



COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

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DECISION OF HEARING OFFICER

In re:

Case number: 11876-R

Reconsideration Decision Issued: September 19, 2023

RECONSIDERATION DECISION

On July 25, 2022, Grievant was issued a Group III Written Notice of disciplinary action with transfer, demotion, and disciplinary pay reduction for falsifying records and failing to comply with a safety policy where there is a risk of harm.

On July 26, 2022, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 15, 2023, a hearing was held by remote conference. A decision was issued on June 20, 2023.

On July 5, 2023, Grievant requested administrative review of the June 20, 2023 Hearing Officer's decision.

On August 8, 2023, the Office of Employment Dispute Resolution (EDR) issued Administrative Review Ruling 2024-5589 (the EDR Ruling) concluding:

[T]he concerns related to documents allegedly withheld support a basis for remand. As such, this matter is remanded for consideration of the issues with production of documents, whether any adverse inferences are warranted to resolve any disputed factual matters, and any resulting impact on the ultimate findings in the case. Because the hearing officer originally assigned to this case is no longer employed by DHRM, a different hearing officer will be appointed for consideration of the remand. The new hearing officer will have discretion to re-open the record to accept additional

An Equal Opportunity Employer

evidence as to the issues on remand. For example, the hearing officer may admit into the hearing record documents identified that were not previously produced in lieu of any adverse inferences, if determined appropriate by the hearing officer.

On August 14, 2023, this matter was reassigned to this Hearing Officer for reconsideration consistent with the EDR Ruling.

The EDR Ruling remanded the matter to the Hearing Officer for further consideration. By letter dated August 14, 2023, the Hearing Officer provided both parties the opportunity to provide the Hearing Officer with written briefings addressing the specific issues remanded for consideration. The parties were given until the close of business on Monday, August 28, 2023 to submit initial briefings and until close of business on Tuesday, September 5, 2023 for responsive briefings.

Both parties submitted information to the Hearing Officer and each other on August 28, 2023. Both parties also submitted information to the Hearing Officer on August 29, 2023 responding to the exchanges of information on August 28.

Grievant objects to the Hearing Officer's consideration of information submitted by the Agency after 5:00 pm on August 28, 2023. The parties had been given until "close of business" on August 28, 2023 to submit written briefs to the Hearing Officer regarding the issues remanded for consideration. A definition of "close of business" was not provided to the parties. At 4:50 pm on August 28th, the Agency representative advised the Hearing Officer and the Grievant that due to unexpected personal matters the Agency submission of information may occur after 5:00 pm on that date. The Agency submitted its written briefing materials at 7:12 pm on August 28, 2023. The Agency representative noted that additional unexpected delays had occurred due to a power outage. Because the "close of business" deadline was not defined, and the Agency representative notified the Hearing Officer and the Grievant of the potential delay of the Agency submission and then appears to have made good faith efforts to ensure submission was made on August 28, there was no prejudice to Grievant or the process.

Grievant also appears to object to the Agency representative's representation of the Agency in this matter. That issue was raised and addressed during the March 15, 2023 hearing and is not a matter before this Hearing Officer on remand.

The briefing information submitted by both parties is included in the record and has been reviewed and considered by the Hearing Officer.

Based on the hearing record, including the written briefs, information and exhibits submitted in response to the Hearing Officer's August 14, 2023 letter to the parties, this Hearing Officer makes the following findings and determinations with respect to the specific issues identified by EDR for consideration on remand:

Omitted Written Notices

EDR's Ruling states:

In response to the grievant seeking evidence about how similarly situated employees were treated, the hearing officer ordered produced “[a]ll similar written notices (by offense codes) from the Eastern Region issued to Unit Manager/Captain and above issued for three years prior to the date of the Written Notice.” EDR narrowed this request in EDR Ruling Numbers 2023-5502, 2023-5503, but the agency was still under an obligation to produce information about similar disciplinary actions. It is not clear from the record what information the agency produced or the basis for withholding information as to certain disciplinary actions, if any were withheld. Accordingly, we are unable to determine whether there would have been a basis for an adverse inference as to this request. The hearing officer should consider this matter on remand.¹

Grievant’s hearing exhibits include a series of emails from the Agency’s advocate dated March 3, 2023 and indicating that the Agency was forwarding to Grievant documents that the Agency considered responsive to several of the Grievant’s document requests including, among other things “an excel spreadsheet with ‘similar Written Notices issued in the last three years against Unit Manager/Captain and above.’”² On its face, the email indicates that the Agency considered the documents provided “responsive to [Grievant’s] requests 1, 2 and 3, 6 and 7³ in compliance with EDR’s Compliance Ruling.”⁴

During the hearing on March 15, 2023, Grievant’s advocate asserted that the Agency had failed to provide information regarding discipline issued to Employee M.⁵ Grievant, however, during the hearing and following, has not provided any information as to why disciplinary action related to Employee M would have been responsive to the order for production of documents or would have been relevant to this case.

The Agency asserts that on March 3, 2023, it provided Grievant with a spreadsheet with information about written notices for similarly situated individuals at the Facility where Grievant was working when she was disciplined. Through its briefing materials, the Agency has confirmed that it did not include information regarding a written notice issued to Employee M because, the Agency asserts, Employee M was not an employee working

¹ EDR Administrative Review Ruling 2024-5589 at 7.

² See Grievant’s Hearing Exs. at 334-335.

³ The numbers associated with these requests appear to correspond to an Order for the production of documents issued by the Hearing Officer on January 5, 2023. That January 5th order was the subject of a compliance ruling issued by the Office of Employment Dispute Resolution on February 9, 2023. The January 5, 2023 order included Request 3: “All similar written notices (by offense codes) from the Eastern Region issued to Unit Manager/Captain and above issued for three years prior to the date of the Written Notice. Names and other personal identifying information may be redacted to preserve privacy....” Ruling Nos. 2023-5022; 2023-5023 clarified that with respect to disciplinary records, the agency was “only required to produce information about discipline that is similar to the conduct for which the grievant was specifically disciplined” and “need only produce information about discipline occurring at the grievant’s facility.” EDR also clarified that a spreadsheet would meet an agency’s obligation to produce information about relevant discipline of non-parties. EDR Ruling Nos 2023-5002; 2023-5023 at 5-4.

⁴ See Grievant’s Hearing Exs. at 334-335.

⁵ Hearing Recording at 10:22-10:42; 16:14-18:14.

at the same Facility as Grievant when the discipline was issued and was not similarly situated to Grievant.⁶

Beyond the assertions made by Grievant's advocate during the hearing, there is no information in the record, and Grievant has not offered any information, to support Grievant's assertion that the Agency failed to produce information about written notices, including any written notices related to Employee M, that should have been produced pursuant to the January 5, 2023 order as clarified by EDR Rulings 2023-5002; 2023-5023.

Grievant's assertion that the Agency withheld information about written notices that the Agency was required to produce is unsupported. No adverse inferences are warranted with respect to this issue.

Page 1 of the Disciplinary Recommendation Form for April 29, 2022

EDR's Ruling states:

Only the second page of the disciplinary recommendation form regarding the April 29, 2022 incident is included in the record (and presumably produced by the agency).⁷ It would appear that such an error, if it indeed is in error, is an oversight. However, the hearing officer ordered produced "[a]ll documents (written, electronic, and audio/video) relating to the management actions grieved." The disciplinary recommendation form for a disciplinary action at issue in this case would appear to be within the scope of this order. Accordingly, on remand, the hearing officer should accept into the record and consider the missing page of this form, or, alternatively, consider whether any adverse inference is appropriate under the circumstances.⁸

Grievant has not identified facts in dispute that Grievant expected to be resolved by the missing page of the Disciplinary Recommendation Form related to the April 29, 2022 incident.

The Agency has provided the missing page of the Disciplinary Recommendation Form related to the April 29, 2022 incident. The Hearing Officer will open the record and include the Disciplinary Recommendation Form for the April 29, 2022 incident (including the

⁶ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023).

⁷ See Agency Hearing Exs. at 7 and Grievant's Hearing Exs. at 243.

⁸ EDR Administrative Review Ruling 2024-5589 at 7 and 8.

previously missing page 1 and the previously produced page 2) in the evidentiary exhibits for the hearing as Exhibit 1-R of the Agency Exhibits.

The Agency asserts that its failure to initially produce the missing page was an “inadvertent oversight.”⁹

Information provided on the Disciplinary Recommendation Form is consistent with information set forth in the Administration of Employee Discipline - Due Process Notification for the April 29, 2022 incident that Grievant included in her exhibits.¹⁰

The failure of the Agency to provide the missing page to Grievant did not prejudice Grievant in this case. The camera footage of the April 29, 2022 incident that was referenced and described in the Disciplinary Recommendation also was presented and viewed during the hearing.¹¹ Grievant and Agency witnesses testified and were cross-examined about the images associated with the April 29, 2022 incident shown on the camera footage as well as the facts of the events that took place.¹² Additionally witnesses testified and were questioned regarding the facts of the incident, level of discipline issued and the specific misconduct charged as related to the incident.¹³

There is no information in the record, and Grievant has not offered any information, that suggests that the Agency’s failure to produce this page has adversely affected Grievant’s ability to present her case.

The Agency’s failure to produce the first page of the Disciplinary Recommendation Form for the April 29, 2022 incident was an oversight that did not prejudice the Grievant. The missing page has been provided and is now part of the evidentiary record. No adverse inference is warranted with respect to this issue.

Incident Report for the April 29, 2022 incident:

EDR’s Ruling states:

The hearing officer clearly ordered the agency to produce the incident reports for this incident. Although it does not appear that the agency produced this report, an unredacted copy purports to be in the grievant’s exhibits.¹⁴ It is not clear how the grievant obtained an apparent copy of the

⁹ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023) at 2.

¹⁰ See Grievant’s Hearing Exs. at 17. There are a couple of differences in phrasing in the Due Process Notification and the Disciplinary Recommendation. The Due Process Notification describes Grievant as displaying “aggression” toward the Inmate, where as the Disciplinary Recommendation Form describes Grievant as displaying “unprofessional conduct.” The Due Process Notification also describes the camera footage of the incident as showing that Grievant “went inside the cell”, whereas the Disciplinary Recommendation form does not include that information.

¹¹ Agency Hearing Ex. 19 (Rapid Eye video).

¹² Hearing Recording at 1:52:10-2:01:37, 5:48:50-6:10:32, 6:49:48-7:10:00, 7:34:11-7:34:46, 7:35:28-7:41:10.

¹³ Hearing Recording at 1:22:20-1:38:10, 1:45:06-1:49:52, 4:13:56-4:15:40, 4:18:18-4:19:17, 4:33:43-4:34:17, 5:23:04-5:33:35, 8:02:14-8:11:36.

¹⁴ Grievant’s Hearing Exs. at 27.

incident report. If it was produced by the agency, there would not be a basis to consider an adverse inference. There may also be no basis to consider an adverse inference where no prejudice has occurred for purposes of the grievance hearing, given the document was apparently available to the grievant and if there is no disputed factual matter to resolve. Nevertheless, the hearing officer should consider this matter on remand.¹⁵

Grievant has not identified facts in dispute that Grievant expected to be resolved by the Incident Report for the April 29, 2022 incident.

Grievant's hearing exhibits include a series of emails from the Agency's advocate dated March 3, 2023 and indicating that the Agency was forwarding to Grievant documents that the Agency considered responsive to several of the Grievant's document requests including, among other things "all incident reports related to the incidents on 4/29/22 and 5/24/22."¹⁶ On its face, the email indicates that the Agency considered the documents

¹⁵ EDR Administrative Review Ruling 2024-5589 at 8.

¹⁶ See Grievant's Hearing Exs. at 334-335.

provided “responsive to [Grievant’s] requests 1, 2 and 3, 6 and 7¹⁷ in compliance with EDR’s Compliance Ruling.”¹⁸

An unredacted copy of the April 29, 2022 Incident Report¹⁹ was included in Grievant’s exhibits and Grievant had the opportunity to, and did, question witnesses about details from the Incident Report during the hearing.²⁰

Information from the April 29, 2022 Incident Report is consistent with the information set forth in the Internal Incident Reports prepared by Grievant and the Lieutenant.²¹

The facts described in the April 29, 2022 Incident Report were reviewed at great length through testimony during the hearing, including the presentation and review of camera footage associated with the incident.²²

During the hearing, Grievant confronted and cross-examined Agency witnesses regarding the report and Grievant’s theories related to the report and its preparation.²³

The Agency asserts that it “provided Grievant with all Incident Reports that existed for the 4/29/2022 matter, which included reports made by [Grievant] and [the Lieutenant].”²⁴

The Agency’s briefing materials do not address with specificity whether the April 29, 2022 Incident Report was provided to the Grievant. Even if the Agency did not provide the report to Grievant, however, there was no prejudice to Grievant with respect to this report. Grievant included a copy of the April 29, 2022 Incident Report in her exhibits and had, and utilized, the opportunity to question witnesses regarding the report as well as

¹⁷ The numbers associated with these requests appear to correspond to an Order for the production of documents issued by the Hearing Officer on January 5, 2023. That January 5th order was the subject of a compliance ruling issued by the Office of Employment Dispute Resolution on February 9, 2023. The January 5, 2023 order included Request 7: “All incident reports completed for the incidents in question on 4/29/22 and 5/24/22.”

¹⁸ See Grievant’s Hearing Exs. at 334-335.

¹⁹ This report identifies Employee F as the “Reporting Staff” for the report. Testimony during the hearing included questioning regarding the preparation of this report. See Hearing Recording at 2:41:12-2:43:32, 3:07:28-3:08:03, 4:34:26-4:38:32.

²⁰ See Grievant’s Hearing Exs. at 27, Hearing recording at 2:41:12-2:43:32, 3:07:28-3:08:03, 4:34:26-4:38:32.

²¹ See Grievant Hearing Exs. at 27, 245 & 246 *and see*, Hearing recording at 2:41:22-2:43:32.

²² See Hearing Recording at 1:52:10-2:01:37, 5:48:50-6:10:32, 6:49:48-7:10:00, 7:34:11-7:34:46, 7:35:28-7:41:10.

²³ See Hearing Recording at 2:41:12-2:43:32, 3:07:28-3:08:03, 4:34:26-4:38:32.

²⁴ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023) at 3.

regarding Grievant's theories associated with the report. No adverse inference is warranted with respect to this issue.

Internal Incident Reports by other individuals for the April 29, 2022 incident

EDR's Ruling states:

[T]he hearing officer ordered the agency to produce incident reports. Based on testimony at the hearing, it is likely that the other individuals identified by the grievant did not complete internal incident reports and, therefore, these records do not exist.²⁵ However, since the agency has not provided a response to the hearing officer or EDR as to these documents, we are unable to make this determination at this stage. As such, the hearing officer should consider this request on remand as to whether any adverse inference is due.²⁶

Grievant has not identified facts in dispute that Grievant expected to be resolved by other Internal Incident Reports related to the April 29, 2022 incident.

Grievant's hearing exhibits include a series of emails from the Agency's advocate dated March 3, 2023 and indicating that the Agency was forwarding to Grievant documents that the Agency considered responsive to several of the Grievant's document requests including, among other things "all incident reports related to the incidents on 4/29/22 and 5/24/22."²⁷ On its face, the email indicates that the Agency considered the documents provided "responsive to [Grievant's] requests 1, 2 and 3, 6 and 7²⁸ in compliance with EDR's Compliance Ruling."²⁹

The Agency asserts that it has provided all of the incident reports related to the April 29, 2022 incident and reiterates that it provided the Internal Incident Reports prepared by Grievant and the Lieutenant which were included as exhibits³⁰ at the hearing by both the Agency and the Grievant.³¹

During the hearing, Grievant had an opportunity to question Agency witnesses regarding the absence of Internal Incident Reports from other Agency staff involved in the April 29, 2022 incident.³² Grievant specifically elicited testimony on cross-examination regarding

²⁵ Hearing Recording at 2:43:34 – 2:44:55.

²⁶ EDR Administrative Review Ruling 2024-5589 at 8.

²⁷ See Grievant's Hearing Exs. at 334-335.

²⁸ The numbers associated with these requests appear to correspond to an Order for the production of documents issued by the Hearing Officer on January 5, 2023. That January 5th order was the subject of a compliance ruling issued by the Office of Employment Dispute Resolution on February 9, 2023. The January 5, 2023 order included Request 7: "All incident reports completed for the incidents in question on 4/29/22 and 5/24/22."

²⁹ See Grievant's Hearing Exs. at 334-335.

³⁰ Agency Hearing Exs. at 8 & 9, Grievant's Hearing Exs. at 245 & 246.

³¹ Agency Response to Administrative Review Decision (Aug. 28, 2023) at 3.

³² Hearing Recording at 2:43:33-2:45:13.

the absence of Internal Incident Reports with respect to the other individuals identified in Grievant's Internal Incident Report as involved in the April 29, 2022 incident.

Grievant has not provided any information to support her suggestion that the Agency has failed to produce all of the Internal Incident Reports in existence and related to the April 29, 2022 incident.

Information in the record, including testimony provided during the hearing, suggests that the only Internal Incident Reports related to the April 29, 2022 incident were those prepared by the Grievant and the Lieutenant, and both of those Internal Incident Reports were produced by the Agency consistent with the January 5th order and EDR Ruling Nos. 2023-5002; 2023-5023. No adverse inference is warranted with respect to this issue.

After-action report for the April 29, 2022 incident

EDR's Ruling states:

Information about an after-action report for the April 29, 2022 incident could reasonably fall within the hearing officer's order for documents related to the actions grieved. The agency has not provided a response to indicate whether records about any after-action report exist. As such, the hearing officer should consider this request on remand as to whether any adverse inference is due.³³

Grievant has not identified facts in dispute that Grievant expected to be resolved by an after-action report regarding the April 29, 2022 incident.

Grievant's hearing exhibits include a series of emails from the Agency's advocate dated March 3, 2023 and indicating that the Agency was forwarding to Grievant documents that the Agency considered responsive to several of the Grievant's document requests.³⁴ On its face, the email indicates that the Agency considered the documents provided "responsive to [Grievant's] requests 1, 2 and 3, 6 and 7³⁵ in compliance with EDR's Compliance Ruling."³⁶

During the hearing, Grievant had the opportunity to ask agency witnesses about whether they prepared or participated in an after-action report for the April 29, 2022 incident. Witness testimony during the hearing did not produce information that would suggest there had been an after-action report regarding the April 29, 2022 incident.³⁷ Grievant's

³³ EDR Administrative Review Ruling 2024-5589 at 8.

³⁴ See Grievant's Exs. at 334-335.

³⁵ The numbers associated with these requests appear to correspond to an Order for the production of documents issued by the Hearing Officer on January 5, 2023. That January 5th order was the subject of a compliance ruling issued by the Office of Employment Dispute Resolution on February 9, 2023. The January 5, 2023 order included Request 1: "All documents ... relating to the management actions grieved."

³⁶ See Grievant's Hearing Exs. at 334-335.

³⁷ See Hearing Recording at 2:47:01-2:47:11, 3:57:00-3:57:15 and 5:17:29-5:17:56.

own testimony, was consistent with other witnesses, and indicated that she had not participated in an after-action report for the incident.³⁸

Through its briefing materials, the Agency has confirmed that no after-action report was prepared for the April 29, 2022 incident.³⁹

Grievant has not provided any information to suggest that an after-action report for the April 29, 2022 exists, indeed, Grievant's testimony and testimony elicited by Grievant during the hearing suggest otherwise.

There is nothing in the record or hearing testimony to suggest that an after-action report for the April 29, 2022 incident exists. No adverse inference is warranted with respect to this issue.

Internal Incident Report by another individual [Employee T] for the May 24, 2022 incident

EDR's Ruling states:

[T]he hearing officer ordered the agency to produce incident reports. Since the agency has not provided a response to the hearing officer or EDR, we are unable to determine whether such a record exists. As such, the hearing officer should consider this request on remand as to whether any adverse inference is due.⁴⁰

Grievant has not identified facts in dispute that Grievant expected to be resolved by an Internal Incident Report prepared by Employee T.

Grievant's hearing exhibits include a series of emails from the Agency's advocate dated March 3, 2023 and indicating that the Agency was forwarding to Grievant documents that the Agency considered responsive to several of the Grievant's document requests including, among other things "all incident reports related to the incidents on 4/29/22 and 5/24/22."⁴¹ On its face, the email indicates that the Agency considered the documents provided "responsive to [Grievant's] requests 1, 2 and 3, 6 and 7⁴² in compliance with EDR's Compliance Ruling."⁴³

The Agency asserts that "prior to the hearing, the Agency provided five Internal Incident Reports to Grievant, including the report of [Employee T]...."⁴⁴ The Agency points to the

³⁸ See Hearing Recording at 6:07:35 – 6:07:48.

³⁹ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023) at 3.

⁴⁰ EDR Administrative Review Ruling 2024-5589 at 9.

⁴¹ See Grievant's Hearing Exs. at 334-335.

⁴² The numbers associated with these requests appear to correspond to an Order for the production of documents issued by the Hearing Officer on January 5, 2023. That January 5th order was the subject of a compliance ruling issued by the Office of Employment Dispute Resolution on February 9, 2023. The January 5, 2023 order included Request 7: "All incident reports completed for the incidents in question on 4/29/22 and 5/24/22."

⁴³ See Grievant's Hearing Exs. at 334-335.

⁴⁴ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023) at 3.

Agency's hearing exhibits 6, 7, 8, 9 and 10 at bate-stamped pages 12, 13, 14, 15 and 16 respectively of the Agency's hearing exhibits. The Internal Incident Reports provided as Agency Hearing Exhibits 6, 7, 8 and 9 are the Internal Incident Reports⁴⁵ prepared by Grievant and the individuals Grievant identified in her Internal Incident Report as "Staff Involved."

Agency Hearing Exhibit 10 (found at bate-stamped page 16 of the Agency's hearing exhibits) is described as a "statement of incident" and appears to be the report that the Agency asserts was prepared by Employee T. This is the only report to mention Employee T. The document itself appears to set forth information related to the May 24, 2022 incident, but is not in the same format as other Internal Incident Reports and does not, on its face, identify its author.

The document included at bate-stamped page 16 of the Agency's hearing exhibits that the Agency appears to attribute to Employee T also is included in the Grievant's hearing exhibits at bate-stamped page 47. Grievant had the opportunity to question witnesses regarding the document during the hearing.

Employee T is not identified as "Staff Involved" on the Internal Incident Report prepared by Grievant nor on the Internal Incident Reports prepared by the other staff identified as "Staff Involved" in the report prepared by Grievant.

Camera footage of the May 24, 2022 incident was presented and viewed during the hearing.⁴⁶ Grievant and Agency witnesses testified and were cross-examined about the facts of the May 24, 2022 incident.⁴⁷

Grievant had the opportunity to question witnesses at the hearing regarding information Employee T may provide or that any report from Employee T may include.

There is nothing in the record or hearing testimony to suggest that there are any internal incident reports prepared by Employee T, other than the document identified as Agency Hearing Exhibit 10 (at bate-stamped page 16 of the Agency's hearing exhibits) and in bates-stamped page 47 of Grievant's hearing exhibits. No adverse inference is warranted with respect to this issue.

Documents regarding Grievant's Equal Employment Opportunity (EEO) complaint

EDR's Ruling states:

The hearing officer ordered the agency to produce "[a]ll communications and documents (written, electronic, and audio/video) relating to the hostile work environment sent by [the grievant]" on June 8, 2022. The grievant states that certain records were not produced, such as recordings of interviews, communications between the EEO Unit and certain identified individuals, and an email forwarding the grievant's complaint within human

⁴⁵ Unredacted versions of these reports also are included in Grievant's hearing exhibits at 44, 45 and 46.

⁴⁶ Agency Hearing Ex. 20 (Rapid Eye video); Hearing Recording at 2:05:39-2:30:55.

⁴⁷ Hearing Recording at 2:05:39-2:30:55, 6:10:31-6:24:29.

resources on June 13, 2022. While the grievant has alleged retaliation as a result of submitting the EEO Complaint, the allegations of that complaint are not at issue in this grievance.⁴⁸ Thus, some of these records might be relevant to the hearing, but many are not relevant or would not help resolve any disputed factual matters material to this case. EDR is also unable to determine whether any of these records exist. Accordingly, the matter is remanded for consideration of these issues by the hearing officer. In determining the appropriate way to address these issues, the hearing officer should consider the materiality of any of these records to the actions grieved.⁴⁹

Grievant's hearing exhibits include a series of emails from the Agency's advocate dated March 3, 2023 and indicating that the Agency was forwarding to Grievant documents that the Agency considered responsive to several of the Grievant's document requests.⁵⁰ On its face, the email indicates that the Agency considered the documents provided "responsive to [Grievant's] requests 1, 2 and 3, 6 and 7⁵¹ in compliance with EDR's Compliance Ruling."⁵²

Through its briefing materials, the Agency asserts that it

forwarded documents regarding Grievant's EEO complaint to Grievant on March 3, 2023. The documents included emails related to the status of Grievant's complaint and a copy of the EEO

⁴⁸ See Grievant's Hearing Exs. at 2-4, 10-11.

⁴⁹ EDR Administrative Review Ruling 2024-5589 at 9

⁵⁰ See Grievant's Hearing Exs. at 334-335.

⁵¹ The numbers associated with these requests appear to correspond to an Order for the production of documents issued by the Hearing Officer on January 5, 2023. That January 5th order was the subject of a compliance ruling issued by the Office of Employment Dispute Resolution on February 9, 2023. The January 5, 2023 order included Request 6: "All communications and documents (written, electronic, and audio/video) relating to the hostile work environment sent by [Grievant] on Wednesday, June 8, 2022 at 11:54 AM. This includes a copy of the completed investigation report."

⁵² See Grievant's Hearing Exs. at 334-335.

Investigation Report. In addition, a letter from [Employee Relations Manager] was also sent to Grievant regarding the EEO decision.⁵³

The Agency also asserts that, with the one exception addressed above relating to the Disciplinary Recommendation Form, “the Agency provided all documents that existed ... to Grievant as ordered.”⁵⁴

Grievant’s hearing exhibits include numerous documents that Grievant identified in her exhibits as related to Grievant’s EEO complaint,⁵⁵ including the Agency’s EEO Investigation Report which included written witness interview statements.⁵⁶

There is nothing in the record or hearing testimony that suggests that there are documents that the agency was required to produce related to Grievant’s EEO complaint that were not produced by the Agency consistent with the January 5th order and the EDR rulings.

Documents related to Grievant’s EEO complaint would only be relevant as to Grievant’s allegations that the disciplinary action at issue in this case was taken in retaliation for Grievant’s filing of the complaint.

The only fact in dispute that Grievant has asserted would be resolved by the documents related to Grievant’s EEO complaint appears to relate to the timing of when Agency or Facility management may have become aware of Grievant’s EEO complaint. Grievant asserts among her briefing materials that

10. Email from [Facility HRO] forwarded the EEO complaint to [Employee Relations Manager]. (allegedly (sic) on 6/13/2022 – the same date as the alleged due process meeting, even though it was sent on 6/8/2022). This email likely shows the very beginning of the EEO report to be a lie.⁵⁷

The Agency issued an “Administration of Employee Discipline - Due Process Notification” regarding the May 24, 2022 incident to Grievant on June 3, 2022. Grievant submitted her EEO complaint on June 8, 2022. The Agency issued an “Administration of Employee Discipline – Due Process Notification” regarding the April 29, 2022 incident to Grievant on June 10, 2022.

The Grievant’s retaliation claim appears primarily to rest on her assertion that the Wardens at the Facility became aware of Grievant’s EEO complaint shortly after she submitted the complaint to Human Resources personnel on June 8, 2022 and before June 10, 2022 when Grievant was issued a due process notice regarding the April 29, 2022

⁵³ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023) at 3.

⁵⁴ Ltr. From Agency Representative to Hearing Officer, re: Agency Response to Administrative Review Decision (Aug. 28, 2023) at 1.

⁵⁵ See Grievant’s Hearing Exs. at 182–336.

⁵⁶ See Grievant’s Hearing Exs. at 210-230.

⁵⁷ Email from Grievant’s Advocate to EDR_Hearings (Aug. 28, 2023), attached undated correspondence to Hearing Officer from Grievant’s Advocate.

incident. Grievant testified regarding her suspicions with respect to the timing of the disciplinary action for the April 29, 2022 incident in relation to her EEO complaint during the hearing.⁵⁸

During the hearing witnesses testified, and were cross-examined, regarding the timing of the disciplinary action as it related to Grievant's submission of an EEO complaint and the timing of the witnesses' knowledge of Grievant's submission of the EEO complaint.⁵⁹ Aside from Grievant's belief that the Wardens at the Facility knew about Grievant's submission of an EEO complaint prior to the issuance of the due process notice for the disciplinary action related to the April 29, 2022 incident, there is no other testimony or record evidence to corroborate her belief.

Grievant's retaliation claim hinges on the issuance of discipline for the April 29, 2022 incident. In that respect it is important to note the determinations made in the Hearing Officer's June 20, 2023 decision as they relate to the April 29, 2022 incident and associated discipline:

Operating Procedure 420.1 governs Use of Force. Under this policy, "if there is a reasonable opportunity to plan a strategy before dealing with disruptive or violent offenders, the incident should be documented using audio-visual recording equipment." When a use of force occurs, the policy requires an employee to complete an internal incident report identifying the people involved and describing their participation. In addition, "[f]ailure of any employee to report accurately and completely any incident where force was used may result in disciplinary action."

The policy provides:

The appropriate type and amount of force used by an employee (e.g., the kind of weapon used, the area of the body struck, etc.) depends on the circumstances of the particular incident. Controlling factors include:

1. The potential consequences if nothing is done
2. The degree of force threatened or used by the offender, including whether the offender possesses a weapon that could be used to cause physical injury
3. The employee's reasonable perception of the danger of death or serious physical injury
4. Any alternatives available to control the situation without the use of force.

Less lethal force may be used in the following situations:

1. In self-defense or defense of others
2. In prevention of suicide

⁵⁸ Hearing recording at 6:07:56-6:10:27, 6:27:16-6:32:15, 6:36:29-6:37:11.

⁵⁹ Hearing recording at 2:50:27-2:52:36, 2:52:59-2:55:25, 4:08:18-4:09:26, 4:26:33-4:31:35, 5:05:59-5:08:32, 5:34:55-5:37:22, 6:37:20-6:41:05, 6:41-50-6:48:55, 7:55:12-7:57:39, 7:58:40-8:00:07.

- 3.To prevent the taking of hostages
- 4.To prevent an escape
- 5.To quell a rebellion/riot
- 6.To prevent property damage
- 7.To compel an offender or group of offenders to comply with direct orders when no quick or immediate alternative method of persuasion is effective and other types of force are deemed not appropriate
- 8.To prevent a crime by the offender where commission of the crime is either imminent or ongoing. ***

Chemical agents will only be used as a control mechanism in accordance with training and must never be used as punishment.

When no alternative method of persuasion has proven effective, the institution's cell extraction team will be utilized when it becomes necessary to enter the cell and physically remove the offender by force.

Group III offenses include "[f]alsifying any records either by creating a false record, altering a record to make it false, or omitting key information ... including ... reports statements."

Key information regarding the April 29, 2022 incident was the identity of the person using the OC spray on the inmate. Grievant did not have current certification necessary to use OC spray. In other words, Grievant was not authorized to use OC spray on an inmate. Grievant's report indicated that OC spray was used but omitted that she was the person using the spray. In addition, Grievant's report suggests she was able to remove her pinned arm after the inmate was sprayed with OC.⁶⁰ Grievant's arms were free before she sprayed the inmate with OC. Grievant falsified the April 29, 2022 incident report because she omitted key information.

In order to succeed with a retaliation defense, Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.⁶¹ If the Agency presents a nonretaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁶² Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have

⁶⁰ Grievant wrote, "at this time I was able to free my arm." She testified that she was able to call for assistance only after the inmate released her arm which was before she sprayed the inmate with OC.

⁶¹ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

⁶² See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

occurred.⁶³ Grievant has satisfied the first two elements of a retaliation claim. Grievant engaged in a protected activity when she submitted an EEO complaint and she experienced an adverse employment action when she received discipline. Even assuming that Grievant's allegations that the Wardens were aware of Grievant's submission of an EEO complaint prior to the issuance of the due process notices for disciplinary action were true, Grievant still has not satisfied the third element for a retaliation claim, because she has not shown that her submission of an EEO complaint was the but-for cause of the disciplinary action. Indeed, the evidence shows that the Agency issued the disciplinary action because it believed that Grievant engaged in behavior that warranted discipline. Even if the Wardens had known about Grievant's EEO complaint as early as June 8, 2022, as the Grievant asserts, the Agency has met its burden of showing that the discipline was warranted and was not pretext.

DECISION

After considering and addressing the questions raised by the EDR Ruling with respect to the production of documents as related to omitted written notices, page 1 of the Disciplinary Recommendation Form for April 29, 2022, the Incident Report for the April 29, 2022 incident, Internal Incident Reports by other individuals for the April 29, 2022 incident, After-action report for the April 29, 2022 incident, Internal Incident Report by another individual for the May 24, 2022 incident and documents regarding Grievant's EEO complaint and for the reasons stated herein, nothing in this Hearing Officer's review changes the outcome of the grievance that the Agency discipline is **upheld**.

For the reasons stated herein, the "Disciplinary Recommendation Form" for the April 29, 2022 incident (including the previously missing page 1 and the previously produced page 2) is included in the evidentiary exhibits for the hearing as Exhibit 1-R of the Agency Exhibits.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

⁶³ *Id.*

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁶⁴

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

⁶⁴ See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.