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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2024-5626
November 20, 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 11992. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11992, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Corrections Sergeant at the Facility for over five years. Her work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.
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> On February 1, 2023, Grievant was a Corrections Sergeant at the Facility and her post that day was Security Supervisor for the Housing Unit. Grievant had been trained on the Housing Unit and had been posted on the Housing Unit as the Security Supervisor for the Housing Unit on other occasions before that date.
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> As the Security Supervisor assigned to the Housing Unit, Grievant was the supervisor in charge of the Housing Unit with numerous responsibilities over the operations of the Housing Unit, including overseeing staff assigned to, or visiting, the Housing Unit. Grievant was responsible for decisions to allow staff into any cell on the Housing Unit.
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> The Housing Unit includes an observation cell (Cell). The Cell is utilized by the Agency when inmates need to be under continuous observation. For

[1] Decision of Hearing Officer, Case No. 11992 ("Hearing Decision"), September 27, 2023, at 2-4 (internal citations omitted).

example, an inmate may be held in the Cell for a period of time if there are concerns that the inmate may cause injury to himself.

The Cell is equipped with a camera. The camera in the Observation Cell runs continuously and continuously sends images to monitors in the Facility, including a Monitor in the Control Booth in the Housing Unit. The Monitor in the Control Booth can be viewed by personnel in the Control Booth. The camera also continuously records so that the images captured by the camera may be played back in the event there is an incident in the Cell.

Grievant knew that there was a camera in the Cell.

On February 1, 2023, during the period relevant for this matter, there were four individuals in the Control Booth: the Grievant, the Floor Officer and two Officers in Training.

The Counselor was in the Housing Unit and came to the Control Booth to request that he be given access to the Cell to use the toilet in the Cell.

The Floor Officer told the Counselor that the restroom in the Control Booth was not in use and was available to the Counselor to use.

The Counselor did not want to use the restroom in the Control Booth and again requested to be given access to the Cell to use the toilet.

Grievant told the Counselor that the Control Booth restroom was not in use and was available to the Counselor. Grievant also told the Counselor that there were restrooms in the medical unit and the staff dining area that also were available for the Counselor's use.

The Counselor told the Officer and Grievant that other security personnel on other shifts allowed the Counselor to use the toilets in the cells.

The Counselor declined the suggestions for other available restrooms and again requested that he be allowed to enter the Cell to use the toilet there.

Grievant agreed to allow the Counselor to use the toilet in the Cell and directed the Floor Officer to let the Counselor into the Cell.

Grievant did not advise the Counselor that there was a camera in the Cell.

Grievant returned to the desk in the Control Booth and was not viewing the Monitor.

The Floor Officer let the Counselor into the Cell.

Images of the Counselor in the Cell appeared on the Monitor in the Control Booth.

The Grievant heard the Officers in Training in the Control Booth commenting when they could see the Counselor in the Cell on the Monitor.

The Floor Officer re-entered the Control Booth and saw the Counselor in the Cell on the Monitor.

The Floor Officer placed a coat over the Monitor so that the images of the Counselor in the Cell could not be viewed in the Control Booth.

Grievant did not notify the Counselor that he was viewable on the Monitor during the time he was in the Cell and afterwards did not try to inform the Counselor he had been viewed on the Monitor while he was in the Cell.

Grievant did not immediately report the incident to her immediate supervisor or anyone else in her supervisory chain of command.

Grievant learned the next day, from a lieutenant, that the lieutenant had heard other staff at the Facility talking and laughing about the Counselor being captured on camera using the toilet in the Cell.

Sometime over the next two days, the Counselor learned from another employee that he had been captured on camera when he was using the toilet in the Cell.

The Institutional Program Manager and the Assistant Warden observed that the Counselor was very upset after learning that he had been captured on camera while he was using the toilet in the Cell.

Two days after the incident, Grievant saw the Counselor for the first time following the incident. Grievant apologized to the Counselor. According to Grievant, the Counselor would not look at her.

The agency issued to the grievant a Group III Written Notice on February 22, 2023 with suspension, demotion, reduction in pay, and transfer to another agency facility for violations of multiple agency and DHRM policies.[2] The discipline was later mitigated by the second-step respondent by reinstating the grievant to her original position of Corrections Sergeant, but the Written Notice remained as a Group III.[3] The grievant timely grieved the disciplinary action, and a hearing was held on September 7, 2023.[4] In a decision dated September 27, 2023, the hearing officer determined that the agency had presented sufficient evidence to support a Group III Written Notice due to the grievant's supervisory role, the serious nature of the offense, and its impact on the affected employee.[5] The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.[6] The grievant now appeals the decision to EDR.

[2] Hearing Decision at 4; Agency Exs. at 1.
[3] Hearing Decision at 4-5, n.5; Grievant Exs. at 12-14.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 9-10.
[6] *Id.* at 10.

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 . . . ."[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.

Newly Discovered Evidence

As a preliminary matter, the grievant submitted new evidence that was not included in the original exhibits. The evidence relates to one of the grievant's mitigation arguments asserted on appeal – that despite one of the testifying officers stating that he did not know about the observation cell being recorded, the Warden sent an email on September 8, 2023, confirming that the cell is monitored at all times. The new evidence is a copy of said email.

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]

Given that the email in question was sent on September 8, one day after the hearing in this matter, the evidence is not considered newly discovered since it was not in existence at the time of the hearing. However, even if this email was presented at the hearing, it is not likely that it would have produced a new outcome. The hearing officer emphasized in her decision that the crux of the issue is the *grievant's* knowledge of the observation cell being recorded.[13] Further, the hearing

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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] *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] *See* Hearing Decision at 7-9.

officer noted that the Counselor only had access to the cell with the grievant's approval.[14] The grievant's knowledge about the active camera does not appear to have been a disputed factual matter. Consequently, any dispute of fact as to other agency employees' knowledge about the camera's activity, which is arguably addressed by the new email, has no impact on the hearing officer's ultimate determinations in this case. For these reasons, EDR declines to disturb the hearing decision as to the grievant's argument of another officer's conflicting testimony about his knowledge of the camera.

Mitigation

The grievant asserts that the issued discipline should be reduced to either a Group II or Group I Written Notice, based on certain mitigating factors including "[her] work performance and [her] taking responsibility for [her] actions." 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]."[15] 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."[16] 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.[17]

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.[18] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[19] and will reverse the determination only for clear error.

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[14] *Id*. at 9.
[15] Va. Code § 2.2-3005(C)(6).
[16] *Rules for Conducting Grievance Hearings* § VI(A).
[17] *Id.* § VI(B).
[18] 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).
[19] "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 action.[20] The grievant alleges that the Counselor, the employee who was directly affected by the incident, has had disciplinary issues in the past and is no longer employed with the agency. The grievant also adds that two other employees were involved in a serious incident with a state vehicle resulting in damage but did not report the incident and nonetheless "kept their current positions." The grievant also reiterates that she has since taken ownership of her actions and emphasizes her past work performance.

EDR cannot find a justifiable basis to conclude that the hearing officer should have mitigated the grievant's discipline for the reason of the Counselor's alleged disciplinary background. While the Counselor was listed as a witness but did not appear at the hearing, the grievant's appeal does not elucidate why either of these facts are relevant to the case and EDR is unable to find such a basis. Further, it is unclear whether any information regarding the Counselor's disciplinary background or availability to testify was presented at the hearing. For these reasons, EDR declines to disturb the hearing decision.

As to the grievant's argument that other agency employees engaged in misconduct and were not disciplined at the same level, EDR cannot find that the grievant's testimony about this matter would support mitigation. The hearing officer considered this factor in her mitigation analysis and found that the vehicle incident was not comparable because the incident did not involve the same agency and DHRM policies that are at issue with the grievant's incident.[21] Further, EDR has previously ruled on the relatedness of the vehicle incident in a compliance ruling and found that documents regarding the vehicle incident did not need to be produced because the misconduct was not of the same character as the case at hand.[22] Accordingly, we cannot find that the hearing officer erred in determining that these two separate incidents are not comparable and, thus, did not support mitigation.

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.'"[23] 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

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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.").

[20] Hearing Decision at 10.

[21] *Id*.

[22] EDR Ruling No. 2023-5557 at 2-3.

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

hearing decision once all timely requests for administrative review have been decided.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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