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## ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4883
May 2, 2019

The agency has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11298. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

## FACTS

The relevant facts in Case Number 11298, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Corrections Officer at the Facility. He had been employed by the Agency for approximately 10 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> On October 21, 2018, Grievant's favorite Football Team was set to play a televised game. Grievant wore a T-shirt with the logo of the Football Team under his uniform. He went to the Facility and assumed his post in the Control Booth. Officer L was also working in the Control Booth. Grievant was responsible for monitoring two Pods.
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> The Facility had televisions on the walls of each Pod. Some inmates had their own televisions. Grievant watch the Football Game on a television as he performed his duties in the Control Booth.

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Decision of Hearing Officer, Case No. 11298 ("Hearing Decision"), Feb. 22, 2019, at 2-3.

When the Football Team won the game, Grievant took off the shirt to his uniform to reveal his T-shirt with the logo of the Football Team. He left his uniform shirt in the Control Booth and walked out of the Control Booth into the First Pod. He had both of his hands above his head and walk through the First Pod as he celebrated the Football Team's victory. As he passed one inmate, the inmate raised his hand and touched Grievant's hand as a "high-five". Grievant continued to walk through the First Pod celebrating the victory. He left the First Pod and went to the Second Pod to display his T-Shirt to the Inmates and continue his celebration. He then returned to the Control Booth.

On October 23, 2018, a family member of an inmate at the Facility sent the Assistant Warden and the Warden an email stating:

> As a side note, apparently there was a CO who was a [Football Team] fan watching a game in which they won on an inmate's TV the other night. Surprising to me was that in addition to watching the TV instead of whatever his duties were, he then donned a [Football Team] jersey over his DOC uniform and went around blowing a whistle in triumph for his team throughout the building. Is this something that your office would support?

The Agency investigated the allegation made in the email. The Agency reviewed videotape of the incident. A Facility Manager spoke with Grievant and he admitted to planning to display his Football Team T-shirt to the inmates if his team won that day. The Agency issued Grievant a Group III Written Notice with removal.

The Counselor worked at the Facility where Grievant worked. Her chain of command included reporting to the Facility Warden. The Facility planned to have a Cognitive Community Day for inmates at the Facility. The Counselor attended the event. On October 26, 2018, the Counselor sent employees, including the Warden and Assistant Warden, at the Facility an email with a picture of her playing cards with three inmates. The picture showed the Counselor seated at a table holding a hand of cards. Five inmates were seated at the table. The table has a sign reading "Spades." Three of the inmates were holding cards and appeared to be playing cards with the Counselor. Upon receiving the picture, Facility Managers may have had "discussions" about the appropriateness of the Counselor's behavior, but the Counselor did not receive any disciplinary action and was not removed from employment.

On or about October 21, 2018, the grievant was issued a Group III Written Notice with termination for fraternization with offenders.[3] The grievant timely grieved the disciplinary action and a hearing was held on February 20, 2019.[4] In a decision dated February 22, 2019, the hearing officer determined that the agency had presented sufficient evidence to demonstrate that the grievant's conduct was properly viewed as fraternization that would ordinarily have justified the

[3] *Id.* at 1.
[4] *Id.*

issuance of the Group III notice and the grievant's termination.[5] The hearing officer went on to conclude, however, that the agency had inconsistently applied disciplinary action among similarly situated employees because the Counselor had also fraternized with offenders at the Facility and was not disciplined for that behavior.[6] As a result, the hearing officer reduced the discipline to a Group II Written Notice with a ten workday suspension because the grievant's failure to wear his complete uniform while on duty constituted a Group II offense.[7] The hearing officer further ordered the grievant reinstated to his former position at the Facility or an objectively similar position and directed the agency to provide the grievant with back pay, less the ten-workday suspension.[8] The agency 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."[9] 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.[10] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency essentially argues the hearing officer abused his discretion by mitigating the disciplinary action. In support of its position, the agency contends that the facts do not support a conclusion that the grievant and the Counselor were similarly situated employees such that mitigation due to their allegedly inconsistent treatment by agency management was warranted. For example, the agency asserts that the Counselor's job "naturally requires some level of interpersonal contact with offenders," that her interaction with the offenders took place at a "sanctioned, pre-planned" event, and that photographs of the Cognitive Development Day (in which the Counselor was depicted interacting with the offenders) were shared with agency employees. The agency argues that the grievant, on the other hand, was "expected to maintain a higher degree of professional detachment from the offenders" because he was employed as a security officer, and that management "did not give any approval" for officers to "watch football on the offenders' televisions, remove their uniforms, or celebrate with the offenders on the floor."

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]."[12] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management

[5] *Id.* at 1, 4-5.
[6] *Id.* at 5-6.
[7] *Id.* at 6.
[8] *Id.*
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] Va. Code § 2.2-3005(C)(6).

that are found to be consistent with law and policy."[13] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[14]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or 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 a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[15] EDR will review a hearing officer's mitigation determination for abuse of discretion,[16] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[17] 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 similarly-situated employees differently . . . ."[18] 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.[19] 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."[20]

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[13] *Rules for Conducting Grievance Hearings* § VI(A).
[14] *Id.* § VI(B).
[15] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).
[16] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts . . . ." *Id.*
[17] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[18] *E.g.*, Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 (2010). Notably, the MSPB utilizes a "more flexible approach" in determining whether employees are comparators following the 2009 decision by the Court of Appeals for the Federal Circuit in *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009). *Lewis*, 113 M.S.P.R. at 663.
[19] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[20] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.

Therefore, in making a determination as to 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 reaching his decision to mitigate the disciplinary action, the hearing officer explained as follows:

> In order to show that the Agency has not consistently applied disciplinary action among similarly situated employees, Grievant must show that another employee engaged in similar behavior, that Agency managers were aware of that behavior, and Agency managers treated the two employees differently without reason or justification.
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> The Counselor engaged in fraternization with several inmates at the Facility. Her duties did not include playing cards with inmates. Although the Cognitive Development Day was a planned and sanctioned event for the Facility, there is no reason to believe the Counselor was expected to play cards with inmates during the event. A sign on the table indicated they were playing "Spades". This card game usually involves completing with other players to obtain a high score. The Counselor associated with the offenders by playing a competitive card game with them. She did not maintain a professional boundary with the offenders because she placed herself in a position where she was no different than an offender. The Counselor should have received disciplinary action for fraternizing with inmates.
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> The Agency inconsistently applied disciplinary action among similarly situated employees thereby justifying mitigation of Grievant's disciplinary action. Both Grievant and the Counselor reported to the Assistant Warden and the Warden. The Counselor sent Facility employees including the Warden and Assistant Warden an email showing her fraternizing with three inmates. The Assistant Warden issued Grievant a Group III Written Notice of disciplinary action with removal for fraternizing with offenders. No action was taken against the Counselor despite evidence she fraternize with offenders. Facility managers learned of the Counselor's behavior on October 26, 2018. Grievant was issued a Written Notice on November 5, 2018 showing that the Agency was aware of the Counselor's behavior at the time it issued disciplinary action to Grievant.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[21] and to determine the grievance based "on the material issues and grounds in the record for those findings."[22] 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 upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing

[21] Va. Code § 2.2-3005.1(C).
[22] *Grievance Procedure Manual* § 5.9.

officer with respect to those findings. Here, the agency does not appear to dispute the hearing officer's factual findings regarding the Counselor's behavior, but instead argues that those facts simply do not establish that she was similarly situated to the grievant such that mitigation was warranted here.

Some of evidence in the record about the nature of the grievant's as compared with the Counselor's conduct weighs against mitigation. For example, the grievant and the Counselor worked in different roles and had different job responsibilities. As a result, the agency's assertion that the responsibilities of the Counselor's position necessarily involved a different level of interaction with offenders than a security officer (such as the grievant) is not without merit. Likewise, the Cognitive Development Day at which the Counselor played cards with the offenders was approved by agency management—although, as discussed below, the evidence does not establish that the Counselor's act of playing cards with offenders was itself approved.

On the other hand, the agency's policy prohibiting fraternization does not establish different or permissible levels of association with offenders for counseling staff as compared with security staff.[23] In other words, both the grievant and the Counselor were held to the same standard with regard to fraternization, even though the nature of their jobs was not the same. Indeed, the Assistant Warden confirmed that playing cards with offenders was considered fraternization and did not qualify her statement as applying to only certain types of employees.[24] Moreover, the grievant and the Counselor worked at the same Facility and reported to the Assistant Warden and the Warden, and their behavior took place at approximately the same time. The grievant engaged in the misconduct charged on the Written Notice on October 21, 2018, and photographs of the Cognitive Development Day where the Counselor played cards with offenders were shared with employees on October 26, 2018, before the Written Notice was issued to the grievant.

Most significantly, the agency did not present evidence at the hearing to establish why the grievant and the Counselor were treated differently. While the Assistant Warden testified that management approved the Cognitive Development Day, she also explained that the proposal for the event did not say the Counselor would play cards with offenders.[25] The Assistant Warden further clarified that activities involving interaction between counseling staff and offenders must be approved by management.[26] Thus, the hearing officer's findings that the Counselor engaged in an unapproved interaction with offenders that was also considered fraternization is supported by the record.[27] While the Assistant Warden believed that "appropriate action was taken" to address the Counselor's behavior, she was not directly involved in that decision.[28] The Assistant Warden said that, after the Cognitive Development Day, she believed there was discussion with counseling staff about their participation in events with offenders.[29] Taken together, this evidence does not necessarily support a conclusion that the Counselor should have received a Group III Written Notice with termination for her behavior; rather, it tends to establish that the

[23] *See* Agency Exhibit 5.
[24] Hearing Recording at 35:15-35:33 (testimony of Assistant Warden).
[25] *E.g.*, *id.* at 34:20-35:12, 49:27-50:22 (testimony of Assistant Warden).
[26] *Id.* at 52:27-52:34 (testimony of Assistant Warden).
[27] *E.g.*, Grievant's Exhibit H.
[28] *E.g.*, *id.* at 35:33-35:44, 37:18-37:26, 51:20-51:36 (testimony of Assistant Warden). It is unclear whether the Counselor was counseled after the Cognitive Development Day or received no corrective action. *See id.*
[29] Hearing Recording at 50:23-51:20 (testimony of Assistant Warden).

grievant and the Counselor engaged in behavior reasonably construed as "fraternization" and were treated differently without legitimate justification for such disparate treatment (or at least without any demonstrable basis in the hearing record).

Accordingly, and based on EDR's review of the hearing record, the hearing officer's conclusion that the grievant and the Counselor were similarly situated for purposes of mitigation, and that the grievant was disciplined more harshly than the Counselor, is supported by the evidence in the record. Given these factual findings, EDR cannot find that the hearing officer abused his discretion in mitigating the disciplinary action or otherwise failed to apply the *Rules'* "exceeds the limits of reasonableness" standard appropriately.

## CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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