Issue: Administrative Review of Hearing Officer's Decision in Case No. 9891; Ruling Date: November 30, 2012; Ruling No. 2013-3452, 2013-3455; Agency: Department of Juvenile Justice; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resources Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Numbers 2013-3452, 2013-3455
November 30, 2012

The grievant and the Department of Juvenile Justice ("the agency") have requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 9891. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 9891 are as follows:[1]

> The Department of Correctional Education employed Grievant as a Trainer & Instructor II at one of its Facilities. The Department of Correctional Education was merged into the Department of Juvenile Justice on July 1, 2012. The purpose of her position was:
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> > to provide effective Career and Technical Education instruction in the assigned trade area; to assist assigned students to complete the required competencies for that trade area; demonstrate effective classroom or lab management; ensure that the lab is operated in compliance with all aspects of safety management; and to maintain accurate and current student records for assigned students.
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> On June 7, 2012, Grievant was supervising students while they cleaned a hallway. The Student was standing within arms-reach of Grievant and to Grievant's side. The Student began cursing even though students were not permitted to curse at the Facility. Grievant "out of reflex" quickly raised her hand to the Student's mouth and hit his mouth with the back of her hand. Grievant said, "Stop your cussing! We are in the hall. We have to be quiet!" Once Grievant recognize that she had hit the Student, she apologized to him and asked

[1] Decision of Hearing Officer, Case No. 9891 ("Hearing Decision"), September 26, 2012 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

> if he was okay. At first, the Student said he was okay and that Grievant did not hit him very hard. The Student became angry at Grievant and said "You f--king hit me in the mouth; only my momma can hit me in the mouth like that!" Grievant continued to apologize. The Student eventually calmed down and continued working. Several days later, the Student was meeting with his counselor and revealed that Grievant had hit him. The Principal learned of Grievant's actions and reported the matter to managers at the Agency's Central Office for further consideration.

On June 26, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for striking a resident in the mouth in response to his use of profanity.[2] In a September 26, 2012 hearing decision, the hearing officer reduced the agency's issuance of a Group III Written Notice of disciplinary action with removal to a Group II with a ten work day suspension.[3] He further ordered that the agency reinstate the grievant to her position prior to removal, or if the position is filled, to an equivalent position and to provide the grievant with back pay less any interim earnings that she received during the period of removal and credit for leave and seniority that she did not otherwise accrue.[4] Both the grievant and the agency now seek administrative review from EDR.

DISCUSSION

By statute, EDR 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."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Mitigation

The agency's request for administrative review asserts that that the hearing officer inappropriately mitigated the discipline issued by the agency in this case. The agency argues that (1) the hearing officer abused his discretion in reducing the agency's discipline, and (2) the agency's executive managers in its Central Office should not be held responsible for the facility Principal's 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 Human Resource Management."[7] EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a 'super-personnel

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[2] *Id.* at 1.
[3] *Id*. at 4.
[4] *Id.*
[5] Va. Code § 2.2-1202.1(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005(C)(6).

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

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. Indeed, the "exceeds the limits of reasonableness" standard 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, abusive, or totally unwarranted.[10] EDR will review a hearing officer's mitigation determination for abuse of discretion,[11] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[12] It is the

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[8] *Rules* § VI(A).

[9] *Rules* § VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.,* EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[10] *E.g., id.*

[11] "'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.*

[12] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charges [is a] relevant consideration [] but not outcome determinative." Lewis v. Department of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, we also acknowledge that certain circumstances may require this result.[13]

One of the mitigating factors expressly listed in the Rules is "whether the discipline is consistent with the agency's treatment of similarly situated employees."[14] In this instance, the hearing officer essentially determined that the agency's discipline was unconscionably disproportionate compared to a situation involving a similarly situated employee working in the same facility as the grievant. The hearing officer summarized his decision to mitigate the discipline issued to the grievant in this case on the basis that:

> [T]he Principal was aware that Ms. C hit students but he chose not to report that information to the Central Office for consideration. He chose only to submit to the Central Office Grievant's action toward the Student. As a result of the Principal's behavior, Ms. C was not disciplined for repeated instances of hitting students while Grievant was removed for one incident of hitting a student. The Agency has inconsistently disciplined employees thereby justifying the reduction of the discipline against Grievant. The Hearing Officer will reduce the Group III with removal to a Group II Written Notice with a ten work day suspension. Because Grievant has no prior active disciplinary action, a Group II Written Notice does not support removal and she must be reinstated.[15]

The agency submits that the hearing officer's decision to mitigate the discipline was unreasonable in this instance. The agency asserts that returning the grievant to work "compromises institutional safety and security and subjects that agency to significant legal liability." EDR's review of the record reveals the agency presented no evidence at hearing that the grievant represents a threat to the safety of the institution or its residents, or would somehow subject the agency to legal liability. Consequently, we are unable to consider such an argument on appeal.

This case and its unusual facts as found by the hearing officer constitute a rare circumstance wherein mitigation could be warranted and appropriate with respect to a disciplinary dismissal. Several witnesses, including the school's Assistant Principal, testified to the fact that they reported Ms. C's abuse of students directly to the Principal, who failed to report that behavior to the Central Office.[16] At the hearing, the Principal explicitly denied any knowledge of Ms. C's actions.[17] The hearing officer found that the Principal was in fact aware of Ms. C's actions and intentionally chose not to report her.[18] The striking contrast between his treatment of Ms. C and his treatment of the grievant led the hearing officer to conclude that the

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[13] The Board views mitigation as potentially appropriate when an agency has knowingly and intentionally treated similarly situated employees differently. *See* Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991); Berkey v. United States Postal Service, 38 M.S.P.R. 55, 59 (1988).
[14] *Rules* § VI(B).
[15] Hearing Decision at 4.
[16] *Id.* at 4.
[17] *See* Hearing Record at 2:38:37 through 2:40:28 (testimony of Principal).
[18] Hearing Decision at 4.

agency inconsistently disciplined employees and mitigation was compelled.[19] Based upon a review of the record, there is nothing to indicate that the hearing officer's mitigation determination was clearly unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision, as we are unable to find that the hearing officer abused his discretion here in applying the "exceeds the limits of reasonableness" standard.

As to whether the agency should be held responsible for the actions of the principal, the hearing officer found that the principal is "representative of the Agency's management and serves in a position within the Agency with sufficient seniority to justify holding the Agency responsible for his actions."[20] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[21] and to determine the grievance based "on the material issues and grounds in the record for those findings."[22] 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. In this instance, testimony was presented from several levels of agency management (the Assistant Principal, the Principal, the Assistant Superintendant, and the Human Resources Director) that provided a foundation for the hearing officer to make this finding. EDR therefore finds the hearing officer's determinations were based on record evidence and we are unable to disturb such findings.

Hearing Officer's Consideration of the Evidence

To the extent that the grievant's request for review addresses several points regarding the items presented as exhibits at hearing, EDR believes that these points are fairly read as challenges to the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. 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.[23] 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.[24] Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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.

[19] *Id.*
[20] *Id.*
[21] Va. Code § 2.2-3005.1(C).
[22] *Grievance Procedure Manual* § 5.9.
[23] *Rules* § VI(B).
[24] *Grievance Procedure Manual* § 5.8.

Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in physical violence against a student, such as the Incident Report completed by agency staff,[25] the written statement of the student in question,[26] and the testimony of the agency's Director of Human Resources, who investigated the incident.[27] Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.[28]

Retaliation

In addition, the grievant appears to be arguing that the hearing officer failed to consider her claim that the discipline she received was retaliatory, as her request for administrative review asserts that "all evidence [that she presented at hearing] supports original grievance of retaliation." The grievant did allege that the disciplinary action taken against her was part of "an ongoing retaliation against [her]" on the original Grievance Form A. However, EDR's review of the hearing record revealed that the grievant presented very little evidence at the hearing to support her claim of retaliation, beyond her initial allegations of such.[29] The grievant was questioned by the hearing officer during her testimony regarding the alleged retaliation; however, her answer described concerns about her job duties and the principal's management style, without addressing the present disciplinary action beyond the assertion that the principal did not "support" her.[30] In light of this limited evidence presented by the grievant at hearing regarding her retaliation claim, EDR concludes that the hearing officer's failure to specifically address the grievant's claim of retaliation in the hearing decision was harmless error, if error at all. However, should management take future action the grievant believes to be retaliatory, nothing precludes the grievant from challenging that action through a subsequent timely grievance.

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

[25] *See* Agency Exhibit 3.
[26] *Id.*
[27] *See* Hearing Record at 42:25 through 43:10 (testimony of Director of Human Resources).
[28] The grievant's request for administrative review claims that she did not have the opportunity to fully review her proposed exhibits or arguments relating to those pieces of evidence at hearing. A review of the hearing record reveals that the grievant did in fact have ample opportunity to submit her evidence and to utilize that evidence to cross-examine the agency witnesses and/or identify forged documents and outcome facts. Further, the hearing officer afforded the grievant a great deal of latitude in testifying on her own behalf and making closing statements. Ultimately, the hearing officer's decision was in the grievant's favor, and the grievant requests that the decision stand. Thus, we need not give further consideration to those claims that would have no material effect on the outcome of this matter.
[29] *See* Hearing Record at 02:00 through 02:33 (opening statement of grievant).
[30] *See* Hearing Record at 02:26:02 through 02:29:05 (testimony of grievant).

review have been decided.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).