Issue: Administrative Review of Hearing Officer's decision in Case No. 9458, 9490; Ruling Date: July 25, 2011; Ruling No. 2011-3002; Agency: Department of Environmental Quality; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Environmental Quality
Ruling No. 2011-3002
July 25, 2011

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9458/9490. For the reasons set forth below, this Department will not disturb the decision of the hearing officer.

FACTS

The facts of this case, as set forth in Case Number 9458/9490, are detailed and lengthy, and need not be recounted in full here. In sum, on May 24, 2010, the grievant was issued a Group II Written Notice of disciplinary action for failure to report to work without notice, unsatisfactory performance, failure to follow instructions and/or policy, abuse of State time, and insubordination.[1] On September 24, 2010, the grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report to work without notice, unsatisfactory performance, failure to follow instructions and/or policy, abuse of state time, and insubordination.[2] The grievant grieved the two Written Notices and on February 2, 2011, a hearing was held at the Agency's office.[3]

The essence of the charges against the grievant and the hearing officer's findings are that the grievant repeatedly failed to timely submit accurate time cards and she further failed to timely correct them when they contained errors. The grievant also purportedly failed to refrain from using her timecards as a forum for expressing her displeasure with the rejection of her time submissions. The hearing officer discussed these conclusions accordingly:

> When an employee fails to comply with an express instruction from a supervisor, the employee may be issued a Group II Written Notice of disciplinary action. This case raises the question of whether an employee may be disciplined for failing to comply with an implicit instruction from a supervisor. The Hearing

[1] *See* Decision of Hearing Officer, Case No. 9458/9490 issued May 13, 2011 ("Hearing Decision") at 1. Footnotes from the Hearing Decision have been omitted here.
[2] *Id.*
[3] *Id.*

> Officer concludes that an employee may receive a Group II Written Notice for failing to comply with a supervisor's implicit instruction.
>
> The Agency contends that Grievant should receive a Group II Written Notice for failure to follow the Manager's instruction to submit accurate time cards. One of Grievant's general job duties was to submit timecards to identify the time she worked and the leave she had taken. When Grievant initially failed to submit an accurate timecard, she failed to satisfy one of her job duties thereby justifying the issuance of a Group I Written Notice for unsatisfactory job performance. Once the Manager rejected the timecard, however, the Manager's rejection served as an implicit instruction to Grievant to correct the error identified by the Manager and to resubmit the timecard to reflect the correction. This implicit instruction arose based on the pattern of interaction between the Manager and Grievant. When the Manager rejected a timecard and identified an error, he expected Grievant to correct the error on her timecard and resubmit it to the Manager. When Grievant learned that her timecard was rejected, she understood that the Manager was instructing her to correct the error and resubmit the timecard. Although the Manager did not expressly instruct Grievant to resubmit corrected timecards, his rejections served as implicit instructions for Grievant to correct the errors identified by the Manager and resubmit corrected timecards.[4]

The hearing officer upheld the Group II Notice on the above basis but did not sustain charges of abuse of state time, failure to report to work without notice, insubordination or falsification of documents.[5]

> As to the Group III Written Notice, the hearing officer reached the following conclusions:
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> The Agency contends Grievant failed to follow instructions to submit accurate time reporting claims, failed to follow the Manager's written instructions regarding her work schedule and work schedule accommodations, and failed to follow PRO management written instructions to provide information necessary to investigate her time reporting claims.
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> When the Manager rejected a timecard submitted by Grievant, the Manager was implicitly instructing Grievant to resubmit a timecard to correct the error he had identified. The Manager rejected Grievant's timecard for the dates of May 10, 2010 through May 24, 2010. On May 27, 2010 at 3:22 p.m., Grievant submitted a timecard for the time period May 10, 2010 through May 24, 2010 which did not reflect any change from the timecard she submitted on May 26, 2010 at 6:19 p.m.

[4] *Id.* at 15 (emphasis in original).
[5] *Id.* at 16.

The Manager instructed Grievant not to use the comments section of the timecard to include "inappropriate comments". He was concerned that other Agency employees involved in the processing of time records would see Grievant's comments challenging or criticizing the Manager's identification of errors made by Grievant. On June 2, 2010, the Human Resource Director affirmed the Manager's instruction and suggested an alternative. The Human Resource director wrote:

> I would also like to remind you that some of your comments on your timecards are not appropriate for this forum. A personal diary or notebook would be better suited for your notes.

When Grievant challenged the Manager's statements regarding errors he believed she made, Grievant's words were protected under Va. Code § 2.2-3000 as an attempt by an employee to freely discuss her concerns with Agency management. Although Grievant's words were protected, the Agency retained the right to govern where Grievant could express her concerns. The Agency had the right to prohibit Grievant from using the comments section on the timecard to express her frustration with the Manager. Grievant disregarded the Manager's instruction regarding the location of her comments. Grievant continued to use the comments section to challenge the Manager's decisions to reject her timecards. In particular, on August 20, 2010, Grievant wrote that the Manager's comments "merit a response". She added, "These details would not be included in the OTL except as a reasonable defense to create issues that could be solved with a reasonable manager."

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the accumulation of the second Group II Written Notice of disciplinary action, agency may remove an employee. Accordingly, Grievant's removal must be upheld.[6]

The hearing officer did not sustain charges of abuse of state time, failure to report to work without proper notice, insubordination and falsification related to the Group III Notice.[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

[6] *Id.* at 16-17.
[7] *Id.* at 17-18.
[8] Va. Code § 2.2-1001(2), (3), and (5).

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]

Here, the grievant has noted eleven objections to the hearing decision. The vast majority of these objections appear to be an effort to re-argue her case. Administrative review is not intended to serve that purpose. Moreover, many of the points appear to have nothing to do with the basis upon which the discipline was upheld: failure to follow her supervisor's instructions (implicit and explicit) and disregarding the instruction to refrain from using timecards as a forum to register disagreement with her supervisor.[10] Accordingly, only Objections 1, 7, 10, and 11 will be addressed further in this ruling.

Inconsistency with Policy

In her request for administrative review (Objections 1 and 11), the grievant asserts that the decision is inconsistent with policy. She claims that that since the initial offense was a Group I and the second a Group II, there was no way she could be terminated. First, the grievant is incorrect in asserting that the hearing officer decided that the first offense was a Group I. He upheld it as a Group II—failure to follow an "implicit instruction." Whether failure to follow an "implicit" instruction constitutes a Group II Offense is a matter of policy for the Department of Human Resource Management (DHRM) to address on administrative review. Accordingly, if she has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issue 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.

Mitigating Factors

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."[11] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") provide in part:

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[9] *See Grievance Procedure Manual* § 6.4(3).

[10] For example, the grievant asserts that if she used a great deal of Long Term Disability leave, she was afraid that she would be terminated. She asserts that the agency did not provide voice activated software or other items. The grievant asserts that her position was changed. The grievant asserts that she did not need to take the five minute break that her doctor had indicated she might need. None of these points changes anything relative to the discipline that was upheld by the hearing officer. Likewise, the objection based on the agency's refusal to engage in mediation fails. Mediation is voluntary and there is no requirement that the agency utilize mediation before using the Standards of Conduct.

[11] Va. Code § 2.2-3005(C)(6).

> 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.[12]

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.[13]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[14] 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.

A. Inconsistent Discipline:

In Objection 7, the grievant appears to assert that she was treated more harshly than other employees. 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.[15]

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[12] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[13] *Id.*
[14] "'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).
[15] *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).

The grievant contends that the hearing officer failed to consider mitigating factors such as inconsistent, more favorable treatment of other allegedly similarly situated employees. The grievant asserts that she is aware of other employees with timecard issues—one who depleted all available leave and another who entered time for inspections that he apparently never performed. The hearing decision does not expressly address these situations regarding other employees but, based on the particular facts of this case, mitigation does not appear to be warranted here. In the case of the first individual, there was testimony that this person was subjected to disciplinary action. The grievant asserts that this testimony indicates that she kept her job but, based on a review of the testimony by this Department, it is not entirely clear that this was the case. Nevertheless, if we were to assume that this other employee was not discharged, the grievant has not submitted sufficient evidence that she is similarly situated to that individual. They were both disciplined for matters related to time cards but for different acts—one for exhausting her leave balance, and the other (the grievant) for refusing to accurately submit leave, correct erroneous submissions, and failing to follow the instruction not use timecards as a forum to argue with her supervisor about rejected timecard submissions. The burden is on the grievant to provide evidence of disparate treatment and, in this case, the grievant did not meet this burden.[16]

B. Vision Issues:

The grievant asserts that her vision problems should be viewed as a mitigating circumstance. The hearing officer addressed this point in his hearing decision. The hearing officer held that:

> Grievant's disabilities affected her ability to perform certain physical activities. The disciplinary action against her, however, did not arise because of her failure to perform physical activity. Grievant argued that her disability affected her ability to read the computer screen. She testified, however, that she received corrective lenses prior to the time period for the issuance of the second Written Notice. Even with corrective lenses, she continued to make mistakes when submitting timecards.[17]

Based upon this Department's review of the hearing record, it cannot be concluded that the hearing officer abused his discretion in not mitigating based on alleged vision issues. First, the hearing officer notes that the charge upheld was for failing to follow supervisor's

[16] In her supplement to her Request for Administrative Review, the grievant asserts that a third individual testified that he had timecards rejected on numerous occasions but that he had never been disciplined. This is essentially correct. However, this individual, testified that typically if his card was rejected, usually it would state the reason for the rejection on the card and he would correct it, if his error. If something like a miscommunication caused the rejection, he would go to his supervisor and try to work out. On cross-examination, this employee was asked if he had ever had a single card rejected more than once. The witness responded that this has happened a "few" times, "two or three, three or four, a half dozen" times during the over 30 years he has been with the agency. This witness reiterated that when there was a timecard issue, typically he would go to his supervisor and ask "what have I done wrong," then he would "work it out." Based on the entirety of the record, we cannot conclude that the grievant was similarly situated to this individual. In contrast to this witness who testified that he attempted to "work it out" with his supervisor, the hearing officer found the grievant consistently challenged the Manager over minor matters," apparently including timecards.

[17] Hearing Decision at 19.

instructions. One of those instructions was the implicit instruction that the grievant resubmit her timecard with corrections. But "[o]n May 27, 2010 at 3:22 p.m., Grievant submitted a timecard for the time period May 10, 2010 through May 24, 2010 which did not reflect any change from the timecard she submitted on May 26, 2010 at 6:19 p.m." It is in no way clear how any vision issues came into play with the grievant's resubmission of the card without changes. This pattern of behavior, resubmitting the timecard without making necessary changes, was the basis upon which the hearing officer sustained the original Written Notice and does not appear obviously linked to any vision deficiency. The hearing decision further notes that the grievant had been instructed to refrain from using her timecards as a forum for challenging her supervisor's rejections of time submissions. The hearing officer found that the grievant disregarded this instruction. Again, it is unclear how any vision deficiencies could have contributed to the grievant's failure to comply with this instruction.[18]

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.[19] 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.[20] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[21]

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Claudia T. Farr
Director

[18] In a supplement to her Request for Administrative Review, the grievant asserts that she suffered disabilities other than those related to vision. Assuming the truth of this assertion, again, it is difficult to see how any such disabilities relate to the charges that were upheld.
[19] *Grievance Procedure Manual* § 7.2(d).
[20] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[21] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).