Issue: Administrative Review of Hearing Officer's Decision in Case No. 9580; Ruling Date: October 7, 2011; Ruling No. 2012-3035; Agency: Southern Virginia Higher Education Center; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Southern Virginia Higher Education Center
Ruling Number 2012-3035
October 7, 2011

The Southern Virginia Higher Education Center (the "agency") has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9580. For the reasons set forth below, this case is remanded for further consideration.

FACTS

The relevant facts as set forth in Case Number 9580 are as follows:[1]

The Southern Virginia Higher Education Center employs Grievant as an Equipment Service and Repair Technician II. The purpose of this position is:

The Equipment and Student Service Tech II position is responsible for providing support for workforce assessment and advancement as well as the SVHEC by:

- Developing and maintaining a sustainable business model for the USA TopSolid Institute:
- Providing technical/mechanical/repair support for the machinery and equipment for the technology lab;
- Instructing CAD/CAM courses for professionals using TopSolid software;
- Assisting with projects requiring CAD/CAM and CNC router as designated;
- Working collaboratively with workforce department members and as part of other agency teams to achieve identified goals.

One of Grievant's Measures of Core Responsibilities under his Employee Work Profile was to "[i]dentify and recruit participants in Topsolid training at SVHEC."

[1] Decision of Hearing Officer, Case No. 9580, ("Hearing Decision") issued June 27, 2011 at 2-4. (Footnotes omitted.)

TopSolid is software used by professionals for CAD/CAM. The Project involved training people to use TopSolid software. The Project was originally funded through a grant from the Tobacco Commission. The Project required revenues from training fees to fund its operations once the grant monies ended.

Mr. N was a TopSolid software reseller. He had knowledge of individuals who may have purchased the software and be in need of training from the Agency. Grievant and Mr. N developed a friendship and sometimes had informal conversations.

Grievant began reporting to the Supervisor in July 2010. She instructed Grievant to contact Mr. N and attempt to obtain Mr. N's customer contact information so that the Agency could contact individuals who might need training.

On November 29, 2010, the Supervisor met with Grievant and instructed Grievant to send to Mr. N an email to obtain information regarding TopSolid customer contact information needed to support the Project. The Supervisor instructed Grievant to send her a copy of his original email to Mr. N along with a copy of Mr. N's response. The Supervisor wanted to know Mr. N's response so that she could update Agency Board members.

On November 29, 2010 at 3:30 p.m., Grievant sent Mr. N an email stating:

> I hope that you had a great Thanksgiving!
>
> When we spoke the week before last about customers and possibly other directions for the USA-TSI, you had mentioned that you could prepare a list of some of your clients that we could contact for our marketing and training. I'm getting pressure by others for that list, and if there are some names that you could provide to us, that would be great.
>
> Also, I had a meeting this morning about exploring other opportunities and directions that the USA-TSI could go, and there is some optimistic forecasts on how we can look at some other avenues. I'll know more later this week.
>
> Are you still planning on coming down to [location] soon?

On November 29, 2010 at 4:05 p.m., Mr. N replied to Grievant:

> Let them pressure me, it will be more fun that way.
>
> I hope to come down next week, I have a few balls in the air right now. Should know more in the next two days.

> I have a new guy to fix the fourth axis issue with the onsrud post and to add the support valve, can you refresh me on what you thought the problem was with the fourth axis. If I recall you thought that xy and yz needed to switch or something like that?

Grievant did not send the Supervisor a copy of his original email to Mr. N and a copy of Mr. N's response.

On December 1, 2010 at 9:20 a.m., the Supervisor sent Grievant an email stating:

> Please forward a copy of your written request to [Mr. N] for TopSolid customer contact information as requested during our meeting Monday. I also would like a copy of his written response to your request for the info as well as the customer contact info you receive from him.

On December 1, 2010 at 11:56 a.m., Grievant replied by inserting a copy of his November 29th email to Mr. N into his reply to the Supervisor. He added:

> I have received a reply to this request, and it reflects a conversational tone and manner that comes from our two years of dialogue and banter, and I am reluctant to forward this without having set proper context and background to the reply to keep any misunderstandings out of the conversation.
>
> Please do note that [Mr. N] is planning to come to [location] in the next few weeks, and I will have some time scheduled with the TSI team while he is here. I still do not know of the details of his trip here and will keep you apprised.

On December 1, 2010 at 4:35 p.m., the Supervisor sent Grievant an email stating:

> This message serves to restate my initial verbal (Nov. 29th) and follow-up written (Dec. 1st) and now 3rd (Dec. 1st) request and expectations regarding TopSolid customer information that is essential to the mission of the USA TopSolid Institute. These are request that follows several previous requests for the same information since July 2010. Please provide the following to me no later than 11:30 a.m. on Thursday, December 2, 2010:
>
> 1. A forwarded copy of your original email message sent on 11/29/10 per your message below to [Mr. N] requesting a listing of USA TopSolid customers and their contact information.
> 2. A forwarded copy of [Mr. N's] response to your email request for the customers and customer contact information.

Grievant did not respond to the Supervisor's request by the deadline.

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The agency issued the grievant a Group II Written Notice with a three workday suspension as a result of the above events. On January 6, 2011, the grievant timely filed a grievance to challenge the agency's action. On June 23, 2011, a hearing was held and in a June 27, 2011 hearing decision, the hearing officer concluded that because the agency had not provided the grievant with a copy of the Standards of Conduct during his orientation, the grievant did not have adequate knowledge regarding the level of disciplinary action that could be imposed for failure to follow a supervisor's instruction.[2] On that basis, the hearing officer reduced the grievant's Group II Written Notice of disciplinary action with a three workday suspension to a Group I Written Notice without a suspension.[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]

In this case, the agency asserts that under the grievance procedure's "exceeds the limits of reasonableness" mitigation standard, the hearing officer had no basis upon which to reduce the level of discipline from a Group II with three-day suspension to a Group I without the suspension. Here, the hearing officer found that the agency had provided sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction.[6] The hearing officer concluded, however, that mitigation was warranted because the grievant lacked notice of the Standards of Conduct, more specifically, notice of the agency's ability under those Standards to suspend him without pay for up to ten days for failing to follow supervisory instructions.[7] The decision references the grievant's testimony that he was unaware that his failure to follow a supervisor's instructions could result in the suspension he received. The hearing officer held "that although Grievant had knowledge that his behavior could result in some disciplinary action, he did not have adequate knowledge regarding the level

[2] *Id*. at 6.
[3] *Id.*
[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Hearing Decision at 5-6 (finding that grievant "knew he was obligated to follow the instructions of his supervisor").
[7] The *Standards of Conduct*, the Commonwealth's discipline and conduct policy promulgated by the Department of Human Resource Management, sets forth the range of discipline available for acts of misconduct.

of disciplinary action that could be imposed and that the reason Grievant lacked adequate knowledge was due to the failure of the Agency to provide Grievant with a copy of the Standards of Conduct during his orientation."[8] The hearing decision seems to conclude that while the agency had provided the grievant with policies that referenced the Standards of Conduct ("thereby providing Grievant with some knowledge of the existence" of those Standards), the agency's failure to provide the grievant with a copy of those Standards during his orientation warranted mitigation.[9]

On administrative review, the agency asserts that (i) a reasonable employee should have known that a failure to follow supervisory instructions could be grounds for a disciplinary notice with suspension, (ii) the grievant was aware of the Standards of Conduct when at his orientation, the agency provided him with DHRM Policy 1.05 and DHRM Policy 1.75, which both referred to those Standards; and (iii) the grievant knew of the consequences of misconduct by word of mouth.

The Mitigation Standard and Lack of Notice

EDR's *Rules for Conducting Grievance Hearings (Rules)* provides 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."[10] 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,

[8] *Id*.
[9] Hearing Decision at 6. Due to a technical error, the hearing was not recorded and, therefore, this Department could not review the hearing record evidence. However, because of the nature of the appeal, this Department reviewed the hearing decision and the record exhibits to address the issues in this review.
[10] *Rules for Conducting Grievance Hearings* VI(A). Further, under the grievance procedure, "the reasonableness of established policy or procedure itself is presumed, and the hearing officer has no authority to change policy." *Rules* § VI(A). Thus, for example, the reasonableness of the *Standards of Conduct*, as policy, is presumed, including the range of possible consequences for the broad categories of misconduct addressed therein. That said, where there is a range of permissible penalties under the Standards of Conduct, including days of suspension, it is the hearing officer's duty to determine, in light of all the facts and circumstances of a particular case, whether the imposed discipline exceeds the limits of reasonableness and thus warrants mitigation in whole or in part. As described further in the body of this Ruling, it is indeed a rare case where the discipline imposed falls within the range of penalties allowed by policy yet mitigation is appropriate. Only where the discipline, under the facts of the case, exceeds the limits of reasonableness is mitigation permissible.

> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[11]

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.[12] 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*.[13] 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,[14] abusive,[15] or totally unwarranted.[16] This Department will review a hearing officer's mitigation determination for abuse of discretion,[17] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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[11] *Rules for Conducting Grievance Hearings* 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) (stating that 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)(holding that 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 factors").

[12] Indeed, the *Standards of Conduct* 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.

[13] 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*.

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

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

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

[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

Section VI(B)(1) of the *Rules* includes "lack of notice" as an example of mitigating circumstances:

> Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.[18]

Significantly, while the *Rules* identify "lack of notice" as an *example* of mitigating circumstances, the *Rules* do not provide that each time there is a lack of notice the imposed discipline automatically "exceeds the limits of reasonableness." Even if the hearing officer finds that an employee lacked notice of the disciplinary consequences of breaking a rule, the hearing officer must still consider all facts and circumstances, including the lack of notice as a mitigating circumstance, to determine whether the imposed discipline "exceeds the limits of reasonableness."

Accordingly, the *Rules'* notice provision is not intended to require or permit a hearing officer to mitigate discipline simply on the basis that an agency had failed to provide the employee with prior notice that a particular offense could result in the specific discipline imposed, or indeed, with prior notice of the *Standards of Conduct* (although the latter would be a good management practice).[19] The *Rules* provision on notice does not require that exact consequences be spelled out in advance; rather, this provision must be read to include an objective "reasonableness" standard. This provision is intended to require actual or constructive notice of the consequences for misconduct only in cases where the severity of the discipline imposed could not have been anticipated by a reasonable employee.

Thus, consistent with the *Rules* provision quoted above, notice of the possible consequences may not even be required if a reasonable, objective employee should have anticipated the severity of the discipline in light of the founded misconduct.[20] And even if the

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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.*

[18] *Rules* § VI(B)(1).

[19] *Cf.* Dept. of Transportation v. Stevens (Court of Appeals of Virginia)(March 31, 2009)(in due process context, declining to recognize "a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").

[20] For instance, if an agency has established hours of work that employees are to adhere to, a reasonable employee would know that failing to report to work on time as required is contrary to fundamental professional standards and could result in being disciplined accordingly. Under the Standards of Conduct, an incident of tardiness is listed as a Group I offense, the lowest level of formal discipline available. Employees need not be given prior notice of the

"reasonable, objective" employee would not have anticipated the severity of the discipline, he or she could still have actual or constructive notice of the possible consequences of breaking a rule. An employee would have notice if, for example, the possible consequences "had been distributed or made available to the employee" or had been "communicated by word of mouth or by past practice."

A hearing officer must consider all relevant factors relating to notice raised by the grievant and raised by the agency in determining whether a lack of notice exists. If the hearing officer so finds, he is to further consider whether due to the lack of notice, and in light of all other surrounding facts and circumstances, the agency's discipline exceeds the limits of reasonableness and should be mitigated. Accordingly, in this case, the hearing decision is remanded for an explanation and/or reconsideration of the issue of notice and the mitigation standard, consistent with this Ruling.

A final point: even assuming for purposes of this ruling only that the Group II Written Notice with three-day suspension exceeded the limits of reasonableness and should be mitigated, the grievant in this case was not found to have lacked notice of his obligation to follow supervisory instructions. Thus, it is unclear from the language of the hearing decision why the hearing officer reduced the offense from a Group II to a Group I, if the issue of the grievant's lack of notice pertained only to the potential consequence of a three-day suspension. If the hearing officer concludes, under the facts of this case, that the suspension was the only portion of the discipline that exceeded the bounds of reasonableness, he has the authority under the *Rules* to reduce or rescind the suspension without reducing the Group II to a Group I. In fact, if the suspension alone exceeded the bounds of reasonableness, the hearing officer has authority only to reduce the suspension. In all cases when considering whether the discipline imposed exceeded the bounds of reasonableness, the hearing officer is to consider all discipline imposed and mitigate only those portions of the discipline that exceed the bounds of reasonableness. Accordingly, the hearing decision is remanded for an explanation and/or reconsideration of the reduction of the level of offense from a Group II to a Group I.

By remanding this decision, this Department is not directing any particular outcome. Rather, the hearing officer is instructed to consider all potential factors raised by the parties in determining whether actual or constructive notice existed (or was even required) as to the disciplinary consequences of failing to follow supervisory instructions such that mitigation would be warranted under the "exceeds the limits of reasonableness" standard.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further clarification and consideration as set forth above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the reconsideration

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common-sense result that a single incident of tardiness could result in being disciplined at a level such as a Group I Written Notice, or that multiple incidents of tardiness could result in additional, more severe discipline.

decision (i.e., any matters not previously part of the original decision).[21] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[22]

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.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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Claudia T. Farr
Director

[21] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[22] *See Grievance Procedure Manual* § 7.2(a).
[23] *Grievance Procedure Manual* § 7.2(d).
[24] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[25] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).