Issue: Administrative Review of Hearing Officer's decision in Case No. 9498; Ruling Date: March 8, 2011; Ruling No. 2011-2904; 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 Department of Behavioral Health and Developmental Services
Ruling Number 2011-2904
March 8, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9498. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

On October 25, 2010, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy and failure to report an accident in a state vehicle. Grievant was removed from employment based upon the accumulation of disciplinary action.

On November 17, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 10, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2011, a hearing was held at the Agency's office. Finding that the grievant had committed the misconduct and that no mitigating circumstances warranted a lesser sanction, the hearing officer is issued his February 4, 2011 hearing decision in which he upheld the discipline in its entirety. The relevant facts as set forth in Case Number 9498 are as follows:

> The Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer at one of its Facilities. She began working for the Agency in 2007. The purpose of her position was, "make routine rounds of the property while on duty, being a presence for others and watching for any unusual activity." Grievant had prior active disciplinary action. She received a Group III Written Notice of disciplinary action with a five work day suspension on April 8, 2009 for sleeping during working hours.
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> In the early morning of October 5, 2010, Grievant was driving the Facility's golf cart across the Facility campus. The golf cart did not have headlights. Grievant drove the golf cart into a tamper switchbox attached to a

> pipe referred to as a Post Indicator Valve that stood approximately 2 to 3 feet tall and was less than a foot wide. The pipe was part of the Facility's sprinkler system. The passenger side of Grievant's golf cart hit the tamper switchbox separating it from the Post Indicator Valve. A small amount of green paint from the golf cart remained on the switchbox. Red paint from the switchbox formed a 5 inch horizontal line across the right front of the golf cart as the golf cart and the switchbox scraped. The collision caused the fire alarm for the Building to activate. Grievant did not report the accident.[1]

Based on the forgoing findings, the hearing officer reached the following conclusions of policy:

> Grievant denied that she hit the pipe with the golf cart. During the Agency's investigation, she told the Investigator that she thought she had hit a fire hydrant which was located approximately 75 feet from the pipe. The Agency has presented sufficient evidence to support the conclusion that Grievant drove a golf cart into the pipe. Grievant was the only person operating the golf cart at approximately 4:25 a.m. on October 5, 2010. Grievant admitted that she hit something at that time. This admission is consistent with the Agency's assertion that Grievant hit the pipe. If the Hearing Officer assumes for the sake of argument that Grievant did not hit the pipe but rather hit a fire hydrant, the outcome of this case remains the same. Grievant's operation of the golf cart resulted in damage to the golf cart. The damage was minor but plainly visible from the red paint that appeared on the golf cart. Grievant was obligated to report the accident even if the accident involved hitting a fire hydrant.
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> Grievant argued that she did not receive notice of the Facility's policy requiring her to report damage to the golf cart. The evidence showed that as a new employee Grievant should have received a copy of the Facility's policy requiring her to report accidents involving the golf cart. The Facility's policy was available to Grievant on the Agency's Intranet. The evidence is sufficient for the Hearing Officer to conclude that Grievant knew or should have known of the Facility policy and her obligation to report golf cart accidents.
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> Grievant argued that the golf cart did not have operating lights and that the Agency knew the golf cart was not safe. This argument is irrelevant. Grievant was not disciplined for failing to properly operate the golf cart. Grievant was disciplined for failing to report an accident involving a golf cart regardless of whether that golf cart could be operated safely.[2]

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[1] Decision of the Hearing Officer in Case No. 9498 issued February 4, 2011 ("Hearing Decision"), at 2 (footnote from original omitted here).
[2] *Id.* at 3-4.

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]

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"[5] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[6] 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.[7] 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.[8] 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.

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.[9] 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 hearing record contains evidence that grievant likely hit the box in question and that she failed to report it.[10] The grievant herself apparently admitting hitting something which she stated she thought was a fire hydrant.[11] Yet, the grievant never reported hitting anything nor did she report the damage to the golf cart she was assigned.[12]

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[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.
[7] *Rules for Conducting Grievance Hearings* § VI(B).
[8] *Grievance Procedure Manual* § 5.8.
[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] Hearing testimony beginning at 3:00.
[11] Agency Exhibit 6.
[12] Hearing testimony beginning at 3:00.

Therefore, because 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 her 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."[13] 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 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.[14]

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.[15]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[16] 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.

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[13] Va. Code § 2.2-3005(C)(6).
[14] *Rules* at § VI(B) (alteration in original).
[15] *Id.*
[16] "'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).

The grievant contends her disciplinary action should be mitigated because she was not aware of the policy that required her to report the accident. Under the *Rules*, lack of notice of a rule is potentially a mitigating factor. The *Rules* expressly allow the hearing officer to consider whether the employee "ha[d] notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it."[17] The *Rules* further state that:

> [A]n 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.[18]

Applying this mitigating factor to the instant facts, the hearing officer apparently found that the grievant had or should have had adequate notice of the operable rule. Because there is record evidence in the form of testimony to support this finding, this Department has no reason to disturb the hearing decision.

Finally, the grievant asserts that the golf cart in question had no lights and was not safe to drive.[19] The hearing officer addressed this point. He correctly pointed out that the grievant was not disciplined for the accident, but rather the failure to report it. Thus, there is no reason to disturb the hearing decision on the basis of the cart's lack of lighting.

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.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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Claudia T. Farr
Director

[17] *Rules* at § VI (B)(1).
[18] *Id.*
[19] It is not entirely clear whether the lack of lighting is raised as a mitigating factor or is intended to establish that the grievant's actions were not misconduct. The distinction is immaterial in this particular case.
[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).