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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2023-5475  
December 8, 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 11826. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11826, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Behavioral Health and Developmental Services employs Grievant as a Security Officer III at one of its facilities. His duties included transporting food throughout the Facility. Some of his duties included de-escalating conflicts. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. B was a cook who worked in the Facility’s kitchen. Ms. H also worked in the kitchen. She is Grievant’s [sister].

On January 19, 2022, Grievant and his sister, Ms. H, were in a main hallway talking. Grievant was carrying a cooler in one hand. Mr. B walked out of the kitchen doorway and into the main hallway. He walked past Ms. H and entered the walk-in freezer in the main hallway. He walked out of the freezer and towards the kitchen door. Ms. H had her back to Mr. B as she spoke to Grievant. Mr. B turned his face towards Ms. H, glanced down, and said, “dumb ass” to Ms. H. Grievant heard Mr. B say “dumb ass”, but Grievant asked Ms. H “What did he say?” Ms. H said that Mr. B called her that all the time. Grievant was shocked by Mr. B’s language. Grievant thought that it “did not feel right.” Grievant told his sister, “He’s not going

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<sup>1</sup> Decision of Hearing Officer, Case No. 11826 (“Hearing Decision”), Oct. 5, 2022, at 2-4 (footnotes omitted).

to disrespect” like that. He opened the door to enter the kitchen hallway to confront Mr. B. Ms. H walked behind him.

After returning to the kitchen, Mr. B walked to a refrigerator and opened it. A metal table was between him and the kitchen hallway. After having opened the kitchen door and walked down the kitchen hallway, Grievant approached Mr. B. Grievant stood on one side of the metal table and Mr. B stood on the other side. Grievant said to Mr. B, “What did you say?” Grievant’s voice and tone were not elevated. Mr. B pointed his finger at Grievant’s face. Mr. B said, “You don’t want none of this.” Grievant said, “What did you say to me?” Grievant took a short step to his left. This positioned him closer to the table’s edge and closer to walking around the table, but Grievant remained on his side of the metal table. Mr. B took a short step to his right and then two steps forward. He passed his side of the table and stood one or two feet in front of Grievant in order to confront Grievant. Mr. B screamed and cursed at Grievant. Grievant argued with Mr. B but did not raise his voice or curse at Mr. B.

Mr. G was also in the kitchen at another kitchen table but on the same side of the table as Mr. B. Mr. G observed Mr. B and Grievant arguing. Mr. G walked five steps towards Grievant and Mr. B and began screaming and threatening Grievant.

The Food Service Supervisor, Ms. D, was in the kitchen and she observed the conflict. Ms. D observed Mr. B position himself in front of Grievant. Ms. D believed Grievant and Mr. B were getting ready to fight. She stepped between Grievant and Mr. B and began pushing Mr. B backwards. Mr. B moved backwards and Grievant and Mr. B kept arguing with each other. Ms. D yelled to Ms. H1 to call an emergency. Ms. D asked Grievant to leave the kitchen. Grievant turned around and began walking through the kitchen hallway and towards the kitchen door.

After Grievant was out of the kitchen, Mr. B continued to yell at Grievant even though Grievant had walked down the kitchen hallway. A male employee got in front of Mr. B and began moving him backwards to stop Mr. B from following Grievant. Mr. B took four or five steps towards the kitchen door while pushing the employee. The employee was able to stop Mr. B and pushed Mr. B back behind the metal table.

Mr. B briefly resumed his work duties by taking a tray to another part of the kitchen. He then returned to the metal table and began yelling down the hallway towards Grievant. The other employee again had to restrain Mr. B. Mr. B pushed the other employee several steps towards the kitchen door as the other employee attempted to stop Mr. B’s advance. Mr. B then resumed his work duties.

Ms. H1 used her radio to announce an emergency in the kitchen. Officer G was part of the Facility’s Emergency Response Team and he began walking to the kitchen where he believed a fight was in progress.

After Grievant walked through the kitchen hallway he attempted to exit the kitchen area. Officer G told Grievant to go with him to the kitchen because an emergency had been announced over the radio and there was a fight in the kitchen. Officer G did not know that Grievant was a participant in that emergency. Grievant began walking back to the kitchen and stopped at the end of the kitchen hallway away from Mr. B's location. Grievant would not have returned to the kitchen if Officer G had not indicated Grievant should do so.

Mr. G began walking in the kitchen hallway towards Grievant's location. Mr. G was attempting to confront Grievant. Mr. G pulled down his mask and said, "Remember this face, you don't want none of this, mother—ker, we can meet in the parking lot." Ms. D observed Mr. G approaching and she approached him to stop his advance. She attempted to turn Mr. G around to cause him to return to the main kitchen area. A security officer grabbed Grievant's right shoulder and began to turn him in the direction of a doorway to exit the kitchen hallway. Grievant backed to his side to avoid the security officer. Grievant then placed his left hand on the security officer's right shoulder in order to brush the security officer to the side so he could move towards Mr. G. Mr. G remained in the kitchen hallway yelling at Grievant. Another security officer began assisting to move Grievant out of the kitchen hallway. Grievant left the kitchen hallway and the incident concluded. Officer G did not hear Grievant threaten anyone.

Throughout the incident, Grievant continued to hold a cooler in one of his hands.

Mr. G was a probationary employee. The Agency removed Mr. G from employment. The Agency did not take disciplinary action against Mr. B. The Agency counseled Mr. B.

The agency issued to the grievant a Group II Written Notice on February 14, 2022 for failure to follow policy.<sup>2</sup> The grievant timely grieved the disciplinary action, and a hearing was held on September 16, 2022.<sup>3</sup> In a decision dated October 5, 2022, the hearing officer determined that the agency had presented sufficient evidence to support the issuance of the Written Notice on grounds that the grievant violated DHRM Policy 2.35, *Civility in the Workplace*.<sup>4</sup> However, the hearing officer also concluded that the grievant proved sufficient mitigating circumstances to reduce the disciplinary action to a Group I Written Notice.<sup>5</sup> 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 . . ."<sup>6</sup> If the hearing officer's exercise of

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<sup>2</sup> Agency Exs. at 1; *see* Hearing Decision at 1.

<sup>3</sup> *See* Hearing Decision at 1.

<sup>4</sup> *Id.* at 4-5.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

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.<sup>7</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>8</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

The grievant has argued that the discipline he received should be mitigated based on the evidence in the record 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].”<sup>9</sup> The *Rules for Conducting Grievance Hearings* 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.”<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.”<sup>13</sup> EDR, in turn, will review a hearing officer’s mitigation determination for abuse of discretion<sup>14</sup> and will reverse the determination only for clear error.

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<sup>7</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>8</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>9</sup> Va. Code § 2.2-3005(C)(6).

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>11</sup> *Id.* at § VI(B)(1).

<sup>12</sup> 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).

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>14</sup> “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

Although mitigation should be utilized only in the exceptional circumstance, the hearing officer did so in this case on grounds that the agency disciplined Mr. B more leniently (a counseling memorandum) for more egregious behavior as compared with the grievant. Ultimately, the hearing officer nevertheless upheld discipline at the Group I level based on the grievant's specialized de-escalation responsibilities, distinct from Mr. B's position. Arguably, the level of evidence of misconduct an agency must present to support the issuance of a Group I Written Notice, which may be appropriate for any instance of "unsatisfactory performance," is not high.<sup>15</sup> The hearing officer's determination in this regard is supported by the record.<sup>16</sup>

Nevertheless, the grievant argues in his appeal that he should not have received harsher disciplinary action than Mr. B received, as all agency employees are required to take a training that inherently teaches the employees to prevent any escalation of conflicts. For that reason, the grievant argues he should have been held to the same standard as the kitchen cook. Having reviewed the evidence in the record regarding the grievant's arguments of inconsistent discipline, however, EDR perceives no error in the hearing officer's consideration of the mitigating factors. The hearing officer properly followed the applicable procedure by considering the relevant factors, including the seriousness of the employees' involvement in the incident, the relative discipline of the other parties involved, and the job status of the employees. Although the grievant disagrees with the weight the hearing officer accorded to these factors, the hearing officer's consideration of the factors was reasonable within the limits of the imperative to sustain the "maximum reasonable level" of disciplinary action, based on consideration of all the relevant facts. Thus, we cannot say that the hearing officer abused his discretion in finding that a Group I Written Notice was within the bounds of reasonableness under the circumstances. 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.<sup>17</sup> 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.<sup>18</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>19</sup>

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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.").

<sup>15</sup> *See* DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped By Level."

<sup>16</sup> Hearing Decision at 1; Hearing Recording at 1:54:30-1:55:15 (Agency Human Resources testimony); *see also* Agency Exs. at 9 (explaining the grievant's role as a security officer and the purpose of such role being to maintain order within the agency).

<sup>17</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>18</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>19</sup> *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).