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ADMINISTRATIVE REVIEW

In the matter of the Department of Fire Programs
Ruling Number 2023-5582
August 11, 2023

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 11919. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11919, as found by the hearing officer, are incorporated by reference within this ruling.[1]

The agency issued to the grievant five Group II Written Notices and one Group I Written Notice, all on November 30, 2022, and all for failure to follow instructions or policy and neglect of duty.[2] The Written Notices culminated in termination effective November 30, 2022.[3] The grievant timely grieved the disciplinary actions, and a hearing was held on May 8, 2023.[4] In a decision dated June 14, 2023, the hearing officer determined that the agency had presented sufficient evidence to support all Written Notices on grounds that the grievant violated numerous policies, including DHRM Policy 1.60, and that the violations each rose to the level of a Group II or I offense, as designated.[5] The hearing officer also concluded that no mitigating circumstances existed to reduce or remove the disciplinary actions.[6] 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

[1] Decision of Hearing Officer, Case No. 11919 ("Hearing Decision"), June 14, 2023, at 4-12.
[2] Hearing Decision at 2; Agency Ex. 2-7.
[3] Hearing Decision at 2.
[4] *Id*.
[5] *Id.* at 15.
[6] *Id.* at 18.

. . . procedural compliance with the grievance procedure . . . ."[7] 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.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Mitigation

The grievant on appeal appears to primarily challenge the hearing officer's consideration of mitigating factors, such as her length of service, performance ratings, witness testimony, and the COVID-19 pandemic. 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]."[10] 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."[11] 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.[12]

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.[13] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[14] and will reverse the determination only for clear error.

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[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005(C)(6).
[11] *Rules for Conducting Grievance Hearings* § VI(A).
[12] *Id.* § VI(B).
[13] 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).
[14] "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

The hearing officer found that there were no mitigating factors to justify further reduction of the disciplinary actions.[15] EDR interprets the grievant's appeal essentially to argue that both the agency and the hearing officer failed to consider "(1) Length of time of service 17 years with agency; (2) COVID-19 Pandemic; (3) Performance Ratings; (4) Witnesses from Training Departments plus past Chief; [and] (5) Severance Package/Salary."[16] However, the first three of these factors cited by the grievant are explicitly mentioned in the hearing officer's mitigation analysis.[17] The hearing officer's determinations follow previous EDR rulings that have held that factors such as tenure and past performance rarely support a finding that a disciplinary action exceeded the limits of reasonableness; the more serious the disciplinary charges, the less significantly such factors play into mitigation.[18] The hearing officer found that despite the grievant's length of tenure, lack of disciplinary actions, and consistently high performance ratings, these factors were not enough to overturn the agency's disciplinary actions, based on the grievant's position of leadership and the importance of her consistently attending work and performing her duties.[19] In regards to these three factors the grievant raised on appeal, EDR finds no error or abuse of discretion in the hearing officer's determination that the agency's disciplinary actions did not exceed the limits of reasonableness.

The two factors mentioned on appeal that the hearing officer did not explicitly discuss are the issue of witnesses in the Training Department, including the past Chief, and the issue of a severance package and/or the grievant's salary. Not including herself, the grievant put on four witnesses: a former coworker, a fire instructor, a former recruiting instructor, and her former supervisor, a division chief at the agency.[20] The former Chief she is referring to is likely the Branch Chief of Training and Operations, who in the past had issued written counseling to the grievant regarding her attendance.[21] Based on a review of the hearing recording and the witnesses' testimony, EDR cannot find evidence in the record regarding the former Chief or other Training Department members that the hearing officer failed to consider, or that would support finding that the disciplinary actions exceeded the limits of reasonableness. For these reasons, EDR declines to disturb the hearing decision on these grounds.

Finally, upon review of the hearing recording, EDR cannot find at any point a discussion of the grievant's salary or details of a severance package. For this reason, EDR will not disturb the hearing decision on the grounds of this factor referenced on appeal.

Overall, we cannot find that the hearing officer erred in determining that the mentioned factors did not rise to a level of unreasonableness that would warrant reducing or rescinding the agency's disciplinary action. In assessing mitigating factors, a hearing officer "will not freely substitute [their] judgment for that of the agency on the question of what is the best penalty, but

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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.").

[15] Hearing Decision at 18.

[16] Grievant's Request for Administrative Review. To the extent this ruling does not consider any other challenge the grievant intended to raise, EDR has thoroughly reviewed the grievance and hearing record and found no basis to disturb the hearing decision.

[17] Hearing Decision at 16.

[18] *Id.*; *see also* EDR Ruling 2010-2368; EDR Ruling No. 2008- 1903; EDR Ruling No. 2007-1518.

[19] Hearing Decision at 16-17.

[20] *See* Hearing Recording Part 6 at 0:30-8:30, 21:25-29:45, 40:55-51:30; Hearing Recording Part 7 at 8:50-42:45.

[21] Hearing Decision at 7; Agency Ex. 16 at 1.

will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[22] EDR has found no specific evidence of mitigating factors presented in the record that were not adequately addressed in the decision or that would support a different result. Thus, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. 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.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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[22] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).
[23] *Grievance Procedure Manual* § 7.2(d).
[24] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[25] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).