Issue: Administrative Review of Hearing Officer's Decision in Case No. 11241; Ruling Date: November 21, 2018; Ruling No. 2019-4793, 2019-4797; Agency: Department of Corrections; Outcome: Remanded to AHO.

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 2019-4793, 2019-4797
November 21, 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 11241. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11241, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Captain at one of its facilities. He was hired by the Agency on February 25, 1999. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant worked at the Facility as the shift commander. He was the highest ranking employee when he was working.
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> Officer E began working for the Agency in October 2017 as an Officer in Training (OIT). Officer E graduated from the Academy on February 2, 2018 and began working at the Facility on February 5, 2018. Officer E worked within Grievant's chain of command at the Facility in 2018 on February 9, February 10, February 12, February 20, February 23, April 11, and April 12.
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> Grievant and Officer E engaged in sexual relations approximately three times sometime in March and/or April 2018.
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> The relationship ended in the last few days of April 2018.
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> Officer W had a child with Grievant and appears to have been following or stalking him. Officer W took a picture of Grievant's vehicle in front of Officer

[1] Decision of Hearing Officer, Case No. 11241 ("Hearing Decision"), Sept. 24, 2018, at 2-3 (citations omitted).

E's residence. Officer W confronted Officer E about her relationship with Grievant. On April 23, 2018, Facility managers learned from Officer W that Grievant might be having a relationship with Officer E. They received Officer W's picture of Grievant's vehicle parked in front of Officer E's home. The Agency began an investigation.

On May 1, 2018, the Assistant Warden and HRO interviewed Grievant regarding why so many employees were asking to leave the shift he supervised and to address rumors that Grievant was in a relationship with Officer E. The Assistant Warden told Grievant, "There is rumor and we have a picture. Are you in a relationship? Are you having sex? Anything going on with this officer?"

Grievant told the Assistant Warden he "is not in a relationship with any officer here." On May 1, 2018, Grievant wrote a statement that, "I am not in no relationship with a officer at [Facility]" Grievant was not in a relationship with Officer E on May 1, 2018.

The Assistant Warden met with other corrections staff at the Facility. She concluded there were widespread rumors about Grievant and Officer E having a relationship. For example, Officer A told the Assistant Warden, he had heard rumors of a relationship between Grievant and Officer E and had observed Grievant's motorcycle in front of Officer E's residence. Officer W told the Assistant Warden she had heard rumors about a relationship between Grievant and Officer E and had sent text messages to Officer E about the rumors. Sergeant L told the Assistant Warden Officer W called her to tell her the rumor.

On May 10, 2018, the Investigator met with Officer E and asked her about her relationship with Grievant. Officer E said she had become close to Grievant and their relationship grew to an intimate sexual level. She said Grievant stopped coming over to her residence approximately a month earlier and they had not conversed nearly as much as they used to.

On May 10, 2018, Grievant met with the Investigator. The Investigator wrote in his report:

> [Grievant] admitted that he had intimate (sexual) relations with [Officer E]. [Grievant] stated that they first started talking approximately two months ago and realized it was a mistake, had not been together for approximately a month.

The Investigator believed Officer E and Grievant were truthful during the investigation.

On May 30, 2018, the grievant was issued two Group III Written Notices and terminated from employment with the agency.[2] The first Written Notice charged the grievant with engaging in a prohibited romantic relationship and the second Written Notice charged the grievant with falsifying statements.[3] In a decision dated September 24, 2018, the hearing officer found that the agency had not presented sufficient evidence to show that the grievant made a false statement to the Assistant Warden and rescinded the second Written Notice.[4] The hearing officer further determined, however, that the evidence demonstrated the grievant had "engaged in a sexual relationship with Officer E" in violation of agency policy, and that the "impact [of the grievant's misconduct] on the Agency was sufficient to justify issuing a Group III Written Notice."[5] Based on this analysis, the hearing officer upheld that issuance of the first Written Notice and the grievant's termination.[6] Both 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."[7] 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.[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 EEDR conduct this administrative review for appropriate application of policy.

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

In their requests for administrative review, both parties argue that the hearing officer's findings of fact, based on the weight and credibility he accorded to testimony presented at the hearing, are not supported by the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] Thus, in disciplinary actions the hearing officer has the authority to determine whether

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[2] *See id.* at 1.
[3] Agency Exhibit 1.
[4] Hearing Decision at 5.
[5] *Id.* at 4-5.
[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 § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).

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.[13] 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.

First Written Notice (Prohibited Romantic Relationship)

The grievant contends that the hearing officer erred in upholding the first Group III Written Notice for engaging in a prohibited romantic relationship with Officer E. In the hearing decision, the hearing officer assessed the evidence about the grievant's relationship with Officer E and concluded that the "Grievant engaged in a sexual relationship with Officer E thereby violating Operating Procedure 135.3," that "[n]umerous employees heard rumors of a relationship between Grievant and Officer E," that the "Grievant held the highest position at the Facility, and [that] widespread knowledge that he was not following Agency policy must have undermined his ability to lead."[14] As a result of this analysis, the hearing officer determined that "[t]he impact [of the grievant's misconduct] on the Agency was sufficient to justify issuing a Group III Written Notice."[15]

The grievant does not appear to dispute the hearing officer's factual conclusion that he engaged in a sexual relationship with Officer E, or that the relationship was a violation of agency policy. The grievant instead asserts there is no evidence to show that his relationship with Officer E either affected his work performance or adversely impacted the work environment at the facility. Moreover, the grievant further asserts that, regardless of any adverse impact that might have resulted from his relationship with Officer E, his misconduct did not rise to the level of a Group III offense under agency policy. In particular, the grievant disputes the hearing officer's statement that his relationship with Officer E "must have undermined have ability to lead," arguing the hearing officer made an assumption that is without support in the record.

The agency's Operating Procedure ("OP") 135.3, *Standards of Ethics and Conflict of Interest*, states that "[s]upervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates."[16] OP 135.3 further provides that "[i]nitiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the *Standards of Conduct* and will be treated as a Group I, Group II, or Group III offense depending on its effect on the work environment."[17] At the hearing, the agency presented evidence to show that multiple employees under the grievant's supervision had requested reassignment to another shift, and that many employees were aware of the rumors about the grievant's relationship with Officer E.[18] On the other hand, several witnesses testified that the rumors about the grievant did

[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 4.
[15] *Id.* at 4-5.
[16] Agency Exhibit 4 at 9.
[17] *Id.*
[18] Hearing Recording at 11:02-14:04, 19:21-23:17 (testimony of Assistant Warden); *see* Agency Exhibit 7.

not impact their work performance, nor were they aware of any issues with the grievant's ability to perform his job.[19] While the hearing officer's discussion of the evidence about this issue could have been more detailed, EEDR cannot find that the hearing officer erred by concluding that the grievant's misconduct had a sufficiently serious impact on the work environment to be considered a Group III offense. 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.[20]

In addition, the grievant claims that the Warden "had the full and exclusive power" to determine what level of discipline was appropriate and did not wish to terminate the grievant, but that his authority was "unjustifiably overridden" by management.[21] This argument does not constitute a basis for remand in this case. OP 135.3 states that "[t]he Organizational Unit Head will determine the appropriate disciplinary action to be taken" when the agency determines that an employee has violated the policy.[22] The agency's OP 135.1, *Standards of Conduct* policy, provides that a Unit Head has the authority to remove, suspend, demote, or transfer an employee at his or her institution "[e]xcept as otherwise directed by the Director, Deputy Director, Regional Operations Chief, or Regional Administrator . . . ."[23] In other words, agency management has the authority to direct the action of a Unit Head, such as the Warden in this case, in disciplinary matters.

In conclusion, EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's conclusion that the grievant's relationship with Officer E had a negative effect on the work environment at the facility, and that the impact of the grievant's misconduct justified the issuance of a Group III Written Notice. Although the grievant may disagree with that decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the impact of his relationship with Officer E was in any way unreasonable or not based on the actual evidence in the record. Accordingly, EEDR declines to disturb the decision based on the grievant's arguments relating to the hearing officer's factual conclusions.

Second Written Notice (Falsifying Statements)

In its request for administrative review, the agency contends that the hearing officer erred in rescinding the second Group III Written Notice because his determination that the "Grievant did not make a false statement when he reported that he was not in a relationship with another officer [] is unsupported by the record and is inconsistent with the Agency's Standards of

[19] *E.g.*, Hearing Recording at 2:30:27-2:31:37 (testimony of Witness M), 2:36:46-2:38:04 (testimony of Witness B).
[20] *See, e.g.*, EDR Ruling No. 2014-3884.
[21] *See* Hearing Recording at 2:13:42-2:14:33, 2:20:25-2:20:54 (testimony of Warden).
[22] Agency Exhibit 4 at 9.
[23] Agency Exhibit 3 at 12.

Conduct." The agency argues that the hearing officer's "interpretation of the facts and applicable policy was unreasonably narrow," and that the "Grievant's statements [to the Assistant Warden] were so misleading that they could only be construed as intentionally false." In addition, the agency claims that the evidence shows the grievant believed "his statements . . . to be true because he considered a 'relationship' to require some level of commitment," not because he and Officer E had recently ended the relationship.

The hearing officer discussed the evidence relating to the grievant's meeting with the Assistant Warden as follows:

> On May 1, 2018, the Assistant Warden asked Grievant if he was in a relationship or having sex with Officer E. She was asking Grievant if he was currently (May 1, 2018) in relationship with Officer E. She did not ask Grievant if he had been in a relationship with Officer E prior to May 1, 2018. Grievant answered that he was not in a relationship. His answer was addressing his status on May 1, 2018. On May 1, 2018, Grievant was not in a relationship with Officer E and was no longer having sexual relations with her. Grievant's response was truthful. There is no basis to support the issuance of a Group III Written Notice for falsifying statements.[24]

At the hearing, the Assistant Warden and the grievant both testified that the Assistant Warden asked the grievant if he was in a relationship with an officer at the facility, and that the grievant said he was not in a relationship with an officer.[25] The grievant further provided a written statement that he "was not in no [sic] relationship with a [sic] officer at" the facility.[26] The Assistant Warden testified that she understood the grievant's response to mean that he had never had an intimate or sexual relationship with Officer E.[27]

Agency policy OP 135.1, *Standards of Conduct*, prohibits "[f]alsifying any records, willfully or by acts of gross negligence," and classifies falsification as a Group III offense.[28] In addition, it is not unreasonable for the agency to expect its employees to provide truthful statements to management during the course of an investigation into potential misconduct. Depending on the facts and circumstances, material omissions of information and/or misleading statements may appropriately be regarded as tantamount to falsification, and such conduct may justify the issuance of a Group III Written Notice. The record evidence in this case shows that the Assistant Warden was aware of rumors about the grievant's relationship with Officer E and was attempting to determine the nature and extent of that relationship at the May 1 meeting. For example, the hearing officer found that the Assistant Warden asked the grievant if "[a]nything [was] going on with" Officer E, and that the grievant denied the existence of a relationship with

[24] Hearing Decision at 5.
[25] Hearing Recording at 14:09-19:15 (testimony of Assistant Warden), 3:11:51-3:15:05 (testimony of grievant); *see* Agency Exhibit 7 at 2.
[26] Agency Exhibit 7 at 4.
[27] Hearing Recording at 16:04-16:45 (testimony of Assistant Warden).
[28] Agency Exhibit 3 at 9.

any officer at the facility.[29] Although the evidence established that the grievant's relationship with Officer E had ended before May 1,[30] the grievant's statement to the Assistant Warden was misleading and omitted material information: namely, the grievant did not disclose that he had an unreported sexual relationship with Office E. As a result, EEDR finds that the agency properly considered the grievant's conduct to be an act of falsification, which warranted the issuance of disciplinary action at the level of a Group III offense under OP 135.1.

For these reasons, EEDR finds that the hearing officer's decision to rescind the Group III Written Notice is inconsistent with agency policy OP 135.1, *Standards of Conduct*. Accordingly, the matter must be remanded to the hearing officer, and the Group III Written Notice must be upheld as the proper application of policy in this case.

Grievant's Arguments Regarding Mitigation

Finally, the grievant challenges the hearing officer's decision not to mitigate the Group III Written Notice 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 [EEDR]."[31] 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."[32] 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.[33]

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

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[29] Hearing Decision at 3; *see* Agency Exhibit 7.
[30] *Id.* at 1:00:56-1:01:30 (testimony of Officer E), 1:17:39-1:18:31 (testimony of Investigator), 3:23:46-3:24:24 (testimony of grievant); *see* Agency Exhibit 8 at 1-2.
[31] Va. Code § 2.2-3005(C)(6).
[32] *Rules for Conducting Grievance Hearings* § VI(A).
[33] *Id*. § VI(B)(1).

totally unwarranted.[34] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[35] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In support of his position that the hearing officer should have mitigated the Group III Written Notice, the grievant appears to argue that his prior satisfactory performance and/or length of employment with the agency supported mitigation, and that his misconduct did not have a serious impact on the work environment at the facility.

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.[36] 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.

Furthermore, EEDR finds that the grievant's claim regarding the impact of his misconduct on the work environment at the facility does not support mitigation in this case. As discussed more fully above, there is evidence in the record to support the hearing officer's conclusion that the issuance of a Group III Written Notice was warranted and appropriate under the circumstances. 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.[37] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EEDR also acknowledges that certain circumstances may require this result.[38]

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[34] 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).

[35] "'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.*

[36] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

[37] 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).

[38] 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,

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.[39] 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.'"[40] EEDR has 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.[41]

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for revisions consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original or first reconsidered decision).[42] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[43]

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 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]

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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).

[39] Hearing Decision at 5.

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

[41] To the extent this ruling does not address any specific issue raised in either party's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

[42] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.

[43] *See Grievance Procedure Manual* § 7.2.

[44] *Id.* § 7.2(d).

[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).