Issue: Administrative Review of Hearing Officer's Decision in Case No. 9600; Ruling Date: March 29, 2012; Ruling No. 2012-3240; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3240
March 29, 2012

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9600. For the reasons set forth below, the decision is remanded to the hearing officer for further consideration and clarification.

FACTS

The pertinent facts and holdings of this case, as set forth in the hearing decision in Case No. 9600, are as follows:

1. Grievant was issued his second Group II Written Notice which occasioned his termination for failure to perform security checks as outlined in post orders and properly log security checks when done.

2. On February 16, 2011, Grievant was assigned area (C-1 Pod). Grievant did not perform hourly security checks from 6:11 a.m. to 8:22 a.m. Grievant was 8 minutes late performing security checks from 12:45 p.m. until 1:53 p.m. No security check was made on February 17 until 9:50 a.m. even though checks were logged as being done.

3. Testimony was heard that log entries were not timely made.

4. Grievant asserted that his position was short staffed and he had to man the gate, supervise feeding, escort a nurse on her rounds and provide a count. By Agency policy, security checks are the top priority duty for corrections officers.

5. Agency witnesses testified that security checks required the Corrections Officer making the checks to enter the cell, make sure the inmate was alive and look for unauthorized activities, all as a first priority over other assigned duties.

6. Testimony was heard that agency staff checked the rapid-eye television camera for evidence of Grievant's activity. The recordings of this camera system were testified to but not produced, therefore testimony about such recordings was not considered.

7. Sufficient evidence was presented to sustain the Agency's case without the "Rapid Eye" recordings.

8. Testimony about Grievant's activities not from "Rapid Eye" were credible.

9. Numerous attempts, causing delay, for cause in this decision, have been made to have the recording from "Rapid Eye" available, all to no avail.

10. The Hearings Officer has disregarded as inadmissible any testimony based on the "Rapid Eye" footage.

11. The Agency has allowed the video clips that the Hearing Officer requested the Agency provide the Gievant's counsel with or means to view the scene, to be recorded over and thus destroyed.

APPLICABLE LAW OR POLICY AND OPINION

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The Director of the Department of Employment Dispute Resolution has ruled that the Grievant has the burden of proof in this matter under Operating Procedure 101.5, dated October 1, 2007.

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)], and Department of Corrections Procedure 101.5, dated October 1, 2010, as amended.

Virginia Department of Corrections Operating Procedure, No. 135.1, effective date April 15, 2009.

DECISION

In spite of valiant attempts by the Advocate for the Agency, the video material testified to has not been made available to Grievant's counsel and has not been considered relevant. It has been recorded over and thus destroyed.

> Based on the testimony of the Grievant that he had other matters, i.e. feeding, escorting a nurse, it is obvious that he did not prioritize and conduct security checks on a priority basis. Therefore, he did not follow policy and instructions by not doing and logging security checks.
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> I find the Group II Written Notice valid and since it was a second active Group II, termination was valid.[1]

The grievant challenges the hearing decision on several bases which are discussed below.

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]

Rapid Eye Video and Related Testimony:

The grievant asserts that the agency did not produce reviewable copies of the Rapid Eye Video that was supposed to record events throughout the institution. It is undisputed that the agency did not provide such a video but the hearing officer held that the agency made "valiant attempts" to do so. The agency asserts that a problem occurred in the recording of data to DVD while the grievant argues, through its expert witness, that there was never any original recording to re-record to the DVD. Regardless of the reason for the absence of the recording, ultimately it should not have prejudiced the grievant because the hearing officer held that testimony about such recordings would not be considered by him. Accordingly, this Department has no reason to further rule on this matter.

Burden of Proof and Findings of Fact

The grievant argues that when the testimony regarding the Rapid Eye Video is disregarded, there is insufficient evidence remaining for the agency to meet its burden of establishing that discipline was warranted. The *Rules for Conducting Grievance Hearings* (*"Rules"*) state that in grievance hearings challenging formal discipline that the agency bears the burden of proof.[4] The *Rules* explain that:

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[1] Decision of the Hearing Officer in Case Number 9600 ("Hearing Decision"), issued January 13, 2012 at 1-3.
[2] Va. Code § 2.2-1001(2), (3), and (5).
[3] *See Grievance Procedure Manual* § 6.4(3).
[4] *Rules for Conducting Grievance Hearings* at VI(B).

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[5]

The *Rules* require that the hearing officer examine the "facts de novo (afresh and independently, as if no determinations had yet been made). Hearing officers alone are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[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.

Based upon a review of the hearing record, this Department will not substitute its judgment for the hearing officer's regarding his findings of delays in performing security checks on February 16, 2011 and February 17, 2011. For instance, the Lieutenant's testimony regarding his review of the log book and the log book itself would appear to support the hearing officer's findings regarding the delays. Furthermore, as to the hearing officer's finding that the grievant did not properly prioritize his duties, there is record evidence supporting the contention that conducting security checks is a top priority and of the utmost importance.[8] (As to whether the grievant was disciplined consistently with others who may have also conducted security checks in an untimely manner is addressed in the mitigation section below.)

Failure to Mitigate/Inconsistent Discipline

The grievant asserts that the hearing officer erred by not mitigating the discipline issued in this case on the basis of inconsistency in how other employees have been treated for untimely security checks.

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

[5] *Id.*
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] Testimony of Mr. "D," Tape 1, Side B; testimony of Warden, Tape 2, Side A.

rules established by the Department of Employment Dispute Resolution."[9] 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."[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,
>
> 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

[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules at* VI(A).
[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] 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.

"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.

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.[18]

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 with the hearing officer. The hearing decision does not address the issue of alleged inconsistency in discipline. Accordingly, this matter is remanded to the hearing officer to consider and address in a remand decision.[19]

Bias

In a supplemental pleading, the grievant asserts that the hearing officer is biased. This was an objection that was not raised in the original request for administrative review but could

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[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 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] *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).

[19] In considering the issue of potential inconsistent discipline, the hearing officer's scope of review should include but is not limited to: (1) the Warden's testimony that he did not consider violations where the security check occurred several minutes late (those incidents identified with an "x" on Agency Exhibit C-8) *see Agency's Request for Administrative Review at 4*; *see also Warden's testimony at Tape 2 Side A;* (2) any testimony and log book evidence regarding other officers who may have delayed performing security checks by more than several minutes but were not disciplined; and (3) as to the agency's point that the grievant did not conduct a check on the top tier on February 17th, the hearing officer held that he would not consider any testimony regarding the Rapid Eye Video, thus any evidence as to the purported failure to make the 2nd tier check must stem from a source other than Rapid Eye Video based testimony.

have been and should have if the grievant intended to raise this concern. Because this objection was not raised within 15 days of the date of the original decision, it will not be addressed here.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing officer is ordered to address the issue of mitigation based on inconsistency in discipline.

The parties will have **15 calendar days** from the date of the remand decision to challenge any *new matter* addressed in the reconsideration decision that could not have been challenged by the original request for administrative review (i.e., any matters not previously part of the original decision).[20] No alleged errors with the original hearing decision will not be addressed, as they would be considered untimely.

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.[21] If neither party timely challenges the remand decision to either the EDR or DHRM Director, the remand decision will become final **15 calendar days** from the date of its issuance.

Once the decision becomes final, it may be appealed within 30 calendar days by either party to the circuit court in the jurisdiction in which the grievance arose.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

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Claudia T. Farr
Director

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