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ADMINISTRATIVE REVIEW

In the matter of Virginia Department of Corrections
Ruling Number 2023-5458
September 28, 2022

The grievant has 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 11821. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11821, as found by the hearing officer, are as follows:[1]

> The Virginia Department of Corrections [(the "agency")] employed Grievant as a Unit Manager at one of its facilities. He received an overall rating of "Extraordinary Contributor" on his November 2021 annual performance evaluation.
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> The Counselor worked at the Facility from June 2021 through December 2021. The Counselor reported to Grievant. Grievant and the Counselor lived in the same apartment complex. The Counselor lived in an apartment below Grievant's apartment. They encountered each other at work and also when they were going to and from their homes.
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> Grievant and the Counselor exchanged cell phone numbers and communicated by text message. On June 11, 2021, Grievant sent the Counselor a text message, "I'm tight right now. Wyd." The Counselor replied, "Why? I'm in the bath lol." Grievant responded, "I'm cumin through." Several minutes later, Grievant asked, "Have u got out the tub Yet." The Counselor wrote, "Yes lol." Grievant wrote, "Make room for me."
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> On June 17, 2021, Grievant sent the Counselor a text message, "Is your ass [as] phat as it looks or is it just me." The Counselor replied, "I don't know come

[1] Decision of Hearing Officer, Case No. 11821 ("Hearing Decision"), Aug. 31, 2022, at 2-3.

look I'm back outside [three laughing emoji's]." Grievant said, "Send me a pick or snap." Grievant wrote, "U want some company in the morning???" The Counselor replied, "Lmaoooo nooooo." Grievant asked, "Why not???" The Counselor said, "Because we can't Lmao." Grievant wrote, "No strings attached." Grievant asked the Counselor about who was in the interview panel for a job interview she had at another facility. The Counselor told him the names and Grievant replied, "And u don't have a thong on." The Counselor replied, "yes I do." Grievant wrote, "I want to see it."

On August 23, 2021 at 6:19 a.m., Grievant sent the Counselor text messages asking if she was awake and dressed. He added, "Want some company." The Counselor replied, "Lmao no. I'm trying to fix my hair and wake up." Grievant said, "I need to release some stress. *** Do you want to help me out." The Counselor said, "No lol I'm leaving for work." The Counselor understood Grievant's comment to refer to having sex to release some stress.

On November 3, 2021, Grievant sent the Counselor a text, "Did you have under garment on today."

Grievant and the Counselor spoke at work. On several occasions, Grievant told the Counselor, "Your ass looks fat today," "I see you do have boobs, I didn't think you did", and "I'm gonna blow your back out soon, just wait for it."

The Counselor believed that Grievant was having a bad day and asked him if he was okay and if there was any work she could do to assist him. Grievant said, "No, the only thing you can do it sit on this pole when the time come and relieve this pressure." Grievant used the word "pressure" to refer to sex.

Grievant knew the Counselor was seeking a promotion at another facility. On June 11, 2021 after the Counselor was interviewed for a position, Grievant told her, "Okay, I guess I can try to make this happen for you. If this goes through you can thank me later." The Counselor understood Grievant's comment to mean she was to reward him with sex for assisting her with her career.

On December 6, 2021, the Counselor wrote a statement to Agency managers that she was being sexually harassed by Grievant. She expressed concern for her safety and career. She wrote that, "when I realized this is something I could not handle any more and was looking to leave DOC as a whole."

On December 9, 2021, the Counselor left the Facility to work at another agency.

The agency issued to the grievant a Group III Written Notice on March 9, 2022 with removal for sexually harassing a subordinate.[2] The grievant timely grieved the disciplinary action, and a hearing was held on August 12, 2022.[3] In a decision dated August 31, 2022, the hearing

[2] Hearing Decision at 1; Agency Exs. at 1-2.
[3] *See* Hearing Decision at 1.

officer determined that the agency had presented sufficient evidence to support the Written Notice on grounds that the grievant created a hostile work environment for the subordinate and, thus, the grievant's removal must be upheld.[4] The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.[5] The grievant now appeals the 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.

Hearing Officer's Consideration of Evidence

The grievant challenges the factual determinations made by the hearing officer. 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 on 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.

The hearing officer found that the grievant created a hostile work environment for a subordinate by making "pervasive repeated sexual comments and innuendos of a sexual nature."[13] While the grievant contests these findings and testified at the hearing to his viewpoint of the circumstances, there is evidence in the record to support the hearing officer's findings, to include

[4] *Id.* at 5.
[5] *Id.* at 6.
[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).
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[12] *Grievance Procedure Manual* § 5.8(2).
[13] Hearing Decision at 5.

direct testimony from the subordinate and documentation of text messages replete with sexual comments and innuendo.[14] 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. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer 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.[15] Accordingly, EDR declines to disturb the hearing decision on these grounds.

Mitigation

The grievant has also argued that the discipline he received should be mitigated based on the evidence he submitted about how other employees were disciplined. 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]."[16] 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."[17] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written 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.[18]

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.[19] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "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."[20] EDR,

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[14] *E.g.*, Agency Exs. at 39-89.
[15] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[16] Va. Code § 2.2-3005(C)(6).
[17] *Rules for Conducting Grievance Hearings* § VI(A).
[18] *Id.* at § VI(B)(1).
[19] 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).
[20] *Rules for Conducting Grievance Hearings* § VI(B)(1).

in turn, will review a hearing officer's mitigation determination for abuse of discretion[21] and will reverse the determination only for clear error.

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, termination is an inherently reasonable outcome.[22] Moreover, a hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[23] In the decision, the hearing officer considered the grievant's evidence regarding mitigation, finding that no mitigating circumstances existed to reduce the disciplinary action.[24] Having reviewed the evidence in the record regarding the grievant's arguments of inconsistent discipline, EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Thus, we cannot say that the hearing officer abused his discretion in finding that the Group III with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. 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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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[21] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

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

[23] *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21; *e.g.* EDR Ruling No. 2014-3777.

[24] Hearing Decision at 6.

[25] *Grievance Procedure Manual* § 7.2(d).

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

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