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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4892
April 15, 2019

The grievant 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 11310. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11310, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Regional Principal. He had been employed by the Agency since 2012 and with its predecessor since July 2004. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant had an ongoing conflict with a coworker. The coworker attended a graduation and Grievant observed the coworker in the audience. That conflict weighted on his mind. After work, Grievant went to work-out and then went to his home. Ms. B resided with Grievant at his home. Grievant had an argument with Ms. B. He touched her against her will. The local police were called and came to Grievant's home. A police officer asked Grievant if he put his hands on the woman and Grievant said "yes." The woman did not suffer any physical injuries. She did not seek medical treatment regarding Grievant's actions.
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> On September 28, 2018, Grievant was arrested for violating Va. Code § 18.2-57.2 with respect to Ms. B. Va. Code § 18.2-57.2(A) provides:

[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. 11310 ("Hearing Decision"), March 8, 2019, at 2-3 (citations omitted).

> Any person who commits an assault and battery against a family or household member is guilty of a Class I misdemeanor.

Grievant called the Administrator shortly after the arrest and notified the Administrator of the arrest.

On October 2, 2018, the Deputy Director gave Grievant a memorandum notifying him that, "effective immediately you are suspended without pay, in accordance with the Standards of Conduct, pending the resolution of the Warrant of Arrest executed on September 28, 2018 out of [county name] County Assault on family member. *** Furthermore, in accordance with the Standards of Conduct, charges or situations that involve crimes against persons are subject to a disciplinary charge that could include termination; a conviction is not necessary to proceed with disciplinary action."

Grievant appeared in the local Court on November 21, 2018 and pled "Nolo Contendere" on the advice of his Counsel. Grievant was tried and the Court found "facts sufficient to find guilt but defer adjudication/disposition to 11/21/20." The Court imposed costs on Grievant.

Grievant called the Administrator and told the Administrator the outcome of the court proceedings.

On November 30, 2018, the Administrator presented Grievant with an Administration of Employee Discipline: Due Process Notification.

On December 3, 2018, the Administrator met with Grievant and listened to his response to the due process notice. Grievant presented a letter with six items supporting mitigation.

Later in the day on December 3, 2018, the Administrator met with Ms. R and two other employees to discuss how to treat Grievant. The Administrator presented Ms. R with Grievant's letter outlining the six reasons to mitigate the disciplinary action. They considered all six items and discussed extensively at least three of the factors.

Ms. R asked the Administrator if Grievant's conflict with the coworker contributed to the conflict between Grievant and Ms. B. The Administrator said he did not believe so because he questioned how one incident could have caused the other.

Ms. R and the Administrator discussed whether to place Grievant in another position such as being a tester where he would not supervise other people. They concluded that that was not a viable option.

Ms. R spoke with HR and talked with the Chief of Operations and discussed how the Agency usually treated situations like Grievant's. She also

> spoke with the Regional Administrator regarding this how to discipline Grievant. Both managers told Ms. R that DOC's current administration usually handled situations like Grievant's as Group III with removal. The Agency decided to remove Grievant from employment.

On or about December 4, 2018, the grievant was issued a Group III Written Notice with termination for a "criminal conviction."[3] The grievant timely grieved the disciplinary action and a hearing was held on February 25, 2019.[4] In a decision dated March 8, 2019, the hearing officer determined that the agency had presented sufficient evidence to show that the court found that the facts were sufficient to find guilt that the grievant committed an assault and battery against a family or household member, and that such conduct was considered a Group III offense under agency policy.[5] As a result, the hearing officer upheld the issuance of the Written Notice and the grievant's termination.[6] 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."[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.

In his request for administrative review, the grievant argues that the hearing officer erred by not mitigating the disciplinary action and/or his termination. 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]."[10] 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 that are found to be consistent with law and policy."[11] 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

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

> mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[12]

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.[13] EDR will review a hearing officer's mitigation determination for abuse of discretion,[14] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

First, the grievant contends that the agency did not consider mitigating factors prior to deciding to issue the disciplinary action and, in the alternative, that any consideration of mitigating circumstances that did occur prior to the issuance of the Written Notice was "superficial" and "played no meaningful role" in the agency's decision to remove him from employment. As an initial matter, EDR notes that the hearing officer directly addressed the evidence in the record on this issue, finding that "the Agency fully considered the mitigating circumstances Grievant presented to the Agency for its consideration."[15] Moreover, and even accepting as true the grievant's assertion that agency management did not adequately consider mitigating factors prior to issuing the discipline, such an argument is not a basis for remand. In cases where the agency does not consider a particular mitigating factor or, indeed, any mitigating factors, the hearing officer shows no deference to the agency's mitigation analysis because there is no such analysis to which he may defer.[16] Regardless of whether or not the agency fully considered mitigating factors, "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]

Next, the grievant argues that he was not disciplined consistent with at least two similarly situated employees who, upon being convicted of criminal offenses, were demoted rather than terminated. In support of this position, the grievant cites to two hearing decisions, dating from 2006 and 2012, in which this outcome occurred.[18] Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's

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[12] *Id.* § VI(B).
[13] 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).
[14] "'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.*
[15] Hearing Decision at 5.
[16] *See* EDR Ruling Nos. 2008-1749, 2008-1759.
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] Grievant's Exhibits 16, 17.

treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[19]

Upon conducting a review of the hearing record, however, it does not appear that there is sufficient evidence to demonstrate that the agency's treatment of the grievant was different from other employees who may have been similarly situated to him. With regard to events described in the two hearing decisions specifically, for example, there was no witness testimony about the nature of the comparator employees' conduct that led to their criminal convictions or any other factors that might have established whether they were similarly situated to the grievant for purposes of mitigation. Furthermore, the hearing decisions relied upon by the grievant in support his argument were issued seven and thirteen years ago, respectively. It is not unreasonable for the agency to have adopted new practices in its approach to disciplining employees for similar situations during that time that would support termination in this case, while other outcomes may have been appropriate in the past. In short, there does not appear to have been sufficient evidence in the record regarding inconsistent discipline that the hearing officer may have relied upon to support mitigation on this basis. Accordingly, EDR cannot conclude that his mitigation analysis was flawed in this respect.

Finally, the grievant argues that his prior satisfactory performance and/or length of employment with the agency supported mitigation. The grievant's claim that his length of employment and/or otherwise satisfactory performance should have been considered as mitigating factors is unpersuasive. While it cannot be said that length of service or prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[20] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that otherwise satisfactory performance becomes. In this case, the grievant's length of employment and prior satisfactory performance are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group III Written Notice for conduct that was determined by the hearing officer to be terminable due to its severity.

In conclusion, and especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is an inherently reasonable outcome.[21] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[22] In this instance, the hearing officer clearly assessed the

[19] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[20] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[21] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).
[22] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343,

evidence in the record relating to mitigation and determined that "the Agency's decision [not to mitigate] was consistent with its Standards of Conduct" under the circumstances presented here.[23] 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.'"[24] Even considering those arguments advanced by the grievant in his request for administrative review, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. Accordingly, EDR will not disturb the hearing officer's decision.

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).
[23] Hearing Decision at 6.
[24] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22.
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).