

Issue: Administrative Review of Hearing Officer's decision in Case No. 9883, 9884;
Ruling Date: November 7, 2012; Ruling No. 2013-3456; Agency: Virginia
Commonwealth University; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of Virginia Commonwealth University
Ruling Number 2013-3456
November 7, 2012

The grievant has 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 9883/9884. For the reasons set forth below, EDR finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts as set forth in Case Number 9883/9884 are as follows:¹

Virginia Commonwealth University employed Grievant as a Police Officer. The primary purpose of his position was to provide patrol operations and services within the VCU Police Department. He received an overall rating of "Achiever" on his 2011 annual performance evaluation.

Mr. M was disruptive in the hospital Emergency Room waiting area and hospital employees called the VCU Police Department for assistance. Grievant, Officer A, and Officer L responded. A hospital employee told Grievant that Mr. M had been there on several occasions and been disruptive. Mr. M was yelling and cursing at the VCU employees. Mr. M began walking out of the waiting area and towards the entry way for the Emergency Room. As he approached the entry door to the Emergency Room, Mr. M turned and yelled and cursed at the police officers. He raised one arm up in the air and lowered as he turned back in the direction of the door. His gesture was consistent with someone indicating he had had enough of the circumstances he was facing and intending to leave. The entry door was designed to open automatically by sliding from one side to the other. The entry door was also designed to fold and collapse if pushed abruptly. Mr. M moved quickly towards the door and pushed it with sufficient force to collapse the door. While Mr. M was moving in a direction away from Grievant, Grievant dipped slightly and lunged forward to push Mr. M all the way past the door and into the entryway and then pushed him up against scaffolding. Grievant held Mr. M's face while pressing Mr. M against the scaffolding. Grievant told Mr. M to leave. Mr. M left the Agency's property. Grievant did not arrest Mr. M.

¹ Decision of Hearing Officer, Case No. 9883/9884 ("Hearing Decision"), October 1, 2012, at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

Based on Mr. M's interaction with Grievant, Mr. M later threatened to kill Grievant. The Agency began its investigation upon learning of the threat.

* * * * *

On April 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for use of unnecessary force.²

In an October 1, 2012 hearing decision, the hearing officer upheld the University's issuance of the Group III Written Notice of disciplinary action with removal.³ The grievant now seeks 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."⁴ 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.⁵

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with the University's policy on excessive use of force. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁶ The grievant has requested such a review. Accordingly, we will not address this claim further in this ruling.

Failure to Mitigate

The grievant asserts that mitigating circumstances exist with regard to his Group III Written Notice with termination. Specifically, he alleges that because the University's prior warning to Mr. M about not returning to the University's emergency room were clearly not heeded by Mr. M when he returned to the emergency room an hour later, the hearing officer should have considered the University's earlier warning and the grievant's subsequent reaction to Mr. M's behavior as a potential mitigating factor.

² The grievant also received a Group II Written Notice on the same date for an unrelated charge. The Group II Written Notice was rescinded by the hearing officer. Neither party has challenged any findings related to that disciplinary action and, therefore, it will not be addressed in this ruling.

³ Hearing Decision at 5.

⁴ Va. Code § 2.2-1202.1(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

The hearing officer found that no mitigating circumstances existed to reduce the Group III Written Notice with termination.⁷ 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 [EDR].”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

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 University 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.¹¹ EDR will review a hearing officer’s mitigation determination for abuse of discretion,¹² and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

Here, the facts the hearing officer relied upon support the finding that termination for the Group III offense was appropriate and did not exceed the limits of reasonableness due to the severity of the offense, which constituted excessive use of force under University policy. Based upon a video taken in the University’s emergency room, the hearing officer found the grievant had pushed Mr. M in the back even though Mr. M did not display any action that would have indicated that he intended to re-enter the building.¹³ Although the grievant testified that Mr. M had been previously warned about not returning to the University’s emergency room earlier that day,¹⁴ the hearing officer held the following:

⁷ Hearing Decision at 5.

⁸ Va. Code § 2.2-3005(C)(6).

⁹ *Rules* § VI(A).

¹⁰ *Rules* § VI(B). The Merit Systems Protection 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. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).

¹¹ *E.g., id.*

¹² “‘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.*

¹³ Hearing Decision at 4.

¹⁴ Hearing Record at 1:29:00 through 1:32:00 (testimony of grievant).

If Grievant had not acted, Mr. M would have passed through the sliding door and into the emergency room entryway and, likely, away from the Agency's property. It was unnecessary for Grievant to use force by pushing Mr. M through the door to the outside entryway and up against the scaffolding. Grievant's unnecessary use of force created a risk of physical injury to Mr. M, legal liability to the Agency, and resulted in a threat to kill Grievant.¹⁵

Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, EDR will not disturb the hearing officer's decision on that basis.

Inconsistent Discipline

The grievant asserts that the University did not apply disciplinary action to him consistent with other similarly situated employees. A review of the hearing record indicates that the grievant did not raise the issue of potentially inconsistent discipline at hearing. Further, the grievant has provided no information to support a contention of inconsistent discipline on administrative review. The grievant had the opportunity at the hearing to submit any such evidence in support of his position and did not do so. Consequently, there is no basis to re-open or remand the hearing for consideration of this issue. As such, EDR will not disturb the hearing officer's decision on that basis.

CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸



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¹⁵ Hearing Decision at 4.

¹⁶ *Grievance Procedure Manual* § 7.2(d).

¹⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁸ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).