseling memo was issued in March 2010.[19] She testified that these weekly meetings continued after the April 19th Written Notice was issued until the end of June.[20] Since there was no significant improvement, the agency issued a second Written Notice on July 9th for unsatisfactory job performance.[21] Therefore, since the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department has no reason to remand the decision.

Mitigating Factors

The grievant contends his disciplinary action should be mitigated. The hearing officer has the sole authority to weigh all of the evidence and to consider whether the facts of the case constitute misconduct and whether there are mitigating circumstances to justify a reduction or removal of the disciplinary action. Under Virginia Code § 2.2-3005, the hearing officer has the 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."[22] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a

[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *See* Hearing Recording at 14:10 through 15:52 (testimony of supervisor).
[16] *See* Hearing Recording at 16:14 through 16:40 (testimony of supervisor).
[17] *Id*.
[18] *See* Hearing Recording at 8:28 through 9:26 (testimony of supervisor).
[19] *See* Hearing Recording at 13:35 through 13:50 (testimony of supervisor).
[20] *See* Hearing Recording at 18:27 through 19:15 (testimony of supervisor).
[21] *Id*.
[22] Va. Code § 2.2-3005(C)(6).

> reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." 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.[23]

The *Rules* further state that:

> Therefore, 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.[24]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[25] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

The grievant contends his disciplinary action should be mitigated because he was on medical leave in January and May 2010, he has vast experience in the field, and other employees made similar mistakes.[26] The hearing officer found the grievant's arguments failed. [27] First, the grievant was disciplined for inaccuracies he submitted while present at work.[28] Second, the hearing officer found it to be reasonable for the agency to expect the grievant to become proficient with the agency's database system.[29] Finally, although other employees had made mistakes, the hearing officer found the number of mistakes made by the grievant were significantly higher than the number for other employees.[30] In light of the above, this

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[23] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[24] *Id.*
[25] "'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. See also* Bynum v. Cigna Healthcare of NC, Inc., 287 F.3d 305, 315 (4th Cir. 2002) quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)("[A]n abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; United States v. General, 278 F.3d 389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).
[26] Hearing Decision at 7.
[27] *Id* at 7-8.
[28] *Id* at 7.
[29] *Id*.
[30] *Id* at 7-8. The grievant further alleges that he was not treated in the same manner as another employee on April 2, 2010. The record evidence shows that all employees were expected to work six hours that day, regardless of what time the employee arrived at work. The agency testified that another employee did stay past 3:00 p.m., but only because that employee had arrived at work at 1:00 p.m. and needed to put in six hours for the day. The grievant was

Department cannot find that the hearing officer abused his discretion in determining there were no mitigating circumstances in this case.

Alleged Bias of Hearing Officer

The grievant also claims the hearing officer could not guarantee a fair and impartial hearing because he allegedly had made his mind up prior to the hearing. 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:

> [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.[31]

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."[32]

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.[33] 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.'"[34] We find the Court of Appeals standard instructive and hold that in compliance reviews by the EDR Director of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision. The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice.[35]

The grievant has offered insufficient evidence of bias. The mere fact that findings align more favorably with one party than another will rarely if ever standing alone constitute sufficient

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expected to leave at 3:00 p.m. because he had already worked six hours on April 2, 2010. *See* Hearing Recording at 16:40 through 17:46 (testimony of supervisor).

[31] *Rules* at II.

[32] EDR Policy 2.01, p. 3.

[33] 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.

[34] 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)).

[35] Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 519-20 (2004).

evidence of bias.[36] Therefore, this Department has no reason to remand the decision for this reason.

CONCLUSION

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.[37] 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.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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Claudia T. Farr
Director

[36] *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.") We note the grievant also alleges the hearing officer was inattentive during the hearing as well. This is a determination we need not reach. Even if true, the hearing decision would not be reversible given the factual support in the record for the discipline in this case.
[37] *Grievance Procedure Manual* § 7.2(d).
[38] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[39] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).