Issue: Administrative Review of Hearing Officer's Decision in Case No. 9541; Ruling Date: June 29, 2011; Ruling No. 2011-2978; Agency: Department of Social Services; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2011-2978
June 29, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9541. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The procedural facts of this case, as set forth in the hearing decision in Case No. 9541, are that on December 18, 2010, the grievant filed a grievance challenging the agency's Group II Written Notice with termination of his employment.[1] On April 12, 2011, a hearing was held at the agency's office and, on April 22, 2011, the hearing officer issued a decision upholding the discipline.[2] The relevant facts, associated analysis, and decision as set forth in Case Number 9541 are as follows:

FINDINGS OF FACT

1. Until his termination, the Grievant had been an employee of the Department for approximately 21 years and 8 months.

2. The Grievant worked as a mailroom clerk where his duties included picking up mail, sorting mail, delivering mail, running the inserter, making deliveries throughout the City, etc. Tapes; GE 6.

3. From 2009, the Properties and Facilities Manager supervised the Grievant and about 8 other employees (the "Supervisor").

4. The Director, Office of General Services (the "Director") supervised the Supervisor.

5. In an effort to achieve cost savings and to streamline operations, the Director instructed the Supervisor to obtain certain information from the

[1] Decision of Hearing Officer, Case No. 9541, issued April 22, 2011 ("Hearing Decision") at 1.
[2] *Id*. at 1 and 11.

employees under her (including the Grievant) concerning the actual tasks they were performing on a daily basis and the amount of time spent on each task.

6. At a staff meeting before June 11, 2010 and subsequently, by e-mail communication dated June 11, 2010 the Supervisor instructed each of the 9 employees (including Grievant) whom she supervised as follows:

> Effective Monday, June 14, I would like you to begin keeping a daily activity log (attached). You should record the time you arrive at work (actual time) and begin to document what you are doing throughout the course of the day. Your log should include breaks and lunch. You may find that you are working on more than one task at a time, for instance you begin to meter mail but continue to sort mail and/or pouches or accept deliveries from UPS. You may be working on a spreadsheet, while responding to e-mails and you need to stop to assist employees. You should also document the time you spend responding to e-mails and voicemail messages.
>
> We all multi-task throughout the day and this activity log will give us a better idea of the amount of time it takes to complete tasks. Please submit your activity logs to me at the close of business each Friday.
>
> AE 90 (Emphasis supplied).

7. The Grievant timely complied with his Supervisor's instruction concerning June 14, 2010. AE 32.

8. While the Grievant testified on direct examination that he submitted additional handwritten daily activity logs to his Supervisor in late July or early August 2010, on cross-examination, the Grievant admitted that he only next submitted any logs to his Supervisor on Thursday, August 19, 2010. Tapes, *see also* AE 96.

9. In the meantime, the Supervisor had requested the logs from the Grievant on numerous occasions to no avail. Tapes, *see also* AE 91-96.

10. The Grievant's office was only one floor away from the Supervisor's office and the Grievant was physically able to move to the Supervisor's office. Accordingly, while the Supervisor stated that she preferred e-mails of the logs, the Grievant could have printed out the logs and hand-delivered the logs to the Supervisor.

11. Grievant admits that he submitted logs delineating actual times and actual tasks he performed for his employer for days he did not work at all, including Saturday, July 3, 2010 (AE 39), Sunday, July 4, 2010 (AE 40), July 5, 2010, a holiday (AE 41), Saturday, July 17, 2010 (AE 44) and Friday, August 13, 2010, a personal sick day (AE 64).

12. The Grievant was not formally disciplined for his omissions and/or errors up to August 23, 2010 but was instructed that he would need to submit daily logs supplying his Supervisor with the actual information she needed to report to the Director.

13. The hearing officer decides that the Grievant did comply with the Supervisor's instruction concerning the required logs for September 7-10, 2010, when on Friday, September 10, 2010 the Grievant sent four (4) individual files of logs for the work week ending September 10, 2010. AE 98, AE 125-128; GE 5 at pages 48-52.

14. While the Department took the position at the hearing that it did not receive from the Grievant a log for September 8, 2010, the hearing officer finds that it did receive such a log. The Supervisor's own e-mail communication of September 14, 2010 refers to four (4) individual files for the work week ending September 10, 2010. AE 98. September 6, 2010 was a holiday and the logs for September 7, 9 and 10 were admitted into evidence. AE 125-128; GE 5 at pages 46-52.

15. The Supervisor's insistence on the Grievant putting the four (4) individual files in one (1) file and resubmitting was unreasonable and unwarranted under the circumstances where the Agency's position is that it was merely seeking the actual information from the Grievant and the method of delivery was not important. The Grievant's earlier submissions of the four (4) individual files for the work week ending September 10, 2010 complied with his Supervisor's instructions.

16. However the Grievant admits that for the work week ending Friday, September 17, 2010, the Grievant did not even attempt any type of submission to his Supervisor of the required logs for the preceding work week beginning Monday, September 13, 2010.

17. The Grievant testified during cross-examination that he made no such attempt in part because he did not want to make a bother of himself but the hearing officer does not find this self-excuse credible.

18. In the Grievant's response dated October 7, 2010, to his Supervisor's "Notice of Intent to Issue Written Notice – Group II" dated October 5, 2010 (the "Notice of Intent") (AE 3A-B), the Grievant provided in part:

> If what you wanted all along was to know what I do on a daily basis, you already had that knowledge. And nothing has changed from that point in time. Please see the attached eighteen pages of the ARMICS document, as well as the attached six pages outlining my daily work duties in a narrative fashion.
> AE 4.

19. From this response, the Supervisor reasonably concluded that the Grievant was deliberately thwarting her instructions. The Department also clarified that the ARMICS document was dated being 2 ½ years old and that the focus of the document was on the duties or responsibilities of the Grievant's position rather than on the specific amount of time spent on each actual task performed by the Grievant on a daily basis, which was the information the Director required to achieve cost-savings and to streamline operations.

* * *

Pursuant to the SOC, the Grievant's failure to follow his Supervisor's instructions by failing even to attempt to deliver his logs to his Supervisor for days during the work week ending September 17, 2010 can clearly constitute a Group II offense, as asserted by the Department.

b. **Group II Offense:**

> Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.
>
> •See attachment A for examples of Group II Offenses.
>
> . . . .
>
> •A second active Group II Notice normally should result in termination . . .
> AE 4.

Attachment A specifically gives failure to follow supervisor's instructions as the first example of a Group II offense. AE 4.

At the hearing, the Attorney objected that the Written Notice was defective because it gave as the "Offense Date(s)" "6/18/10 – 9/17/10". The

hearing officer agrees with the Attorney that the Agency could not formally discipline the Grievant on August 23, 2010 for any offense in June 2010, for example, as the offense would be too remote in time. However, the Written Notice itself makes it clear that no such remote formal discipline was administered by Management:

> The first report was due June 18, 2010. [The grievant] completed a partial report for the day of June 14, 2010, but he failed to submit other reports to the supervisor for the next several weeks. The supervisor counseled [the grievant] on Aug. 16, 2010, but he did not submit the report as prompted; so, the supervisor followed up again on Aug. 18, 2010. The work product offered by the employee on Aug. 19, 2010, was illegiblewriting [sic] on a form that was to be used for another purpose, not activity logs. Of the data that could be read, [the grievant] had reported work activities on days that he was not working. His explanation was that he did not keep daily records and had to try to remember what he had done. This was indication that the information about the work reported had been fabricated.
>
> The supervisor counseled [the grievant] again on Aug. 23, 2010. As remedial instruction [the grievant] was advised that he must use the proper form and record his work activities daily. [the grievant] was required to submit the reports electronically to the supervisor by close of business each Friday.
> AE 1 (Emphasis supplied).

The hearing officer decides that the Grievant complied with his Supervisor's instructions concerning submission of logs for the work weeks ending September 3, 2010 and September 10, 2010 but the Grievant did not even attempt to comply with such instructions for days in the work week ending September 17, 2010.

The Department's Written Notice makes it clear that the Grievant was simply counseled for any infractions up to August 23, 2010 and adopting the technical position of the Grievant is antithetical to the more nimble, less rule-intensive character of administrative proceedings under the Rules and the Grievance Procedure Manual. However, the hearing officer did take this factor into account for his mitigation analysis, discussed in more detail below.

The Grievant, by counsel, strongly objected to the admission into evidence of the documents behind AE 7. The Advocate offered those documents (and confirmed to the hearing officer after a break during the hearing, when the Attorney renewed his objections to these documents, that the documents were offered) as the actual documents used by the Agency concerning its mitigation

analysis under Section IV of the Written Notice. The hearing officer has received and used the documents behind AE 7 solely for purposes of establishing that the Agency did in fact perform a mitigation analysis and of considering such Agency mitigation analysis.

However, despite the Advocate's insistence that the documents were only offered for the mitigation analysis, the hearing officer decides that the Supervisor, in fact, inappropriately used some of the documents in formulating her conclusion that the Grievant willfully and deliberately disobeyed her instructions in the present case. The Attorney argues that this fact requires that the hearing officer undo the discipline. The hearing officer disagrees that this result is mandated for the following reasons:

1. Subjective intent of the Grievant is not an element which is required to be proved by the Agency for the offense of failure to follow supervisor's instructions.

2. Nothing in DHRM or Agency policy requires such a result.

3. While this approach by the Supervisor is arguably unfair it is not violative of due process under the facts and circumstances of these proceedings for reasons including the following: The Grievant's response dated October 7, 2010 to the Supervisor's Notice of Intent (*see* paragraphs 18 and 19 above), the Grievant's challenging the Supervisor's right to assign the task (see, e.g. AE 1-2) and the Grievant's repeated failures over a period of about ten (10) weeks until August 19, 2010 to deliver his handwritten logs despite numerous requests from his Supervisor were also reasonably used by the Supervisor to lead her to the conclusion that this was not just an oversight on the Grievant's part. Additionally, the decision to impose formal discipline on the Grievant was made collectively with the Director and Human Resources.

The hearing officer has taken into account for his mitigation analysis such inappropriate use by the Supervisor of some documents under AE 7 in her formulation of Grievant's intent in this case.

The Attorney also argues that no documents before the Grievant's most recent EWP and Performance Evaluation of October 2009 should have been used by the Agency in its mitigation analysis. The Attorney offered no authority for his position and the hearing officer finds no support for this position in DHRM or Agency policy. The Attorney also asserts that the documents under AE 7 are wildly irrelevant. The hearing officer disagrees and decides that such documents were relevant and appropriate for the mitigation analysis performed by the Agency.

As previously stated, the Agency's burden is to show upon a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances and essentially the Grievant contests this determination by the Department in his Issue One in the Form A.

The hearing officer decides for each offense specified in the Written Notice (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. The Grievant specifically raised mitigation as his Issue Six in the Form A so the hearing officer will undertake a more detailed analysis of this required component of his decision below.

Concerning the second and third issues raised by the Grievant, the hearing officer finds that the Department did not misapply or unfairly apply policies or otherwise act in an arbitrary and capricious manner but rather acted applying progressive discipline to obtain the sought information from the Grievant in accordance with the SOC and applicable policies. The other 8 employees under the Supervisor provided the information, the Grievant could and did send e-mail attachments, received training concerning computer use (AE 8) and was given the goal in his most recent EWP of "Become more proficient with the use of e-mail and other Microsoft Office products." AE 140.

Concerning the Grievant's Issue Four, the hearing officer decides that DHRM policy in the case of failure to follow supervisor's instructions does not require a showing that the failures were "intentionally done by Grievant with knowledge of said alleged wrongdoing."

Concerning Issue Five raised by the Grievant, the hearing officer decides, as discussed above in more detail, that failure to follow a supervisor's instructions, in general, and in particular, under the facts and circumstances of this case, can rise to the level of a Group II offense.

The Grievant asserts in his Issue Six that the Department failed to properly consider mitigating circumstances. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007.

However, this DHRM ruling does not negatively impact the Grievant's position under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with 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". EDR's *Rules for Conducting Grievance Hearings* 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his long service to the Department over approximately 21 years and 8 months.

The Grievant has an active Group II Written Notice (AE 10). The normal sanction for two (2) Group II violations is termination.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors herein, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's long service to the Agency over 21 years and 8 months;

2. the fact that the Grievant received an overall rating of "Contributor" on his most recent Performance Evaluation, signed by the Director and the Supervisor;

3. the fact that Grievant has received many "Contributor" ratings over his past long employment with the Agency.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records

on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

Here, the hearing officer has only decided that the Grievant only failed to follow his Supervisor's instructions for days concerning the work week ending September 17, 2010. The above Ruling applies.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense is very serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical

task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group II Written Notice and in terminating the employment of the Grievant because of his accumulation two (2) active Group II Written Notices is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.[3]

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."[4] 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.[5]

[3] *Id.* at 2-11
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).

Assignment of Error No. 1

In assignment of Error No. 1, the grievant asserts that the hearing officer erred by concluding that the grievant failed to follow the instruction to provide requested information for the week of September 17, 2010. The grievant's position appears to be that because he was unable to provide the requested information in the format requested, he was essentially unable to comply with the directive. Thus, he could not properly be disciplined for his failure.

This argument largely turns on findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[7] 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.[8] 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 actions taken were both warranted and appropriate under all the facts and circumstances.[9] 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.

The grievant argues that because the grievant's supervisor would purportedly accept information from the grievant in only one format (e-mailed in a single file)—a format the grievant was incapable of producing—it was senseless to provide information in another format. This argument is premised on several factual findings. First, this argument is premised on the supposition that grievant's supervisor would accept information only in a single file, e-mail format. However, the hearing officer found that "while the Supervisor stated that she preferred e-mails of the logs, the Grievant could have printed out the logs and hand-delivered the logs to the Supervisor." In other words, the hearing officer finds that Supervisor had not limited the format exclusively to a single file, e-mail format. Rather, her *preference* was for this format.[10] Record evidence supports this finding.[11] Because there is record evidence supporting the finding that other formats were acceptable, this argument is unpersuasive.

Assignment of Error No. 2

The grievant's second assignment of error is related to the first. The grievant appears to argue that the hearing decision contains no findings or discussion regarding the agency's failure

[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] Hearing Decision at 3, Finding 10.
[11] Hearing tape 2, side B testimony beginning at 360.

to provide the training necessary for the grievant to carry out his work, including providing information to his supervisor in the preferred format. This argument is also unpersuasive because the grievant was not disciplined for failing to provide information in a particular format; he was disciplined for failing to provide information in any format.

Assignment of Error No. 3

The grievant's third assignment of error is also related to the first two. The grievant asserts that the hearing officer erred by concluding that the grievant's actions equated to misconduct. We cannot agree. The hearing officer found that the grievant failed to provide his supervisor any information for the work week ending September 17, 2010. The hearing officer found not credible the grievant's testimony[12] that he provided no information in any form because did not want to make a bother of himself.[13] As discussed above, determinations of credibility are the exclusive dominion of the hearing officer. Here, the hearing officer found the grievant provided no information to his supervisor the week of September 17th and had no valid excuse for his omission. Under the facts of this case, this Department has no basis to disturb the conclusion that the grievant's failure to provide his supervisor with any information the week of September 17th amounted to an unexcused failure to follow an instruction--misconduct at a Group II level.

Assignment of Error No. 4

In the final assignment of error, the grievant contends the agency's disciplinary action should have been 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."[14] 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.[15]

The *Rules* further state that:

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[12] Hearing tape 3, side B testimony beginning at 460.
[13] Hearing Decision at 4, Finding 17.
[14] Va. Code § 2.2-3005(C)(6).
[15] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).

> 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.[16]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[17] 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 that the hearing officer failed to consider the mitigating factor of the grievant's supervisor's "specific, unyielding, inflexible, and unrelenting instruction" to provide requested information only via e-mail in a single file. Contrary to the grievant's assertion, the hearing officer did address the supervisor's insistence on putting four files into a single file and resubmitting it via e-mail. He found this directive to be "unreasonable and unwarranted." Again though, the hearing officer did not uphold the discipline based on the failure to provide an e-mailed single file report. He upheld the discipline based on the grievant's failure to provide information in any form for the week of September 17th and the grievant's explanation for his failure to be less than credible.

The second point that the grievant raises regarding mitigation relates to documents found at Agency Exhibits Tab 7. The grievant asserts that the agency should not have been allowed to have admitted into the record as aggravating circumstances documents found at Tab 7, which include, but are not limited to, various counseling memoranda. The hearing officer addressed these documents and found that these documents had been considered not solely for purposes of a mitigation/aggravation analysis, but also to establish that the grievant's failure to follow her directive was a willful and deliberate act. The hearing officer found that consideration of these documents was inappropriate but that it did not change the outcome of this case. He interpreted the Standards of Conduct as not mandating any "intent" requirement. The grievant does not appear to challenge the hearing officer's interpretation of policy regarding intent, but, rather, appears to focus on the supervisor's alleged unrelenting demand to receive information in a particular format. As discussed above, the hearing officer upheld the discipline for the grievant's failure to provide any information the week of September 17th, not for violating any preference regarding format. The hearing officer found, and record evidence supports, that the grievant was

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[16] *Id.*

[17] "'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).

not limited solely to a format that he could not provide. Therefore, this Department cannot find that the hearing officer abused his discretion in determining there were no mitigating circumstances in this case.

CONCLUSION AND APPEAL RIGHTS

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.[18] 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.[19] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[20]

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Claudia T. Farr
Director

[18] *Grievance Procedure Manual* § 7.2(d).
[19] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[20] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).