Issue: Administrative Review of Hearing Officer's Decision in Case No. 11256; Ruling No. 2019-4809, 2019-4811; Ruling Date: December 20, 2018; 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 2019-4809, 2019-4811
December 20, 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 11256. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11256, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Sergeant at one of its facilities. Grievant was demoted to a Corrections Officer and transferred to another facility as part of this disciplinary action. She received an 8% disciplinary pay reduction to a lower pay band. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant worked at the Front Gate post. Her shift began at 5:45 p.m. and ended at 6:15 a.m. She worked "five days on" with "five days off." She frequently worked overtime. Grievant was allowed two 30 minute breaks during her shift.
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> On October 16, 2017, Grievant received a Virginia Uniform Summons charging her with reckless driving as prohibited by Va. Code 46.2-852. She was summoned to appear at the Local General District Court on November 20, 2017.
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> On November 29, 2017, Grievant submitted to the Agency a completed "Criminal Offense/Moving Traffic Violation Notifications" form. The Agency created this pre-printed form with blanks to be completed by employees. Part of the pre-printed language was:
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>> Pursuant to Department of Corrections Operating Procedure 040.1, Litigation, I am notifying my Organizational Unit Head that I have been charged with the following criminal offense, moving traffic

[1] Decision of Hearing Officer, Case No. 11256 ("Hearing Decision"), Oct. 31, 2018, at 2-4.

> violation, or civil or disciplinary proceeding for engaging or attempting to engage in sexual activity by force in the community:

Grievant wrote on the form:

> Case to be heard on 3/14/18
> Reckless Driving

Above the pre-printed words "Date of Event", Grievant wrote, "11/25/17."

Another pre-printed part of the form stated:

> I understand I am responsible for notifying my Organizational Unit Head of the disposition (outcome) of the criminal charge, moving traffic violation, or civil or disciplinary proceeding for engaging or attempting to engage in sexual activity by force in the community. Failure to notify my Organizational Unit Head of the disposition may result in disciplinary action.

Grievant signed her name below the above statement and wrote the date "11/28/17."

Although the case was originally scheduled to be heard on November 20, 2017, it was continued to March 12, 2018.

Grievant hired an attorney to handle the reckless driving charge. Her attorney appeared in court on her behalf.

Grievant had a unique log in identification and password. She was authorized to access the Agency's computers which would provide her with access to the internet. Each time Grievant logged into her computer account, she received a notice that her computer usage was monitored and she was obligated to comply with the Agency's computer usage policy.

There were often periods of limited activity at the Front Gate. Grievant had access to a computer in the Front Gate post. When Grievant took breaks, she sometimes accessed the internet using the Agency's computers located in other sections of the Facility.

The Agency had internet firewall software to record every employee's internet activity. Each time Grievant accessed a website, the Agency's firewall software would record her activity. The software recorded the webpages visited. Each time Grievant accessed a webpage, that webpage would automatically activate and load numerous objects contained on the webpage. The firewall software would record each time Grievant accessed a webpage but also each of the software objects contained on the webpage. This resulted in a lengthy report.

Grievant sometimes watched YouTube videos that were work-related.

> Grievant was involved in preparing for some social events at the Facility. She sometimes searched for recipes for food for the events. She sometimes considered purchasing items such as jugs of juice for a Facility event.
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> On December 15, 2017, the Warden asked the Information Technology Officer to "run a report" on Grievant's internet usage for the prior 60 days.
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> The Agency's Information Technology Officer testified that in her opinion Grievant had excessive personal internet use. However, she could not recall how much time per day Grievant's spent engaging in personal use of the internet.
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> Grievant did not seek reinstatement to her prior position at her former facility. She indicated she preferred to remain at the facility where she was transferred.

On February 9, 2018, the Grievant was issued two Group II Written Notices.[2] The first Written Notice charged the grievant with a failure to follow policy regarding reporting moving traffic violations.[3] The second Written Notice charged the grievant with failing to follow agency policy by "spending excessive non-work related time on the internet during work hours."[4] Based on the grievant's accumulation of disciplinary action, the second Written Notice was accompanied by a disciplinary pay reduction, demotion, and transfer.[5] The grievant timely grieved the disciplinary actions and a hearing was held on October 11, 2018.[6] In a decision dated October 31, 2018, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant failed to timely report a moving traffic violation as required by agency policy and upheld the issuance of the first Written Notice.[7] The hearing officer further determined, however, that the evidence did not support a conclusion that the "Grievant's personal internet use was more than incidental."[8] As a result, the hearing officer rescinded the second Group II Written Notice, ordered the grievant reinstated to her former rank of Sergeant, and directed the agency to reverse the disciplinary pay reduction and provide the grievant with back pay resulting from the reduction in her rank.[9] Both parties now appeal the hearing decision to 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."[10] If the hearing

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[2] *Id.* at 1.
[3] Agency Exhibit 1 at 1.
[4] *Id.* at 2.
[5] *Id.*
[6] Hearing Decision at 1.
[7] *Id.* at 4-5.
[8] *Id.* at 6.
[9] *Id.* at 7.
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).

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.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Parties' Argument Regarding Hearing Officer's Consideration of the 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"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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.

Grievant's Claim Regarding Retaliation

The grievant asserts that the hearing officer erred by concluding that the Written Notice that charged her with failing to report a moving traffic violation was not issued as a form of retaliation. In the hearing decision, the hearing officer assessed the evidence and stated that the "Grievant engaged in protected activity because she complained about how the agency treated her" and that she "suffered an adverse employment action because she received disciplinary action."[17] The hearing officer determined, however, that the grievant had "not established a connection between her protected activity and the adverse action."[18] In support of her position, the grievant contends that the hearing officer "ignored [her] unrefuted testimony" regarding her treatment by the Warden, and that the evidence was sufficient "to establish a nexus between her protected activity and the adverse action . . . ."

Although a state agency may not discipline an employee because she engaged in protected activity, an employee's exercise of protected activity does not serve to insulate her from disciplinary action that is warranted and appropriate if the discipline does not have a causal

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[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] Hearing Decision at 6-7.
[18] *Id.* at 7.

connection to the protected activity.[19] In this case, the hearing officer determined that evidence did not support a conclusion that the agency's decision to issue the disciplinary action had a causal connection to her protected activity, and that the agency did not discipline the grievant "as a pretext for retaliation."[20] While the hearing officer did not explicitly discuss all of the evidence in the record that could have supported her claim of retaliation,[21] there is no requirement under the grievance procedure that a hearing officer specifically discuss every piece of evidence in the hearing record. Thus, mere silence as to some of the evidence does not necessarily constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties. In this case, it would appear that the hearing officer did not discuss the grievant's testimony about the Warden's alleged response to her exercise of protected activity because he determined that it was not credible and/or persuasive.

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer's decision with regard to this issue. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is evidence in the record to support the hearing officer's conclusion that the agency's decision to issue the discipline did not have a retaliatory motive,[22] and EEDR has not reviewed anything to indicate that the hearing officer's analysis of the evidence regarding the agency's motive for the discipline was in any way unreasonable or not based on the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR cannot conclude that the hearing officer's decision constitutes an abuse of discretion in this case. Accordingly, EEDR will not disturb the hearing decision on this basis.

Agency's Claim Regarding Internet Use

The agency argues that the evidence in the record supports a conclusion that the grievant's personal internet use was excessive, and the hearing officer erred in concluding otherwise. The hearing officer discussed the evidence relating to the grievant's internet use as follows:

> The Agency's policy does not define what exceeds incidental use. The Agency did not present evidence showing how much time in a given day Grievant spent on the internet. The Agency did not present evidence showing that it reviewed Grievant's internet usage to distinguish between personal and business related usage. Grievant sometimes searched for items for Facility events that would otherwise appear as personal usage. She reviewed business related YouTube videos that might otherwise appear as personal use. The Agency did not present evidence showing that it excluded time Grievant spent on the internet during her work lunches and breaks. The opinion of the Information Technology Officer, standing alone, is not sufficient for the Agency to meet its burden of proof.[23]

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[19] *See*, *e.g.*, Laing v. Fed. Express Corp., 703 F.3d 713, 719-22 (4th Cir. 2013).
[20] Hearing Decision at 7.
[21] *See*, *e.g.*, Hearing Recording at 2:56:39-3:08:38 (testimony of grievant).
[22] *See*, *e.g.*, Agency Exhibits 5-7, 11; Hearing Recording at 58:00-58:49 (testimony of Witness L), 1:57:05-1:57:23 (testimony of Warden).
[23] Hearing Decision at 6.

In support of its position, the agency asserts that it presented a record of the grievant's internet use that "clearly logs the amount of time she spent online," and that "she conducted many searches that had no discernable relationship to her work." The agency further claims that the hearing officer improperly "place[d] the burden on the Agency to make distinctions between Grievant's personal and work-related internet use and account for whether Grievant's internet use occurred during her break time."

The relevant portion of the agency's Operating Procedure ("OP") 310.2, *Information Technology Security*, provides:

> Personal use means use that is not job-related. Internet use during work hours should be incidental and limited to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. Personal use is prohibited if it:
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> (a) Adversely affects the efficient operation of the computer system; or
> (b) Violates any provision of this operating procedure, any supplemental procedure adopted by the agency supplying the internet or electronic communication system, or any other policy, regulation, law, or guideline as set forth by Federal, State or Local law.[24]

The plain language of this provision suggests that, in order to find that an employee's internet use constituted misconduct, a hearing officer must assess the quantity of time the employee spent on the internet (i.e., whether it is incidental and limited), the nature of the employee's internet use (i.e., job-related or personal), and the impact, if any, of the employee's internet use on the performance of her duties. In this case, the agency did not argue that the grievant's internet use impacted the operation of the agency's computer system or otherwise violated policy or law. The agency instead advanced a theory that the grievant's personal internet use exceeded the "incidental and limited" amount that is permissible under OP 310.2.

At the hearing, the Information Technology Officer testified that she interprets the "incidental and limited" language in OP 310.2 to mean that employees should use the internet quickly to look something up or during their breaks.[25] The agency presented two documents listing a record of the grievant's internet use for a period of 60 days: a 6-page "condensed report" of internet searches, and a spreadsheet listing all of the grievant's internet activity during that time.[26] Based on her review of the grievant's internet activity, the Information Technology Officer informed the Warden that she believed grievant "far exceed[ed] the limits of 'incidental use.'"[27]

As an initial matter, EEDR finds that the agency's assertion regarding the burden of proof is unpersuasive. In hearings involving disciplinary actions, the agency is required to show by a

[24] Agency Exhibit 4 at 9.
[25] Hearing Recording at 1:27:17-1:28:04 (testimony of Information Technology Officer).
[26] Agency Exhibit 8 at 3-8; Agency Exhibit 10.
[27] Agency Exhibit 8 at 1.

preponderance of the evidence that the disciplinary action issued to the grievant was warranted and appropriate under the circumstances.[28] In this case, the Written Notice charged the grievant with "spending excessive non-work related time on the internet during work hours."[29] The burden was, therefore, on the agency to present witness testimony and/or other evidence to demonstrate by a preponderance of the evidence that the grievant engaged in personal use of the internet in excess of the "incidental and limited" personal use that is acceptable under OP 310.2.

Moreover, EEDR has thoroughly reviewed the hearing record and finds that there is evidence to support the hearing officer's conclusion that the record evidence did not support the issuance of disciplinary action in this case. EEDR does not disagree with the agency that both the condensed report and the full internet report demonstrate that some of the grievant's internet use was not work-related. As stated above, however, a finding that the grievant's conduct was properly considered a violation of OP 310.2 depends on the hearing officer's assessment of the evidence relating to the quantity of time the grievant spent on the internet and the nature of the her internet use. Presenting records of an employee's internet activity without evidence to establish the amount of time the employee spent using the internet and the extent of activity that the agency determined was not job-related will rarely, if ever, be sufficient to support a charge of excessive personal internet use.[30]

In this case, the agency's full internet report records the total amount of time the grievant spent on the internet while she was at work; it does not, however, distinguish between personal use and work-related use.[31] The Information Technology Officer testified that the condensed report reflected personal use that she believed was not business-related.[32] Even if the Information Technology Officer's testimony that all of the activity on the condensed report was personal is credible, the condensed report does not show the amount of the time the grievant spent performing the listed internet activity.[33] While the Information Technology Officer explained that the grievant used the internet for personal activity outside of what is recorded in the condensed report, she could not recall the amount of time the grievant spent using the internet for personal reasons, whether on activity listed in the condensed report or recorded elsewhere in the full internet report.[34] Similarly, EEDR has not identified any witness testimony to establish whether, and to what extent, the internet use listed in the condensed report and the full report occurred during the grievant's breaks.[35] Under these circumstances, EEDR cannot conclude that the hearing officer abused his discretion in finding that the evidence was insufficient to support

[28] *Grievance Procedure Manual* § 5.8.
[29] Agency Exhibit 1 at 2.
[30] In its request for administrative review, the agency cites to certain periods of allegedly "mostly continuous [internet] activity." However, no witness testified about these periods of time specifically or whether the listed "hits" would indicate such continuous activity. The full internet report is not readily understandable without such witness testimony.
[31] *See* Agency Exhibit 10.
[32] Hearing Recording at 1:25:21-1:25:33, 1:28:07-1:28:28 (testimony of Information Technology Officer).
[33] Agency Exhibit 8 at 3-8. While the agency may be accurate in stating that the condensed report demonstrates personal use of the internet, the record is lacking of any testimony that would quantify that personal use such that it could be evaluated as being incidental or not. This report, again, is not readily understandable without such witness testimony. For example, while the condensed report lists a variety of search queries, they are not grouped by date or time to suggest to any degree the amount of time spent.
[34] Hearing Recording at 1:26:53-1:27:12 (testimony of Information Technology Officer).
[35] The Warden testified that the grievant typically took two 30-minute breaks during her shift, and that she was permitted to use the internet during her breaks. Hearing Recording at 2:51:24-2:52:14 (testimony of Warden).

the agency's charge that the grievant exceeded the level of "incidental and limited" personal internet activity that is permitted by OP 310.2.

Although it is clear the agency disagrees with the decision, there is nothing to indicate that the hearing officer's consideration of the charge set forth on the Written Notice was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case 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.

Grievant's Argument Regarding Mitigation

In addition, the grievant challenges the hearing officer's decision not to mitigate the disciplinary action charging her with failing to report a moving traffic violation. Under 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]."[36] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[37] 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.[38]

Thus, the issue of mitigation is only reached if the hearing officer 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 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.[39] EEDR will review a hearing officer's mitigation determination for abuse of

[36] Va. Code § 2.2-3005(C)(6).
[37] *Rules for Conducting Grievance Hearings* § VI(A).
[38] *Id.* § VI(B)(1).
[39] 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).

discretion,[40] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In her request for administrative review, the grievant contends that "the Agency had the burden of proof" and did not present "evidence that similarly situated employees who failed to timely report a moving violation were also charged with a Group II offense that led to serious consequences such as a demotion or transfer." 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." The grievant's assertion regarding the burden of proof, however, is incorrect. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors, including inconsistent discipline of similarly situated employees.[41] Upon conducting a review of the hearing record, it does not appear that the grievant presented any evidence regarding the agency's treatment of employees who may have engaged in similar misconduct (i.e., failing to report or providing false information in a report of a moving traffic violation) and either were not disciplined or were disciplined less severely than the grievant. While the grievant argues that "there was some testimony with regard to at least one other employee . . . who turned in late, a traffic incident that was in court," EEDR did not identify any such testimony in its review of the hearing record. Even accepting the grievant's assertion as true, such evidence, by itself, would not demonstrate that the comparator employee was similarly situated to the grievant. Under these circumstances, 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. Accordingly, EEDR cannot conclude that his mitigation analysis was flawed in this respect and declines to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR 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.[42] 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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

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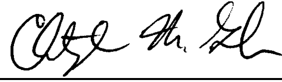
[40] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

[41] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B). Moreover, the grievant misstates the nature of the additional consequences accompanying discipline she received. The disciplinary pay reduction, demotion, and transfer were based on her accumulation of two Group II Written Notices, not the issuance of the single Written Notice for failing to report a moving traffic violation. *See* Agency Exhibit 1 at 2. This conclusion is further borne out by the hearing officer's reinstatement of the grievant to her former rank and reversal of the disciplinary salary reduction due to the rescission of the second Written Notice. Hearing Decision at 7.

[42] *Grievance Procedure Manual* § 7.2(d).

[43] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[44] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).



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