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ADMINISTRATIVE REVIEW

In the matter of the Department of Motor Vehicles
Ruling Number 2022-5328
December 16, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11734. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11734, as found by the hearing officer, are as follows:[1]

> [T]he Grievant was employed by the [Department of Motor Vehicles (the "agency")] as an Office Manager in Customer Records in the Data Management Services division . . . .
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> The grievant became the Customer Records Office Manager in 2019.
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> As the Office Manager in charge of Customer Records, the Grievant was held to a higher standard than employees who do not hold a management position.
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> As the Manager, the Grievant was in a position of leadership and was expected to lead by example. Managers are expected to support the Agency's vision and mission, including its emphasis on strong customer service.
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> Managers must themselves set an example to those under their supervision to ensure that all Agency policies, guidelines, practices and rules are followed.
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> The Grievant's Employee Work Profile (EWP) stresses that the Grievant was required to maintain the Agency's official customer records in compliance with federal and state statutes as well as agency policies and procedures and to ensure

[1] Decision of Hearing Officer, Case No. 11734 ("Hearing Decision"), November 9, 2021, at 4-10 (citations and paragraph enumeration omitted).

that requests for information were released timely and that data submitted was technically accurate, complete and submitted and reported as scheduled.

The Grievant was required to take action as needed to prevent and/or resolve production backlogs and to provide production reports that were accurate and timely. The law generally requires [the agency] to provide responses to requestors of data within 5 business days. . . .

The Grievant received significant training concerning her management position and the Grievant stated that the manner in which work was reported had not been changed since she started her tenure as office manager.

Accordingly, work should have been stamped in and accounted for within one business day. Any backlogs should have been accurately and clearly reported and senior management and executive officers immediately alerted, so that the situation could be remedied through authorization of overtime resources, reallocation of staff, etc.

In fact, this is precisely what happened on November 10, 2020, when the Grievant realized that the office had a backlog of 3,207 requests. The Grievant followed instructions and the applicable protocols to request assistance, assistance was provided, and the backlog was resolved.

On approximately December 1, 2020, one of Grievant's work leads, ["Work Leader 1"], retired. [Work Leader 1] was replaced by [Work Leader 2]. [Work Leader 2]'s duties had included stamping in and counting customer requests. On November 5, 2020, the Grievant sent an email to the staff under her supervision explaining how [Work Leader 1]'s duties would be distributed.

Notably, in this email, the Grievant stressed, **"Any incoming LexisNexis will need to be put to the side for me. I will sort, count, and scan the requests to the teleworking staff."** (Emphasis in original).

While the grievant continues to blame [Work Leader 2] for her shortcomings, it is uncontroverted that at the relevant time, [Work Leader 2] did not know how to scan and of course, the Grievant's email specifying her own responsibility concerning LexisNexis requests (never countermanded in writing) is highly probative.

LexisNexis is a business that provides information to insurance companies. Requests from LexisNexis usually arrive in large envelopes. Per past practice, instructions and policy, these envelopes are opened and each page is date stamped. In the early part of 2021, the Grievant stopped stamping the arrival date of the requests from LexisNexis, as required. When the requests stopped being date stamped, the turnaround time for the LexisNexis requests could not be tracked. A

backlog of approximately 10,017 LexisNexis requests dating back to February ensued.

As stated above, requests for crash reports should be processed and responded to within five business days. Additionally, there were checks payable to the Agency associated with each LexisNexis request that were being held with the backlog in the work center.

Accordingly, the Grievant failed to follow policy and perform the work that she stated in her email . . . that she would do. Grievant failed to reassign this responsibility to any other employee. Grievant failed to stamp, count and scan all LexisNexis requests within one business day and failed to ensure LexisNexis requests were timely processed. This failure to follow instructions and policy resulted in a backlog of over 10,000 requests from LexisNexis, which severely impacted Agency operations. . . .

. . . Grievant's duties included maintaining accurate and timely statistical data related to work center activities and providing upper management and top executives with reports.

Grievant was also required to review reports submitted by subordinates to ensure data was technically accurate, complete and submitted as scheduled.

There were LexisNexis requests that were not opened, date stamped or entered into the notebook. Without having been stamped and counted, the volume of LexisNexis requests was not properly entered into the notebook or accounted for on weekly management reports or on the intranet dashboard, relied upon by the top Agency executives. These LexisNexis requests had been set aside for Grievant as Grievant had directed, and these requests began to pile up. The result was a backlog of over 10,000 LexisNexis requests, of which senior management and top executives were for a long period totally unaware.

The reports Grievant provided were inaccurate and unreliable, and they severely impacted Agency operations. As the Office Manager, Grievant was required, per instructions and policy, to provide production reports that were accurate and timely. . . .

Grievant had ample opportunity to notify management that a backlog existed, as she had done in the past.

Indeed, Grievant did not notify management of the backlog and made no request for assistance even though the backlog was becoming more severe on a daily basis and even though LexisNexis management had contacted Grievant to discuss the difficulty they were experiencing with [the agency's] untimely responses.

> Grievant's EWP specifies that Grievant is to plan the organization of work and assignments to improve work flow and to achieve efficient and economical operations within established guidelines and procedures. The Grievant is required to take action "as needed to prevent and/or resolve production backlogs." Despite LexisNexis' intervention, Grievant failed to report the backlog or to remedy it.
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> The Agency only became aware of the problem when, on June 8, 2021, LexisNexis contacted the [agency] Commissioner directly, who rightly was livid when he discovered the nature and severity of the problem. . . .
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> . . . [T]he weekly production reports Grievant provided . . . had shown no backlog, and Grievant was reporting no backlog to management.
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> The electronic dashboard that the Agency created to monitor backlogs and turnaround time showed no backlog at all and a typical turnaround time of within 3 business days.
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> On Tuesday, June 8, 2021, prompted by the Commissioner's queries following LexisNexis reaching out to him, the Grievant had two phone conversations with her Director ["Director 1"] regarding this matter.
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> On both occasions the Grievant stated there was no backlog. The Grievant attributed LexisNexis' complaint to peripheral factors, such as the way in which LexisNexis was counting their backlog and delays in the U.S. Mail.
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> After [Director 1] drafted a response to the Commissioner based upon the Grievant's explanations, [Director 1] decided not to send the response because a cryptic email from the Grievant, amongst other things, did not make sense.
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> [Director 1] called a meeting for the next morning. In attendance were the Grievant, [Work Leader 2], the Deputy Director and [Director 1]. At this meeting, the Grievant essentially admitted that there were LexisNexis requests backlogged in cabinets that had not been counted and not reported. Many were in envelopes and unopened. There were requests from February, March, April, May and June which had not been counted.
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> The hearing officer agrees with [Director 1] that the Grievant knew of the backlog, knew that the requests should have been counted and reported, and that the Grievant was not candid when discussing the matter with [Director 1]. . . .

By Written Notice dated July 16, 2021, the agency charged the grievant with three Group II offenses and one Group III offense, with termination. The Group II offenses cited the grievant's failure to perform assigned work, and the Group III offense cited the grievant's failure to be candid with management, undermining the agency's operations, and contravening the agency's core values. The grievant timely grieved these disciplinary actions, and a hearing was held on October

26, 2021.[2] In a decision dated November 9, 2021, the hearing officer upheld the disciplinary action, concluding that the agency had proven the cited offenses and that no mitigating circumstances existed to reduce the disciplinary action.[3]

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[5] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant argues that the hearing officer failed to consider evidence that contradicted the agency's charges of misconduct, specifically as to whether the grievant was responsible for intake of LexisNexis mail and whether the grievant's actions necessitated hundreds of hours of overtime to correct, as the agency alleged.[7] In addition, the grievant argues that the hearing officer should have mitigated the agency's chosen penalty because "similarly situated employees were not charged or disciplined."[8] Finally, the grievant asserts "[m]isapplication of DHRM policy" with respect to "HR disciplinary processes."[9]

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 the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and

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[2] Hearing Decision at 1.
[3] *Id.* at 12, 14-16.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[7] Request for Administrative Review at 2-10, 13-19. The grievant asserts that the agency's claims as to overtime costs have been "fraudulent."
[8] *Id.* at 1, 10-13.
[9] *Id.* at 1, 19-26. To the extent the grievant has raised issues for administrative review not specifically discussed herein, EDR's review of the record suggests no additional grounds to remand the hearing decision for reconsideration.
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).

circumstances.[13] As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Misconduct Allegations

The grievant maintains that she properly assigned responsibility for processing LexisNexis requests to her subordinate employee, Work Leader 2, in accordance with Work Leader 2's EWP. The grievant argues that the hearing officer failed to consider her evidence in support of this defense and that the agency did not prove that it was the grievant's failures, rather than Work Leader 2's, that caused the large backlog of unprocessed LexisNexis requests. She also contends that the agency's disciplinary action was premised on overtime allegations that the agency did not substantiate at the hearing.

In his decision, the hearing officer found that the grievant "was required to take action as needed to prevent and/or resolve production backlogs and to provide production reports that were accurate and timely."[14] He further found that early in 2021, the grievant "stopped stamping the arrival date of the requests from LexisNexis . . . . A backlog of approximately 10,017 LexisNexis requests dating back to February ensued."[15] He determined that the grievant "failed to reassign this responsibility to any other employee."[16] Moreover, the hearing officer found that the grievant

> had ample opportunity to notify management that a backlog existed . . . . Grievant did not notify management of the backlog and made no request for assistance even though the backlog was becoming more severe on a daily basis and even though LexisNexis management had contacted Grievant to discuss the difficulty they were experiencing with [the agency]'s untimely responses.[17]

The hearing officer also observed that the grievant's "failure to accept any measure of accountability in this case and to recognize responsibility for her shortcomings has essentially undermined her position" in light of the agency's core values.[18]

Evidence in the record supports the hearing officer's conclusions as to the grievant's misconduct. Agency emails indicate that on June 8, 2021, a LexisNexis representative contacted the agency commissioner directly to express their "concern[] since the amount [of backlogged requests] has significantly grown from 9k to 16k since February 2021. We have previously spoken to [the grievant] . . . but we have not received a response after our initial meeting despite numerous attempts."[19] Director 1 testified that, when she inquired with the grievant about this situation, the grievant initially confirmed that the agency's internal records (showing no backlog) were correct

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[13] *Grievance Procedure Manual* § 5.8.
[14] Hearing Decision at 5.
[15] *Id.* at 6.
[16] *Id.* at 7.
[17] *Id.* at 8.
[18] *Id.* at 13.
[19] Agency Ex. 19.

and said that their oldest request from LexisNexis was dated June 1.[20] However, the grievant then seemed to give conflicting information: "We are currently working on requests that have checks dated from March, but we don't have 16k crash reports."[21] After Director 1 expressed confusion, the grievant essentially explained that the internal records she had been producing reflected only the requests she had begun to process, not all requests that the agency had received.[22] The grievant recounted meeting with the LexisNexis representative in February 2021 regarding an existing backlog of requests at that time.[23] The grievant indicated she doubted the representative's numbers, and she felt LexisNexis was "monopolizing" the agency's services.[24] However, according to Director 1's testimony, the grievant ultimately acknowledged that the full production workload was not accounted for, and a subsequent physical count of all received requests totaled "a little over 10,000," with dates as old as February 2021.[25] Upon learning of the scope of the backlog, the agency's commissioner was "very upset" and ordered staff to work every day until it was resolved, with daily reports directly to him.[26] Director 1 testified that Work Leader 2 had not been trained to process LexisNexis work or on how to scan.[27]

The grievant maintains that she "assigned the duties of scanning crash reports to [Work Leader 2] with assistance as needed . . . ."[28] She argues that agency management should not have accepted Work Leader 2's description of the division of responsibilities, and she appears to suggest that Work Leader 2's credibility should have been explored in witness testimony. However, although she asserts that Work Leader 2 was available and "could have easily been summoned" to testify, the grievant does not explain why she did not call Work Leader 2 in presenting her case, and we identify nothing in the record that prevented the grievant from doing so.[29] Similarly, the grievant objects that the agency did not produce requested evidence tending to show that Work Leader 2 did know how to scan in requests, but it does not appear that the grievant presented any such objection for resolution by the hearing officer. In sum, there is no indication that the grievant asserted a right to obtain or introduce evidence that was improperly denied by the hearing officer.

The grievant argues that she offered other evidence to support her claims, including her own testimony, which she suggests the hearing officer failed to consider. As a general matter, the grievance procedure does not require that a hearing officer specifically discuss every argument or fact presented by a party; thus, a hearing decision's mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand.[30] Here, the

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[20] Hearing Recording Pt. I at 1:21:20-1:22:30 (Director 1's testimony); Agency Ex. 21.
[21] Agency Ex. 21.
[22] Agency Ex. 20; Hearing Recording Pt. I at 1:29:30-1:35:10 (Director 1's testimony).
[23] *Id.*
[24] Agency Ex. 20; Hearing Recording Pt. I at 1:32:30-1:33:57 (Director 1's testimony).
[25] Hearing Recording Pt. I at 1:39:30-1:40:40, 1:43:30-1:45:30.
[26] *Id.* at 1:41:10-1:44:30; Agency Exs. 25, 27.
[27] Hearing Recording Pt. I at 1:49:20-1:51:24 (Director 1's testimony).
[28] Request for Review at 15 (emphasis omitted).
[29] *See id.* at 14. The agency listed Work Leader 2 as a witness but did not ultimately call her. However, the grievant's witness list included "[a]ny and all witnesses called or identified by the Agency" as well as those "necessary for rebuttal testimony." There appears to be no dispute that Work Leader 2 would have been available as a witness. *See* Hearing Recording Pt. III at 2:39:50-2:41:50.
[30] *See, e.g.*, EDR Ruling No. 2020-5075; EDR Ruling No. 2020-5073.

record indicates not that the hearing officer failed to consider the grievant's testimony but rather that he found the agency's testimony and other evidence more credible. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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 EDR 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.[31]

Moreover, the hearing officer's findings sustaining the grievant's misconduct are not undermined by any issue regarding the hours of overtime that the grievant's misconduct may have necessitated. In the description of the offenses in its Written Notice, the agency charged the grievant as follows:

> . . . [Y]ou failed to routinely count and sort the LexisNexis requests. You failed to adequately scan LexisNexis requests to the telework staff in order for them to be processed. . . . [Y]ou failed to reassign this responsibility to any other employee. You failed to count and scan all LexisNexis requests within one business day and you failed to insure LexisNexis requests were processed. . . .
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> You knew the [production] reports you were providing were not correct. You knew that the reports you provided were relied upon in order to make important decisions. . . .
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> Despite LexisNexis intervention and your work leader's concerns, you failed to report this backlog or to remedy it. . . .
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> You were given an opportunity to explain any circumstances that gave rise to this dilemma. . . . You were not candid when discussing this matter with your management.

The agency's descriptions of these offenses are not premised on the volume of overtime hours necessary to correct the misconduct charged. Therefore, in order to carry its burden of proof, the agency was not required to prove overtime costs. While the Written Notice cited such costs as an aggravating factor, there is no indication that this factor was necessary to justify the disciplinary actions imposed. Instead, the grievant's failures as charged in the Written Notice were classified as failure to perform assigned work or duties (three offenses) and lack of candor with management (one offense). The agency imposed discipline at the Group II level for failure to perform assigned work or duties and at the Group III level for lack of candor. The grievant's arguments as to overtime costs do not suggest that these offense classifications, as upheld by the hearing officer,

[31] *See*, *e.g.*, EDR Ruling No. 2020-4976.

are inconsistent with policy.[32] Under DHRM Policy 1.60, *Standards of Conduct*, two Group II offenses or a single Group III offense would normally result in termination. Therefore, although evidence as to overtime costs may be relevant to the grievant's mitigation arguments (discussed below), we cannot find that it presents a basis to disturb the hearing officer's conclusions as to the misconduct charged.

Mitigation

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[33] 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."[34] 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.[35]

Upon making such findings, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high, 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 unconscionably disproportionate, abusive, or totally unwarranted.[36] EDR will review a hearing officer's mitigation determination for abuse of discretion,[37] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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[32] *See* DHRM Policy 1.60, Att. A: Examples of Offenses Grouped by Level.
[33] Va. Code § 2.2-3005(C)(6).
[34] *Rules for Conducting Grievance Hearings* § VI(A).
[35] *Id.* § VI(B)(1).
[36] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[37] "'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.*

Here, the grievant argues that the hearing officer should have mitigated the agency's disciplinary actions based on (1) the agency's "fraudulent use of overtime," and (2) inconsistent discipline of similarly situated employees.

As to overtime, the grievant contends that at least some of the overtime ordered by the agency to eliminate the LexisNexis backlog was unnecessary, because the backlog "had been totally eliminated by June 17, 2021."[38] She cites evidence that at least half of the 555 hours cited as an aggravating circumstance were not attributable to the acts or omissions charged in the Written Notice. She also claims that the agency improperly withheld evidence regarding overtime costs and that the hearing officer erred because he "did not explain and identify the overtime as a disputed fact or discuss the issue in the hearing decision."[39]

However, as detailed above, it does not appear that the grievant asked the hearing officer to address any issue of withheld evidence at the hearing. Moreover, we do not perceive that findings one way or another on the issue of overtime might have altered the hearing officer's analysis, and accordingly we cannot say that the omission of this issue from the hearing decision was an abuse of discretion. Even if the hearing officer had explicitly concluded that *no* overtime was proven as an aggravating factor, his mitigation authority would have allowed him only to reduce the penalty to the *maximum* reasonable level. As we have concluded, the hearing officer found that the disciplinary actions were consistent with law and policy, and the grievant does not explain how the agency's management decisions with respect to overtime might have nevertheless pushed its chosen penalty outside the bounds of reasonableness.[40] Accordingly, EDR will not disturb the hearing decision for reasons related to the overtime issue.

The grievant also objects that the hearing "decision failed to consider . . . the evidence presented regarding similarly situated employees that were not charged or disciplined."[41] The grievant points specifically to another office manager who allegedly "had a three-month backlog of large number of requests and unopened mail in her area of responsibility,"[42] and to Work Leader 2 who the grievant maintains was responsible for the LexisNexis backlog but received no formal discipline.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[43] Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-

[38] Request for Administrative Review at 3.
[39] *Id.* at 5.
[40] The grievant asserts that the agency's position with respect to overtime reached "the point of abusing the use of state resources and waste of taxpayer funds worthy of reporting to an oversight entity." Request for Administrative Review at 8. We note that EDR does not have authority to act as such an entity with respect to the fraud, waste, or abuse of state resources.
[41] Request for Administrative Review at 10.
[42] *Id.* at 12.
[43] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

situated employees differently . . . ."[44] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[45] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[46] Therefore, in making a determination as to whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.

Here, it appears that the hearing officer did not find that the evidence established similar misconduct by similarly situated employees, and we find no error in that conclusion. With respect to another employee's[47] backlog, a witness testified that this lag in fulfilling requests was the result of lighter office presence due to the public health emergency at the time, and that the delays did not exceed established response deadlines.[48] By contrast, the grievant was charged with knowingly ignoring an accumulating backlog of requests for which she was responsible and misleading management with respect to the size of the backlog, including while managers were attempting to assess and respond to the situation. The hearing officer sustained these charges. Although the grievant asserts that Work Leader 2 was equally or more responsible for this conduct, the hearing officer determined that the grievant, not Work Leader 2, was responsible for the LexisNexis requests, knew they were not being fulfilled timely, and failed to work candidly with her supervisors to manage the problem. Moreover, the hearing officer emphasized that the grievant, as a manager, was held to a higher standard of conduct than subordinate employees like Work Leader 2.[49] Therefore, we cannot say based on the record that the grievant and Work Leader 2 were similarly situated or committed similar misconduct such that mitigation was required under the circumstances.

In sum, the grievant has not presented grounds to disturb the hearing officer's conclusions with respect to mitigation.

Due Process

Finally, the grievant argues that "due process [in her case] was lacking . . . . There was no progressive discipline and no formal disciplinary meeting . . . ."[50] In pre-disciplinary contexts,

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[44] *E.g.*, Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 663-64 (2010) (applying a "more flexible approach" in determining whether employees are comparators following *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009)).
[45] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[46] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[47] The grievant claims that the other employee was an office manager like the grievant, but the record evidence on the comparator's role and responsibilities is somewhat mixed and does not necessarily establish that the comparator would have been similarly situated to the grievant.
[48] Hearing Recording Pt. III at 3:00-5:50 (Director 2's testimony).
[49] Hearing Decision at 13.
[50] Request for Administrative Review at 19. Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or

courts have held that the due process requirements of notice and an opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct their behavior. Rather, the pre-disciplinary process need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[51] Accordingly, state disciplinary policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.[52]

In addition, the *Rules for Conducting Grievance Hearings* provide that an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[53]

On the other hand, post-disciplinary due process is more robust, requiring that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[54] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[55]

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written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). Constitutional due process is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *e.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974). Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue as presented by the grievant for administrative review.

[51] *Loudermill*, 470 U.S. at 545-46.

[52] DHRM Policy 1.60, *Standards of Conduct*, § E(1).

[53] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. U.S. Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002) (holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[54] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[55] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

Here, the grievant objects that agency management did not meet with her following her response to the notice of potential disciplinary action against her, asked her redundant questions during the disciplinary process, and applied pre-disciplinary leave inconsistent with applicable state policy. She asserts that her failure to answer the agency's questions during the disciplinary process was the basis of the agency's charged Group III offense. However, as we interpret the hearing decision and underlying discipline, the hearing officer sustained the Group III offense based on the grievant's initial responses regarding the LexisNexis workload as Director 1 was attempting to understand the scope of the issue, in response to a direct inquiry by the agency commissioner. Furthermore, although the grievant's professed confusion during the pre-disciplinary process may have understandable, she ultimately had a full grievance hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. We are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[56] Because we perceive no impairment to the hearing or hearing decision that may have resulted from the agency's pre-disciplinary process, EDR finds no due process violation under the grievance procedure and will not disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[57] 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.[58] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[59]

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[56] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).
[57] *Grievance Procedure Manual* § 7.2(d).
[58] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[59] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).