EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2022-5352
February 4, 2022

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11731. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11731, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services [the "agency"] employed Grievant as a Health Information Management Specialist Senior. She had been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant's duties included, "assembling closed records and data collection. *** Provide medical record information to authorized persons." She also was responsible for "safeguarding patient records" and following "procedures for archiving inactive records."
>
> The Agency used "banker's boxes" to keep business records and patient records.
>
> When the Agency needed to destroy documents, it placed the documents in a bin and then contacted a vendor who came to the Facility to shred the documents.
>
> Grievant worked at a workstation in an office with two interior rooms. Room 105 was for general office operations. Room 105 had a counter with cabinets under the counter. It had a chair and computer where someone could sit and work on top of the counter. Room 106 had shelves for storage of boxes. It was a "storage

[1] Decision of Hearing Officer, Case No. 11731 ("Hearing Decision"), January 14, 2022, at 2-3 (citations omitted).

closet." Room 106 did not have a counter. The Agency used Room 106 to store "active" patient records.

Rooms 105 and 106 were "side by side" in a secured part of the building. When Grievant was at her workstation, she could see the opening of Room 106. If she stood up and walked a few paces down the hallway, she could see Room 105.

Three banker's boxes were stacked on the floor in Room 106. Inside the boxes were patient records. The Agency was obligated to keep patient records for 50 years. On top of each of the three banker's boxes in Room 106 were a Library of Virginia Certificate of Records Destruction also known as a "destruction log" to process the records so they could be transported to the Library of Virginia to be stored for several decades. The destruction log showed that the documents had not been reviewed and "signed off" by Agency leadership.

Three banker's boxes were stacked on the counter in Room 105. Inside the boxes were human resource documents. The boxes were marked with a large "S" on the side of each box.

On July 27, 2021, the Supervisor sent Grievant an email:

> Can you please give the driver the media that is on top of the cabinet in the box. It needs to be destroyed. He handles it separately. Also, can you ask him if he can take the 3 boxes in the front room and shred them during this service? They are on the left when you enter the front room on the counter.

The Driver came to the office and spoke with Grievant. Grievant pointed to the three boxes on the floor in Room 106 and told the Driver to take those boxes and shred the contents. The Driver picked up the three boxes on the floor of Room 106 and took them to a bin. He dumped the contents of the boxes into the bin and the documents were shredded. The Driver took the three empty boxes back to Grievant and placed them next to Grievant's office.

The Supervisor walked to Grievant's area and noticed that three banker's boxes remained on the counter in room 105. She asked Grievant what boxes were given to the Driver. Grievant pointed to the three boxes next to her. The Supervisor observed Library of Virginia forms on each box. The Supervisor realized the contents of the wrong boxes were shredded.

Grievant apologized to the Supervisor. She indicated she did not intend to have the contents of the wrong boxes shredded.

On August 3, 2021, the agency issued to the grievant a Group III Written Notice with termination for unsatisfactory performance and recklessly damaging state property or records.[2]

[2] Agency Ex. A; *see* Hearing Decision at 1.

The grievant timely grieved the disciplinary action and a hearing was held on January 12, 2022.[3] In a decision dated January 14, 2022, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant's misconduct constituted failure to follow a supervisor's instruction, normally a Group II offense.[4] However, the hearing officer went on to conclude that the grievant's behavior supported elevation to a Group III offense because it had a "unique impact" on the agency.[5] As a result, the hearing officer upheld the Group III Written Notice and the grievant's termination.[6] The hearing officer further determined that there were no circumstances warranting mitigation of the discipline.[7]

The grievant now appeals the 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 . . . ."[8] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant appears to argue that the hearing officer failed to properly consider mitigating factors.[11] The grievant acknowledges that "clarity should have been asked for and specifics should have been confirmed by [her]" before any documents were shredded and apologizes for her mistake. However, she requests mitigation of the disciplinary action to a suspension without pay rather than termination. In support of her argument, the grievant asserts that she displayed a history of satisfactory performance, including "following procedures and rules," during her 15-year tenure with the agency. The grievant further emphasizes that she made no similar mistakes over the course of her employment with the agency and "would never intentionally jeopardize [her] job or the jobs of others for any reason." As a result, the grievant contends that her termination was unwarranted.

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

---

[3] *See* Hearing Decision at 1.
[4] *Id.* at 4.
[5] *Id.*; *see* DHRM Policy 1.60, *Standards of Conduct*, Attachment A: Examples of Offenses Grouped by Level (stating that "in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense" and that "[a]gencies may consider any unique impact that a particular offense has on the agency" in making such a determination (emphasis in original)).
[6] *Id.* at 4-5.
[7] *Id.* at 5.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] The grievant has not challenged the hearing officer's factual findings or conclusions regarding the misconduct charged on the Written Notice.

by [EDR]."[12] The *Rules for Conducting Grievance Hearings* ("*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."[13] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[14]

Because reasonable persons may disagree over whether and 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.[15] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[16] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[17] and will reverse the determination only for clear error.

The hearing officer discussed at some length whether it would be appropriate to mitigate the discipline issued in this case "based on Grievant's 15 years of service and because she did not intend to disregard the Supervisor's instruction."[18] Indeed, the hearing officer noted that, "if the Supervisor had listed the room numbers in her email, Grievant's error likely would not have occurred."[19] Ultimately, however, the hearing officer determined that "these [were] factors the Agency could have utilized to mitigate the disciplinary action," but they did not serve as sufficient grounds for a hearing officer to mitigate pursuant to the *Rules*.[20]

Having thoroughly reviewed the hearing record and the grievant's request for administrative review, EDR cannot find that the hearing officer clearly erred in his consideration of potential mitigating circumstances. For example, the grievant's claim that her length of

---

[12] Va. Code § 2.2-3005(C)(6).
[13] *Rules for Conducting Grievance Hearings* § VI(A).
[14] *Id.* § VI(B).
[15] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).
[16] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[17] "'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.*
[18] Hearing Decision at 5.
[19] *Id.*
[20] *Id.*

employment and history of satisfactory work performance supported mitigation in this case is unpersuasive. Though it cannot be said that length of service and prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which they could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[21] 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 length of employment becomes. Here, the grievant's length of employment is not so extraordinary that it 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.

As to the grievant's argument that she did not intend to commit the charged offense, the hearing officer noted that there was "little doubt that Grievant did not intend to improperly destroy patient records or harm the Agency" and that "[t]he Agency could have corrected Grievant's behavior with lesser disciplinary action."[22] Nonetheless, the hearing officer determined that the agency had the discretion to issue discipline for failure to follow a supervisor's instruction "even if the employee did not intend to disregard the instruction."[23]

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is an inherently reasonable outcome.[24] Though it is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline, EDR also acknowledges that certain circumstances may require this result.[25] Here, we have found no specific evidence of mitigating factors presented in the record that were not addressed in the decision, nor has the grievant identified any on administrative review. Although the grievant disagrees with the hearing officer's analysis of the mitigating factors discussed above, EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Thus, we cannot say that the hearing officer abused his discretion in finding that the agency's Group III Written Notice with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

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

---

[21] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[22] Hearing Decision at 4.
[23] *Id.*
[24] 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).
[25] For example, the Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

hearing decision once all timely requests for administrative review have been decided.[26] 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.[27] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[26] *Grievance Procedure Manual* § 7.2(d).
[27] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[28] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).