Issue: Administrative Review of Hearing Officer's Decision in Case No. 11018; Ruling Date: September 12, 2017; Ruling No. 2018-4611; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2018-4611
September 12, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Virginia Department of Human Resource Management administratively review the hearing officer's decision in Case Number 11018. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11018, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed the grievant as Chief of Housing and Programs until his demotion, disciplinary pay reduction, and transfer to Unit Manager at another institution. He has been employed by the Agency for approximately 13 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Agency teaches its employees how to de-escalate conflict with inmates. Grievant knew how to de-escalate conflict with inmates. Grievant provided training to new staff regarding how to de-escalate conflict with inmates.
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> Building E housed approximately 100 inmates. The inmates lived in a "dormitory style" pod with inmates sleeping in bunk beds instead of staying cells.
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> Contraband was found in the recreation yard at the Facility on January 4, 2017. Agency managers decided to close the rec yard to inmates on January 5, 2017. These managers failed to tell the corrections officers in Building E. The Building E officers opened the recreation yard on January 5, 2017. The Sergeant entered Building E and told the employees to close the recreation yard. Inmates who were in the recreation yard were force to return to their pod. They became angry that the rec yard was closed. Several inmates were cursing and yelling.

[1] Decision of Hearing Officer, Case No. 11018 ("Hearing Decision"), August 9, 2017, at 2-3.

> Grievant entered the pod and was with the Sergeant and Lieutenant. Inmates gathered around Grievant. Grievant began telling the inmates that the recreation yard was closed because contraband was found in the yard on the prior day. Inmates began yelling and cursing at Grievant. Inmates asked why they were being punished for the actions of one inmate. Grievant said it (contraband) was not acceptable and he had some ideas about this. One of the inmates said, "f—k you, [Grievant's last name]". Another inmate said, "you can carry your fat ass somewhere and lose some weight." Grievant told the inmates to return to their bed areas. Grievant yelled and cursed at the inmates.
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> At some point, the argument because so heated that the Sergeant and Lieutenant became concerned about safety. They stepped between Grievant and a group of inmates.
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> Grievant turned to leave the Building. Inmates were yelling "f—k up [Grievant's last name]". Grievant said, "Kiss my ass!" He yelled this loud enough for inmates to hear him.
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> The Sergeant testified that Grievant contributed to the conflict and that the Sergeant was concerned for his safety because of Grievant's behavior.
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> After Grievant left the Building, several inmates asked to file grievances. Several filed grievances complaining about the recreation yard being closed and several wrote grievances complaining about Grievant's behavior.
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> The Lieutenant and Sergeant heard Grievant's comments. Someone told them not to write internal incident reports until asked to do so. When the Warden returned to work from her vacation, she learned of the incident. The Lieutenant and Sergeant wrote incident reports on January 24, 2017 about what they observed on January 5, 2017.

On February 23, 2017, the grievant was issued a Group III Written Notice for failure to follow policy and workplace violence, accompanied by a demotion, disciplinary pay reduction, and transfer to another agency facility.[2] The grievant timely grieved the disciplinary action and a hearing was held on July 20, 2017.[3] In a decision dated August 9, 2017, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant had engaged in workplace violence and upheld the Group III Written Notice and the grievant's demotion, transfer, and disciplinary pay reduction.[4] The grievant now appeals the hearing decision to EEDR.

[2] Agency Exhibit 1.
[3] *See* Hearing Decision at 1.
[4] *Id.*at 1, 3-5.

DISCUSSION

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[6]

Mitigation

In his request for administrative review, the grievant alleges that the hearing officer erred in not mitigating the Group III Written Notice. Specifically, the grievant claims that: (1) the agency did not respond to the incident in accordance with its workplace violence policy; (2) his prior work performance was satisfactory, and (3) the agency did not apply disciplinary action to him consistent with its treatment of other similarly situated employees. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EEDR]."[7] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[8] 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.[9]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or

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[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005(C)(6).
[8] *Rules for Conducting Grievance Hearings* § VI(A).
[9] *Id*. § VI(B)(1).

totally unwarranted.[10] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[11] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Agency's Response to the Incident

The grievant argues that the hearing officer should have mitigated the discipline because the agency did not comply with its workplace violence policy in responding to the incident. In support of his position, the grievant asserts that several employees did not write incident reports describing what occurred for several weeks and their recollection of events was inaccurate, that management did not assess the situation or immediately notify the warden of the incident, and that no safety plan or other corrective action was implemented to address the incident. In essence, the grievant appears to assert that the evidence in the record does not show the incident was sufficiently serious to justify the issuance of a Group III Written Notice.

Having conducted a review of the hearing record, there is no basis for EEDR to conclude that the hearing officer's consideration of the evidence about the agency's response to the incident was in error or constituted an abuse of discretion in this case. In the hearing decision, the hearing officer considered the evidence presented by the grievant to show that "the level of disciplinary action was too harsh" and found that, although "lesser disciplinary action" could have been appropriate, the agency had presented sufficient evidence to show that the grievant used "abusive language" that justified the issuance of a Group III Written Notice.[12] There is evidence in the record to support the hearing officer's conclusions on this issue.[13] While the grievant may disagree with the hearing officer's findings, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EEDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion in this case. Accordingly, EEDR declines to remand the hearing decision on this basis.

Prior Satisfactory Work Performance

Similarly, the grievant's claim that his otherwise satisfactory performance should have been considered as a mitigating factor is unpersuasive. While it cannot be said that prior satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[14] The weight of an employee's past work performance will depend largely on the facts of each case, and will

[10] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[11] "'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.*

[12] Hearing Decision at 4.

[13] *See*, *e.g.*, Agency Exhibit 2 at 13; Agency Exhibit 7 at 5, 7, 9, 11, 13, 15, 26.

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

be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that otherwise satisfactory performance becomes. In this case, the grievant's prior satisfactory performance 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 support the issuance of such a disciplinary action. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the evidence in the record. Accordingly, EEDR will not disturb the hearing officer's decision on this basis.

Inconsistent Discipline

Finally, the grievant argues that the hearing officer did not consider or discuss evidence presented to show that he was not disciplined consistent with other similarly situated employees. In particular, the grievant asserts that the hearing officer should have mitigated the Written Notice based on several EEDR hearing decisions and rulings that were admitted into the hearing record,[15] which the grievant alleges support his claim of inconsistent 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.[16]

To the extent the hearing officer did not discuss the evidence presented by the grievant in support of his assertion that he had been disciplined more harshly than similarly situated employees, there is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties at a hearing. Thus, mere silence as any specific piece of evidence does not necessarily constitute a basis for remand. It is squarely within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented. In this case, it would appear the hearing officer did not discuss this evidence because he did not find it to be credible and/or persuasive. Furthermore, it does not appear that the evidence in the record regarding inconsistent discipline is sufficient to support a conclusion that the agency's treatment of the grievant was different from other employees who may have been similarly situated to him.[17] There is nothing to indicate that the hearing officer's decision not to mitigate on this basis was contrary to the evidence in the record or constitutes an abuse of discretion. Accordingly, EEDR will not disturb the hearing officer's mitigation decision on this basis.

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[15] *See* Grievant's Exhibit E.

[16] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[17] The hearing officer upheld the Written Notice issued to the grievant in this case because he made "insulting" statements that "could have caused some of the Inmates . . . to try to fight [him]." Hearing Decision at 4. The employees in the cases presented by the grievant, on the other hand, appear to have been disciplined for using obscene or abusive language that either was directed at other employees or that was not intended to insult or provoke a violent response. Furthermore, other than the cases themselves, EEDR has not identified any evidence or argument in the hearing record to meet the grievant's burden to show how the comparator employees were similarly situated to the grievant such that mitigation would have been warranted.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[18] 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.[19] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[20]

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