Issue: Administrative Review of Hearing Officer's Decision in Case No. 9514; Ruling Date: June 29, 2011; Ruling No. 2011-2992; Agency: Department of Motor Vehicles; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2011-2992
June 29, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9514. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The Department of Motor Vehicles ("Agency") issued to the grievant a Group II Written Notice with a three day suspension on August 30, 2010, for refusal to perform assigned work and interference with state operations on August 10, 2010. The grievant timely filed a grievance to challenge the Agency's disciplinary action. A grievance hearing was scheduled for May 5, 2011, and took place on that date. The hearing officer ultimately upheld the discipline.

The relevant facts and determinations as set forth in Case Number 9514 are as follows:

> The Agency employed Grievant as a warehouse specialist, and he has enjoyed 27 years of service with the Agency. His work profile, as referenced above, requires him to cooperate within the work environment with a high degree of care and responsiveness.
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> On August 10, 2010, the manager of a related department, Printing Services, requested the Grievant to obtain and provide a supply of needed boxes. The boxes were stored at a remote warehouse, and the Grievant responded to the printing manager that he lacked the proper access code for the remote warehouse. The regular warehouse manager was off and another manager was covering, as usual, for the Grievant's warehouse department. Other than informing the Printing manager that he did not have an access code, the Grievant did nothing to further the Printing manager's request.
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> The same afternoon, the Printing manager learned from other sources that all employees in the warehouse should have an access code for the remote warehouse. The Printing manager returned late in the afternoon to ask, again, the Grievant about his ability to fulfill the request, and the Grievant reiterated that he

did not have an access code. The Printing manager reports that the Grievant responded to his requests and intentions to get the boxes with a disrespectful attitude, stating something like "knock yourself out."

The Printing manager brought the conduct to the attention of the manager covering the warehouse. The covering manager investigated the incident and interviewed the Grievant and co-worker witnesses who mostly corroborated the Printing manager's account. The covering manager reported that two warehouse coworkers corroborated overhearing the Grievant use inappropriate language and tone with the Printing manager. The covering manager testified that the Grievant admitted to her making the "knock yourself out" comment. However, during the grievance hearing, the Grievant denied making that comment.

Upon his return to work, the Warehouse manager investigated the incident and issued the Group II Written Notice with three days' suspension. He testified that the seriousness of the conduct could have justified a Group III Written Notice, but he mitigated it down to a Group II with less than the ten days suspension permitted. The mitigation was in deference to the Grievant's long tenure with the Agency.

The Agency's controller testified that his department manages all the areas involved in these circumstances, including the warehouse, printing division and the mailing department. He testified to the requirements and expectations of employees to interract and cooperate with each other.

A program support technician from another department who found herself in the warehouse area overheard the exchange between the Grievant and the Printing manager. She described the Grievant as speaking heatedly at the Printing manager to the point that she felt uncomfortable and left the area. She reported this to the covering manager.

Contrary to the covering manager's report and testimony, two warehouse co-workers testifying on the Grievant's behalf denied overhearing or corroborating any heated or inappropriate communication between the Grievant and the Printing manager.

In his testimony, the Grievant denied that he raised his voice to the Printing manager or used any inappropriate language. The Grievant insisted that he did not have an access code to the remote warehouse, and that he tried only to communicate that to the Printing manager.

From the evidence presented, it appears that the Grievant should have had an access code to the remote warehouse, but neither side presented sufficient evidence either to show that a code had been issued to the Grievant or to explain why the Grievant did not have an access code. This code issue appears to be the

genesis of the negative interraction at issue. Nevertheless, the Grievant made no effort to honor the manager's request to obtain the needed supplies.

Based on the evidence presented, I find that the Agency has met its burden of proof that the Grievant failed to accept the manager's direction or cooperate in seeing that the request was satisfied. Regardless of whether the Grievant had an access code to the remote warehouse, he admitted during questioning at the grievance hearing that he did not take any action to help or respond to the Printing manager's request for boxes. While there is conflict in the evidence on the severity of the Grievant's response to the Printing manager, the Grievant's response is misconduct. The question, then, turns to whether the level of discipline was justified.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Because the offending conduct satisfies the characterization of failure to perform assigned work, violation of PEAK performance policy, and insubordination, it falls within the categories of offenses assigned to Group II. The Agency, thus, has met its burden of proving the Group II Written notice.

Despite the above rationale, the Agency had the discretion to elect less severe discipline. Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive 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."

Under the *Rules for Conducting Grievance Hearings*, "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The Grievant challenges the degree of the conduct charged, but he advances the argument that the Agency blew his offense out of proportion or over-reacted. While there is some conflict in the evidence on the severity of the confrontation on August 10, 2010, it does preponderate in showing that the Grievant did not make any effort to satisfy the manager's request or fulfill the Agency's mission and vision of service. Although the Agency could have justified a lesser sanction, the Agency's choice of a Group II offense is well-founded. While I find the Agency has met its burden of proof, the hearing officer must consider the arguments for mitigation.

Mitigation. Although the Agency could have done so, it did not assess the maximum ten days suspension that a Group II offense allows. The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of what was levied. The Agency had the discretion to elect less severe discipline. Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…." Va. Code § 2.2-3005. Under the *Rules for Conducting Grievance Hearings*, "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. Grievant contends his prior years of service and good work record should provide enough consideration to mandate a lesser sanction than the Group II with three days suspension. Other than arguing the degree of his conduct and his long career at the Agency, the Grievant does not present any evidence or argument that he did not have notice of the Agency's conduct expectations or an improper motive by the Agency. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. 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.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action. In fact and law, the hearing officer lacks the authority to override the Agency's discipline and mitigation determination unless the circumstances show that the discipline exceeds the limits of reasonableness. As stated above, the hearing officer is not allowed to act as a "super-personnel officer." Therefore, the hearing officer must give deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the severity of the disciplinary action. Accordingly, the Hearing Officer finds no mitigating circumstances exist that compel a reduction of the disciplinary action.[1]

[1] Decision of the Hearing Officer in Case No. 9514 ("Hearing Decision") issued May 9, 2011, at 2-6.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[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]

Inconsistency with Agency Policy

The grievant challenges the decision on several policy bases. Among other things, the grievant asserts that the Standards of Conduct "require that supervisors from other departments inquire with the employees' direct/acting supervisor when manpower and/or supplies are needed from another department." This Department is unaware of any such policy provision but the Department of Human Resource Management (DHRM) has the sole authority to make a final determination on whether the hearing decision comports with policy.[4] Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue (as well as his assertion that progressive discipline required the agency to issue a counseling memorandum rather than written notice)[5] in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges the hearing officer's fact findings and essentially argues that the agency did not meet its burden of proof. 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 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 action taken was both warranted and appropriate under all the facts and circumstances.[9] Where the evidence conflicts or is subject to

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[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[5] Likewise, the grievant may present his argument to the DHRM Director that his conduct, as established by the hearing officer as factual findings, did not rise to the level of a Group II offense.
[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.

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 argues that the hearing officer should have accepted his version of the facts over that of the agency. In his Reconsideration Decision, the hearing officer explained:

> As pointed out by the grievant, there was discrepancy in the testimony, as noted in the original decision. However, discrepancy in the testimony is not a basis to reconsider or overturn a decision as long as there is evidence to support the finding. For example, the hearing officer found believable the covering manager's testimony, especially her account that the grievant admitted stating to the Printing manager "knock yourself out." The testimony of the program support technician corroborated the inappropriate expressions from the grievant.[10]

Where the evidence is in conflict, the hearing officer has the sole discretion to determine which version of the facts he deems more credible. This Department has no authority to second-guess the hearing officer regarding which testimony he deems more credible. Accordingly, this Department will not disturb the decision on this basis.

Failure to Mitigate

The grievant asserts that the hearing officer erred by not mitigating the discipline issued in this case based on inconsistency in how another employee was treated.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[11] The *Rules for Conducting Grievance Hearings ("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."[12] 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,

[10] Reconsideration of the Hearing Officer in Case No. 9514 ("Hearing Decision") issued June 1, 2011, at 2.
[11] Va. Code § 2.2-3005(C)(6).
[12] *Rules at* VI(A).

> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[13]

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.[14] 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*.[15] 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,[16] abusive,[17] or totally unwarranted.[18] This Department will review a hearing officer's mitigation determination for abuse of

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[13] *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* 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").

[14] 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.

[15] 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.

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

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

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

discretion,[19] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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.[20] The grievant argues that the hearing officer erred by not considering evidence of inconsistent discipline. The grievant argues that the individual who instructed him to get the boxes was rude to him and, to be consistent, that employee should have been disciplined. This argument fails because the grievant was disciplined for failing to follow the instruction to get the boxes, not for being rude. Thus, the grievant and the other employee (the supervisor) are not considered similarly situated employees for purposes of a mitigation analysis. 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.

Letter from the Chief Deputy Commissioner Allegedly Discouraging Employees from Testifying

The grievant asserts that in January 2011, he received a letter from the Chief Deputy Commissioner that purportedly stated ". . . should this grievance go to a hearing, your co-workers would be required to testify under oath. I am concerned about the possible negative impact this process might have on your team." The grievant did not provide a copy of this letter with request for administrative review, thus, this Department has no way of verifying the veracity of this allegation. Furthermore, even if this turned out to be an accurate portrayal of a portion of a letter, this Department is unable to view this language in context with the remainder of the purported letter. Most importantly, although the grievant asserts that the purpose of the letter was to discourage him from "pursuing justice for [his] cause," the grievant nevertheless did proceed with his grievance and concedes that his co-workers did indeed testify. Thus, the grievant has shown no actual prejudice as a result of the purported letter. That being said – and while we make no finding as to the content of the letter or even its existence – this Department is compelled to note that managers must be vigilant that their representations will not inadvertently or otherwise be viewed as an attempt to chill testimony, discourage participation in the grievance process or otherwise impede an employee's right to use the statutorily based grievance process.

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

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[19] "'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.*

[20] *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).

review have been decided.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

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Claudia T. Farr
Director

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