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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Health Professions  
Ruling Number 2022-5355  
February 17, 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 11748. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11748, as found by the hearing officer, are as follows:<sup>1</sup>

The [Department of Health Professions (the “agency”)] employed Grievant as a record manager. As such, Grievant was the supervisor of each of the four Agency employees who are the subjects of the four Written Notices.

The Agency’s first witness was the Technical & Business Services Director, having come to the Agency in 2013. The witness testified that the Grievant was a Supervisor and had the responsibilities set out in the employee work profile, including those set out at page 5, i.e. “creates, promotes and maintains a positive and productive work environment through effective communication among Agency staff and management. The Witness further testified that it was August 24, 2021 that the witness first learned of the Grievant’s conduct which led to Grievant’s termination of employment.

The witness testified that the investigation regarding Grievant began as a result of the information provided by subject T. when asked why the subject no longer wanted to work as the receptionist supervised by Grievant. The Director was concerned that the Agency was going to lose subject T who was an excellent employee. The witness then reviewed the allegations . . . provided by subject T., including an allegation that the Grievant on July 30, 2021 called subject T. (and despite being advised by subject T. that she was not well), asked subject T to meet

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<sup>1</sup> Decision of Hearing Officer, Case No. 11748 (“Hearing Decision”), January 13, 2022, at 3-7 (citations omitted).

the Grievant at Starbucks to notarize a document. When subject T met the Grievant at Starbucks she discovered that the Grievant wanted not just the Grievant's signature notarized but the Grievant's spouse's signature notarized, without the spouse being present. The subject testified that the subject notarized both signatures fearing there would be repercussions if the subject did not notarize both signatures.

The Director further testified that the Grievant showed subject T. a co-worker's Facebook page (subject W.) and made negative comments about subject W. In addition, the Grievant disclosed to subject T. various co-workers' personal business, pointing out staff members who have been arrested or were allegedly on drugs. Subject T alleged that the Grievant gossiped with staff members about other staff members under Grievant's supervision. Subject T included in her notes the fact that other staff members had confided in subject T on what they had experienced with respect to the Grievant and how they felt bullied, threatened and uncomfortable (Subject C. and subject W.). The Director continued by reviewing the investigation notes . . . .

The Director reviewed the Investigation Report including the Findings, Conclusions and Recommendations reached on September 14, 2021. The Director testified that the issue regarding the request that subject T notarize the document would alone justify termination. The Director testified that subject T's resignation caused a domino effect as far as negative impact on Agency operations. The Director further reviewed each Written Notice and testified that the findings of the investigation supported each of the written notices being issued as Group III violations.

During cross-examination, the Director testified that prior to the investigation there had never been an issue regarding the Grievant's conduct or behavior and confirmed that the Grievant was rated as a "Strong Contributor" on Grievant's performance evaluations. The Director testified that at the conclusion of the investigation Human Resources recommended termination and the Director agreed. The Director testified that despite the fact the Grievant was a long-term employee with no previous discipline, the nature of Grievant's conduct set out in each of Written Notices constituted a violation of Policy 2.35 which authorizes termination of employment in the discretion of the Agency.

The Agency's second witness was subject T. who was the front desk receptionist from October 2020 until September 2021. The witness testified that from the time the witness was hired the Grievant told the witness about other employees' personal problems, such as "He's on drugs" or "He embezzled." The witness testified that the Grievant constantly tried to pit one employee against another and would gossip with each employee about the other employees. The witness testified that when the witness decided to leave the position as receptionist, the personnel office contacted the witness to ask "Why?". It was then that subject T. provided the details of the Grievant's behavior. The witness testified that the witness did not come forward earlier due to fear of retaliation by the Grievant, especially since subject T. was still on probation and could be terminated without cause. Subject T testified that having worked for twenty-five years as a federal

government employee and ten as a state employee, the witness had, “Never had a manager like (the Grievant)”.

Subject T testified that the Grievant was always saying negative things about subject C. The witness then affirmed and agreed with the statements set out at Written Notice, Agency Exhibit 3, namely that Grievant’s behavior negatively impacted the work environment, negatively impacted the relationships in the work environment, caused subject T to feel marginalized, very uncomfortable and threatened.

During cross-examination, the witness confirmed that witness moved to another position just to get away from the Grievant as a supervisor and that the personal messages and cards were personal matters and did not refer to Grievant’s conduct in the workplace.

The Agency’s third witness was subject C2, who appeared by Zoom by agreement of the parties. The witness testified that the witness’s employment began April 1, 2019 and continued until October 2020, supervised by Grievant. The witness testified that in the beginning the Grievant was very pleasant but then was regularly volatile and unpredictable. The witness testified that the Grievant would talk about co-workers and made the witness feel uncomfortable. Subject C2 testified that the Grievant treated the contract or temporary employees poorly because the Grievant could let them go without cause. The witness testified that the Grievant targeted subject C. the most, regularly demeaning subject C causing subject C to frequently cry by saying or implying that subject C didn’t know how to do the necessary work after ten years on the job. In addition, subject C2 stated that the Grievant’s comments about subject C2 being biracial made the witness uncomfortable. The Grievant made comments such as “You aren’t really black” and “You don’t talk like a black girl.” In addition, the witness felt uncomfortable when the Grievant would ask if another employee was sleeping on the job, or when another employee arrived at or left work. The witness testified that the work environment was made very stressful due to the Grievant’s behavior. In addition, subject C2 confirmed that in July 2019 when the witness’s grandfather had died, the Grievant told the witness to go home “We’ll take care of you” and Grievant arranged for pay for hours that were not actually worked.

Subject C2 affirmed and agreed with the statements set out at Written Notice, Agency Exhibit 5, namely that Grievant’s behavior was disrespectful, aggressive, unwanted and intimidating.

During cross-examination, subject C2 confirmed that there was some personal interaction outside of work with the Grievant and that subject C2 did not believe that the Grievant disliked subject C2 for being biracial.

The Agency’s fourth witness was subject C. who began work November 2010 scanning records and was supervised by Grievant. The witness testified that because the witness was considered a “temp” with no benefits, the witness could be terminated as an employee at any time by the Grievant. The witness testified that

the witness's work environment was always chaos with the Grievant's bullying and mental abuse directed toward the witness "from the very beginning."

Subject C. confirmed the allegations set out in the Written Notice at Agency Exhibit 2 and the investigation notes . . . . The witness testified that the witness did not report Grievant's behavior for fear of retaliation. The witness testified that due to the Grievant talking about the witness to other employees and the Grievant constantly demeaning the witness, the witness frequently went home crying at the end of the day. Subject C. testified that although subject C applied for the receptionist opening, subject C withdrew because of Grievant's comments about other applicants being "real receptionists" and that the other two panel members conducting the interviews did not want subject C. to get a second interview. Note: . . . the interview panel unanimously included subject C. on the list of candidates for second interviews.

Finally, subject C. testified that the Grievant not only gossiped about other employees but also said derogatory things about Grievant's superiors, including calling the Director a "snake."

During cross-examination, subject C. did not deny that subject C had personal interaction with Grievant, including attending Grievant's family functions and sending or signing personal cards to the Grievant.

The Agency's fifth witness was T. A. who appeared by Zoom by agreement of the parties. The witness testified that the Grievant was the witness's peer, each of them answering to the same supervisor. The witness testified that it was the witness's opinion that Grievant was targeting subject C. stating that "I don't want to give (subject C.) a full-time job." The witness testified that the Grievant never gave subject C. credit for anything that subject C did. The witness further testified that in 2020 the witness drove for an hour and a half to participate on an interview panel but upon arriving the Grievant told the witness that the witness was being removed from the panel because the witness did not "look black." The Grievant told the witness that "HR said to do it."

The Agency's sixth witness was the Chief Operating Officer of the Agency for five years and had been with the Agency for twenty-five years. The witness testified that the witness had a good working relationship with the Grievant up until the investigation which was prompted by the information provided by subject T. The witness testified that at the completion of the investigation it was concluded that the Grievant's conduct justified each of the four Group III Written Notices with termination of employment. The witness testified that although mitigation was considered (i.e. long-term employee, no prior discipline) the Grievant's continued employment was not acceptable due to the toxic work environment created by the Grievant, resulting specifically in the loss of an excellent receptionist (subject T) an subject C. who was "good at (subject C) job".

During cross-examination, the COO testified that the Grievant was put on administrative leave during the investigation because management wanted the

employees to come forward without fear of retaliation. The witness further testified that the witness believed there had been no complaints against the Grievant for ten years because of fear of retaliation.

The Agency's seventh and final witness was the HR Director who had been with the Agency for eighteen years. The witness testified that the witness had never met the Grievant before the Grievant's hearing. The witness reviewed the matters set out in the Investigation report and testified that the Grievant's conduct in each case set out in the four separate Written Notices were violations of Policy 2.35 Civility in the Workplace. The witness further testified that contract employees and P-14 employees are covered under this policy even though they have no state benefits or grievance rights. The witness testified that the Standards of Conduct provide that violation of [Policy] 2.35 may, depending on the nature of the offense, constitute a Group III offense. The witness pointed out that the Grievant completed training regarding civility in the workplace both on January 24, 2019 and January 21, 2021 and that the Agency holds a supervisor to a higher standard than an employee who is not a supervisor. Finally, the witness testified that HR never takes a person off an interview panel based on skin color, contrary to the alleged statement made by the Grievant.

The Grievant did not testify or call any additional witnesses. The Grievant's Exhibits . . . do not conflict with a finding that the four subjects are credible.

On September 24, 2021, the agency issued to the grievant four Group III Written Notices with termination, each of which charged violations of DHRM Policy 2.35, *Civility in the Workplace* based on her alleged conduct directed towards Subjects T, C2, W, and C, respectively.<sup>2</sup> The grievant timely grieved the disciplinary actions and a hearing was held on January 6, 2021.<sup>3</sup> In a decision dated January 13, 2021, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the misconduct charged on the Written Notices and upheld the discipline, along with the grievant's termination.<sup>4</sup> The hearing officer further determined that there were no circumstances warranting mitigation of the agency's disciplinary action.<sup>5</sup>

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 . . ."<sup>6</sup> 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.<sup>7</sup> The

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<sup>2</sup> Agency Exs. 2, 3, 4, 5; *see* Hearing Decision at 1.

<sup>3</sup> *See* Hearing Decision at 1.

<sup>4</sup> *Id.* at 1, 7-9.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>8</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant contends that the hearing officer erred in upholding the four Written Notices, arguing that the agency's evidence was insufficient to support any of the charged misconduct. The grievant alleges that Subject T, whom the grievant describes as a "disgruntled employee," complained that the grievant "bullied her and created a hostile work environment" before leaving employment with the agency.<sup>9</sup> The grievant claims that the agency's "expansive investigation" resulted in "very few allegations" of harassment, "generalized and vague accusations," and no evidence of discriminatory or retaliatory behavior.<sup>10</sup> In support of this position, the grievant attacks the credibility of Subjects T, C2, W, and C and notes that "there was zero documentary evidence" to support their allegations.<sup>11</sup> The grievant further argues that, even if the evidence was sufficient to support the Written Notices, the hearing officer should have mitigated the agency's discipline to a penalty less severe than termination.<sup>12</sup>

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>13</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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 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.

#### *Hearing Officer's Consideration of Evidence*

The four Group III Written Notices issued to the grievant in this matter charged her generally with engaging in "pervasive and persistent behaviors" that "negatively impacted and created a hostile work environment."<sup>17</sup> Each Written Notice cited different instances of conduct directed at Subjects T, C2, W, and C, respectively:

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<sup>8</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>9</sup> Request for Administrative Review at 1.

<sup>10</sup> *Id.* at 1-2.

<sup>11</sup> *Id.* at 2-4.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> Va. Code § 2.2-3005.1(C).

<sup>14</sup> *Grievance Procedure Manual* § 5.9.

<sup>15</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>16</sup> *Grievance Procedure Manual* § 5.8.

<sup>17</sup> Agency Exs. 2, 3, 4, 5.

- Regarding Subject T, the Written Notice charged the grievant with commenting on Subject T's son's college graduation photo in a way that "caused [Subject T] to feel marginalized and very uncomfortable," telling Subject T that "others could have been hired [for] her job," and "inform[ing Subject T] anyone can be replaced." The Written Notice also charged the grievant with convincing Subject T to meet and notarize the grievant's husband's signature while Subject T was on sick leave. According to the Written Notice, the grievant's husband was not present but Subject T notarized the document "because she felt if she did not do it there would be repercussions when she returned to the office." The Written Notice described the grievant's conduct as making Subject T feel "marginalized, uncomfortable, and threatened."<sup>18</sup>
- Regarding Subject C2, the Written Notice charged the grievant with "shar[ing] other employee[s] personal information with [Subject C2]," making "numerous inappropriate racial comments regarding [Subject C2] being bi-racial," and intimidating Subject C2 by stating "it's easier to let you go rather than deal with issues." The Written Notice further stated that the grievant had Subject C2 work on "church bulletins and bake sale flyers during work hours" and that she "falsified [Subject C2's] timesheet in July 2019 by entering 8 hours worked for a day she only worked 3 hours." The Written Notice described the grievant's conduct as making Subject C2 "feel uncomfortable" and creating a "very stressful" work environment where treatment of staff depended on the grievant's "mood on any given day."<sup>19</sup>
- Regarding Subject W, the Written Notice charged the grievant with "disclos[ing Subject W's] personal business and posts on [her] social media accounts to employees," "show[ing] anger toward [Subject W] and others working under [the grievant's] supervision which caused them to fear for their jobs," and asking Subject W "to dog sit [the grievant's] daughter's dog." The Written Notice described the grievant's conduct as making Subject W "feel very uncomfortable."<sup>20</sup>
- Regarding Subject C, the Written Notice charged the grievant with describing other employees "very disrespectfully by referring to them as 'snakes.'" The Written Notice also stated that, when Subject C applied for a position in July 2020, the grievant told Subject C that she "wanted a real receptionist" and "that other interview panel members didn't like [Subject C]" while also telling Subject C "she had the job at the beginning of the recruitment." According to the Written Notice, the grievant's conduct caused Subject C to withdraw her application for the position, cancel a planned personal trip "due to her emotional state," and ultimately to "accept another position where she had no prior experience." Finally, the Written Notice stated that the grievant's "toxic and abusive behaviors towards [Subject C] prevented her from reporting [the grievant] to management or Human Resources in fear of retaliation."<sup>21</sup>

The hearing officer sustained the charges on the Written Notices, finding that "[t]he Agency's evidence . . . established by a preponderance of the evidence that the Grievant did behave in the manner set out in each Written Notice and that in each of the four instances the Grievant's conduct was a violation of Policy 2.35 Civility in the Workplace."<sup>22</sup> EDR has thoroughly reviewed

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<sup>18</sup> Agency Ex. 3.

<sup>19</sup> Agency Ex. 5.

<sup>20</sup> Agency Ex. 4.

<sup>21</sup> Agency Ex. 2.

<sup>22</sup> Hearing Decision at 8.

the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notices, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. At the hearing, Subjects T, C2, and C testified about the grievant's behavior consistent with the charges on the Written Notices and the hearing officer's factual findings.<sup>23</sup> Subject W, who was not an agency employee at the time of the hearing, was unavailable.<sup>24</sup> However, the agency provided documentary evidence about its investigation of Subject W's claims, along with documentary evidence about the allegations made by Subjects T, C2, and C.<sup>25</sup> Moreover, the Technical and Business Services Director and the HR Director testified to the information discovered during their investigation of the grievant and confirmed that, in the agency's judgment, the grievant's behavior constituted four separate Group III offenses based on her conduct directed at Subjects T, C2, W, and C.<sup>26</sup>

Although the grievant disagrees, the hearing officer was entitled to evaluate the testimony of the witnesses on these matters and to accept the agency's interpretation of these events as more persuasive. Taken together, the above evidence supports the hearing officer's finding that the grievant's behavior violated DHRM Policy 2.35, which prohibits acts of harassment, bullying, and retaliation, as well as "[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety."<sup>27</sup> In this case, the hearing officer agreed with the agency's determination that the grievant's conduct violated the provisions of Policy 2.35, and justified the issuance of four Group III Written Notices and the grievant's termination.<sup>28</sup>

Nevertheless, the grievant objects that the hearing officer erred in accepting the witnesses' testimony as proof that she engaged in misconduct, emphasizing that "there was zero documentary

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<sup>23</sup> E.g., Hearing Recording at 1:06:39-1:36:33 (Subject T's testimony about the matters described on the Written Notice and the grievant's behavior generally), 2:03:46-2:22:40 (Subject C2's testimony about the matters described on the Written Notice), 2:35:55-3:04:15, 3:16:14-3:19:48 (Subject C's testimony about the matters described on the Written Notice and the grievant's behavior generally).

<sup>24</sup> See *id.* at 7:12.

<sup>25</sup> Agency Ex. 12 (Subject T's written statement); Agency Ex. 13 (agency investigation report); Agency Ex. 14 (agency investigation notes from Subject C's interview); Agency Ex. 16 (agency investigation notes from Subject W's interview); Agency Ex. 17 (agency investigation notes from Subject C2's interview).

<sup>26</sup> E.g., Hearing Recording at 26:00-41:48 (Director's testimony about information provided by Subjects T, C2, W, and C and the agency's decision to terminate the grievant), 3:50:58-4:12:30 (HR Director's testimony about the agency's investigation and its decision to issue four Group III Written Notices).

<sup>27</sup> DHRM Policy 2.35, *Civility in the Workplace*, at 3. Policy guidance from DHRM provides further examples of specific behaviors that may be considered misconduct under Policy 2.35 and are implicated in this case, including, for example:

- "Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others,"
- "Making disparaging remarks [and] spreading rumors . . . about others in the workplace,"
- "Humiliating others" and "impugning one's reputation through gossip,"
- "Making culturally insensitive remarks,"
- "Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong,"
- "Retaliating against one who, in good faith, reports a violation of this policy or participates in related investigations," and
- "[D]iscussing sensitive, private information about someone to others."

DHRM Policy Guide – Civility in the Workplace.

<sup>28</sup> The range of misconduct under DHRM Policy 2.35 may vary in severity and effect on the workplace; as a result, such misconduct may constitute a Group I, II, or III offense, depending on its nature. DHRM Policy 1.60, *Standards of Conduct*, Att. A; see DHRM Policy 2.35, *Civility in the Workplace*, at 5.



evidence” to support their allegations.<sup>29</sup> In particular, the grievant asserts that the testimony of Subjects T, C, and C2 was insufficient to prove that she engaged in misconduct under DHRM Policy 2.35 as charged on the Written Notices pertaining to them, while Subject W failed to testify.<sup>30</sup> The grievant further argues that the agency did not present evidence demonstrating that she retaliated against Subjects T, W, or C2.<sup>31</sup>

In addition, the grievant claims that the behavior of the Subjects T, C, W, and C2 established that they were not offended by or fearful of retaliation from the grievant. For example, she argues that Subject T asked the grievant to resume working with her in July 2021 after transferring to another department at the agency, which the grievant approved.<sup>32</sup> She also alleges that Subject C2 testified that she was not offended by the grievant’s comments about her race and that Subject W left the grievant a friendly voicemail message in November 2021.<sup>33</sup> In addition, the grievant contends that Subject C “never filed a single complaint” about the grievant despite working with the grievant for 10 years, chose not to accept a position elsewhere in 2018 and continued working with the grievant, and “had a personal relationship [with the grievant] outside of work.”<sup>34</sup> Finally, the grievant asserts that she presented evidence of “text messages and handwritten messages in various greetings cards from her staff demonstrat[ing] that she in fact had positive personal and work relationships with all of her coworkers.”<sup>35</sup>

The hearing officer directly addressed at least some of the grievant’s defenses in the decision, noting that “[t]he Grievant did not testify or call any additional witnesses” to support her position that she did not engage in misconduct and that her exhibits “[did] not conflict with a finding that the four subjects [were] credible.”<sup>36</sup> Regarding the issue of retaliation specifically, the grievant’s conduct, as found by the hearing officer, falls under Policy 2.35, which specifically prohibits “any form of retaliation” and, for example, contemplates “intimidation” within the definition of retaliation.<sup>37</sup> Engaging in conduct that makes employees fearful of retaliation or other repercussions if they report concerns to management, as the agency and the hearing officer found the grievant had done in this case, clearly falls within the scope of conduct covered by the policy.

Although the hearing officer could have discussed the grievant’s defenses in greater detail, we find no error in his assessment of the evidence in the record or his conclusion that the agency’s evidence was sufficient to support the charges against the grievant in the four Group III Written Notices, as discussed in more detail above.<sup>38</sup> Furthermore, there is no requirement under the

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<sup>29</sup> Request for Administrative Review at 2-4.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 2-3.

<sup>34</sup> *Id.* at 2-4.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> Hearing Decision at 7.

<sup>37</sup> DHRM Policy 2.35, *Civility in the Workplace*, at 3, 8. “Retaliation” is defined in Policy 2.35 as “[o]vert or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy.” *Id.* at 8.

<sup>38</sup> The hearing officer had the authority to assess the credibility of the witnesses’ testimony about the matters described by the grievant in her request for administrative review, which are more nuanced than she has described on appeal. Subject T, for example, testified that she resumed working with the grievant in July 2021 but had “concerns” about that decision and had already begun planning to leave the agency. Hearing Recording at 1:37:31-1:39:10 (Subject T’s testimony). Subject C2 may not have explicitly described the grievant’s comments about her race as “offensive” but clearly described the comments as “hurtful” and something that the grievant should have known not to say. *Id.* at

grievance procedure that the hearing decision specifically address each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular testimony or other evidence does not necessarily constitute a basis for remand. EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact. Moreover, 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 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.<sup>39</sup> Accordingly, EDR declines to disturb the ruling on these grounds.

### *Mitigation*

In addition, the grievant argues that the hearing officer should have mitigated the discipline and/or her termination to a lesser penalty. As support for this position, the grievant contends that she "was never reprimanded or counseled regarding her treatment of subordinates" during her 12 years of employment with the agency and "has consistently been recognized" for her work performance.<sup>40</sup> The grievant further claims that she did not receive any "negative feedback or complaints regarding her performance as a supervisor," that she "had no basis to reasonably believe that her subordinates interpreted any of her behavior as inappropriate or as misconduct" before the agency's investigation, and that she "was not given the opportunity to correct any problems" prior to her termination.<sup>41</sup> As a result, the grievant contends that the four Group III Written Notices should be reduced to a single Group I offense and requests an opportunity to attend leadership training.<sup>42</sup>

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]."<sup>43</sup> 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."<sup>44</sup> 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.<sup>45</sup>

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2:31:15-2:32:02 (Subject C2's testimony). Finally, Subject C testified that she had an opportunity to accept another job in 2018 but did not because it would have resulted in a loss in pay. *Id.* at 3:06:31-3:06:55 (Subject C's testimony).

<sup>39</sup> See, e.g., EDR Ruling No. 2020-4976.

<sup>40</sup> Request for Administrative Review at 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Va. Code § 2.2-3005(C)(6).

<sup>44</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>45</sup> *Id.* § VI(B).

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.<sup>46</sup> 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.”<sup>47</sup> EDR, in turn, will review a hearing officer’s mitigation determination for abuse of discretion<sup>48</sup> and will reverse the determination only for clear error.

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. In this case, the grievant’s claim that her length of 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.<sup>49</sup> 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 four Group III Written Notices for conduct that was determined by the hearing officer to be terminable due to its severity.

As to the grievant’s argument that she should have been given an opportunity to correct her behavior prior to termination, we likewise find no error in the hearing officer’s decision. Although DHRM Policy 1.60, *Standards of Conduct*, encourages progressive discipline, it is “also designed to enable agencies to fairly and effectively discipline and/or terminate employees . . . where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.”<sup>50</sup> An agency may therefore appropriately terminate an employee following a single instance of misconduct if the employee’s offense is sufficiently serious. Indeed,

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<sup>46</sup> 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).

<sup>47</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>48</sup> “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.*

<sup>49</sup> See EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

<sup>50</sup> DHRM Policy 1.60, *Standards of Conduct*, at 1.

the policy goes on to specifically describe Group III offenses as “acts of misconduct of such a severe nature that a first occurrence normally should warrant termination,” including actions that “endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.”<sup>51</sup>

In this case, the grievant received four Group III Written Notices with termination for violation of DHRM Policy 2.35.<sup>52</sup> As the hearing officer correctly noted,<sup>53</sup> DHRM Policy 2.35 grants agencies the discretion to determine whether a Group I, II, or III offense is appropriate for specific misconduct, based on the severity of the offense.<sup>54</sup> The hearing officer assessed the facts, concluding that the agency had presented sufficient evidence to support each of the four Group III Written Notices and the grievant’s termination and that there were no mitigating circumstances warranting reduction of the discipline.<sup>55</sup> The agency could have issued a lower level of disciplinary action and afforded her an opportunity to correct her behavior prior to termination; nonetheless, DHRM Policy 1.60 explicitly states that progressive discipline is not required in all cases, particularly for conduct appropriately categorized as a Group III offense, which the hearing officer determined was the case here.

In conclusion, and 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 one or more Group III Written Notices, dismissal is an inherently reasonable outcome.<sup>56</sup> 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.<sup>57</sup> Here, 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 four Group III Written Notices with removal were 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 hearing decision once all timely requests for administrative review have been decided.<sup>58</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

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<sup>51</sup> *Id.* at 9.

<sup>52</sup> See Agency Exs. 2, 3, 4, 5.

<sup>53</sup> Hearing Decision at 8.

<sup>54</sup> DHRM Policy 2.35, *Civility in the Workplace*, at 5 (“Any employee who engages in conduct prohibited under this policy . . . shall be subject to corrective action, up to and including termination, under Policy 1.60, *Standards of Conduct*.”); DHRM Policy 1.60, *Standards of Conduct*, Attachment A: Examples of Offenses Grouped by Level.

<sup>55</sup> Hearing Decision at 8.

<sup>56</sup> 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).

<sup>57</sup> 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).

<sup>58</sup> *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.<sup>59</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>60</sup>

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<sup>59</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>60</sup> *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).