JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5589
August 8, 2023

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 11876. For the reasons set forth below, EDR remands this matter for further consideration.

FACTS

The relevant facts in Case Number 11876, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employs Grievant as a Counselor Senior at one of its facilities. She used to work as a Unit Manager prior to her demotion. She has been employed by the Agency for over 20 years. Grievant had favorable annual performance evaluations.
>
> When Grievant was a Unit Manager, she was responsible for supervising the activities inside a housing unit. In particular, she was responsible for supervising the activities inside a Restrictive Housing Unit with inmates who were especially difficult to supervise.
>
> On April 29, 2022, Inmate S was verbally combative. He had a history of lewd and obscene acts towards staff. Grievant noticed that the tray slot of the cell door was open when it should have been closed. Inmate S refused to allow the tray slot to be closed. Grievant ordered Inmate S to cuff up but he refused. Grievant called for assistance. The Lieutenant[2] and several other security staff arrived. The Lieutenant carried a can of OC spray on his duty belt. Grievant did not carry OC spray. She did not have a current re-certification to use OC spray. While speaking

[1] Decision of Hearing Officer, Case No. 11876 ("Hearing Decision"), June 20, 2023, at 2-4 (footnotes renumbered).

[2] The Lieutenant also received a Group III Written Notice. The Warden testified that the Lieutenant admitted a portion of his incident report was written by Grievant and that he should not have allowed that action.

with Inmate S when the cell door was open, Grievant grabbed the can of OC spray from the Lieutenant's duty belt and sprayed Inmate S in the face. Inmate S backed into his cell and Grievant and several security staff entered the cell. Inmate S was restrained and removed from the cell.

Spraying an inmate with OC spray is a use of force.

Grievant wrote an incident report describing her interaction with Inmate S on April 29, 2022. Grievant wrote:

> [Inmate S] was present in cell [number] with the tray slot open, in which after several rude remarks which encourage myself to secure the tray slot, [Inmate S] proceeded to stick his arm through the slot while stating "Hell naw, you not shutting this s—t, you don't run s—t." [Grievant] was prevented from removing my hand from the sliding lock because [Inmate S's] arm and hand were over top of [mine] preventing it from moving. I immediately called for assistance, in which, several staff members had to respond which interrupted institutional operations. The cell was accessed and [Inmate S] received a ½ to 1 second burst of O.C. spray to his upper facial area, at this time I was able to free my arm and [Inmate S] complied.[3]

The Lieutenant wrote an incident report stating, "[Grievant] administered a one half second burst of OC spray to his upper forehead area."[4]

On May 24, 2022, Grievant was working in the Restrictive Housing Unit. An RHU Inmate broke a sprinkler head inside of his cell. This resulted in water spreading throughout his cell and into the pod. Breaking the sprinkler head activated the fire alarm.

Grievant, Lieutenant H, Sergeant W, and Officer W walked towards Inmate K's cell. Grievant instructed Inmate K to come to the cell door and cuff up. Inmate K shook his head to indicate "no." Grievant did not call for a cell extraction team with appropriate training and equipment. Instead, the three security staff entered Inmate K's cell while Grievant remained outside the doorway. One of the security staff brought Inmate K out of his cell. Inmate K was handcuffed with his hands behind his back. The other two security staff followed. Grievant and the three security staff escorted Inmate K out of the pod. They walked through several inches of water.

---

[3] Grievant later wrote that she used the OC spray on Inmate S because she feared for her life. She stated she reported the incident as a use of force.

[4] It is unclear whether Grievant wrote this part of the Lieutenant's statement or the Lieutenant wrote it.

> It is unclear whether the water was turned off before or after Grievant arrived to the cell. One report suggested that the water was turned off in approximately five minutes.[5] Grievant wrote that staff lacked the experience to turn off the water and that water was pouring on Inmate K as they encountered him. Grievant wrote that she accessed Inmate K's cell because she was concerned that he may have harmed himself and that he may have popped the sprinkler heads in order to get help for himself.
>
> The Agency could have issued written notices for the April 29, 2022 incident and the May 24, 2022 incident. The Agency chose to combine the two incidents and issue one notice.

On July 25, 2022, the agency issued to the grievant a Group III Written Notice 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.[6] The grievant timely grieved this disciplinary action, and a hearing was held on March 15, 2023.[7] In a decision dated June 20, 2023, the hearing officer determined that the agency had "presented sufficient evidence to support the issuance of a Group III Written Notice."[8] The hearing officer determined that the grievant omitted key information in an incident report and failed to follow agency safety rules in conducting a cell extraction.[9] Moreover, the hearing officer found that the grievant presented insufficient evidence to substantiate her defenses, and that there was no basis for mitigation of the disciplinary action.[10]

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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."[11] 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 a party; the sole remedy is that the hearing officer correct the noncompliance.[12] The Director of DHRM also has the sole authority to make a final determination on whether the hearing

[5] Agency Exhibit 16.
[6] Agency Exs. at 3-6; *see* Hearing Decision at 1.
[7] *See* Hearing Decision at 1.
[8] *Id.* at 6.
[9] *Id.* at 5-6.
[10] *Id.* at 6-7.
[11] Va. Code §§ 2.2-1202.1(2), (3), (5).
[12] *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.[13] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.[14]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[16] 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.[17] 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.[18] 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.[19]

Due Process

The grievant appears to argue that the agency failed to provide sufficient pre-disciplinary due process. First, the grievant states that the hearing officer failed to address the Correctional Officer Procedural Guarantee Act (COPGA)[20] in the decision. Testimony at the hearing reflects that the agency's position is that the COPGA does not apply to the grievant as a unit manager, but only applies to the agency's ranked security staff.[21] The grievant disagrees with this assessment.[22] By its terms, the COPGA applies to "duly sworn" agency employees "whose normal duties relate to maintaining immediate control, supervision, and custody of prisoners confined in any state correctional facility."[23] Evidence available in the hearing record does not establish whether the grievant was considered a "duly sworn" agency employee at the time of the events giving rise to this case. Assuming without deciding that the COPGA applies to the grievant, the provisions of the COPGA principally relate to pre-disciplinary due process steps, which will be considered

[13] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[14] The grievant's advocate requested that this review be conducted by the DHRM Director herself. The DHRM Director responded to the grievant's advocate declining that request and directed that this review be conducted consistent with normal practices by EDR.
[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] *Grievance Procedure Manual* § 5.8.
[19] The grievant's appeal does not appear to challenge any factual determinations made by the hearing officer or otherwise contest the facts on which the disciplinary action was found to be supported by the record evidence. Nevertheless, EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged in the Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy.
[20] Va. Code §§ 9.1-508 through -512.
[21] *See* Hearing Recording at 2:48:17-2:49:31.
[22] *See id.*
[23] Va. Code § 9.1-508.

accordingly in this ruling.[24] The grievant also appears to argue that she was not notified of alleged policy violations through pre-disciplinary due process.

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[25] In pre-disciplinary contexts, the due process requirements of notice and an opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct their behavior. Rather, the pre-disciplinary process need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[26] Accordingly, state disciplinary policy requires that

> [p]rior to the issuance of Written Notices, [as well as disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations,] employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.[27]

In addition, the *Rules for Conducting Grievance Hearings* provide that an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[28]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[29] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[30] Therefore, EDR has previously

---

[24] *See* Va. Code § 9.1-509.

[25] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property.").

[26] *Loudermill*, 470 U.S. at 545-46.

[27] DHRM Policy 1.60, *Standards of Conduct*, at 10. The Commonwealth's Written Notice form for formal disciplinary actions instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence." DHRM, *Written Notice*.

[28] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[29] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[30] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or a lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present

held, in accordance with many jurisdictions, that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[31] Even assuming that the pre-disciplinary due process afforded to the grievant was somehow deficient, the full post-disciplinary due process described above cured any error.[32] Accordingly, EDR finds no due process violation as a matter of the grievance procedure warranting remand.

Document Request Issues

In her appeal, the grievant raises issues concerning "15 categories of evidence" allegedly withheld by the agency in this case. While the grievant's appeal does not identify what these categories are or their impact on the case, EDR is able to deduce from case correspondence the history of this issue. On January 3, 2023, the grievant asked the hearing officer to order production of 11 categories of documents that had apparently been sought from the agency in the previous weeks. On January 5, 2023, the hearing officer issued an order for the agency to produce seven categories of documents.[33] The record does not reflect what records were ultimately produced by the agency. However, on the day of the hearing, the grievant identified to the hearing officer 13 categories of documents that the agency allegedly had failed to produce. At the beginning of the hearing, the agency stated on the record that they would produce the records that exist.[34] The hearing officer indicated that the record would be held open following the conclusion of the hearing for the grievant to supplement with any additional documents produced by the agency.[35] The grievant sought adverse inferences against the agency for their failure to produce the records, which was not granted by the hearing officer at that time.[36] Following the hearing, it appears that the agency produced no additional records. The grievant thereupon submitted a request to the hearing officer to again find against the agency and seeking adverse inferences for the categories of documents allegedly withheld, adding two new categories (bringing the total to 15 categories). The agency does not appear to have responded to that submission. Additionally, the hearing officer did not include any discussion of these issues or the grievant's request for adverse inferences in the hearing decision. Following issuance of the decision, the grievant questioned why the matter had not been addressed. In response, the agency appears to assert that the grievant is seeking "documents to which EDR said the grievant was not entitled."[37] The agency further stated that other documents requested did not exist or are included in the grievant's hearing exhibits. The

---

testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[31] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).

[32] To the extent the grievant argues that the agency failed to provide notice of alleged policy violations, the Written Notice issued to the grievant reflects multiple policy violations. Agency Exs. at 3-6. Therefore, the grievant had notice prior to the hearing about alleged violations of policy.

[33] This order would become the subject of a compliance ruling request to EDR. *See* EDR Ruling Nos. 2023-5502, 2023-5503.

[34] Hearing Recording at 17:35-18:19, 1:19:40-1:21:01.

[35] *Id.*

[36] *Id.*

[37] While we will address the specific document requests in turn, only certain portions of the hearing officer's order for documents were addressed and limited in EDR Ruling Nos. 2023-5502, 2023-5503. Other categories ordered by the hearing officer were not addressed in the ruling.

agency has provided no detailed response to each of the 15 categories of evidence allegedly withheld.[38] EDR will address each briefly below, but because of the lack of information in the record or apparent resolution by the hearing officer, many of these issues will be remanded for further consideration.

The *Rules for Conducting Grievance Hearings* provide that hearing officers "have the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents …. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents …. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor."[39] Hearing officers may only draw adverse inferences for failure to produce records that have been ordered produced by the hearing officer.[40] Therefore, in assessing whether an adverse inference should have been considered in this case, we will refer back to whether the hearing officer had ordered production of the documentation allegedly withheld.

Omitted Written Notices

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.

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

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).[41] 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

[38] As such a detailed response has not been provided, we have no way of knowing which records the agency states do not exist, and which are in the grievant's exhibits. Unless otherwise noted in the discussion below, it does not appear that the records the grievant argues the agency withheld were part of the grievant's exhibits.
[39] *Rules for Conducting Grievance Hearings* § V(B). The grievant has not submitted any indication of what factual disputes any such adverse inferences would resolve.
[40] *Id.* §§ III(E), V(B); *see also*, *e.g.*, EDR Ruling No. 2020-5032.
[41] *See* Agency Exs. at 9.

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.

COPGA Investigation Notices

The grievant seeks COPGA Investigation Notices for the disciplinary action issued to the grievant. As discussed above, it does not appear that the agency considered the COPGA to apply to the grievant in her role as a unit manager. Accordingly, the available evidence suggests that these notices do not exist. Therefore, there would be no basis for an adverse inference as to these records. This request need not be further considered on remand.

Incident Report for the April 29, 2022 incident

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.[42] It is not clear how the grievant obtained an apparent copy of the 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.

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

As stated above, the 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.[43] 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.

After-action report for the April 29, 2022 incident

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.

[42] Grievant's Exs. at 27.
[43] Hearing Recording at 2:43:34-2:44:55.

Internal Incident Report by another individual for the May 24, 2022 incident

As stated above, the 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.

List of official designees authorized to approve the use of chemical agents

EDR cannot find that this list, to the extent it exists, was either requested by the grievant or reasonably within the scope of an order for production by the hearing officer. Accordingly, there would be no basis to consider an adverse inference as to this request and it need not be considered on remand.

Email between Regional Administrator and Human Resources

The grievant indicates that an email to the grievant on August 10, 2022 alluded to emails between the Regional Administrator and Human Resources. EDR has reviewed the hundreds of pages of exhibits, but we have been unable to locate the August 10, 2022 email to the grievant. The grievant did not provide a copy with the appeal or a citation to a portion of the record evidence. Accordingly, we are unable to determine whether these records could be reasonably interpreted to have been ordered produced by the hearing officer. As we have no indication that the hearing officer ordered the agency to produce these records, there would be no basis to consider an adverse inference as to this request and it need not be considered on remand.

Documents regarding grievant's EEO complaint

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 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.[44] 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.

[44] *See* Grievant's Exs. 4-6, 12-13.

Written Notice issued to the Lieutenant involved in the April 29, 2022 incident

While the grievant asserts that the agency withheld information about this disciplinary action, the agency was not under a duty to produce this information based on EDR's Ruling, which limited production for similar misconduct issued to employees at the Unit Manager/Captain rank and above.[45] Further, evidence about this record was presented at the hearing, with the Lieutenant himself testifying about the disciplinary action, including reading the description of misconduct and resulting discipline.[46] Accordingly, there would be no basis to consider an adverse inference as to this request and it need not be considered on remand.

Email from the grievant to the Lieutenant with Internal Incident Report

The Lieutenant involved in the April 29, 2022 incident testified that the grievant drafted his internal incident report for him and sent it to him, presumably, by email.[47] It is unclear whether this was a revelation at hearing, but the grievant was not disciplined for allegedly giving the Lieutenant a draft internal incident report to submit as his own. EDR cannot find that this email, to the extent it exists, was either requested by the grievant or the subject of an order for production by the hearing officer. Accordingly, there would be no basis to consider an adverse inference as to this request and it need not be considered on remand.

Mitigation

The grievant has also argued that the discipline she received should be mitigated based on evidence submitted about how other employees were disciplined (or not). 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]."[48] 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."[49] 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.[50]

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

[45] EDR Ruling Nos. 2023-5502, 2023-5503.
[46] Hearing Recording at 2:39:43-2:40:40, 3:58:02-4:02:15. The Lieutenant also received a Group III Written Notice for submitting inaccurate information in a report. *See id.*
[47] Hearing Recording at 3:52:21-3:53:10.
[48] Va. Code § 2.2-3005(C)(6).
[49] *Rules for Conducting Grievance Hearings* § VI(A).
[50] *Id.* at § VI(B)(1).

high.[51] 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."[52] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[53] and will reverse the determination only for clear error.

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.'"[54] In the decision, the hearing officer considered the grievant's evidence regarding mitigation, finding that no mitigating circumstances existed to reduce the disciplinary action.[55] Specifically, the hearing officer stated that he "cannot conclude that the Agency intentionally treated [the grievant] differently from similarly situated employees."[56] 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.[57] Thus, we cannot say that the hearing officer abused his discretion

---

[51] 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).

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

[53] "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.").

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

[55] Hearing Decision at 7.

[56] *Id.*

[57] For example, the grievant contends that other individuals included the same language in reports of the April 29, 2022 incident as the grievant, but were not disciplined. Record evidence reflects that the Lieutenant involved in the April 29, 2022 incident received a Group III Written Notice for submitting incorrect information in his report, as well. *E.g.*, Hearing Recording at 2:39:43-2:40:40, 3:58:02-4:02:15. In addition, the watch commander who completed the overall incident report (who was not present for the incident) compiled information submitted by those directly involved. Hearing Recording at 2:41:11-2:42:37, 4:34:25-4:38:26. This information does not provide a basis for EDR to find that the hearing officer failed to appropriately consider evidence of mitigation presented at hearing.

in finding that the Group III with demotion was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

Hearing Officer Bias

The grievant asserts that the hearing officer failed to act as an impartial arbiter. The *Rules* provide that a hearing officer is responsible for avoiding the appearance of bias and:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.[58]

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[59] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[60] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[61] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[62]

EDR has conducted a thorough review of the hearing record and decision, finding no basis to conclude that the hearing officer's conduct at the hearing demonstrated bias against the grievant that warrants remanding the case. The grievant quotes the hearing officer as having said, "unfortunately, I (HO Schmidt) am subordinate to the EDR and must do what they say." The grievant does not indicate the conference call in which this statement was allegedly made so we are unable to confirm the context of this statement or if it is accurate. Even so, without more, this alleged statement by the hearing officer appears to be an accurate recitation of the requirements of all hearing officers to adhere to the grievance procedure and *Rules for Conducting Grievance Hearings*.[63] Accordingly, the grievant has not met her burden to demonstrate bias on the part of the hearing officer in this case.

---

[58] *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

[59] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

[60] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

[61] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

[62] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

[63] *E.g.*, *Grievance Procedure Manual* §§ 5.7, 5.8; *Rules for Conducting Grievance Hearings* § II (requiring hearing officers to comply with "these *Rules*, the *Grievance Procedure Manual*, and other general administrative and/or technical instructions from EDR).

Allegations against EDR Director

The grievant's advocate suggests that the EDR Director influenced the hearing officer in this case and "ordered him to uphold the discipline." The grievant's advocate presents no evidence to support this allegation. The undersigned EDR Director did not have contact with the hearing officer regarding the subject matter of this case. The grievant appears to ascribe impropriety because the EDR Director had knowledge of the subject of the hearing prior to the issuance of the decision. However, EDR was called upon to issue an interlocutory compliance ruling during the hearing process, which provided information about the subject matter of the hearing.[64]

The grievant's advocate suggests that there is "strong evidence of collusion between the DOC and [the EDR Director]." Again, the grievant's advocate presents no such evidence. The grievant refers to the fact that the grievant in this case was investigated and eventually terminated because of documents she apparently obtained from agency files herself and submitted as part of her evidence in this case (Case Number 11876). The grievant's advocate asserts that the agency's actions in this regard are retaliatory and that the EDR Director was aware of the behavior and supported it. The EDR Director has not provided "support" to the agency's action as it is not EDR's role to approve or deny agency actions outside the grievance process. The grievant's termination is now the subject of a separate grievance and will be addressed by an independent hearing officer. If found to be retaliatory, appropriate relief can be awarded by the hearing officer.

The grievant's advocate also suggests that the EDR Director has "authorized" DOC's violation of Virginia Code Sections 54.1-3900 and 2.2-507. The grievant relies on these statutes to argue that DOC's use of agency-employed legal advocates is improper or that their role is limited only to questioning witnesses at hearing. EDR has not addressed the grievant's advocate's argument in this particular case. However, EDR did rule on this issue in a different grievance matter in which it was found that there was not a basis to disqualify DOC's chosen advocates or to limit their ability to represent the agency.[65] EDR's extensive analysis of the issue is reflected in that ruling and applies in this case as well.[66]

In conclusion, there is no evidence of improper action by the EDR Director that impacts this case. While the DHRM Director already determined that it was appropriate for this review to continue through the normal course, the EDR Director separately has also determined that there is no basis in this case for recusal. Accordingly, this review has been conducted consistent with EDR's normal practices.

CONCLUSION AND APPEAL RIGHTS

As described above, the 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,

[64] *See* EDR Ruling Nos. 2023-5502, 2023-5503.
[65] EDR Ruling No. 2023-5541.
[66] *Id.*

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 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. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[67]

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.[68] 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.[69] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[70]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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