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 Corrections
Ruling Number 2021-5180
December 18, 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 11584. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11584, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [the "agency"] employed Grievant as a Commercial Driver at one of its facilities. He worked as a commercial truck driver for approximately five years. Grievant had prior active disciplinary action. Grievant received a Group II Written Notice on March 26, 2019. Grievant received a Group II Written Notice on July 9, 2020.
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> Grievant suffered an injury preventing [him] from performing his duties as a Commercial Driver. Grievant was released to return to work with restrictions to perform light duty work. He was taking medication which caused drowsiness. On April 6, 2020, his prescription was changed to medication that did not make him drowsy.
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> As part of his light duty work, Grievant worked at a security desk at the Building entrance. His shift began at 5:30 a.m. and ended at 2 p.m. He was responsible for observing employees sign-in as they entered the Building, taking their temperatures, and asking them several health screening questions. He did not have other employees working near him.
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> On June 11, 2020, the Facility Head approached the security desk and observed Grievant sleeping. His eyes were closed and his head was back as he sat

[1] Decision of Hearing Officer, Case No. 11584 ("Hearing Decision"), October 28, 2020, at 2-3.

in his chair which was pushed away from the desk. The Facility Head said Grievant's first name several times, but he did not respond. She banged on the desk in front of Grievant as she called his name. Grievant awoke in response to the noise. The Facility Head told Grievant that "this is unacceptable." She told him if he was caught asleep again there would be disciplinary action issued to him.

On June 16, 2020 at approximately 8:30 a.m., Ms. O approached the security desk to sign-in. Grievant was seated in a chair. His chair was pushed back from the security desk. He was leaning back in the chair with his eyes closed. Ms. O observed Grievant sleeping. Ms. O walked to the desk and stood there for several seconds. She lightly hit her hand on the desk and Grievant awoke.

On June 17, 2020 at approximately 10:30 a.m., Ms. M approached Grievant at the security desk. She observed him with his head down to the side and his eyes closed. Ms. M was startled by what she saw. Grievant was asleep. Ms. M called Grievant by his first name several times, but Grievant did not awaken. She raised her voice as she repeated his name. After a few minutes, Ms. M knocked on the table and Grievant awoke.

On July 9, 2020, the grievant was issued a Group III Written Notice with termination for sleeping during work hours.[2] The grievant timely grieved the disciplinary action and a hearing was held on October 26, 2020.[3] In a decision dated October 28, 2020, the hearing officer determined that the Written Notice and the grievant's termination "must be upheld" because he was observed sleeping at work on June 16 and June 17, 2020, after being warned on June 11, 2020 that his behavior was unacceptable.[4] Regarding mitigation, the hearing officer considered the grievant's arguments that the agency disciplined two other employees less harshly for sleeping during work hours, but ultimately found that mitigation was not warranted.[5] The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . ."[6] 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.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

[2] *Id.* at 1; Agency Ex. 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 3.
[5] *Id.* at 4-5.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* 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 decision not to mitigate the agency's disciplinary action. 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 does not appear to take issue with those findings. Instead, the grievant contends that the hearing officer failed to properly consider evidence that the agency "did not apply the same disciplinary action" to a similarly situated employee.

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]."[9] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[10] 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.[11]

Thus, the issue of mitigation is only reached if the hearing officer 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 that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high, described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[12] EDR will review a hearing officer's mitigation determination for abuse of discretion,[13] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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

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[9] Va. Code § 2.2-3005(C)(6).
[10] *Rules for Conducting Grievance Hearings* § VI(A).
[11] *Id.* § VI(B)(1).
[12] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[13] "'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.*

with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[14] Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently . . . ."[15] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[16] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[17] Therefore, in making a determination as to whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.

In reaching his decision not to mitigate the disciplinary action, the hearing officer reasoned as follows:

> Grievant argued that the Agency inconsistently applied disciplinary action. On June 14, 2017, Mr. S received a Group I Written Notice for sleeping during work hours. The Agency mitigated the offense to a Group I Written Notice because of his overall performance and it was his first occurrence. On October 17, 2017, Mr. H received a written counseling for sleeping on the job. He initially received a Group I Written Notice but submitted a document from his physician explaining that his medical condition may have led him to fall asleep or pass out. The Agency determined that Mr. H had not been given an Employee Health Screening document so it decided to issue him a written counseling. Grievant also had not been given an Employee Health Screening document.
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> The Hearing Officer cannot conclude that the Agency inconsistently applied disciplinary action. The Hearing Officer does not believe the Agency singled-out Grievant for disciplinary action. Grievant was asleep on June 11, 2020. This was his first occurrence of sleeping and the Warden gave him a verbal counseling instead of issuing a Written Notice. Grievant was treated less severely than Mr. S who received a Group I Written Notice for his first occurrence. Only after Grievant fell asleep two more times did the Agency take disciplinary action. The corrective action taken against Mr. S and Mr. H was issued by a former supervisor and not by the current Facility Head. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[18]

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[14] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[15] *E.g.*, Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 663-64 (2010) (applying a "more flexible approach" in determining whether employees are comparators following *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009)).
[16] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[17] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[18] Hearing Decision at 5 (footnote omitted).

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and grounds in the record for those findings."[20] 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 upon 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.

The grievant alleges that the hearing officer failed to properly consider evidence that he was disciplined more harshly than Mr. H, without justification for the disparity. The evidence in the record confirms that Mr. H received a written counseling for sleeping during work hours.[21] Although the grievant and Mr. H may have engaged in similar conduct—sleeping at work—that supported an inference of inconsistent discipline, the hearing officer found that the agency had presented credible evidence to establish a legitimate explanation for the disparate treatment. For example, the Facility Head testified that the incident for which Mr. H was counseled occurred before she worked for the agency and was Mr. H's first offense.[22] Indeed, the incident with Mr. H occurred in 2017, approximately three years prior to the grievant's misconduct.[23] Regarding the grievant, the evidence showed that the Facility Head observed him sleeping on June 11, 2020 and warned him that his behavior was unacceptable,[24] which the hearing officer found amounted to a verbal counseling.[25] As the hearing officer noted, two witnesses later observed the grievant sleeping on June 16 and 17, after the Facility Head's counseling, before he was disciplined.[26] The hearing officer concluded that, taken together, the evidence demonstrated that Mr. H and the grievant were not similarly situated. Accordingly, he declined to mitigate the discipline issued to the grievant on those grounds.

EDR has thoroughly reviewed the hearing record and found nothing to indicate that the hearing officer's mitigation analysis was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion here. A hearing officer "will not freely substitute [their] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[27] In this case, there does not appear to have been sufficient evidence in the record regarding inconsistent discipline of similarly situated employees that the hearing officer may have relied upon to support mitigation. Accordingly, EDR cannot conclude that his mitigation analysis was flawed in this respect and declines to disturb the decision.

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[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] Grievant's Ex. 6.
[22] Hearing Recording at 1:19:21-1:21:03 (Facility Head's testimony).
[23] Grievant's Ex. 6.
[24] *E.g.*, Agency Ex. 7.
[25] Hearing Decision at 5.
[26] *Id.*; *see*, *e.g.*, Agency Exs. 5-6.
[27] EDR Ruling No. 2014-3777 (citing Davis v. Dep't of Treasury, 8 M.S.P.R. 317 (1981)); *see Rules for Conducting Grievance Hearings* § VI(B)(1) n.21.

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.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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