Issue: Administrative Review of Hearing Officer's Decision in Case No. 9710; Ruling Date: December 19, 2011; Ruling No. 2012-3102; Agency: Department of Corrections; Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3102
December 19, 2011

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9610. 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. 9610, are as follows:

> On or about November 7, 2008, the Grievant received an Employee Work Profile Performance Evaluation indicating that his performance was Below Contributor. [1]
>
> On or about October 13, 2009, the Grievant received a Notice of Improvement Needed/Substandard Performance form indicating that:
>
> > ...you must make immediate improvement in the performance of your duties. Continued poor performance as described below may result in an overall "Below Contributor" rating on the annual performance evaluation conducted in this performance cycle. [2]
>
> On or about October 1, 2009, the Grievant received an e-mail from his immediate supervisor indicating a need for him to "do your September annuals at 0815 tomorrow morning (10/2/09)." [3]

[1] Agency Exhibit 1, Tab 3, Page 4
[2] Agency Exhibit 1, Tab 4, Page 1
[3] Agency Exhibit 1, Tab 2, Page 10

On or about October 2, 2009, the Grievant received another e-mail from his immediate supervisor reiterating his job performance expectations and pointing out to him those things that he needed to correct in order to be a "Contributor" employee. [4]

On or about January 13, 2010, the Grievant received from the Assistant Warden a Memorandum summarizing a meeting which she had with him on December 11, 2009. In this Memorandum, the Assistant Warden stated that the Grievant's overall rating for his 2009 performance review was again that of Below Contributor. The Assistant Warden pointed out that the Grievant had chosen to not timely file a response to his performance review. [5]

On or about January 20, 2010, the Grievant received a Memorandum from his Unit Manager specifying when his ninety (90) day re-evaluation period would commence. The Grievant was told in this Memorandum that, "...continued poor performance may result in further disciplinary action under [the] Standards of Conduct." There were eleven (11) areas of specific performance deficiencies set forth in this Memorandum.[6]

On or about February 18, 2010, the Grievant was provided with an FCCW Interim Evaluation Form. This Form stated that:

> At this time none of the performance areas are meeting job criteria or responsibilities
>
> Monthly Contact Sheets have not been turned in for January or February 2010
>
> No annual reviews have been received for January or February 2010
>
> After not receiving the contact sheets or annual reviews, an audit of 20 random offender files resulted in the following: Of your 71 offender files 29% were reviewed, of that 29% - 80% of the files were not current on the annuals and 100% of the files had no current contact for January or February of 2010. [7]

On or about April 22, 2010, the Grievant received an Employee Work Profile Performance Evaluation indicating that his performance level was Below Contributor. [8]

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[4] Agency Exhibit 1, Tab 2, Page A4
[5] Agency Exhibit 1, Tab 2, Page 6
[6] Agency Exhibit 1, Tab 2, Page 5
[7] Agency Exhibit 1, Tab 2, Page 4
[8] Agency Exhibit 1, Tab 5, Page 9

On or about July 20, 2010, the Grievant sent the Warden a Memorandum titled, Job Performance Rebuttal Statements. In that document, the Grievant stated as follows:

> **I would like to say that I take full responsibility in acknowledging that I could and should have been more diligent in filing my contacts as soon as I returned to my office from visiting with the offenders...while I do have some shortcomings, I am doing a lot of things right...I agree that there is room for improvement in my area of record keeping**.[9] (Emphasis added)

Finally, on or about August 6, 2010, the Grievant received an FCCW Interim Evaluation Form indicating areas of substandard performance. [10]

Subsequently, this Grievant was transferred to another location within this Agency. The Grievant introduced into evidence a Group II Written Notice which was issued to him on May 26, 2011, at his new location. [11] The Hearing Officer is not certain of the reason behind the introduction of this Exhibit by the Grievant. The Hearing Officer did not rely upon or use this Exhibit to reach his Decision in this matter.

The documentary evidence in this case is overwhelming with regards to the Grievant being put on notice of his substandard performance. The Grievant admits his own substandard performance in his Memorandum to the Warden dated July 20, 2010. [12] There was considerable evidence before the Hearing Officer as to general confusion relating to which counselors were in charge of which inmates and where files would or would not be located within the institution. While it is clear that there was, at best, disorganization at the institutional level, the Hearing Officer does not find that lack of organization justified this Grievant not properly documenting the institutional files.

The Grievant alleged that his punishment was directed at him solely because of his national origin. The burden of proof is on the Grievant to show that he was discriminated against because of his national origin. The Grievant has simply not bourne this burden of proof. The Grievant testified that an Assistant Warden at this Agency told him that she was sorry that he had been treated differently than other counselors when she spoke to him regarding this grievance. That testimony from the Grievant is essentially the only testimony that the Grievant produced at the hearing to indicate that he was treated differently. The Assistant Warden testified telephonically and the Grievant had the chance,

[9] Agency Exhibit 1, Tab 2, Page A1
[10] Agency Exhibit 1, Tab 2, Page 1
[11] Grievant Exhibit 1, Tab 20, Page1
[12] Agency Exhibit 1, Tab 2, Page A1

through counsel, to question her about that statement. No such questions were asked.

The Grievant called a witness who testified that she was a party to a meeting between the Grievant and his immediate supervisor. This witness testified that she thought the Grievant was spoken to in a harsh manner and in a non-respectful way. She offered no testimony as to how other employees were treated under similar factual situations and her testimony did not indicate that she was present in enough meetings to indicate that there was a pattern of harsh and disrespectful treatment of the Grievant.

In considering the totality of the Grievant's testimony and the testimony of the other witnesses for the Grievant, the Hearing Officer is simply not persuaded that the Grievant was singled out for this Group I offense pursuant to his national origin.

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."[13] 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.[14]

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 other employees have been treated related to their file management.

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."[15] 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."[16] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

[13] Va. Code § 2.2-1001(2), (3), and (5).
[14] *See Grievance Procedure Manual* § 6.4(3).
[15] Va. Code § 2.2-3005(C)(6).
[16] *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.[17]

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.[18] 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*.[19] 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,[20] abusive,[21] or totally unwarranted.[22]

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[17] *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").

[18] 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.

[19] 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.

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

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

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

This Department will review a hearing officer's mitigation determination for abuse of discretion,[23] 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.[24]

The grievant argues that the hearing officer erred by not considering evidence of inconsistent discipline among agency employees. A review of the hearing record indicates that the grievant raised the issue of potential inconsistent discipline at hearing. An agency witness, the Warden, provided testimony regarding the files of other employees[25] and the hearing officer followed up the Warden's testimony with his own questions.[26] The Warden testified that the files under discussion had nothing to do with the files for which the grievant was disciplined.[27] Accordingly, this Department cannot conclude that the hearing officer's decision that mitigation was not appropriate in this circumstance was an abuse of discretion or without record evidence support. [28]

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.[29] 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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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Claudia T. Farr
Director

[23] "'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.*
[24] *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).
[25] Cross-examination testimony of the Warden at Track 3 beginning at 1:15:00.
[26] *Id.* beginning at 1:58:00.
[27] *Id.* at 2:04:00-2:05:00.
[28] Hearing Decision in Case No. 9610, issued on August 24, 2011 ("Hearing Decision") at 1-4.
[29] *Grievance Procedure Manual* § 7.2(d).
[30] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[31] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).