Issue: Administrative Review of Hearing Officer's Decision in Case No. 9716; Ruling Date: March 8, 2012; Ruling No. 2012-3201; Agency: Department of Corrections; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3201
March 8, 2012

The Department of Corrections (the "agency") has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9716. For the reasons set forth below, this Department will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9716 are as follows:[1]

> The essential facts in this matter are undisputed. In July of 2010, Offender A was released from the custody of the Department of Corrections. Subsequent to that release, Offender A and the Grievant began to see each other, visit each other's homes and were "friends" on Facebook. The Grievant, in her testimony, did not deny these contacts with Offender A. In her Second Step, the Grievant stated that, "I did err in not asking for an exception as outlined in policy although this was not intentional." Further, when the Grievant was interviewed by the Special Agent who collected information in this matter, she stated as follows:
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> > I have known Offender A since the 1990's. When he was incarcerated, I did not communicate with him at all. When he was released, I did not think about any pending probation or anything for that matter. I now realize that I cannot communicate with him for the next year or so. We are friends, not friends with benefits. We have never been sexually involved. He contacted me when he was released.
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> Within the appropriate 180 day time frame of his release from custody, Offender A maintained a page on Facebook which indicated that the Grievant was one of his friends. Offender A maintained this Facebook page under an assumed

[1] Decision of Hearing Officer, Case No. 9716, ("Hearing Decision") issued December 8, 2011 at 2-3. (Footnotes omitted.)

name. Likewise, within the appropriate 180 day time frame of his release, the Grievant maintained a page on Facebook showing Offender A as one of her friends.

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The Grievant was issued a Group III Written Notice on September 1, 2011 for:[2]

> Grievant fraternized with a recently-released offender who was currently on supervised probation during the time of the fraternization. Grievant and the offender began to see each other on a regular basis shortly after the offender's release from custody in July of 2010. The offender assisted Grievant with her personal computer, they were "friends" on the social media website, Facebook, and they visited in each other's homes. Such fraternization violated Operating Procedure 130.1, which prohibits fraternization or non-professional relationships with offenders within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last.

Pursuant to the Group III Written Notice, the Grievant was terminated. On September 12, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. On November 7, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 29, 2011, a hearing was held at the Agency's location.[3]

In a December 8, 2011 hearing decision, the hearing officer concluded that the grievant fraternized with an offender in violation of Policy 130.1.[4] However, the hearing officer mitigated the Group III Written Notice with termination down to no punishment upon a finding that the agency had disparately punished the grievant by terminating her, despite having simply warned another Corrections Officer to stop living with an offender in an earlier case.[5] The agency now seeks administrative review from this Department.

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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

[2] *Id*. at 1.
[3] *Id*.
[4] *Id*. at 7.
[5] *Id*.
[6] Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[7]

Mitigating Circumstances: Inconsistent Application of Discipline

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."[8] 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."[9] 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, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[10]

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.[11] Rather, mitigation by a hearing officer under the

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3005(C)(6).
[9] *Rules at* VI(A).
[10] *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").
[11] 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

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*.[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.

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." For example, in EDR Ruling No. 2011-2704 this Department indicated that if one employee receives a Written Notice for a founded complaint of misconduct and a second "similarly situated" employee receives only a counseling memorandum or nothing at all for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance.[17] The grievant has the burden to raise and establish any mitigating factors.[18] The first factor that the grievant has the burden of establishing is the existence of appropriate comparators—persons who committed similar infractions—who are "similarly situated" to the grievant. The key in establishing an appropriate comparator—a similarly situated employee—is that the misconduct of both the accused and any other potential comparator be of the same character. Thus, for example, in a case such as this where the grievant was issued a Written Notice for fraternization, only misconduct in the form of comparators' fraternization is relevant. Furthermore, nowhere does the grievance procedure provide that the severity of the offense is the controlling factor in a hearing officer's determination as to whether mitigation is appropriate due to an inconsistent application of discipline.

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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.

[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*.

[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.*

[17] *See also* EDR Ruling 2010-2376.

[18] *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).

Here, the hearing officer concluded that mitigation was warranted because the grievant proved by a preponderance of the evidence that she had been disparately punished.[19] However, the agency argues that the hearing officer erred by mitigating the discipline because Corrections Officer B's case and the grievant's case were different. Specifically, the agency asserts on administrative appeal that Corrections Officer B told the Warden that she did not know that the person she was living with was on probation, whereas the grievant knew her friend had been recently incarcerated, and did not think about the probationary requirements he may have. We are compelled to note, however, that the hearing record shows that when the agency's advocate specifically questioned the Warden whether Corrections Officer B knew that the person with whom she was living was probationary, the Warden testified that he did not know what Corrections Officer B knew or did not know, but that he told Corrections Officer B that now that she did know, the living arrangement needed to cease.[20] In addition, the record evidence contains the grievant's testimony that she, the grievant, did not know that her friend was probationary,[21] and once she learned he was, she ceased interaction with him, and told the Warden.[22]

Moreover, as the hearing decision explains, when the hearing officer asked the Warden to clarify the difference between these two cases, the Warden testified that the sole distinction was that Corrections Officer B had self-reported the fraternization to him, and the grievant had not.[23] The hearing officer found in his decision, however, Corrections Officer B's coming to the Warden was "precipitated by a probation officer's letter to the Warden."[24] Thus, there is record evidence to support the finding that Corrections Officer B had not self-reported.[25] Further, in the agency's request for administrative review, the agency's advocate states that "Corrections Officer B, in fact, did not self-report."[26] Thus, because there is record evidence to support that these two employees were similarly situated in that neither had self-reported (contrary to the Warden's testimony that the sole distinction was that only Corrections Officer B had self-reported) this Department cannot conclude that the hearing officer's decision to mitigate on the basis of inconsistent discipline constitutes an abuse of discretion.[27]

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[19] Hearing Decision at 7.
[20] *See* Hearing Record at 1:32:06 through 1:35:20 (testimony of facility warden).
[21] *See* Hearing Record at 1:41:40 through 1:42:20 (testimony of grievant).
[22] *See* Hearing Record at 1:07:58 through 1:11.54 (testimony of grievant and facility warden).
[23] *See* Hearing Record at 1:22:21 through 1:32:01 (testimony of facility warden). Under questioning by the hearing officer regarding how the grievant's case was different from Corrections Officer B's, the Warden explained that "In [Corrections Officer B's] situation, again, she came to me." Hearing officer: "So, so that's your delineator?" Answer: "Yes." Hearing officer: "So that's what you're going to hang your hat on?" Answer: "Yes." Hearing Record at 1:31:45-1:32:00.
[24] Hearing Decision at 5.
[25] For example, at an earlier point during the hearing, the Warden had testified that when he first called Officer B in to question her about her involvement with the parolee with whom she was living, she "denied it," which appears to contradict the position that Officer B came to him. Hearing Record beginning at 1:14:00.
[26] Emphasis added.
[27] The agency also argues that the discipline cannot be mitigated because of the seriousness of the offense. This Department notes, however, that nothing in the *Rules* prohibits the mitigation of any offense, serious or otherwise, when, as here, mitigating factors exist. As explained above, the hearing officer found that mitigating circumstances exist, i.e., that the Warden had disciplined two similarly situated employees inconsistently. The agency further argues, for the first time on administrative appeal, that the grievant's termination was nevertheless consistent with

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.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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Claudia T. Farr
Director

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that of Corrections Officer B because both had committed a prior act of fraternization and been simply warned before being terminated for a subsequent fraternization offense. From a review of the hearing recording, however, it appears that this argument was never made at hearing or otherwise provided as the rationale for the grievant's termination, by the Warden or any other witness. Thus the grievant had no opportunity to attempt to counter that argument at hearing. Administrative review is not the time for a party to assert a new argument that could have been made at hearing.

[28] *Grievance Procedure Manual,* § 7.2(d).

[29] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).

[30] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).