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**ADMINISTRATIVE REVIEW**

In the matter of the Department of State Police  
Ruling Number 2024-5636  
December 12, 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 11974. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11974, as found by the hearing officer, are as follows:<sup>1</sup>

Grievant was hired as an officer in the Virginia State Police on February 25, 2002. In 2006, after approximately 4.5 years, he was promoted to Special Agent, Law Enforcement Officer III in narcotics. He was fired on March 14, 2023, when he had approximately 21 years of service. Grievant had no active record of prior discipline. Grievant was performance rated in 2022 as a "contributor" and in 2021 as a "major contributor."

"The chief objective of the position is to reduce the crime problem (narcotics) throughout the Commonwealth through enforcement, education, and prevention. An employee in this position maintains liaison with supervisors and members of other law enforcement agencies."

In his position Grievant signed a Code of Ethics that among other things required him to "Dedicate my efforts toward earning the respect, trust, and confidence of elected and appointed official with whom I work, and the public ..." and "Act with integrity in all aspects of my profession."

As a sworn police officer, Grievant was required to strictly follow the Standards of Conduct (SOC) set forth in General Order ADM 11.00, the purpose of which is "[t]o establish standards of honesty, integrity, impartiality, and conduct

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<sup>1</sup> Decision of Hearing Officer, Case No. 11974 ("Hearing Decision"), Oct. 10, 2023, at 2-10 (citations and footnotes omitted).

by Department employees and to list the types of violations that may result in disciplinary actions.”

The SOC stressed that “The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of Department business and the maintenance of confidence by citizens of the Commonwealth.”

Pursuant to the policy, “Employees must be able to perform the core responsibilities of their position. Conditions or circumstances, as they become known, which prevent employees from performing their assigned tasks, shall be reported to supervision.”

According to Grievant's spouse, Grievant was self-medicating with alcohol and prescription sleeping pills since approximately 2014. Under the policy Grievant was required to inform his supervision of his sleep issues and self-medication, and to identify any essential functions of his job that needed accommodation. Grievant did not do so.

On February 17, 2015, at 2:10 am, Grievant's spouse, who is employed as a VSP dispatcher, called 911 from their residence for a nonviolent domestic dispute between her and Grievant. The Sheriff's Office responded at approximately 2:32 am and found Grievant's spouse distraught and crying. No criminal charges were placed, however, in accordance with Va. Code § 16.1-253.4 an Emergency Protective Order was petitioned by Grievant's spouse and issued by a County magistrate prohibiting contact with her by Grievant. The Order expired on February 20, 2015, at 11:59 pm.

Grievant's spouse stated that Grievant had consumed alcohol during the evening while taking medication that was prescribed for insomnia and was upset that he could not fall asleep. Grievant's prescription bottle read that each dose is 10 mg and not to consume alcohol while taking the medication. His spouse stated that she had locked herself in a guest bedroom but Grievant gained access to the bedroom and wanted more of the prescribed sleep medication from her prescription.

Approximately eight (8) days thereafter, Grievant's spouse had a more upbeat assessment of her husband's disposition. She stated that Grievant's doctor had revoked his sleep prescription, and he was no longer in danger.

On February 21, 2015, the Grievant was placed on pre disciplinary leave and given specific instructions to not exercise his police powers, to surrender his vehicle, badges, and weapon and to not communicate with witnesses involved in the matter.

Grievant was referred for a Fitness for Duty evaluation on February 27, 2015. The Fitness for Duty Report was issued on March 3, 2015. The psychiatrist evaluated Grievant for 2 hours, spoke with his spouse for approximately 40 minutes and spoke with Grievant's supervisor.

According to the report, Grievant denied any specific sleep disorder other than the sleep medication, denied any abuse of substances including alcohol, and denied that he misused the sleep medication. His spouse indicated that Grievant exhibits bizarre behavior under the influence of sleep medication and alcohol, and she described numerous other such occasions. Grievant's supervisor said there were no concerns regarding absenteeism, medication use at work, safety, or violence at the workplace. He described Grievant as one of the best agents and very dedicated to work.

The formal psychiatric diagnosis was Anxiety not otherwise specified, Rule out Insomnia Disorder, and rule out sleep medication Induced Dissociation.

Regarding work performance and fitness, the Report concluded that there does not appear to be any specific issues at work including safety for himself and others, nor any question of memory impairment, confusion, or dissociative behavior.

Grievant was deemed "fit to return to work with his usual responsibilities." The psychiatrist "strongly recommended that he receive substance abuse counseling and family counseling and that his use of any psychotropic medications be closely monitored by his physician."

On June 8, 2015, the administrative investigation was concluded as unfounded and Grievant was returned to full duty.

At no time during the investigation Grievant sought reasonable accommodation for an essential job function.

On or around November 14, 2016, Grievant received a Group II Written Notice for failure to report without proper notice to supervision pursuant to General Order ADB 12.02, Paragraph 13.b(4), and faced the prospect of termination, transfer, demotion, salary reduction, or suspension.

The Notice explained that the offense was because Grievant had "failed to report for duty on two of the three days of training (May 11 and May 12, 2016). The Undercover Officer Training was facilitated by the Fairfax County Police Department who paid all costs related to the Travel, Training, Lodging and Meals/per diem for you to attend the referenced training in Boston, Massachusetts."

It is noteworthy that Grievant did not assert that alcohol or prescription medication caused him to miss two days at the conference. Instead, he admitted that “he has difficulty falling asleep, and to having a sleep disorder that is worsened in strange environments.” He did not assert that an inability to perform an essential job function caused him to not report. Instead, Grievant successfully argued for a lesser penalty because “While attending training the change in the schedule made it difficult for me to sleep as well as the change in the environment. As a result, I missed 2 days of training. In hindsight this could have been handled in a more appropriate manner and every effort will be taken in the future to avoid this situation. Also, I would ask that my work ethic and lack of disciplinary actions prior to this incident be taken into account.”

The agency's mitigation response clearly demonstrate that Grievant was regarded as a high performing police officer, and not as an alcoholic or insomniac. The response recognized that “Special Agent Grievant has a commendable work history with his most recent performance rating being that of a Major Contributor. Special Agent Grievant’s work ethic is above average, and he has continued to perform at acceptable levels during this investigative process ... Special Agent Grievant has had one sustained citizen complaint for having an unauthorized passenger in his issued vehicle in 2007 and has no further founded formal disciplinary action during his fourteen years of service with the Department. His work record and the fact that no reimbursement is being sought by the Fairfax County Police Department, nor did they request an official investigation into this matter, help to support the determination not to suspend Special Agent Grievant. Lastly, he has accepted full responsibility for his actions.”

Grievant was removed from the Fairfax County Violent Crimes task force. Grievant was reminded of the need to follow Department policy and “as an experienced member in DES, he was expected to set the example for the new agents by and knowing policy and applying that policy properly, and by providing good advice to other agents, especially new agents.”

Despite all the warnings he received and promises to follow the procedures, Grievant was again involved in a domestic dispute with his spouse that ultimately led to the issuance of the current Group Notice and his termination.

In the evening of July 11, 2022, and continuing into July 12, 2022, Grievant had an argument with his spouse at their home while he was intoxicated due to a combination of alcohol and prescription sleep medication. The medication was in the same class of medications that he previously used. Grievant introduced into the argument a loaded firearm that he placed on a bathroom counter close to his spouse. His spouse was understandably terrified and called the agency for assistance.

Grievant's spouse vividly described the chaotic events of July 11 and 12 to the agency investigator. She got home at 1:00 am. Grievant was angry and

intoxicated. They argued over a financial matter that Grievant believed would doom his chances for a top security clearance and placement on a Federal task force.

According to the report, “[She] goes upstairs to a bathroom at the top of the stairs to prepare for bed. [She] sees [Grievant] coming up the stairs holding a gun in his hand. [She] described the gun as a Glock ... [Grievant] brings the handgun into the bathroom, never threatens her with the handgun but lays it on the sink. [She] asked [Grievant] who the gun is for; [Grievant's] drunk reply was slurred and heavy-tongued, saying it wasn't for him. [She] then said, ‘if you think I am going to shoot you or myself, that's not going to happen.’ At some point [he] leaves the bathroom and goes to bed, leaving the gun in the bathroom with [his spouse]. She then takes the gun and put it in a filing cabinet.”

She said Grievant's conduct caused her to take her blanket and pillow and sleep on the bathroom floor, however Grievant kept coming to the bathroom door, yelling and trying to push the door in. She ultimately gave in and returned to the bedroom with him.

She said that Grievant went to sleep or passed out, and around 2:45 am she grabbed some clothes and went to her vehicle to get away from Grievant and called the Department for help. At the hearing, she testified that she left her house at approximately 3 am to sleep in her car in the parking lot of a dentist for a 9:00 am appointment.

On July 12, 2022, Grievant was interviewed at Division Headquarters. He informed the interviewer that he never intended to harm his spouse. He admitted to taking a loaded gun with a bullet in the chamber to the bathroom during the argument. When asked why he introduced a gun into the argument, he said “that [his spouse] had threatened suicide in the past.” Grievant claimed that he “forced his way into the bathroom because he was concerned about [her] safety.”

[The agency] sought to address the matter as a criminal case and administratively. The criminal case never developed because a County magistrate ruled that the allegations lacked probable cause. The administrative investigation continued and ultimately led to the issuance of the Group III Notice and termination.

Grievant was scheduled for a Fitness for Duty evaluation on August 16, 2022. In a report received by the Department on August 29, 2022, the psychologist declared Grievant fit for full duty with recommendations.

In the report, the psychologist made 5 recommendations:

1. Grievant “meets criteria for an Alcohol Use Disorder – mild to moderate. [He] echoed the opinion of [Grievant's] 2015 evaluation by again offering a strong recommendation that he receive and engage with substance abuse counseling and family counseling to significantly reduce alcohol and never again combine alcohol intake with any sleep medications.”
2. Grievant meets criteria for Anxiety Disorder, Not otherwise specified. However, his anxiety symptoms are mild, appear to be situationally determined, and may be connected to his use of alcohol and prescription sleep medication. For this reason, Anxiety is not believed to rise to the level of being an interfering condition.
3. It is recommended that Special Agent [Grievant] continue with his current VSP roles and pursue Substance Use and Anxiety symptom treatment in therapy. While therapy with psychotropic medications may be indicated, it should only be prescribed and closely followed by a psychiatrist.
4. From a psychological standpoint, by virtue of the absence of any signs or symptoms of an interfering psychological condition that meets criteria for diagnosis, Special Agent [Grievant] is fit for duty and able to perform the essential duties of his job as a Special Agent in the Virginia State Police.
5. In the event that Special Agent [Grievant] develops any signs or symptoms of a psychological condition in the future, he should seek mental health treatment. As always, if he should ever feel he is a danger to himself or others, he should go to the nearest emergency room.

In accordance with the Fitness for Duty report, Grievant was returned to duty on September 12, 2022, and permitted to work on his pending cases. Grievant was not required to testify in court on those cases.

The administrative investigation continued and effective March 3, 2023, Grievant was suspended and placed on Pre-Disciplinary leave with Pay. The notice stated, “your continued performance of the duties as a Virginia State Police Special Agent could constitute negligence in regard to the Department's duties to the public or other employees.”

Grievant was prohibited from representing himself “as a sworn employee of the department, except when appearing in court concerning cases which occurred while [he] was in good standing.”

On March 14, 2023, the agency issued to the grievant a Group III Written Notice with termination, charging the grievant with “handl[ing] a firearm with reckless disregard for human life by providing it to [his spouse] while believing she might use the firearm to harm herself.”<sup>2</sup> The grievant timely grieved the disciplinary action, and a hearing was held in two sessions on July 21 and August 16, 2023.<sup>3</sup> In a decision dated October 10, 2023, the hearing officer determined that the agency had presented sufficient evidence to support the disciplinary action and, thus, the grievant’s removal must be upheld.<sup>4</sup> The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.<sup>5</sup>

The grievant now appeals the hearing decision to EDR.

### DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”<sup>6</sup> If the hearing officer’s exercise of 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.<sup>7</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>8</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant challenges the hearing officer’s decision on multiple grounds. As a procedural matter, the grievant contends that the hearing officer failed to comply with the grievance procedure by not creating an audio recording of the proceedings. As to the hearing officer’s substantive findings, the grievant maintains that the agency did not prove the allegations in the Written Notice or that the grievant violated any policy provision cited therein. The grievant further claims that the hearing officer failed to exclude irrelevant evidence and to properly consider probative evidence as to several material facts. In addition, the grievant argues that the hearing officer failed to fully consider whether the agency discriminated against the grievant on the basis of a perceived disability, and failed to mitigate discipline despite evidence of inconsistent discipline for similar offenses. Finally, the grievant argues that the hearing officer “improperly interjected himself . . . to debate grievant’s counsel” during the hearing, in the presence of witnesses, and generally was biased to an extent that deprived the grievant of due process rights.<sup>9</sup>

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

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

<sup>4</sup> *Id.* at 10-14, 16.

<sup>5</sup> *Id.* at 14-15.

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

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

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

<sup>9</sup> Request for Administrative Review at 9.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>10</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.

### *Hearing Recording*

The grievant objects that the hearing officer failed to comply with the grievance procedure “by not providing recording equipment for the hearing.”<sup>14</sup> The grievant asserts that “[a]n issue arose during the hearing where the transcript was not recorded for parts of the testimony.”<sup>15</sup>

Under the grievance statutes, a hearing officer’s duties include “oversee[ing] a verbatim recording of the evidence.”<sup>16</sup> Accordingly, the grievance procedure is clear that “[i]t is the hearing officer’s responsibility to record the hearing,”<sup>17</sup> and they “will provide their own recording equipment.”<sup>18</sup> Moreover, “[p]rior to commencing the hearing, the hearing officer must test the recording equipment to ensure that a clearly audible recording is produced.”<sup>19</sup> Creating the official hearing record for purposes of appeal is a vital component of the neutral administration of the hearing. Although unforeseen technical failures may occur despite a hearing officer’s due diligence to avoid them, EDR does not interpret anything in the grievance procedure to permit a hearing officer to delegate such due diligence to either of the parties.

The importance of this responsibility is illustrated by the record in this matter. The hearing record returned to EDR for appellate purposes contained seven separate audio/visual files. EDR’s review of these files suggests that the agency’s advocate apparently agreed to record audio and video of the virtual proceedings via a feature of the remote conferencing platform used to host the hearing.<sup>20</sup> However, at some point during the agency’s examination of its second witness,

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<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>13</sup> *Grievance Procedure Manual* § 5.8.

<sup>14</sup> Request for Administrative Review at 1.

<sup>15</sup> *Id.*

<sup>16</sup> Va. Code § 2.2-3005(C)(5).

<sup>17</sup> *Grievance Procedure Manual* § 5.6; *Rules for Conducting Grievance Hearings* § IV(B); *see id.* § II.

<sup>18</sup> *Grievance Procedure Manual* § 5.6. To facilitate hearing officers’ responsibilities in this regard, EDR’s long-standing practice has been to make state-owned recording equipment available to hearing officers as needed.

<sup>19</sup> *Rules for Conducting Grievance Hearings* § IV(B).

<sup>20</sup> *See* Hearing Recording Pt. I at 0:00-1:45. The seven audio files received by EDR as part of the official hearing record, which included approximately 13 hours of disjointed recorded proceedings, were not labeled in any way that



recording apparently ceased for unknown reasons and then resumed some hours later, unbeknownst to the hearing participants. Near the end of the first day's proceedings, as the parties were discussing the need for a second day of testimony, the agency's advocate noted a concern that there may have been a technical issue with the recording.<sup>21</sup> He then confirmed that two to four hours of the day's proceedings had not been captured.<sup>22</sup> The record indicates that the parties ultimately reconvened for a second day of proceedings, including re-examination of at least one agency witness. During this second day of proceedings, the hearing officer's statements indicated that he continued to hold the agency responsible for capturing a verbatim recording.

EDR emphasizes that such an expectation is not consistent with the grievance procedure, and the agency advocate should not have been required to devote his attention during the hearing to creating the audio record, much less troubleshooting recording issues while simultaneously examining witnesses. More importantly, because the creation of a verbatim recording of the evidence is a fundamental responsibility of the hearing officer, any defect in the recording is solely attributable to the hearing officer. To the extent that a hearing officer fails to enter a party's admitted evidence into the record, or bases his decision on evidence not in the record, such failure may well be grounds for remand.

However, because the recording defect here was identified midway through the agency's case, and the parties were already contemplating a second day of proceedings, it appears that they were able to reach a mutually agreeable path forward involving stipulated facts and re-examination.<sup>23</sup> Further, the grievant does not appear to challenge the substance of the recordings as the basis by which the hearing decision should be reviewed. We regret the unfortunate and unnecessary burdens borne by the parties due to the recording issues. That said, because the recording defect does not appear to have had any material impact on the outcome of the case, we will not disturb the decision on this basis. The decision will stand as long as it is otherwise supported by the evidence in the record the hearing officer provided to EDR, as discussed in the foregoing sections.

### *Findings Sustaining Misconduct*

The grievant's request for administrative review presents numerous evidentiary challenges that are fairly read to challenge the hearing officer's findings that the grievant engaged in the misconduct described in the Group III Written Notice. The Written Notice charged the grievant with "handl[ing] a firearm with reckless disregard for human life by providing it to [his spouse]

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would indicate the order in which they were captured. After reviewing each file, EDR has renamed each file based on our inference of the correct chronological order. For purposes of any further appeal by the parties, the hearing record provided by EDR for such appeal purposes will contain the renamed audio files aligning with the citations herein.

<sup>21</sup> See Hearing Recording Pt. III at 2:03:50-2:21:12.

<sup>22</sup> *Id.*

<sup>23</sup> It appears that the grievant initially argued that the error in the recording required a decision in his favor, and the hearing officer denied his request. See Order of Hearing Officer, Case No. 11974, July 24, 2023. To the extent the grievant challenges the hearing officer's decision in this regard on appeal, we do not find that the hearing officer's resolution of the issue – allowing the parties to present the evidence they wished to present on a second day – was an unreasonable approach under the circumstances, and there is no indication that the recording error ultimately prevented either party from introducing material evidence on disputed facts into the record.

while believing she might use the firearm to harm herself.”<sup>24</sup> In an attached memorandum, the issuing manager explained his reasoning for sustaining the allegation, noting that it was in violation of the agency’s standards related to civility in the workplace and maintaining the agency’s reputation and avoiding conflicts of interest.<sup>25</sup> Specifically, the manager cited two violations:

- (1) Threatening or coercing employees, supervision, or the public; and
- (2) Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the [agency’s] activities. This includes actions which might impair the [agency’s] reputation as well as the reputation or performance of its employees.<sup>26</sup>

In his decision, the hearing officer found that the agency proved the conduct charged in the Written Notice – that is, that the grievant “acted with reckless disregard for human life when he introduced a loaded firearm into an argument with his spouse,”<sup>27</sup> who was also employed by the agency.<sup>28</sup> Specifically, the hearing officer found that, on July 12, 2022, the grievant “had an argument with his spouse,” during which he placed a loaded firearm “on a bathroom counter close to his spouse.”<sup>29</sup> She asked the grievant who it was for, and he responded that it was not for himself.<sup>30</sup> The grievant’s spouse told an agency investigator that she interpreted these actions to imply that she should kill herself.<sup>31</sup> Based on these events, the hearing officer concluded that the grievant violated the agency’s policy against threatening or coercing employees.<sup>32</sup>

Evidence in the record supports the hearing officer’s findings. The grievant’s spouse testified that she had an interaction with the grievant on July 12, 2022, in which the grievant placed a gun on the bathroom counter, she asked him who it was for, and he responded that it was “not for me.”<sup>33</sup> According to the agency’s investigative records, investigators interviewed the grievant’s spouse on July 12, 2022 and September 26, 2022. Their respective notes reflect her consistent account that (1) the grievant made angry comments to her after she arrived home in the early hours of July 11, 2022; (2) after she went upstairs, the grievant came up with a gun and set it down in their bathroom; (3) she asked him who the gun was for, and he said it was not for him; (4) this interaction was threatening and made her fear for her safety.<sup>34</sup>

The hearing officer noted an evidentiary discrepancy as to whether the grievant’s spouse was in the bathroom or a different room when he brought the gun into the bathroom. The hearing officer concluded that, to the extent the grievant’s spouse testified to different facts than were represented in the investigative notes of her first interview, he found the investigative notes to be

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<sup>24</sup> Agency Ex. 1.

<sup>25</sup> Agency Ex. 1 at 4.

<sup>26</sup> *Id.*; Agency Ex. 13 at 4, 15.

<sup>27</sup> Hearing Decision at 10.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.* at 11; Agency Ex. 6H at 5; *see also* Agency Ex. 4.

<sup>32</sup> Hearing Decision at 11.

<sup>33</sup> Hearing Recording Pt. VI at 1:35:10-1:42:20 (grievant’s spouse’s testimony).

<sup>34</sup> Agency Exs. 4, 6H.

more credible, due at least in part to their timing, which closely followed the underlying events.<sup>35</sup> Regardless of the exact proximity between the grievant's spouse and the gun when he placed it down, evidence in the record supports the hearing officer's finding that the grievant's spouse was reasonably threatened by the grievant's acts and statement with respect to the gun.<sup>36</sup> Moreover, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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.<sup>37</sup>

Nevertheless, the grievant appears to argue that the agency failed to prove his intention to coerce or threaten his spouse, or that he "believ[ed] she might use the firearm to harm herself" as charged in the Written Notice. However, EDR cannot find that the agency's burden of proof included an element of intent to prove threatening behavior. As the issuer stated in the documentation attached to the Written Notice:

When I asked you why the firearm was introduced in the volatile situation, you appeared to have difficulty responding to the question . . . . Whether you intended for [your spouse] to hurt herself or not, the introduction of the firearm in an already tense and potentially violent scenario can have devastating consequences.

Your actions are in violation of [agency policy] as it pertains to the threatening or coercing of employees, supervision, or the public.<sup>38</sup>

Based on this explanation, it appears that the agency does not interpret its prohibition on coercion and threats to require intent,<sup>39</sup> nor does its plain language contain an element of intent.<sup>40</sup> Generally, an agency's interpretation of its own policies is afforded great deference. EDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference unless that interpretation is clearly erroneous or inconsistent with the express language of the policy.<sup>41</sup> Accordingly, the grievant's arguments as to his intention to commit misconduct provide no basis for EDR to disturb the hearing decision.

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<sup>35</sup> Hearing Decision at 7 n.3.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *See, e.g.*, EDR Ruling No. 2020-4976.

<sup>38</sup> Agency Ex. 1 at 4.

<sup>39</sup> This interpretation would align with DHRM Policy 2.35, *Civility in the Workplace*, which defines prohibited conduct (including threats) objectively by how a reasonable person would perceive the conduct, irrespective of intent. *See Policy Guide – Civility in the Workplace: DHRM Policy 2.35 Prohibited Conduct/Behaviors* at 1.

<sup>40</sup> Agency Ex. 13 at 4.

<sup>42</sup> Request for Administrative Review at 1-3.

Improper/Prejudicial Admission of Evidence & Other Hearing Officer Conduct

Notwithstanding the above analysis, the grievant appears to argue that a number of additional factors improperly affected the hearing officer's conclusions as to whether the grievant engaged in the misconduct charged. Primarily, the grievant objects to references in the hearing decision to past disciplinary allegations against the grievant, and he argues that those past allegations improperly influenced both the agency's and the hearing officer's determinations.<sup>42</sup> The grievant also objects to findings in the decision that appear to have been based on the criminal investigator's testimony, which the grievant argues should have had little to no impact on the hearing officer's analysis.<sup>43</sup> Moreover, the grievant argues that the hearing officer "improperly interjected himself" during the hearing "to debate" the grievant's counsel in the presence of witnesses and otherwise demonstrated bias against the grievant, denying him a fair hearing.<sup>44</sup>

Upon a thorough review of the record, EDR cannot conclude that any of these assignments of error present a basis for remand. As to the hearing officer's consideration of prior disciplinary allegations and/or actions, our review of the hearing decision does not indicate that these past allegations were invoked as progressive discipline to support a Group III Written Notice. Rather, they were invoked as relevant to the issue of the grievant's reckless behavior.<sup>45</sup> The hearing officer found that, at the time he was handling his gun, the grievant was "intoxicated and disoriented from consuming alcohol with prescription sleep medication."<sup>46</sup> Noting the grievant's claim that he was not in a state of mind to form a subjective intent to harm to his spouse, the hearing officer reasoned that this argument was not persuasive, as the combination of alcohol and sleep medication had also appeared to play a role in the past disciplinary allegations, and the grievant was thus aware of the risks.<sup>47</sup> In any event, the hearing officer's analysis in this regard does not compromise his ultimate conclusion that the grievant engaged in the misconduct alleged in the Group III Written Notice at issue – that is, handling his firearm recklessly and in a manner that threatened another employee/individual.

As to the hearing officer's consideration of the agency's criminal investigation, the grievant also objects to the hearing officer's finding that, when asked by the criminal investigator why he brought the gun to the bathroom, the grievant responded that his spouse "had threatened suicide in the past."<sup>48</sup> EDR has reviewed the recorded investigative interview in which the grievant was alleged to have made this statement, and we agree that the recording does not necessarily support this presentation of the exchange with the investigator.<sup>49</sup> The grievant's statement was made in the context of a discussion about whether the grievant should waive his right to remain silent, not specifically what his motivation was with the gun.<sup>50</sup> However, our reading of the hearing decision

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<sup>42</sup> Request for Administrative Review at 1-3.

<sup>43</sup> *Id.* at 3-4.

<sup>44</sup> *Id.* at 9.

<sup>45</sup> *See* Hearing Decision at 15.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 10-11.

<sup>48</sup> *See id.* at 8.

<sup>49</sup> Agency Ex. 27W.

<sup>50</sup> The grievant argues that this statement was obtained in violation of his constitutional rights. Upon a thorough review of the record, we find no basis to conclude that the hearing officer erred in admitting evidence related to this issue into

does not suggest that its conclusions relied upon the grievant's statement, as reflected in the hearing decision, in any material way. Accordingly, EDR will not disturb the hearing decision on this basis.

Finally, the grievant argues that, during the hearing, the "hearing officer improperly interjected himself on numerous occasions throughout the hearing to debate grievant's counsel (in the presence of witnesses) on the form of questions, the underlying theory of the line of questions and whether or not counsel should proceed with questioning."<sup>51</sup> The grievant further asserts generally that the hearing officer "failed to act as an impartial decision-maker."<sup>52</sup> EDR has reviewed the entirety of the hearing proceedings in this matter, and we cannot find that the hearing officer's conduct or demeanor during the hearing was out of compliance with the grievance procedure. While we acknowledge that the hearing officer took a somewhat active approach during witness examinations and liberally engaged the party advocates in discussion, we have reviewed nothing to suggest that this approach favored the agency or impaired the grievant's ability to present evidence to support his claims.

In sum, evidence in the record supports the hearing officer's findings that the grievant engaged in the conduct charged by the Written Notice and that this conduct violated agency policy.

### *Mitigation*

In his request for administrative review, the grievant appears to argue that the hearing officer failed to adequately consider evidence in mitigation. Specifically, the grievant argues that disciplinary action should have been mitigated on grounds that the action (1) was not consistent with disciplinary actions issued to other employees for similar misconduct;<sup>53</sup> (2) was based on agency decision-makers' perception of the grievant's disability;<sup>54</sup> and (3) was based on unfounded speculations about the grievant's propensity for dangerous behavior.<sup>55</sup>

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."<sup>56</sup> 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."<sup>57</sup> More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and

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the record. However, to the extent the grievant believes the hearing decision is contrary to law, he will have the opportunity to challenge the hearing decision on those grounds in the circuit court.

<sup>51</sup> Request for Administrative Review at 9.

<sup>52</sup> *Id.* at 9-10.

<sup>53</sup> *Id.* at 6-9.

<sup>54</sup> *Id.* at 5-6.

<sup>55</sup> *Id.* at 3, 6.

<sup>56</sup> Va. Code § 2.2-3005(C)(6).

<sup>57</sup> *Rules for Conducting Grievance Hearings* § VI(A).

policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>58</sup>

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.<sup>59</sup> Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."<sup>60</sup> EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion<sup>61</sup> and will reverse the determination only for clear error.

### Inconsistent Discipline

The grievant argues that the agency and the hearing officer improperly evaluated discipline for similarly situated employees who received more lenient disciplinary than the grievant did in this matter. Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees."<sup>62</sup> As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.<sup>63</sup> Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated

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<sup>58</sup> *Id.* at § VI(B)(1).

<sup>59</sup> The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." *Batten v. U.S. Postal Serv.*, 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

<sup>60</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>61</sup> "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" *Graves v. Shoemaker*, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011)). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* *United States v. Jenkins*, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

<sup>62</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>63</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

similarly-situated employees differently . . . .”<sup>64</sup> Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.<sup>65</sup> Similarly, the *Rules* provide that while it is the burden of the grievant to “raise and establish mitigating circumstances,” the agency bears the burden of demonstrating “aggravating circumstances that might negate any mitigating circumstances.”<sup>66</sup> Therefore, in making a determination whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees’ positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.

In this case, the hearing officer was not persuaded by the grievant’s argument that the agency issued inconsistent discipline to similarly situated employees. The hearing officer considered two of the grievant’s exhibits that summarized various disciplinary allegations against other agency employees, and he concluded that none of the proffered comparators were similarly situated for purposes of mitigation.<sup>67</sup> The hearing officer specifically addressed one incident, in which the employee was accused of entering a third party’s residence and “brandish[ing] a firearm.”<sup>68</sup> According to the agency’s summary report of the allegations, the employee received a Group III Written Notice without termination.<sup>69</sup> Nevertheless, the hearing officer found that the grievant had not presented sufficient evidence to show that this incident could “provide a genuine comparison to Grievant’s conduct in the instant case.”<sup>70</sup> The hearing officer noted that only a summary of the accusations in the other incident was in evidence. That summary indicated that the proffered comparator held a lower rank than the grievant in this matter, and it did not include information about the date, the supervisors involved, or other circumstances that could have supported mitigation of termination for that employee.<sup>71</sup> Without these details, the hearing officer concluded that the grievant had not met his burden of proof that the employees were similarly situated. Although the grievant does not agree that such distinctions would be material, we do not find that the hearing officer applied an erroneous standard or otherwise failed to comply with the grievance procedure’s requirements in this regard.

#### Disability Discrimination

The grievant further contends that the hearing officer failed to adequately evaluate evidence as to how agency decision-makers’ perception of him as an alcoholic, *i.e.*, a person with a disability, affected the disciplinary process. DHRM Policy 2.05, *Equal Employment Opportunity*, “[p]rovides that all aspects of human resource management be conducted without regard to race . . . ; sex; color; national origin; religion; sexual orientation; gender identity or expression; age;

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<sup>64</sup> *E.g.*, *Lewis v. Dep’t of Veterans Affairs*, 113 M.S.P.R. 657, 663-64 (2010) (applying a “more flexible approach” in determining whether employees are comparators following *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009)).

<sup>65</sup> *E.g.*, *Lewis*, 113 M.S.P.R. at 665.

<sup>66</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.

<sup>67</sup> Hearing Decision at 13-14; *see* Grievant Exs. 10, 24.

<sup>68</sup> Hearing Decision at 14.

<sup>69</sup> Grievant Ex. 24.

<sup>70</sup> Hearing Decision at 14.

<sup>71</sup> *Id.*

veteran status; political affiliation; *disability*; genetic information; and pregnancy, childbirth, or related medical conditions.”<sup>72</sup> Under this policy, “disability” is defined in accordance with the Americans with Disabilities Act (ADA), the relevant federal law governing disability discrimination and accommodations.<sup>73</sup> Like Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual’s disability.<sup>74</sup>

To prevail on a claim of disability discrimination, an employee must prove that they experienced an adverse employment action because of their disability (as defined by the ADA).<sup>75</sup> At a grievance hearing, if the agency proves that the adverse employment action was justified by a legitimate, nondiscriminatory business reason, the burden of proof shifts to the grievant to show that the agency’s proffered justification was not the true reason for its action, and was instead a pretext for discrimination.<sup>76</sup>

In his decision, the hearing officer addressed the grievant’s argument that the agency’s disciplinary action was based upon the grievant’s disability. In doing so, the hearing officer found that the grievant had failed to prove that his termination occurred “because of [his] disability.”<sup>77</sup> The hearing officer credited the reasoning offered by the agency decision-maker in terminating the grievant’s employment – that the grievant’s actions of combining sleep medication with alcohol showed “a callous attitude for the wellbeing of [your spouse] and yourself,” which led to the introduction of a firearm into a “volatile” situation with his spouse.<sup>78</sup> The grievant argues that the hearing officer neglected to analyze the ADA issue as one in which the grievant was “regarded as” having the disability of alcoholism.<sup>79</sup> Although it is true that the hearing decision does not address this distinction, the grievant’s request for administrative review does not clarify the significance of whether the grievant experienced alcoholism or was simply regarded as an alcoholic. In either case, the grievant had the burden to prove that the agency’s disciplinary action was taken because of his disability, real or perceived. The hearing officer identified a legitimate, non-discriminatory reason for the agency’s disciplinary action, and he did not find that the grievant met his burden to show pretext. Our review of the record does not suggest that the evidence would have required the

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<sup>72</sup> DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

<sup>73</sup> *Id.*; see 42 U.S.C. §§ 12101 through 12213. A disability may refer to “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . .” 42 U.S.C. § 12102(1).

<sup>74</sup> 42 U.S.C. § 12112(a). A qualified individual is defined as a person who, “with or without reasonable accommodation, can perform the essential functions of the [job].” *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). Given the circumstances of this case (the loss of the grievant’s license), it is a reasonable question as to whether the grievant would have met this definition. As a determination of this issue is not necessary to resolve these claims, EDR will assume, for purposes of this ruling only, that the grievant was a qualified individual with a disability.

<sup>75</sup> See 42 U.S.C. § 12102(1).

<sup>76</sup> See *Hannah P. v. Coats*, 916 F.3d 327, 342-43 (4th Cir. 2019); see also EDR Ruling No. 2023-5449 at 14 (affirming the hearing officer’s finding that “a reasonable accommodation would not include reversing or reducing disciplinary action even though the disciplinary action was caused, in part, by Grievant’s disability”).

<sup>77</sup> Hearing Decision at 12-13.

<sup>78</sup> *Id.* at 13-14. The hearing officer further reasoned that the decision-maker “did not waiver or back[track] on his reasoning when he was cross examined extensively on these points.” *Id.* at 13.

<sup>79</sup> Request for Administrative Review at 5-6.



hearing officer to reach a different result. Accordingly, we will not disturb the hearing decision on this basis.

### Aggravating Factors

Finally, the grievant objects to the hearing officer's finding that "the agency had a valid concern that Grievant's conduct was so beyond the pale that management lost trust in Grievant's ability to serve the public and the agency with [the utmost] respect."<sup>80</sup> Specifically, the grievant challenges the hearing officer's apparent reliance on the agency decision-maker, who had concluded that it was likely that the grievant's "dangerous behavior will continue and possibly worsen."<sup>81</sup> The grievant contends that the decision-maker's assessment was not credible because it did not align with a medical opinion finding the grievant fit for duty and was based on recommendations from other managers whose credibility was in question.<sup>82</sup> However, as discussed above, 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. At the hearing, the agency decision-maker testified at length regarding his disciplinary reasoning, and EDR has no basis to second-guess the hearing officer's assessment of that testimony.

We emphasize that whether the hearing officer or EDR fully agrees with the agency's discipline is irrelevant. 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.'"<sup>83</sup> In addition, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances."<sup>84</sup> 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. Thus, we cannot say that the hearing officer abused his discretion in finding that the Group III Written Notice with removal was within the bounds of reasonableness.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision in this matter.<sup>85</sup> Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>86</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final

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<sup>80</sup> Hearing Decision at 15.

<sup>81</sup> *Id.*

<sup>82</sup> Request for Administrative Review at 3.

<sup>83</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21; e.g., EDR Ruling No. 2014-3777.

<sup>84</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>85</sup> To the extent the grievant's request for administrative review raises any arguments not explicitly address in this ruling, EDR has thoroughly reviewed the hearing record and concludes that no basis for remand is apparent.

<sup>86</sup> *Grievance Procedure Manual* § 7.2(d).

decision to the circuit court in the jurisdiction in which the grievance arose.<sup>87</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>88</sup>

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<sup>87</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>88</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).