Issue: Administrative Review of Hearing Officer's Decision in Case No. 9548, 9549; Ruling Date: October 6, 2011; Ruling No. 2012-3039; Agency: Department of Behavioral Health and Developmental Services; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2012-3039
October 6, 2011

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9548, 9549. For the reasons set forth below, this Department will not disturb the decision.

FACTS

The pertinent facts and holdings of this case, as set forth in the hearing decision in Case No. 9548, 9549, are as follows:

> The Department of Behavioral Health and Developmental Services employed Grievant as a Certified Nursing Assistant at one of its Facilities. She had been working for the Agency for approximately three years prior to her removal effective January 26, 2011.
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> The Client resided at the Facility. She was admitted from a local jail. She had been incarcerated for assaulting staff. Her diagnosis included borderline personality disorder.
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> On December 31, 2010, the Client asked Grievant to receive an additional salad dressing with her meal. Grievant gave the Client an additional salad dressing. The Registered Nurse observed that the Client had an additional salad dressing and removed the salad dressing from the Client's tray. The Registered Nurse explained that the Client was on a special diet and could not receive food items beyond those specified in her diet. The Client became infuriated by the Registered Nurse's action. The Client turned over a table and yelled "f--k this damn shit!" Grievant smiled. The Client observed Grievant smiling and said to Grievant "you bony bitch, I'll smack your face." Grievant threw down the clipboard she was holding onto a chair and said to the Client "I wish you would." The Client responded "what'll happen". Grievant said "you'll find out." Grievant began to take her earrings out in front of the Client. The Client perceived Grievant as getting ready to fight. Other staff intervened. Grievant went into the nurse's station and closed the door. The Client began throwing water at the window to the nurse's station and said "you stay in there forever".

Grievant had received Therapeutic Options of Virginia training. None of that training would sanction Grievant's response to the Client's outburst.

CONCLUSIONS OF POLICY

The Agency has a duty to the public to provide its clients with a safe and secure environment. It has zero tolerance for acts of abuse or neglect and these acts are punished severely. Departmental Instruction ("DI") 201 defines client abuse as:

Abuse means any act or failure to act by an employee or other person responsible for the care of an individual that was performed or was failed to be performed knowingly, recklessly or intentionally, and that caused or might have caused physical or psychological harm, injury or death to a person receiving care or treatment for mental illness, mental retardation or substance abuse. Examples of abuse include, but are not limited to, acts such as:

- Rape, sexual assault, or other criminal sexual behavior
- Assault or battery
- Use of language that demeans, threatens, intimidates or humiliates the person;
- Misuse or misappropriation of the person's assets, goods or property
- Use of excessive force when placing a person in physical or mechanical restraint
- Use of physical or mechanical restraints on a person that is not in compliance with federal and state laws, regulations, and policies, professionally accepted standards of practice or the person's individual services plan; and
- Use of more restrictive or intensive services or denial of services to punish the person or that is not consistent with his individualized services plan.

For the Agency to meet its burden of proof in this case, it must show that (1) Grievant engaged in an act that she performed knowingly, recklessly, or intentionally and (2) Grievant's act caused or might have caused physical or psychological harm to the Client. It is not necessary for the Agency to show that Grievant intended to abuse a client – the Agency must only show that Grievant intended to take the action that caused the abuse. It is also not necessary for the Agency to prove a client has been injured by the employee's intentional act. All the Agency must show is that the Grievant <u>might</u> have caused physical or psychological harm to the client.

Grievant mocked the Client when she said "I wish you would" in response to the Client's threat. This language served to demean the Client by daring the Client to respond. Grievant threw down the clipboard in a manner to intimidate the Client. When Grievant told the Client she would find out what would happen in response to the Client's statement that she would smack Grievant's face, Grievant's comments served to threaten an unspecified response to the Client. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for client abuse. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she put down the clipboard and removed her earrings because she believed the Client was about to hit her. The evidence showed that under TOVA training employees were taught to move away from an aggressive client. They are not taught to remove jewelry in preparation for physical contact. If Grievant had time to remove her earrings, surely she had time to leave the room to deescalate the conflict.

Grievant argued that the Registered Nurse inappropriately initiated the conflict with the Client. Although it may be true that the Registered Nurse initiated the conflict and could have handled the matter differently, this fact did not relieve Grievant of her obligation to respond appropriately to an angry patient.

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…." 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

The Agency also issued Grievant a Group II Written Notice based on the same facts as presented in the Group III Written Notice. Although it is possible that a single set of behavior could violate more than on policy and justify more than one written notice, this is not one of those cases. The non-therapeutic behavior alleged in the Group II Written Notice is sufficient to justify issuance of a Group III Written Notice. The Group II Written Notice is redundant. The

Agency has not established any separation between the two written notices which would justify two distinct disciplinary actions. Accordingly, the Group II Written Notice must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**. The Group II Written Notice of disciplinary action is **rescinded**.[1]

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]

Failure to Mitigate

The grievant asserts that the hearing officer erred by not mitigating the discipline issued in this case on two bases: (1) that the hearing officer removed the Group II Written Notice leaving only a single Group III Written Notice; and (2) inconsistency in how another employee was treated for a similar offense.

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."[4] The *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."[5] 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,

[1] Decision of the Hearing Officer in Case 9548, 9549 issued July 1, 2011 ("Hearing Decision") at 2-5 (footnotes from original hearing decision omitted here).
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Va. Code § 2.2-3005(C)(6).
[5] *Rules at* VI(A).

> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[6]

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.[7] 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 the "exceeds the limits of reasonableness" standard set forth in the *Rules*.[8] 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,[9] abusive,[10] or totally unwarranted.[11] This Department will review a hearing officer's mitigation determination for

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[6] *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").

[7] 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.

[8] 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.

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

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

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

abuse of discretion,[12] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

I. Group II Written Notice Rescinded

The grievant notes that one of the two Written Notices, a Group II for non-therapeutic interaction with a client, was removed by the hearing officer. The hearing officer, having found sufficient evidence to uphold the Group III for patient abuse, held that the Group II for the non-therapeutic interaction was "redundant." Accordingly, he removed the Group II.

The mere removal of the Group II does not by itself serve as a basis for reinstatement. The hearing officer upheld the Group III, and the normal discipline for a Group III is discharge. Thus, upholding the discipline of discharge is consistent with policy and the hearing officer was bound to leave undisturbed the agency's decision to terminate the grievant's employment unless the discharge exceeded the bounds of reasonableness. We conclude, as did the hearing officer, that the discharge did not exceed the bounds of reasonableness and address below the only remaining potential mitigating circumstance.

II. Inconsistent Discipline:

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.[13]

The grievant argues that the hearing officer erred by not considering evidence of inconsistent discipline issued to another allegedly similarly situated employee. A review of the hearing record indicates that the grievant raised the issue of potential inconsistent discipline with the hearing officer and he addressed this concern in his hearing decision.[14] 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. The other employee to which the grievant appears to refer was the nurse who removed the salad dressing from the client's tray and tossed it onto a food cart.[15] While the removal of the dressing might have been handled differently, this Department agrees with the hearing officer that these two individuals (the grievant and nurse) are not similarly situated. The nurses actions had the effect of provoking the grievant whereas the

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[12] "'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.*

[13] *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).

[14] Hearing Decision at 4.

[15] Hearing testimony at 2:11:00 through 2:20:00.

actions of the grievant—particularly the inflammatory statements—appear to have been intended to provoke the client. We find no error with the hearing officer's decision not to mitigate.

APPEAL RIGHTS AND OTHER INFORMATION

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.[16] 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.[17] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[18]

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Claudia T. Farr
Director

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