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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Numbers 2022-5413, 2022-5414
June 28, 2022

The parties have each requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11738. For the reasons set forth below, EDR will not disturb the hearing decision based on the parties' submissions. However, the case will be remanded to the hearing officer for further proceedings based on other grounds.

FACTS

The relevant facts in Case Number 11738, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [(the "agency")] employed Grievant as a Corrections Officer at one of its facilities. She began working for the Agency in 2010. She worked in the Intelligence Unit ("Intel Unit") at the Facility. Grievant reported to Sergeant L, Lieutenant B, and Major R.
>
> *Inmate G*
>
> Inmate G was a "mid-level" gang member. Inmate G had control over some of the inmates in the Facility. A "reliable" inmate told Sergeant L that Inmate G asked that inmate to "move" drugs for Inmate G.
>
> Grievant did not have an "open investigation" against Inmate G. Grievant did not request assistance from other staff to help her investigate Inmate G. She did not take notes of her interactions with Inmate G.
>
> *Listening to Phone Calls*
>
> The Agency has a system (Global Tel Link) to record all telephone calls involving inmates and individuals located outside of the Facility.

[1] Decision of Hearing Officer, Case No. 11738 ("Hearing Decision"), May 10, 2022, at 2-7 (footnotes omitted).

Grievant had the authority to listen to the recordings of inmate telephone calls. She did not need approval from a supervisor in order to listen to an inmate's calls. Grievant was able to access the GTL system and listen to those calls while she was working inside the Facility or while off-duty at her home. Grievant had the authority to listen to live inmate calls as well.

Grievant had a "certain amount of discretion" regarding how to conduct investigations. It would not be typical, however, for an Intelligence Officer to listen to 200 telephone calls made by an inmate.

Between September 13, 2020 and April 20, 2021, Grievant listened to several hundred phone calls involving Inmate G. She did not enter case notes regarding information she heard while listening to the calls. Inmate G would attempt to facilitate transactions by sending "cash apps." Inmate G would discuss whether money had been sent through "cash apps." Grievant would later review the cash apps to determine who was involved in the transaction.

On October 18, 2020, Grievant listened to three of Inmate G's telephone calls. She was at her home when she listened to the calls for total time of approximately 50 minutes.

Excessive Meetings

Grievant spent a lot of time talking to Inmate G. She went out of her way to speak with Inmate G. She was both building her informant relationship with Inmate G and monitoring his possible improper behavior.

On November 4, 2020, Grievant met with Inmate G and Inmate E for more than three hours. Inmate G and Inmate E were members of rival gangs but they were also cousins. Each inmate was in a position to "diffuse" conflict between the gangs. Sergeant D asked Grievant to meet with Sergeant D and the two inmates so the inmates could find "common ground." Sergeant D left the meeting. Grievant waited because she expected Sergeant D to return.

On February 26, 2021, Grievant spent more than a half hour at Inmate G's cell speaking to him while her co-workers conducted a cell search in the housing unit.

On March 26, 2021, Grievant spoke with Inmate G for more than a half hour.

On April 19, 2021, Grievant and another employee entered the pod to deliver mail. Grievant stopped to speak with Inmate G while the other employee continued delivering mail.

Interfering in Inmate Charge

Inmate G received an offense charge on October 10, 2020. Grievant called Officer B and asked Officer B not to go forward with the charge. Grievant told Officer B she was trying to help out Inmate G. Officer B refused to withdraw the charge.

On February 15, 2021, Inmate G received a charge for having "mash" in his cell. Mash is prison-made alcohol consumed by inmates. Several charges were referred to Hearings Officer M to hear. Grievant was not a reporting officer or witness. Inmate G was found guilty of the infractions. While Grievant was distributing mail to inmates, Inmate G told Grievant about the charges and that he did not have mash in his cell. He told Grievant that the video would show he did not have mash. Grievant reviewed the video of the time and location where the mash was supposedly found. After viewing the video, Grievant believed the charges against Inmate G were false. Officer D handled some of the paperwork in that matter. Inmate G told Grievant that Officer D had deemed the video irrelevant. Since Officer D was in the Intel Unit and not a Hearing Officer, Grievant believed Officer D had inserted himself into Inmate G's hearing without justification.

Grievant contacted Hearings Officer M and asked Hearings Officer M if she wanted to review the video of Inmate G's cell to show he was not guilty. Grievant said she was trying to help out Inmate G. Hearings Officer M said that Inmate G had been found guilty of the charge. Hearing Officer M perceived Grievant's behavior as unusual because Grievant was not involved in the matter.

Expressing Refusal to Help Officer D

Grievant and Officer D met with Inmate G and Inmate D in the Pod Interview Room. Inmate G was angry with Officer D because of how Officer D had responded to a charge against Inmate G. Inmate G questioned how Officer D decided that the video camera evidence was irrelevant. Inmate G believed Officer D "lied on him." Inmate G was shouting and yelling at Officer D. Grievant did not attempt to deescalate Inmate G's behavior.

On March 15, 2021, Grievant was in the Intel office speaking with Lieutenant S, Officer Da and Officer P. Grievant said that she and Officer D were speaking with Inmate G. Grievant said Inmate G became red in the face and was very upset with Officer D and she thought they were going to fight. Grievant said

she thought Inmate G was going to jump on Officer D to attack him. Grievant told Lieutenant S and Officer Da that if they did fight, Grievant was not going to help Officer D. Lieutenant S heard Grievant say she would not have done anything to help Officer D. Officer P heard Grievant say Grievant would not have stopped Inmate G if he "jumped" on Officer D. Grievant said she agreed with Inmate G and why he was upset and would not have blamed him if he decided to hurt Officer D.

Inmate M

The commissary at the Facility sold certain oils to inmates. Prayer oils were to be sourced from an approved vendor and then enter the Facility through approved procedures. These procedures required the oils to be delivered to the warehouse for distribution inside the Facility.

The Intel Unit staff attempted to recruit and maintain relationships with informants at the Facility. Inmate M was a "known informant" providing information to the Intel Unit at the Facility. Inmate M told investigators he was a "big drug dealer in prison for years."

Lieutenant B developed a relationship with Inmate M and obtained information from Inmate M about inmate activity within the Facility. Major R also knew Inmate M was an informant and attempted to maintain a relationship with Inmate M to obtain information about inmate activity at the Facility. Inmate M met Grievant through Lieutenant B. Inmate M was helping the Agency find cellphones and drugs inside the Facility. Lieutenant B assigned Grievant to obtain information from Inmate M.

On one occasion, Sergeant L and Grievant drove to another facility to obtain a television and bring it to Inmate M. Their actions were approved by their supervisors.

Inmate M's cell was searched by corrections officers on November 3, 2019. Inmate M's shoes and prayer oils were taken during the search. Inmate M did not like having his property seized. He expressed his concerns to Lieutenant B. Lieutenant B told Grievant that Inmate M wanted his shoes and oils replaced.

Inmate M believed that a corrections officer at the Facility took his shoes and gave them to another inmate. Inmate M did not want those shoes back but rather wanted to receive new shoes and prayer oils from his girlfriend. Major R and Lieutenant B knew that shoes and oil would be shipped to Inmate G.

Inmate M's girlfriend ordered new shoes sometime in 2020 and sent them to Lieutenant B. Grievant obtained shoes from Lieutenant B and gave them to Inmate M.

Sergeant L did not take the shoes to Inmate M. He was not present when Grievant gave oils to Inmate M.

Inmate M told investigators he made a "prayer oil deal" with Major R. Inmate M had a deal with Major R where Inmate M would pour prayer oil into smaller bottles and sell it to inmates inside the Facility so that those inmates could hide the scent from drugs. He used oil sales to gather information about drug possession and give that information to the Intelligence Unit.

On May 7, 2021, Major R told investigators that he knew about the prayer oils and he told Intel staff that as long as they ensured it was actual prayer oil that it could be brought in to the Facility.

Inmate M told Investigators Major R approved the first order of oils in the prior year, 2020, and that the first order was shipped to Lieutenant B. Inmate M's Girlfriend purchased prayer oils from a company and had them shipped to the Facility. On October 27, 2020, Inmate M informed Grievant that "THE OIL IS ON THE WAY IN [LIEUTENANT B'S] NAME. *** IT'S LIKE 6 BOTTLES OF OIL AND SOME TOOTHBRUSHES …."

Lieutenant B told Grievant to look out for the items. Inmate M told investigators he got oil orders in October 2020 and November 2020. The Facility received prayer oils on November 17, 2020. Grievant retrieved the package on November 18, 20207 and gave it to Inmate M on November 19, 2020.

Inmate M told investigators he used the oils to obtain information from inmates. Inmate M told investigators he had helped the Intel Unit obtain at least twenty cell phones and 8000 Sub Oxone strips from inmates.

Sergeant L learned of the second shipment of oils and told Grievant to send the shipment back. Sergeant L knew that Inmate G had received the first shipment and thought that was sufficient.

Agency Investigation and Interviews

The Agency investigated Grievant's behavior. Before interviewing Grievant, the Investigator advised Grievant that she was obligated to be truthful and if she failed to do so she could be subject to disciplinary action up to and including termination of employment.

Grievant met with investigators on May 7, 2021. Her interview lasted from approximately 3:03 p.m. to 8 p.m.

Grievant told the Investigator she listened to Inmate G's telephone calls because he was trying to bring drugs into the Facility. She had to listen to the phone calls because Inmate G was speaking using code words.

The Investigator asked if Grievant listened to Inmate G's telephone calls while she was at home. She said "no." When the Investigator told Grievant that Grievant listened to Inmate G's calls from home in October, Grievant did not recall listening from home when she initially answered the Investigator's question.

Grievant said that she and Sergeant L took the shoes to the property division for Inmate M to pick up. Actually, Grievant gave the shoes to Inmate M.

Grievant told the Investigator she and Sergeant L gave prayer oils to Inmate M. Actually, Grievant gave prayer oils to Inmate M.

Grievant said the oils were given to Inmate M as a bargaining tool for information and then said they were not a bargaining tool.

Grievant denied saying she would not help Officer D if Inmate G attacked him. Grievant wrote a statement on May 7, 2021 saying, "Never did I say I would not assist [Officer D] if an altercation would have happened."

Investigators interviewed Lieutenant B for a second time on May 18, 2021. He resigned following the interview.

While Grievant was out on leave in June 2021 during the Agency's investigation, she called the Facility to find out information about her husband who was also an employee. Her actions did not represent fraternization.

On August 16, 2021, the agency issued to the grievant two Group III Written Notices – one charging fraternization and/or inappropriate relationships with inmates under agency policy ("Fraternization Written Notice"), and the other charging untruthfulness during the agency's investigation of those charges ("Untruthfulness Written Notice").[2] The grievant timely grieved the

[2] The exhibits that were admitted into the record contain two unsigned, undated Written Notices. Agency Ex. at 3-8; Grievant Exs. 1, 2. These versions are different from the versions the agency submitted to EDR for appointment of a hearing officer, which are signed and dated, including a signature of receipt by the grievant. The hearing officer does not address this issue in the decision and it does not appear that it was resolved during the hearing. While neither party has requested administrative review concerning this fundamental evidentiary deficiency in the record, EDR is compelled to address this issue below.

disciplinary actions, and a hearing was held on February 2, 2022.[3] In a decision dated May 10, 2022, the hearing officer reversed the Fraternization Written Notice but sustained the Untruthfulness Written Notice, ultimately upholding the termination of the grievant's employment based on the sustained Group III Written Notice.[4] The hearing officer further determined that there were no circumstances warranting mitigation of the agency's disciplinary action.[5] Both parties now appeal the hearing officer's decision to 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 . . . ."[6] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant argues that the hearing officer erred in upholding the Untruthfulness Written Notice based solely on the grievant's denial of one of the charges against her when she spoke to investigators. Primarily, she disputes the agency's evidence that she ever commented to others that she would not have helped her colleague Officer D if Inmate G attacked him. Therefore, she maintains that the record lacks support for the conclusion that her denial of that charge was untruthful. The grievant also challenges the Untruthfulness Written Notice to the extent it hinges on statements she made after the "offense date" listed on the Written Notice form. Finally, the grievant contends that the hearing officer should have mitigated the discipline because termination exceeded the limits of reasonableness for the one offense sustained.

For its part, the agency argues that the hearing officer erred in rescinding the Fraternization Written Notice. The agency points to "uncontradicted" witness testimony that the grievant's contacts with Inmate G exceeded norms for intelligence officers, including listening to hundreds of his calls without documenting the purpose, and meeting with him for extended periods without another officer present. The agency further contends that the hearing officer should have accorded more weight to the judgment of agency administrators as to the significance of the grievant's interactions with inmates as a matter of agency policy.

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[3] *See* Hearing Decision at 1.
[4] *Id.* at 8-9, 11.
[5] *Id.* at 11.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Consideration of the Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] Further, 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.[11] 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.[12] 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.

As an initial matter, EDR will not disturb the hearing decision on grounds that the Untruthfulness Written Notice failed to put the grievant on sufficient notice of the charges against her. The grievant points out that the Untruthfulness Written Notice identifies a date of April 20, 2021 as the "offense date" but then lists allegedly untruthful statements made after that date.[13] However, the Untruthfulness Written Notice articulated in detail the statements alleged to be untruthful and specified that they occurred in the course of the investigation, which was opened on April 20, 2021. Despite the agency's apparent error in entering an offense date to match its description of the offenses, we find no indication in the record that this error impaired the grievant's apprehension of the charges against her or ability to defend them. Accordingly, we will not disturb the hearing decision on this basis.

Regarding the sustained charge articulated in the Untruthfulness Written Notice, the hearing officer concluded that at least one of the grievant's statements to investigators was a "clear" example of the grievant being "untruthful to investigators."[14] The hearing officer credited testimony by Officer P that the grievant "said she would not have stopped Inmate G if he 'jumped' on Officer D."[15] The hearing officer also found that Lieutenant S "heard Grievant say she would not have done anything to help Officer D" in that scenario.[16] Therefore, the hearing officer determined that the grievant was not truthful in her written statement that: "Never did I say that I would not assist [Officer D] if an altercation would have happened."[17]

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[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] *See* Agency Ex. at 6.
[14] Hearing Decision at 11.
[15] *Id.*
[16] *Id.* at 4.
[17] *Id.* at 11; Agency Ex. at 54; *see* Hearing Recording Pt. I at 7:59:55-8:01:35 (grievant's testimony).

The grievant challenges the hearing officer's adoption of a "version of facts where Grievant was present in the office with three co-workers on 3/15/2021, who all overheard . . . similar versions of Grievant's alleged statement."[18] The grievant points out that Lieutenant S referenced comments the grievant made on March 15, 2021, whereas Officer P described hearing the comments between March 22 and March 26; neither witness testified that anyone else was in the room at the time they heard the grievant's comments.[19] To the extent that the hearing officer found that Officer P heard the grievant say she would not help Officer D on March 15, 2021, with others present in the room,[20] we agree that finding does not appear to be supported by the evidence, as Officer P specifically testified that she would not have been at work that day.[21] However, the record does contain evidence supporting the hearing officer's substantive conclusion that witnesses heard the grievant say she would not help Officer D, and we do not agree that his conclusions in that regard turned on the exact date of the comments or on whether the witnesses were present at the same time. Explaining how the agency established that the grievant made the comments and then falsely denied them, the hearing officer determined that "Officer P testified credibly" that she heard the comments.[22] Although Officer P and Lieutenant S cited different dates for when they heard the grievant's comments, this difference is not necessarily a material inconsistency, as the record contains evidence that the grievant could have commented about not helping Officer D on more than one occasion.

According to the grievance procedure, a hearing officer's written decision must "identify and explain the reasoning in resolving" issues of disputed facts.[23] Such reasoning may include a determination that one witness is more credible than another. In this case, the hearing officer appears to have made such a determination in crediting the testimony of Officer P and Lieutenant S over that of the grievant as to what she said regarding not helping Officer D. Consistent with our deferential standard of review as to findings of fact, only exceedingly rare circumstances might merit remand with instructions for the hearing officer to justify a credibility determination. We do not find such circumstances present in this case. Ultimately, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Hearing officers may, but are not required to, detail each of these potential considerations in the hearing decision. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority and, absent evidence that a hearing officer's credibility determination may have been tainted by improper bias, EDR will not second-

[18] Grievant's Request for Administrative Review at 2.
[19] *Id.* at 3; *see* Agency Ex. at 186-188.
[20] Hearing Decision at 4.
[21] Hearing Recording Pt. II at 2:11:50-2:12:30 (Officer P's testimony).
[22] Hearing Decision at 11; Hearing Recording Pt. II at 1:59:25-2:00:45 (Officer P's testimony).
[23] *Rules for Conducting Grievance Hearings* § V(C).

guess those findings where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[24]

Upon a thorough review of the record, EDR concludes that similar reasoning applies to the agency's arguments on appeal. As to the Fraternization Written Notice, the hearing officer found that, unlike other corrections officers, the grievant as an intelligence officer "was expected to build relationships of trust with inmate informants."[25] He further found that "Inmate G was trying to get drugs into the Facility"[26] and that "Inmate M provided the Intel Unit with valuable information about illegal activity within the Facility."[27] The agency does not appear to dispute these findings on appeal. The hearing officer concluded that, under those circumstances, the grievant's behavior was "consistent with attempting to interdict drugs being brought into the Facility" and with maintaining inmates' "favorable impression of the Intel Unit" in order to "maintain [the] flow of information."[28]

The agency disagrees, pointing to testimony by its witnesses that the grievant's actions "were outside the norm for what Intelligence Officers were required to do to cultivate relationships and build trust with inmates."[29] In particular, the agency points to witness testimony that listening to over 200 calls of a particular inmate, in the absence of an active investigation and without taking notes of the call and the reason for it, would not be appropriate; nor would meeting with inmates alone, as the grievant allegedly did on multiple occasions.[30]

A thorough review of the record reveals that the parties presented starkly divergent testimony on the agency's norms and expectations of its intelligence officers in attempting to cultivate informants among the inmate population. The grievant testified that, to the extent she was initially trained as an intelligence officer, such training was "informal," and her understanding was that they should listen to as many inmate calls as possible in spare work time to try to learn useful information about inmate activity.[31] During the events in question, the grievant testified that her activities related to Inmate M were overseen by Lieutenant B and Major R – both of whom left their positions during the agency's investigation or shortly thereafter and did not testify at the hearing.[32] The grievant further testified that she told her supervisor she wanted to review Inmate G's calls for drug-dealing intelligence, and he agreed with her rationale.[33] She testified to her belief that documentation was typically not required or expected when listening to inmate calls or after having discussions with inmates for intelligence purposes.[34]

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[24] *See, e.g.*, EDR Ruling No. 2022-5399; EDR Ruling No. 2020-4976.
[25] Hearing Decision at 8.
[26] *Id.*
[27] *Id.* at 9.
[28] *Id.*
[29] Agency's Request for Administrative Review, Supplement at 5.
[30] *Id.*
[31] Hearing Recording Pt. II at 7:25:35-7:27:30 (grievant's testimony).
[32] *See, e.g.*, *id.* at 7:30:40-7:32:30; Hearing Recording Part II at 1:42:35-1:44:18 (warden's testimony).
[33] Hearing Recording Pt. I at 7:48:01-7:48:52 (grievant's testimony).
[34] Hearing Recording Pt. II at 10:10-13:25 (grievant's testimony).

Ultimately, the agency's burden was to prove that the grievant committed the misconduct of fraternization under its Operating Procedure 135.2, as cited in the Fraternization Written Notice. Operating Procedure 135.2 prohibits fraternization, defined as "[e]mployee association with offenders . . . outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior . . . ."[35] The policy further provides: "Associations between staff and offenders that may compromise security, or undermine the employee's ability to carry out their responsibilities may be treated as a Group III offense . . . ."[36] Although multiple agency witnesses testified that they disagreed with the grievant's conduct as a matter of sound intelligence practices, the hearing officer was entitled to credit the grievant's testimony that her activities had legitimate intelligence-related motivations. The agency argues that its witnesses' concerns about the grievant's actions deserved more deference, but we cannot say that the evidence required the hearing officer to infer an unprofessional or personal relationship with any inmates. Similarly, the hearing officer did not find that the grievant engaged in conduct that compromised security or undermined her responsibilities, and upon a thorough review of the record, we perceive no error in that determination.

In sum, we recognize that the evidence in this case required the hearing officer to resolve several material inconsistencies and to draw reasonable inferences from his findings. Even if we disagreed with the hearing officer's inferences, we have consistently held that conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer. Although both parties take issue with the hearing officer's judgments in this case, we conclude that his findings are based on evidence in the record and sufficiently explained in the hearing decision. Therefore, we have no basis to second-guess the hearing officer's consideration of the evidence presented. Accordingly, we will not disturb the hearing decision on these grounds.

Mitigation

On appeal, the grievant also argues that the hearing officer failed to properly consider mitigating factors that caused the agency's disciplinary action to exceed the limits of reasonableness. By 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]."[37] 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."[38] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written

[35] Agency Ex. at 245. Under this definition, examples of fraternization include "non-work related visits between offenders and employees" and "discussing employee personal matters . . . with offenders." *Id.*
[36] *Id.* at 244.
[37] Va. Code § 2.2-3005(C)(6).
[38] *Rules for Conducting Grievance Hearings* § VI(A).

Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[39]

Because reasonable persons may disagree over whether and 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 high.[40] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, he or she "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[41] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[42] and will reverse the determination only for clear error.

In this case, as explained above, the hearing officer sustained the agency's charge of untruthfulness based on evidence in the record. The agency has given no indication at any time during the grievance process that it would desire a lesser penalty than termination based on fewer charges sustained. Under DHRM Policy 1.60, *Standards of Conduct*, a Group III Written Notice is appropriate for offenses that "constitute illegal or unethical conduct."[43] In addition, the facility warden testified at the hearing that intelligence officers like the grievant are "privy to a lot of sensitive information" that other employees are not, requiring a high level of trust.[44] Consistent with the evidence and applicable policies, the hearing officer concluded that the grievant engaged in certain conduct alleged in the Untruthfulness Written Notice and that this conduct constituted misconduct consistent with a Group III Written Notice. DHRM Policy 1.60, *Standards of Conduct*, provides that a Group III Written Notice generally should result in termination – the discipline imposed in this case.[45] Where a Group III Written Notice has been sustained and the agency has removed the grievant from employment, we do not require an agency to offer additional proof of

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[39] *Id.* § VI(B).

[40] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

[41] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[42] "'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.*

[43] DHRM Policy 1.60, *Standards of Conduct*, eff. Apr. 16, 2008, at 9.

[44] Hearing Recording Pt. I at 6:57:40-6:58:50 (warden's testimony).

[45] DHRM Policy 1.60, *Standards of Conduct*, eff. Apr. 16, 2008.

intent to terminate.[46] Therefore, we find no error in the hearing officer's conclusion that the agency's chosen penalty of termination was warranted for the offense of making untruthful statements to agency investigators.

The grievant argues that she "should have the right to rebut and challenge the allegations against her in a pre-disciplinary process without fear that any marginally inconsistent statement in her own defense will [be] asserted as an alternative basis to support a termination."[47] Although we generally agree with these principles, we also recognize the agency's right to identify dishonesty by its employees during work activities and to invoke the disciplinary process to address it. The grievance procedure requires the agency to prove such charges at a hearing, which it did in this instance by presenting witness testimony that was accepted as credible by a neutral hearing officer. As explained above, we have no basis to disturb the hearing officer's findings in that regard. Even if the hearing officer believed a lesser penalty would be more reasonable than termination under the circumstances, he lacked authority to mitigate the penalty by substituting his own judgment for the agency's discretion to maintain a trustworthy and reliable workforce.[48] Likewise, EDR cannot say that the hearing officer abused his discretion in finding that the agency's Group III Written Notice with removal was within the bounds of reasonableness.

Hearing Record Issue

While the agency provided a purportedly fully complete copy of both Group III Written Notices in this case with its Form B request for the appointment of a hearing officer, both parties submitted undated, unsigned versions of the Written Notices as hearing exhibits that appear different.[49] Although neither the hearing officer nor the parties appear to have addressed this issue, EDR cannot uphold the result in this case without addressing this fundamental failure of the record evidence. It may very well be that the two versions of the Written Notices do not differ in any material ways that impact the outcome in this case.[50] However, the hearing record must be supplemented so that the accurate version of the Written Notices are part of the record, especially in light of the parties' appeal rights. As such, the case is remanded to the hearing officer to reopen the record for the proper version of the Written Notice forms. The hearing officer may be able to do this by the equivalent of judicial notice or by requesting submissions by the parties. The hearing officer must then issue a remand decision that addresses what steps were taken to correct the record and make any further determinations in the case as appropriate due to the updated record.

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[46] *See* EDR Ruling No. 2020-5027.
[47] Grievant's Request for Administrative Review at 4.
[48] *See* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings*§ VI(B)(2).
[49] Agency Ex. at 3-8; Grievant Exs. 1, 2.
[50] The fully complete versions of both Group III Written Notices provided to EDR at the time of appointment of the hearing officer are also signed by the grievant as received. Therefore, it appears that the grievant was on notice of the completed versions of the Written Notices.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision based on the parties' submissions. However, the matter is remanded to the hearing officer for further proceedings to correct the record as to the appropriate version of the Written Notice form and resulting determinations that might impact the case, if any. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[51] 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.[52] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[53]

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