Issue: Administrative Review of Hearing Officer's Decision in Case No. 9606; Ruling Date: October 6, 2011; Ruling No. 2012-3040; 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 Department of Behavioral Health and Developmental Services
Ruling Number 2012-3040
October 6, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9606. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts of this case are uncomplicated. On February 1, 2011, the grievant, a Certified Nursing Assistant, was issued a Group III Written Notice of disciplinary action with removal for verbal abuse for asking a client "Are you going to eat that damn food?" The grievant timely filed a grievance to challenge the agency's disciplinary action and a grievance hearing was held. In his July 1, 2011 hearing decision, the hearing officer found that the agency did not establish that the grievant engaged in client abuse but that by using the word "damn" in his communication with a client, the grievant had violated Agency Policy RI 050-20 which governs staff and resident interaction and prohibits "[u]sing profanity, vulgarity, and/or abusive language with anyone at any time while working." Therefore, the hearing officer reduced the Group III Written Notice to a Group II Written Notice for failure to follow written policy. Because the grievant had a prior active Group II Written Notice, and because the accumulation of a second Group II Written Notice allows an agency to remove an employee, the hearing officer concluded that the removal must be upheld. The hearing officer found no circumstances that warranted a reduction in the discipline.[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]

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[1] Decision of the Hearing Officer in Case 9606 issued July 1, 2011 ("Hearing Decision").
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).

Challenge to Hearing Officer's Findings of Fact and Conclusions

In his request for administrative review, the grievant appears to challenge one of the hearing officer's fact findings—that he had an active Group II Written Notice. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[4] and to determine the grievance based "on the material issues and grounds in the record for those findings."[5] 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.[6] 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.[7] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the grievant asserts that he has two previous Group I Notices. The hearing officer found that the grievant had at least one active Written Notice, a Group II Notice. Based on this Department's review of the record evidence we cannot conclude that this finding is without record evidence support. Agency Exhibit No. 8 is a Group II Written Notice issued to the grievant dated May 27, 2010. The hearing officer was correct in observing that under state policy, an agency may remove an employee for the accumulation of two Group II Written Notices.[8] Accordingly, this Department has no reason to disturb the decision on this basis.

Failure to Mitigate

The grievant challenges the hearing officer's decision not to mitigate in this case.

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."[9] 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."[10] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[4] Va. Code § 2.2-3005.1(C).
[5] *Grievance Procedure Manual* § 5.9.
[6] *Rules for Conducting Grievance Hearings* § VI(B).
[7] *Grievance Procedure Manual* § 5.8.
[8] In fact, under state policy "[a] second active Group II Notice normally should result in termination . . . ." *Standards of Conduct* (*"SOC"*)(B)(2)(b).
[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules at* VI(A).

(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.[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. 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*.[12] 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,[13] abusive,[14] or totally unwarranted.[15] This Department will review a hearing officer's mitigation determination for abuse of discretion,[16] 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 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").

[12] 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.

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

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

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

[16] "'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.*

The grievant cites to his long exemplary state service and military service as potential mitigating factors. As reflected above, however, under the Standards of Conduct "[a] second active Group II Notice normally should result in termination . . . ." Further, while clearly agencies have wide latitude in exercising their option to mitigate the discipline of removal under policy, [17] hearing officers can mitigate only when the discipline exceeds the bounds of reasonableness, that is, when the discipline is unconscionably disproportionate, abusive, or totally unwarranted. Thus, given that under policy, a second active Group II Written Notice normally results in termination, it is a rare case in such an instance where mitigation on the basis of prior service is warranted. This does not mean that mitigation by a hearing officer should never occur--just that mitigation is reserved for exceptional circumstances.[18] Such exceptional circumstances are not present here. Thus, the hearing officer did not err or abuse his discretion by not mitigating the discipline in this case.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[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

[17] Indeed, the *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.

[18] *See* EDR Ruling No. 2011-2861(mitigation by hearing officer upheld where grievant did not receive adequate notice of the rule that was violated). *See also* EDR Ruling No. 2010-2474 (the inability to perform a particular task because of other assigned duties can be relevant as to the issue of mitigation where the employee was disciplined for not performing the particular task in question).

[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).