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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2024-5600
September 7, 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 11966, which addresses a grievance with the Department of Corrections (the "agency"). For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

On December 19, 2022, the agency issued to the grievant a Group I Written Notice for obscene or abusive language, disruptive behavior, and violation of DHRM Policy 2.35, *Civility in the Workplace*.[1] The grievant timely grieved the disciplinary action and a hearing was held on July 10, 2023.[2] In a decision dated July 12, 2023, the hearing officer made the following factual findings:[3]

> The Agency employed the Grievant as a mental health clinician II, and the Grievant has been employed with the Agency for 18 years, without other active disciplinary actions.
>
> The Grievant's direct supervisor, unit director, testified consistently with the offense noted in the Written Notice. She testified that the discipline was mitigated from at least one Group II Written Notice to one Group I Written Notice, as described in the circumstances considered within the Written Notice. She also noted that as of the date of the Written Notice, the Grievant had not yet apologized for his conduct. The Grievant has returned to work from a four-month leave, but the supervisor was not privy to the circumstances. The program director also testified regarding her first resolution step response to the Grievant's grievance, affirming the Group I Written Notice.

[1] Decision of Hearing Officer, Case No. 11966 ("Hearing Decision"), July 12, 2023, at 1 (internal citations omitted); Agency Ex. 1.
[2] *See* Hearing Decision at 1.
[3] *Id.* at 4.

> Testifying for the Grievant, the facility's assistant warden testified to her good experience with the Grievant at an earlier post as well has his current one. The assistant warden described the Grievant as a hard-working employee, hospitable and not disrespectful nor disruptive.
>
> Through his testimony, the Grievant admitted to his profane verbal outburst as described in the Written Notice. However, he denies that he threw papers at his supervisor. The Grievant asserts that mitigating circumstances should weigh in favor of dismissal or reduction of the Group I Written Notice. The Grievant was on a four-month bereavement leave following the sudden death of his father, that followed the death of his mother a few months before that. The Grievant testified that the meeting regarding performance issues should not have occurred immediately upon his return to work from a sensitive leave and family situation. Just prior to his return to work, the Grievant was taking prescribed medication that he believes contributed to his disruptive conduct.

In his decision, the hearing officer found that the agency provided sufficient evidence to show that the grievant's behavior towards his supervisor "[was] sufficiently abusive, disrespectful, and insubordinate to warrant a Group I Written Notice."[4] The hearing officer further concluded that there were no mitigating factors sufficient to reduce or rescind the Written Notice.[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.

In his request for administrative review, the grievant argues that certain facts were either inaccurate or omitted from the hearing officer's findings. Specifically, the grievant objects to the hearing officer's finding that the grievant's supervisor "was not privy to the circumstances" of his leave of absence.[9] Along with his appeal, the grievant provided new evidence that suggests his supervisor did in fact know about the reason behind his leave of absence. As to the omitted facts, the grievant argues on appeal that there were certain mitigating factors, such as his disability, resulting medication, and staffing problems at his worksite, all of which the hearing officer allegedly failed to mention in his findings of fact and analysis.

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[4] *Id*. at 6.
[5] *Id*. at 6-7.
[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] Hearing Decision at 4.

Newly Discovered Evidence

As a preliminary matter, the grievant submitted new evidence that was not included in the original exhibits. The evidence all directly relates to the grievant's assertions on appeal, including (1) a text message chain between him and his supervisor about the specific circumstances of his leave of absence, (2) an email exchange between him and his supervisor of the same subject, (3) documentation of his disability and resulting medication, and (4) a timesheet from June of 2022 illustrating staffing at the grievant's facility. While some of this evidence does seem to contradict agency testimony and the hearing officer's findings of fact, EDR nonetheless cannot find that such evidence is likely to produce a new outcome if the case were retried.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[10] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[11] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[12]

The hearing officer found that the supervisor "was not privy to the circumstances" of the grievant's leave of absence.[13] On appeal, the grievant has included text messages and emails wherein the grievant informed his supervisor in early August that he would need to miss some workdays due to the death of his father. The supervisor responded with "Of course! Take whatever time you need." Later, on August 15, the grievant advised her that he would be out of work for disability leave for at least one month. Yet at the hearing, the grievant's supervisor testified repeatedly that she was not privy to the circumstances of the grievant's leave of absence – only that she knew of "traumatic circumstances" but did not know of the "specifics."[14]

Although the new evidence presented by the grievant demonstrates a possible inaccuracy, EDR cannot find that the additional evidence would be likely to change the hearing officer's conclusions, either as to the misconduct sustained or potential mitigation. First, the hearing officer found that the reason for the grievant's leave of absence was the death of his father, thus showing that the hearing officer knew of the circumstances.[15] Also, the agency had already mitigated the

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[10] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[11] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[12] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[13] Hearing Decision at 4.
[14] Hearing Recording at 32:30-33:20, 34:40-35:30, 36:25-36:50.
[15] Hearing Decision at 4. Specifically, the hearing officer found that the "Grievant was on a four-month bereavement leave following the sudden death of his father . . . ." *Id.* As a point of clarification, state employee benefits do not

discipline from a Group II for reasons of tenure and good performance, and also acknowledged in the hearing that the leave of absence was for traumatic reasons. Therefore, the supervisor's knowledge was not apparently material to the mitigation analysis, as the hearing officer had the opportunity to consider the grievant's bereavement as a mitigating circumstance and nevertheless found the agency's discipline to be within the limits of reasonableness. Similarly, the grievant's new medical evidence would be unlikely to change the hearing outcome, as the decision accounted for the grievant's prescribed medication and its possible effect on the grievant's disruptive conduct.[16]

In addition to the unlikelihood that the newly submitted evidence would change the outcome of the case, the evidence also cannot be added to the record because it is untimely. The screen captures of text messages and emails, as well as the medical documents, are from August 2022, and the timesheet is from June 2022. Nothing in the record suggests that any of this newly submitted evidence was newly **discovered**, and the grievant has provided no evidence suggesting that he exercised due diligence in presenting the new evidence as soon as he was able. Therefore, there is no basis for EDR to re-open or remand the hearing for consideration of any new evidence submitted by the grievant on appeal.

Hearing Officer's Findings of Fact

The grievant also alleges on appeal that the hearing officer's findings of fact are inconsistent with the testimony and evidence given in the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[18] 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.[19] 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.[20] 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.

Other than the grievant's supervisor's knowledge of the context of the grievant's disability leave, nothing in the hearing officer's findings of fact appears to be unsupported by the record. As to the grievant's claims that the hearing officer mistakenly omitted the grievant's specific diagnosis

include dedicated "bereavement leave," although a number of broader leave categories may be used for that purpose, *See, e.g.*, DHRM Policy 4.10, *Annual Leave*; DHRM Policy 4.57, *Virginia Sickness and Disability Program*. In any event, we interpret the hearing officer's finding as attributing the grievant's need for leave broadly to the loss of his father.

[16] *Id*. at 4.
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.
[19] *Rules for Conducting Grievance Hearings* § VI(B).
[20] *Grievance Procedure Manual* § 5.8.

and "the medication [he] was taking," this is not entirely true. The hearing officer did mention the grievant's medication in his findings of fact.[21] Although the grievant's specific diagnosis is not discussed in the decision, it does not appear that this detail would be a material fact to the hearing officer's determinations.

In his appeal, the grievant also argues that the hearing decision should have addressed staffing issues that interfered with his work duties. However, these duties relate to the grievant's conduct before his leave of absence, and thus bear little relevance to the core issue of the behavior exhibited by the grievant as charged on the Written Notice. 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.[22] Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the hearing decision on this basis.

Mitigation

Although EDR declines to consider the grievant's new evidence or to disturb the hearing officer's findings of fact, the grievant's appeal is fairly read to challenge the hearing officer's overall mitigation determination. 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]."[23] 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."[24] 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.[25]

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

[21] Hearing Decision at 4.
[22] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[23] Va. Code § 2.2-3005(C)(6).
[24] *Rules for Conducting Grievance Hearings* § VI(A).
[25] *Id.* § VI(B).

high.[26] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[27] and will reverse the determination only for clear error.

The hearing officer found that while the grievant presented convincing mitigating factors – specifically the grievant's "long tenure with the agency and . . . a record of satisfactory work performance" – none were sufficient to allow the hearing officer to further mitigate the grievant's discipline.[28] 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 an agency's chosen disciplinary action exceeded the limits of reasonableness.[29] On appeal, the grievant suggests that the hearing officer did not fairly consider his medical diagnosis and subsequent medication as mitigating circumstances. 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 will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[30] While it might have been beneficial for the hearing officer to mention these issues in his mitigation analysis specifically, the decision indicates that he did consider the grievant's medication and how such medication could, according to the grievant, affect the grievant's behavior.[31] Even when considering the medical diagnosis by itself, none of the evidence as to that factor suggests that the agency's Group I Written Notice went beyond the limits of reasonableness, and 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. We decline to disturb the decision on these grounds.

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[26] 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).

[27] "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.").

[28] Hearing Decision at 6-7.

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

[30] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).

[31] Hearing Decision at 4.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision.[32] 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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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[32] To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.
[33] *Grievance Procedure Manual* § 7.2(d).
[34] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[35] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).