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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5158
October 6, 2020

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 11495. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11495, as found by the hearing officer, are as follows:[1]

> On September 30, 2019, the grievant was working as a corrections officer for the Virginia Department of Corrections at a secure facility. He had 5 years' experience in that job. During his lunch break he left the grounds to return home for a meal. While at his home he used chewing tobacco. The tobacco was kept by him in a sandwich-size plastic bag. Prior to returning to work, he placed the plastic bag of tobacco into his rear pocket.
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> He returned to the facility with the tobacco still in his rear pocket. According to established procedure, before he was to be allowed to enter the secure portion of the facility, he was to undergo a complete search, subject to certain limitations based on a medical condition of his. The search was to have included his emptying all pockets so a search officer could verify he was not introducing any contraband into the facility. The search of the grievant on this date failed to include the required emptying of his rear pockets and exposing the pockets completely. As a result, the grievant returned to his post in a control room within one of the inmate housing buildings with the tobacco on his person.
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> The grievant testified when he returned to the control room and was seated, he discovered the tobacco was still in his rear pocket. He removed it from his pocket and placed it in open view on a desk in the control room. One other officer (hereafter "the gun officer") was stationed in the control room with the grievant.

[1] Decision of Hearing Officer, Case No. 11495 ("Hearing Decision"), Aug. 26, 2020, at 3-4.

> Approximately 2.5 hours after the grievant had returned to work after his lunch break, the control room was entered by a Lieutenant and a Sergeant who were in the process of making regular rounds. The Lieutenant noticed the baggie on the desk and asked the grievant what it was. He initially replied, "beef jerky." The gun officer was directed to leave the room and the Lieutenant and Sergeant proceeded to question the grievant further. The grievant admitted that it was tobacco in the bag. The tobacco was then voluntarily flushed down a toilet by the grievant at the direction of the superior officers. Inmates do not have access to the control room but the officers there can be called to a pod where inmates are present at any time.

On January 3, 2020, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for introducing contraband into the facility.[2] The grievant timely grieved his termination, and a hearing was held on August 10, 2020.[3] In a decision dated August 26, 2020, the hearing officer noted that the "grievant has not contested his possession of tobacco within the facility," which "clearly qualifies . . . as a Group III offense."[4] Regarding mitigation, the hearing officer considered the grievant's arguments that the agency had disciplined another employee less harshly for a similar offense and did not prevent the widespread use of tobacco by employees at the grievant's facility. However, the hearing officer ultimately did not find that mitigation was warranted.[5]

The grievant now appeals the hearing decision to EDR.[6]

DISCUSSION

By statute, EDR has 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."[7] 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.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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[2] Hearing Decision at 3, 4.
[3] *Id.*at 2.
[4] *Id.* at 5.
[5] *Id.* at 6-8; *see* Order Upon Motions to Vacate or Reconsider ("Order"), Case No. 11495, Sept. 10, 2020.
[6] On September 3, 2020, the grievant requested that the hearing officer vacate or reconsider the hearing decision based on new evidence. On September 6, 2020, the hearing officer advised the grievant that an order would be forthcoming denying his requests. On September 10, 2020, the grievant filed his request for administrative review citing, among other things, the hearing officer's failure to consider the new evidence proffered. Later on the same date, the hearing officer issued an order articulating the grounds for denying the grievant's motions. *See* Order. On September 14, 2020, the grievant supplemented his request for administrative review with additional argument responsive to the order. Because the supplemental briefing does not exceed the scope of the initial objections raised, EDR considers it part of the grievant's timely request for administrative review.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

In his request for administrative review, the grievant challenges the hearing officer's initial decision not to mitigate the agency's disciplinary action as well as his subsequent order declining to admit a proffered email into the record as newly discovered evidence.

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]."[10] 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."[11] 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.[12]

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.[13] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[14] and will reverse the determination only for clear error.

In this case, the hearing officer found that the grievant engaged in the misconduct alleged and that the agency's disciplinary action was consistent with law and policy, and the grievant's request for administrative review appears to take no issue with these findings. Instead, the grievant contends that mitigating factors pushed the agency's disciplinary action outside the bounds of reasonableness and that the hearing officer failed to adequately analyze these factors. Specifically, the grievant argues that the hearing officer improperly considered evidence of inconsistent discipline between similarly situated employees, in part by erroneously finding that the grievant's misconduct involved dishonesty while another employee's did not.

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[10] Va. Code § 2.2-3005(C)(6).
[11] *Rules for Conducting Grievance Hearings* § VI(A).
[12] *Id.* § VI(B).
[13] 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).
[14] "'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.*

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[16] 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.[17] 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.[18] 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.

As to the grievant's claim that the agency had disciplined a similarly situated employee less harshly, the hearing officer noted that "the Warden viewed the lack of openness by the grievant in his initial encounter of the superior officers as an aggravating factor" that distinguished the grievant from his proposed comparator.[19] Further, the hearing officer observed that "[c]ertain circumstances do not support the grievant's version of events."[20] For example, neither the sergeant nor the lieutenant took the grievant's "beef jerky" response to be joking or sarcastic.[21] The hearing officer also was not persuaded that the grievant remembered the tobacco only when sitting in the control room, rather than in his car, or that the grievant was attempting not to involve the gun officer in the infraction despite leaving the tobacco in open view on the desk.[22] Finally, though acknowledging that other employees' common usage of tobacco in the facility parking lot could be a factor in mitigation, the hearing officer declined to reduce the grievant's discipline on that basis in the absence of evidence that the warden knew of such misconduct yet failed to address it.[23] Based on this reasoning, the hearing officer concluded that the grievant did not carry his burden to prove his arguments in mitigation.[24]

These findings are supported by evidence in the record. The warden testified that among his considerations in determining the level of discipline was that the grievant "attempted to portray [the tobacco] as beef jerky, falsely."[25] The warden's testimony matched other testimony by both the Sergeant and Lieutenant that they did not believe the grievant was joking or sarcastic when he told them the tobacco was beef jerky.[26] As to the grievant's proposed comparator, the warden

[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] *Grievance Procedure Manual* § 5.8.
[19] Hearing Decision at 6.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 6-7.
[23] *Id.* at 7.
[24] *Id.*at 7-8.
[25] Hearing Recording at 51:24-53:20, 1:01:15-1:04:35 (warden's testimony).
[26] *Id.* at 12:45-13:20 (Sergeant's testimony), 27:10-27:40 (Lieutenant's testimony).

testified that he found mitigation appropriate for that employee because the employee admitted responsibility and was remorseful about the incident.[27] The other employee himself testified that the offense had been a one-time occurrence that he "owned."[28] The warden also testified that he was "not aware of anybody using tobacco in the parking lot."[29] As factfinder, then, the hearing officer was entitled to conclude that the warden reasonably perceived the grievant as at least initially untruthful in contrast to the proposed comparator, and that the warden did not fail to discipline other employees for violating the tobacco prohibition on the premises.

The grievant disagrees, arguing that he was not less honest than his proposed comparator, especially to a degree warranting a Group III Written Notice with removal. He raises questions about the true nature of the proposed comparator's misconduct and whether it was as honest and remorseful as the warden and the hearing officer appeared to believe.[30] The grievant contends that the hearing officer "fail[ed] to provide the same type of scrutiny to the actions of the similarly situated employee that he does to the actions of the grievant."[31]

However, in considering arguments in mitigation, the hearing officer is required to

> give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness.[32]

Thus, regardless of how the hearing officer himself might have determined the appropriate respective discipline for the agency's employees, his role was limited to assessing whether the agency's disciplinary action against the grievant was unreasonable. Although inconsistent discipline between similarly situated employees can be a basis for mitigation, the hearing officer found that the grievant had not met his burden to prove that the grievant was similarly situated to his proposed comparator – mainly in the degree to which dishonesty played a role in their misconduct. The hearing officer assessed this issue with the benefit of live testimony by the grievant, the warden, and the proposed comparator. 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 such 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.[33]

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[27] *Id.* at 58:10-1:01:20 (warden's testimony).
[28] *Id.* at 1:18:20-1:20:50 (proposed comparator's testimony).
[29] *Id.* at 1:15:15-1:15:45 (warden's testimony).
[30] *See* Request for Administrative Review at 7.
[31] *Id.* at 7-8.
[32] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[33] *See*, *e.g.*, EDR Ruling No. 2020-4976.

Newly Discovered Evidence

The grievant also claims that the hearing officer should have reconsidered his decision in light of new evidence proffered by the grievant after the evidentiary record was closed. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[34] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[35] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[36]

In this case, the grievant has proffered an email apparently sent by the facility's former assistant warden to the entire facility staff on May 23, 2019. The email stated in full:

> Good Morning, it has come to my attention that some staff may be utilizing tobacco products within the facility, there has been evidence of such use, please be mindful that this is a violation of policy and if a violation occurs you will be subject to disciplinary action under [Operating Procedure] 135.1 Standards of Conduct. Department Heads, Shift Commanders, Unit Managers, please communicate this to your staff and document. Thank you.[37]

The grievant contends that this email "shows that the Warden's testimony concerning virtually anything to do with this case must be cast into doubt."[38] Further, the grievant interprets the hearing decision to say that mitigation would be warranted if evidence showed the warden knew employees were using tobacco on the premises.

However, after the grievant raised these arguments with the hearing officer, the hearing officer declined to reopen the record or reconsider the hearing decision.[39] He found that the email could not be considered newly discovered evidence under the grievance procedure, not least because it was unlikely to produce a different outcome:[40]

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[34] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[35] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[36] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[37] Request for Administrative Review, at 29.
[38] *Id.*
[39] *See generally* Order.
[40] *See Rules for Conducting Grievance Hearings* § IV(G).

> Rather than supporting the argument of the grievant that he should not be severely punished for a tolerated, common violation of policy, the email shows that the administration was prepared to take disciplinary action against any employee found to be in violation of the policy. Lower level officers were instructed to make subordinate employees, such as the grievant, aware of the prohibition against tobacco usage. Also, the grievant has chosen to ignore the doubts expressed in my earlier decision about his own credibility. Even if I were to find that the Warden misrepresented the level of his knowledge regarding tobacco usage, my finding based on circumstantial evidence that the Warden was substantially correct in his assessment of the credibility of the grievant would be enough to sustain my original decision.[41]

EDR agrees with the hearing officer's analysis. Even accepting the grievant's arguments that he exercised due diligence to discover the email and that its content could be impeaching and material, it is unclear how a general reminder from a past facility manager could render the grievant's particular penalty unreasonable, in light of the hearing officer's other findings. The grievant disagrees, asserting that the email shows "a systemic agency wide problem with tobacco use at [the grievant's facility]."[42] However, EDR perceives no error in the hearing officer's observation that the email's substance was, at best, cumulative with other general testimony regarding unpunished tobacco use at the facility.[43] In addition, contrary to the grievant's argument, EDR does not read the hearing decision to find that mitigation would necessarily be warranted with evidence of common tobacco usage in the facility's parking lot – as opposed to inside the secure area of the grievant's facility, where the grievant's tobacco was discovered. While the hearing officer correctly reasoned that unpunished tobacco violations may well be a factor in mitigation under the circumstances, the standard for mitigation requires a finding that the discipline was unreasonable. The hearing officer expressly declined to draw this conclusion, and EDR perceives no error in his reasoning.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing officer's conclusion that mitigation was not warranted is supported by the record, within his discretion, and not otherwise unreasonable. Upon review of the new evidence proffered by the grievant, EDR finds no basis in the grievance procedure to re-open the record or to disturb the hearing 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.[44] Within 30 calendar days of a final hearing decision, either party may appeal the final

[41] Order at 3-4.
[42] Supplemental Request for Administrative Review at 4-5.
[43] Order at 3.
[44] *Grievance Procedure Manual* § 7.2(d).

decision to the circuit court in the jurisdiction in which the grievance arose.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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