Issue: Administrative Review of Hearing Officer's Decision in Case No. 11222; Ruling Date: November 9, 2018; Ruling No. 2019-4791, 2019-4792; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Numbers 2019-4791, 2019-4792
November 9, 2018

Both the grievant and the Department of Corrections (the "agency") have requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11222. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11222, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Superintendent at one of its facilities. She had been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Human resource services for employees at Unit 1 were performed by one human resource employee at Unit 1 and other employees at Facility V. The Human Resource Officer, Ms. L, worked at Facility V where many Unit 1 employee personnel files were kept. The Warden worked at Facility V and did not have Unit 1 employees reporting to him although he could access personnel records contained at Facility V.
>
> Grievant was working at Unit 1 until July 2017 when she was moved to Unit 2. Once she moved to Unit 2, she no longer supervised any employees at Unit 1.
>
> Ms. M began working for the Agency as a corrections officer in training. She became pregnant and was unable to complete her training to work as a corrections officer at Facility D. She asked for an accommodation from the

[1] Decision of Hearing Officer, Case No. 11222 ("Hearing Decision"), Sept. 17, 2018, at 2-8 (citations omitted).

Agency. She began working in the human resource department for a short period of time at Facility D or Facility P.

Facility D or Facility P required employees working on a temporary basis in human resources to sign a confidentiality form acknowledging that they understood their obligation to keep personnel records confidential. Ms. M was not required to sign a confidentiality form.

On April 17, 2017, the Benefits Manager informed Ms. M that she was being assigned to work at Unit 1 effective April 25, 2017. Grievant supervised Ms. M. Ms. M performed poorly. Grievant had to correct Ms. M's poor performance on several occasions.

Ms. M worked in Office 1. Across the hall from her was Office 2. No one was assigned to work in Office 2. Office 2 was sometimes used one or two days per week to hold interviews of prospective employees. Ms. M had a key to Office 2. Some other employees also had keys to Office 2. When Ms. M began working in Office 1, approximately 10 boxes of records were in the office. The boxes were taped and sealed. In order to make more room for herself, Ms. M had an offender move several boxes of employee records from Office 1 to Office 2. Ms. M did not open the boxes to look inside to see what items she was moving to Office 2. Ms. M did not ask anyone's permission to move the boxes. She intended to move the boxes to a tractor shed at Unit 1 to be stored. Ms. M was instructed to return the boxes.

Ms. M moved the boxes back to Office 1 on the following day. She looked inside the boxes and saw some of the document including timesheets, cycle sheets, employee names and numbers. The boxes also contained confidential employee medical records and doctor's notes. Ms. M did not consider any of the papers she viewed to contain confidential information even though several documents contained confidential medical records.

Once Grievant learned that Ms. M had moved the boxes to Office 2 without first determining the contents of the boxes, Grievant became concerned regarding Ms. M's judgment. Grievant became concerned that Ms. M did not understand the importance of keeping employee records confidential. It was a "red flag" for Grievant. Grievant wanted to "secure her office" and knew that Ms. F could accomplish this objective. Grievant knew that Ms. F had more experience in human resources than did Ms. M. Grievant decided to cross-train Ms. F and Ms. M to ensure that the Institution would have adequate and competent human resource services. Grievant knew that Major M would be leaving the Institution soon and that the Institution would need someone to perform HR duties while Ms. M was on maternity leave.

On June 8, 2017, Ms. M filed a complaint with the Agency falsely alleging harassment and hostile work environment by Grievant. The Agency began an investigation.

On June 22, 2017, Grievant sent the Regional Administrator an email:

> I need clarification regarding the temporary reassignment of [Ms. M]. [Ms. L, Facility V HRO] has informed [Ms. K] ([Ms. M's supervisor [ )] that she is her new supervisor and all of [Unit 1's] HR services are now at [Facility V]. That is all well and fine, except that [Unit 1 employees] are at [Unit 1] and need someone in our Office. I was in the process of getting [Ms. F] trained to take over the [Unit 1] HR Office and cross train both her and [Ms. M]. Is that no longer to take place? If so, this leaves [Unit 1] without anyone in that Office on site.
>
> In addition, [Ms. M] was pending getting a Notice of Needs Improvement for mishandling confidential employee records. She needs to receive her EWP. [Ms. L], informed [Ms. K] that she will do her EWP. [Ms. L] is acting as if this is a permanent transfer for this employee. We just need clarification.

The Regional Administrator ignored Grievant's email as well as a follow up email from Grievant.

On August 17, 2017, the EEO Manager sent Grievant a letter describing her findings in response to Ms. M's June 8, 2017 complaint of harassment and hostile work environment. The EEO Manager wrote, in part:

> The investigation revealed that shortly after being placed at [Institution] (less than two months) due to an ADA accommodation (protected activity), you:
>
> 1) Reprimanded [Ms. M] by issuing a NOI and instructed her temporary supervisor to issue a 2nd NOI:
> 2) Transferred [Ms. M] to another position, including changing her office, for what was described as "cross training";
> 3) Stated to two members of your Executive Team that you wanted to fire [Ms. M].
> 4) Increased your scrutiny over [Ms. M] by initiating a review of her computer usage based upon the allegation that [Ms. M] was accessing Facebook and the [denied] report by [Fiscal Tech] that [Ms. M] "spends a lot of time on her computer"; and

5) Plan to increase [Ms. M's] workload by adding training in the Records function before she had a reasonable opportunity to fully acclimate to her HR duties. ***

Conclusion
Based on the evidence obtained through the investigation, this complaint is concluded as founded for retaliation and interference as defined by the EEOC and VA DOC Operating Procedure 145.3 resulting in a hostile work environment for [Ms. M] due to her placement as the OSS at [Facility] as an accommodation under the Americans with disabilities act (ADA).

On October 17, 2017, Grievant was issued a Group I Written Notice of disciplinary action for:

> A violation of DOP 150.3, Reasonable Accommodations; DOP 145.3, Equal Employment Opportunity, DHRM Policy 2.05, Equal Employment Opportunity, DHRM Policy 2.30, Workplace Harassment, and the Americans with Disabilities Act (ADA) for retaliation and interference as defined by EEOC and DOP 145.3 resulting in a hostile work environment for a subordinate employee due to her placement at [the Facility] as an accommodation under the ADA.

On November 3, 2017, Grievant filed a grievance to challenge the Group I Written Notice.

On December 4, 2017 at 9:33 a.m., Grievant sent Ms. B an email stating:

> I have an issue and I need your assistance on regarding an employee who started working at [Unit 1] last April. She was transferred from [Facility D or Facility P] due to having an ADA accommodation to [Unit 1]. Her name is [Ms. M]. My question is do you recall if she worked in the HR Office pending a placement and if so how long?

On December 4, 2017 at 10:15 a.m., Ms. B replied to Grievant:

> [Ms. M] was with [Facility P] from January 20, 2017 to April 25, 2017. Due to ADA accommodations, [Ms. M] was placed in Human Resource office at [Facility D] for a time period of less than two months, during this time [Ms. M] helped with filing and shredding documents for Human Resources. [Ms. M] did not perform any official HR duties that would require Human

> Resource System access, such as timekeeping, personnel transactions or payroll. I hope this information helps. Thank you.
>
> On December 4, 2017 at 10:25 a.m., Grievant responded to Ms. B:
>
> What you have provided is excellent. Did anyone train her about the confidentiality of the HR documents that she was filing?
>
> On December 4, 2017 at 10:49 a.m., Ms. B wrote Grievant:
>
> Yes, when we have OITs work in Human Resources we go over with the confidentiality of personnel information, in addition she should have signed a disclosure agreeing to this condition, it would be in per personnel file at [Facility V]. Thank you.

On December 4, 2017 at 3:33 p.m., Grievant sent an email to the Warden with the subject "Information" and stating:

> Would you check in [Ms. M's] personnel file for a confidentiality statement as noted below and have it sent to me or scanned? I am working on refuting one of her complaints that she filed at [Unit 1]. Please keep this confidential and I need you to personally look into this if you will? The only reason I know it is there is that [Ms. B] provided the information below. Thank you.

Grievant was vague in her explanation of why she wanted the document because she did not want the Warden to know more than necessary about the reason for her request.

On December 4, 2017 at 5:52 p.m., Grievant sent an email to the Warden with the subject "Information" and stating:

> [Major H] will be at the Major's meeting tomorrow. If you can, give him the document in a sealed envelope. If anyone asked me where I got it, I got it from her file at [Unit 1]. Thanks

The Warden received the emails from Grievant. He contacted Ms. L about the request. Ms. L told the Warden no such document existed because Ms. M was administratively transferred due to an ADA accommodation and that it was a permanent transfer.

On December 6, 2017, the Warden informed the Regional Administrator who referred the matter to the Agency's Special Investigations Unit. The Warden told the Major to tell Grievant that he was not going to be able to retrieve the documents Grievant requested.

On December 7, 2017, the Agency's Special Investigations Unit received a request to investigate Grievant's request of the Warden.

The Investigator met with Grievant on December 13, 2017. The Investigator asked questions of Grievant, but did not record the interview and did not ask written questions. Grievant wrote a statement as requested by the Investigator. Grievant described the document she sought as a training form. She admitted to sending the emails to the Warden. Grievant said, "[t]his form is needed to follow up on a pending corrective action that is needed or had been recommended where [Ms. M] had mishandled employee personnel files." She intended to "follow up to the pending action for appropriate corrective action." Grievant said she asked the Warden to keep the matter confidential. Grievant said she did not "want anyone to misunderstand that I was trying to cover up how I obtained the training form and I should have explained this in detail. I would have reviewed the training form at [Unit 1] when I was the Superintendent there if that had been included in her training file." Grievant said the document in question was not a personnel record.

On December 18, 2017, the Investigator sent Grievant an email asking for additional information. Grievant addressed all of the Investigator's questions contained in the email. Most of the questions regarded the basis for the corrective action against Ms. M. The Investigator also asked why it had taken so long to issue a notice of needs improvement counseling for something that occurred in June 2017. Grievant explained that Ms. M had filed a complaint alleging harassment by Grievant, the Agency's equal employment officer accused Grievant of removing Ms. M from her ADA placement and violating the ADA. Grievant wrote:

> I informed [Regional Administrator] that the corrective action was needed to address the issue and I received no reply. I sent him a follow up email on [June 22, 2017] and received no reply. [Ms. M] was then transferred to [Facility V] pending outcome of the investigation. I was transferred to [Unit 2] and was not informed that the investigation had concluded until August. I realized by reviewing my pending file that I still had for [Unit 1] that the corrective action had not been taken and knew the employee, [Ms. M] had been out due to medical leave and had recently returned to the HR office. To close out the incident after the investigation and employee's return from medical leave and to address her mishandling [of] employee personnel files by removing files from the HR Office without checking the contents, I wanted to follow up and resubmit a recommendation that [Ms. M] at least receive a Notice of Substandard Performance as documentation to her probationary performance review. It is important that this employee receive some corrective action because she is still

> working with employee personnel files and she needs to understand the importance of the sensitivity and security mandates surrounding employee personnel files. *** My concern was for the best interest of the employee's future job performance and for the Department's liability.
>
> On March 20, 2018, a grievance hearing was held before this Hearing Officer regarding the Group I Written Notice issued to Grievant. This Hearing Officer issued a decision reversing the disciplinary action. This Hearing Officer issued a remand decision confirming the reversal of the Group I Written Notice.
>
> On May 3, 2018, Grievant was given a Group III Written Notice and notified she would be removed from employment.

In a decision dated September 17, 2018, the hearing officer found that the evidence showed the grievant made a false statement to the Warden when she "promised deception in order to induce the Warden to provide her with information" from Ms. M's personnel file, that this "behavior [was] consistent with falsifying records," and that the grievant's misconduct was properly considered a Group III offense.[2] The hearing officer further concluded that the agency had not presented sufficient evidence to demonstrate that the grievant was untruthful to the Investigator, retaliated against Ms. M, or engaged in unethical behavior that violated agency policy.[3] Finally, the hearing officer determined that, while the grievant had violated policy in attempting to access confidential records in Ms. M's personnel file, this behavior was properly considered a Group II offense.[4] Based on the grievant's false statement to the Warden, the hearing officer upheld the agency's issuance of the Group III Written Notice and the grievant's termination.[5] The grievant and the agency now seek administrative review from EEDR.

DISCUSSION

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

---

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

Grievant's Arguments Regarding Mitigation

In her request for administrative review, the grievant challenges the hearing officer's decision not to mitigate the Group III Written Notice and/or her 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 [EEDR]."[9] 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."[10] 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.[11]

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 the 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.[12] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In support of her position that the hearing officer should have mitigated the Group III Written Notice, the grievant argues that: (1) she "had no prior history" of discipline during her employment with the agency, and (2) the hearing officer erred by finding that the agency's decision to issue the Written Notice "was not free of an improper motive" while also upholding

---

[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules for Conducting Grievance Hearings* § VI(A).
[11] *Id.* § VI(B)(1).
[12] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[13] "'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.*

the issuance of the disciplinary action. In addition, the grievant asserts that the hearing officer should consider whether her misconduct "justif[ied] disciplinary action at a level other than a Group III" offense if the decision is remanded for reconsideration of the evidence relating to mitigating factors.

Prior Satisfactory Performance

The grievant's claim that her 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.[14] 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. Accordingly, EEDR will not disturb the hearing officer's decision on this basis.

Improper Motive

In the hearing decision, the hearing officer stated that he "[did] not believe that the facts of this case including the Agency's decision which is not free of an improper motive form[ed] a basis for mitigation under the EEDR standard as currently applied," and accordingly declined to mitigate the disciplinary action.[15] In her request for administrative review, the grievant argues that the hearing officer's determination that the Written Notice was "not free of improper motive"[16] supported a conclusion that the discipline exceeded the limits of reasonableness in this case, and thus the Written Notice and/or her termination should have been mitigated.

The hearing officer has the sole authority to weigh the evidence, determine credibility, and make factual findings when the evidence presented conflicts or is subject to varying interpretations. 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 inherently a reasonable outcome.[17] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal

[14] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[15] Hearing Decision at 12.
[16] *Id.*
[17] 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).

discipline. However, EEDR also acknowledges that certain circumstances may require this result.[18]

While the hearing officer apparently found that the grievant had presented evidence to establish some level of improper motive on the part of the agency in this case, the decision does not contain factual findings describing what that improper motive is. Further, mitigation would be warranted only if the evidence also met the burden of demonstrating that the disciplinary action exceeded the limits of reasonableness. Here, there is no indication that such a showing was made; to the contrary, the hearing officer found that the evidence did not support a conclusion that mitigation was warranted.[19] 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.'"[20] EEDR has thoroughly reviewed the hearing record and finds there is nothing to indicate that the hearing officer's determination about this issue was in any way unreasonable or not based on the actual evidence in the record. As such, EEDR will not disturb the hearing officer's decision on this basis.

Lower Level of Offense

For the reasons discussed above, EEDR finds no error or abuse of discretion in the hearing officer's decision declining to mitigate the Group III Written Notice. Accordingly, EEDR will not order the hearing officer to discuss whether the grievant's misconduct could have supported the issuance of less severe disciplinary action.

Agency's Arguments Regarding Hearing Officer's Consideration of the Evidence

In its request for administrative review, the agency argues that some of the hearing officer's findings of fact are not supported by the evidence in the record. More specifically, the agency contends that the hearing officer erred by finding that: (1) the grievant did not make a false statement to the Investigator; (2) the grievant's actions were not an attempt to retaliate against Ms. M; and (3) the grievant did not engage in unethical conduct that violated agency policy. The agency further disputes the hearing officer's conclusion that it had an improper motive for disciplining the grievant.[21]

---

[18] 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, 354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

[19] Hearing Decision at 12.

[20] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

[21] In addition, the agency submitted a response to the grievant's request for administrative review in which it appears to raise additional issues with some of the hearing officer's findings of fact that were not discussed in its original request for review. The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** EEDR within 15 calendar days of the date of the original hearing decision. ***Received by*** means delivered to, not merely postmarked or placed in the hands of a delivery service." *See Grievance Procedure Manual* § 7.2(a). To the extent the agency's response is attempting to challenge additional factual matters in the

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[22] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[23] 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.[24] 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.[25] 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer assessed the evidence and concluded that "[t]he Investigator did not record his conversation with Grievant" or "prepare a list of written questions to ask Grievant," and that in the absence of this evidence "[t]here [was] no way to measure whether Grievant with untruthful . . . because the Agency did not establish with reasonable specificity the questions asked of Grievant."[26] The hearing officer found that the grievant appeared to have "simply expressed her reasoning and justification for her actions" to the Investigator.[27] With regard to retaliation, the hearing officer stated that the "Grievant had several objectives and motives for asking for Ms. M's confidentiality form," but that "[n]one of them related to an objective of retaliating against Ms. M," nor did her behavior "have the effect of interfering or retaliating [with] the Agency's placement of Ms. M at Unit 1."[28] Finally, the hearing officer determined that the policy language cited in support of the agency's charge of unethical conduct was "aspirational in nature" and did not support the issuance of a Written Notice "without a separate basis for disciplinary action under the Standards of Conduct."[29]

EEDR has thoroughly reviewed the hearing record and the agency's request for administrative review and concludes that most of the alleged errors in the hearing officer's assessment of the evidence challenged by the agency were either not material or are simply factual findings on which the agency disagrees with either the hearing officer's conclusions or the impact of his factual findings. At the hearing, for example, the Investigator testified about his interview with the grievant and his belief that she had not been truthful.[30] The Investigator did not, however, identify any specific aspect of the grievant's statement that was objectively untrue.

---

decision, it is untimely and those arguments will not be addressed. The agency's submission has been considered only as a rebuttal the grievant's arguments.

[22] Va. Code § 2.2-3005.1(C).
[23] *Grievance Procedure Manual* § 5.9.
[24] *Rules for Conducting Grievance Hearings* § VI(B).
[25] *Grievance Procedure Manual* § 5.8.
[26] Hearing Decision at 9.
[27] *Id.*
[28] *Id.* at 10.
[29] *Id.* at 11.
[30] *E.g.*, Hearing Recording at 40:24-44:05 (testimony of Investigator).

He instead explained that the grievant "talked around the issue" of her emails and offered him a different justification for her request for Ms. M's confidentiality form than the one she provided to the Warden.[31] The grievant testified that the explanation she gave to the Warden and the reason she explained to the Investigator for requesting Ms. M's confidentiality form were both true, and that they were not incompatible with one another.[32] Under these circumstances, EEDR finds that the evidence in the record is insufficient to demonstrate that the hearing officer abused his discretion in finding that the grievant did not make a false statement to the Investigator.

EEDR has not identified any evidence to conclusively demonstrate that the grievant sought Ms. M's confidentiality form for retaliatory reasons. The grievant testified about her motive in asking the Warden for the form, denied that she intended to retaliate against Ms. M, and stated that she did not have the authority to take any management action against Ms. M because she was no longer Ms. M's supervisor.[33] Conclusions as to the credibility of witnesses 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 EEDR 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.[34]

With regard to the matter of unethical conduct, EEDR has previously found that, while the agency's policy regulating ethical behavior is broad and could apply to a wide range of possible behavior, it nevertheless prohibits employees from engaging in behavior that would be considered "unbecoming [of] an employee of the Commonwealth."[35] Depending on the facts and circumstances, an employee may be found to have violated her ethical duties to the agency under the terms expressed in this policy and the applicable *Standards of Conduct* policy.[36] However, even if EEDR assumes the agency is correct and the facts supported a conclusion that the grievant had engaged in unethical conduct in violation of agency policy, nothing about the result in this matter would be altered on remand. Accordingly, remand is not warranted to address this issue that has no effect on the outcome.

Finally, EEDR will not remand the case for revision or clarification of the hearing officer's finding regarding the agency's motive for issuing the disciplinary action. It is understandable that the agency does not agree with the hearing officer's conclusion that the disciplinary action was "not free of improper motive" and was a "pretext to end [the agency's] long standing conflict with the grievant."[37] However, these statements are, at best, inconclusive and, more importantly, have no effect on the outcome of this case. It is not clear how the

[31] *E.g.*, Hearing Recording at 1:20:08-1:26:28 (testimony of Investigator).
[32] Hearing Recording at 6:13:52-6:15:27 (testimony of grievant).
[33] *Id.* at 6:13:52-6:15:27, 6:21:20-6:21:53 (testimony of grievant).
[34] *See, e.g.*, EDR Ruling No. 2014-3884.
[35] *See* EEDR Ruling No. 2018-4742.
[36] *See id.*
[37] Hearing Decision at 12.

agency's apparent "pretext" to end the grievant's employment was an "improper motive" where, as here, the hearing officer found that "pretext" (the grievant's misconduct) to be supported by the evidence at a Group III level, which generally warrants termination.

At the hearing, the grievant testified at length about her history of protected activity with the agency,[38] and the grievant's legal counsel argued that the agency issued the discipline as a means of retaliating against her.[39] The question of whether there was a causal connection between the grievant's protected activity and the issuance of the Written Notice will necessarily depend on the hearing officer's assessment of the evidence presented by the parties, including the credibility of the witnesses who testified at the hearing and the corresponding weight given to their testimony. Significantly, the hearing officer further determined that the grievant had engaged in the misconduct charged on the Written Notice because she "promised deception in order to induce the Warden to provide her with information from a confidential file at Facility V" and that the agency properly determined this misconduct was a Group III offense akin to falsifying records.[40] The hearing officer upheld the issuance of the Written Notice and the grievant's termination based on her false statement to the Warden.[41] In other words, the hearing officer found that the disciplinary action was warranted and appropriate under the circumstances, regardless of any impropriety in the agency's motive found by the hearing officer.

In summary, EEDR notes that remanding the case for reconsideration of the specific factual issues alleged by the agency would not have any impact on the ultimate outcome, as the hearing officer has already determined that the grievant engaged in the behavior charged on the Written Notice, that her behavior constituted misconduct, and that the discipline was consistent with law and policy.[42] Any error in the hearing officer's factual findings with regard to the matters challenged by the agency, if such error exists, is therefore harmless. Accordingly, EEDR declines to disturb the decision on any of the bases cited by the agency.[43]

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[44] Within 30 calendar days of a final hearing decision, either party may appeal the

[38] *See* Hearing Recording at 5:13:16-5:26:15 (testimony of grievant).
[39] *E.g.*, *id.* at 7:21:06-7:22:42, 7:25:30?-7:25:58, 7:29:28-7:30:28.
[40] Hearing Decision at 9.
[41] *Id.* at 9, 12.
[42] As discussed more fully above, EEDR finds no error with the hearing officer's determination that mitigation of the disciplinary action was not warranted, as the grievant alleges in her request for administrative review.
[43] To the extent any issue raised in the agency's request for administrative review is not specifically addressed above, EEDR has determined that such issues would have no material effect on the outcome of this case or otherwise lack merit warranting further discussion here.
[44] *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

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