Issue: Administrative Review of Hearing Officer's Decision in Case No. 11040; Ruling Date: February 14, 2018; Ruling No. 2018-4669; 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 2018-4669
February 14, 2018

The Department of Corrections (the "agency") has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11040. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11040, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employs Grievant as a Probation Officer at one of its locations. He began working for the Agency in 2006. Grievant's position was non-exempt under the Fair Labor Standards Act. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant was responsible for providing daily supervision of offenders who required both intensive and regular probation, parole, and post-release supervision. Grievant was responsible for assessing the risk of crime and treatment needs for offenders under his supervision. He was responsible for preparing reports including pre-sentence, sentencing guideline, and major violation.
>
> When a case was removed from one employee and assigned to another employee, the employee receiving the case was supposed to review the case file and take appropriate action as needed. This would include meeting with the probationer.
>
> An offender arrested for committing a felony has committed a "major violation" of his parole. The probation officer supervising an offender who has committed a major violation must file a major violation report. A major violation report is a "document completed by a P&P Officer outlining the alleged violations of supervision conditions." Agency policy does not establish a deadline for submitting a major violation report.

[1] Decision of Hearing Officer, Case No. 11040 ("Hearing Decision"), December 28, 2017, at 2-4 (citations omitted).

On April 13, 2016, the Offender was arrested for Grand Larceny. The arrest was a major violation of the Offender's probation. The Offender was assigned to Grievant's case load on April 14, 2016. Grievant called and spoke with the Offender on May 6, 2016.

On August 19, 2016, the Offender was convicted of Grand Larceny.

There was no deadline for writing a major violation report, but if Grievant had contacted the Supervisor about the Offender's Grand Larceny, the Supervisor would have instructed Grievant to complete a major violation report. When Grievant was asked later by the Supervisor why he did not immediately file a major violation report regarding the Grand Larceny, Grievant told the Supervisor he thought Officer D had completed the major violation report. If Officer D had completed a major violation report, however, that action would have been visible to Grievant when he reviewed VACORIS.

On December 18, 2016, the Offender was arrested for First Degree Murder and Use of a Firearm in a Felony.

On December 18, 2016, the Supervisor sent Grievant a text and left a telephone message for Grievant to contact her immediately about the Offender. Grievant called the Supervisor on December 19, 2016. The Supervisor told Grievant that a serious incident report would need to be completed for the Offender. Grievant told the Supervisor he would not return to the office until December 27, 2016 after completion of his approved leave.

Some of Grievant's family visited him for the Christmas holiday. They all agreed not to use their cell phones during the visit in order to encourage family communication and avoid distractions.

On December 19, 2016, the Chief sent Grievant a text message to Grievant and left telephone messages for Grievant on Grievant's home telephone and cell phone asking him to contact the Chief. The Chief wanted to speak with Grievant to obtain information about the Offender so that the Supervisor could write a serious incident report. Grievant did not reply to the Chief's messages.

One of Grievant's children played the message the Chief left on Grievant's home phone and told Grievant about receiving a message from the Chief. Grievant did not listen to the Chief's message. Grievant did not take action because he was on vacation.

Grievant drafted a letter dated December 27, 2016 to the local Circuit Court Judge requesting a Probation Violation Hearing and that a Circuit Court Capias be issued regarding the Offender. Grievant attached a copy of a major violation report dated December 28, 2016 for the Offender. The major violation report mentioned the Offender's August 19, 2016 conviction and December 18, 2016 arrest.

On January 6, 2017, the grievant was issued a Group II Written Notice with a three workday suspension for failure to follow a supervisor's instructions and failure to follow agency policy.[2] The grievant timely grieved the disciplinary action and a hearing was held on September 8, 2017.[3] In a decision dated December 28, 2017, the hearing officer determined that the agency had not presented sufficient evidence to show that the grievant filed to follow instructions and/or policy sufficient to support the issuance of a Group II Written Notice.[4] The hearing officer did, however, determine that the grievant's conduct constituted unsatisfactory work performance and reduced the Group II Written Notice to a Group I Written Notice.[5] As a result of the reduction in the level of discipline imposed, the hearing officer ordered the agency to restore the grievant's benefits and seniority that did not accrue during the three workday suspension and provide the grievant with back pay for the period of suspension, less any interim earnings.[6] The agency now appeals the hearing decision to EEDR.

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."[7] 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.[8]

In its request for administrative review, the agency asserts that the hearing officer erred in reducing the Group II Written Notice to a Group I Written Notice for unsatisfactory work performance. In support of its position, the agency makes a number of claims regarding both the hearing officer's application of agency policy and his consideration of the evidence in the record. The determination as to whether a Written Notice was issued at the appropriate level is a mixed question of fact and policy, and the agency's arguments challenge the hearing officer's application of agency policies to the facts of this case, as well as the hearing officer's factual findings on certain issues. 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 EEDR conduct this administrative review for appropriate application of policy. Accordingly, this ruling will address both the agency's policy-related claims, as well as the hearing officer's consideration of the evidence in the record.

Hearing Officer's Description of the Charge and the Grievant's Job Duties

The agency claims that the hearing officer's description of the charge against the grievant is in error because it "disregard[ed] D12 local policy with cited statutory provisions and the procedures described in" agency policy. This argument is unpersuasive. In the hearing decision,

[2] *Id.* at 1.
[3] *Id.*
[4] *Id.*at 4-5.
[5] *Id.*
[6] *Id.* at 6.
[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).

the hearing officer explained that the grievant "was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow instructions and policy."[10] The hearing officer's description of the offense is accurate: the Written Notice and attachments charged the grievant with failing to follow instructions by not returning the Chief's message and failing to follow agency policy by not completing a major violation report in a timely manner.[11] Furthermore, the hearing officer's decision and discussion of the evidence clearly shows that he considered the arguments presented by the agency in relation to both of the charges set forth on the Written Notice as well as the cited policies.[12] EEDR will not disturb the decision on this basis.

The agency further argues that the hearing officer erred by providing an incomplete description of the grievant's job duties. While a detailed explanation of a grievant's job responsibilities might be necessary in some cases, the nature of the grievant's responsibilities in this case was not a matter in dispute. For example, the grievant did not argue that he was not required to complete major violation reports for the offenders under his supervision. While the hearing officer could have provided a more detailed description of the grievant's job duties, his choice not to do so here is not a basis for remanding the decision.

Major Violation Report Deadline

In addition, the agency asserts that the hearing officer misapplied agency policy by finding that OP 920.6 and/or D12 policy did not prescribe a specific time period in which the grievant was required to file a major violation report about the Offender. In support of its position, the agency cites to multiple provisions of its policies, as well as sections of the Code of Virginia that relate to the supervision of offenders on probation and parole. EEDR's review of the agency's submission and the hearing record indicates that many of the policies and statutes relied upon by the agency are inapplicable to the facts of this case. Some relate to arrest warrants that may be filed by a probation officer to detain an offender. Others discuss the post-release supervision of offenders who are paroled. In this case, the grievant was charged with failing to file a major violation report for the Offender, who was on probation, in accordance with agency policy. Any policies, laws, or regulations addressing the supervision of offenders who are not on probation, or matters other than the filing of major violation reports, are outside the scope of the charge at issue in this case, have no bearing on the hearing officer's application of policy and consideration of the evidence, and will not be discussed in this ruling.

OP 920.6 and D12 policy are the only policies in the record that discuss the circumstances under which a major violation report should be filed for an offender on probation. In the hearing decision, the hearing officer found that OP 920.6 "does not set a deadline for the filing of major violation reports."[13] As a result, he concluded that the agency's evidence was not sufficient to show that the grievant failed to comply with OP 920.6 by not completing a major violation report for the Offender earlier than he was directed to do so.[14] OP 920.6 states that, "[w]hen a revocation hearing is recommended, the P&P officer shall submit to the sentencing

[10] Hearing Decision at 1.
[11] Agency Exhibits 1, 2.
[12] Hearing Decision at 4-6.
[13] *Id.* at 5.
[14] *Id.* at 4-5.

Court [a] Major Violation Report."[15] The plain language of the policy does not specify a deadline for when the report must be filed. Similarly, D12 policy states that "[i]n the event of a major violation, written notice will be prepared for the Sentencing Court by the way of a Major Violation Report produced in VACORIS,"[16]containing no specific time within which the report should be filed. Under these circumstances, EEDR cannot conclude that the hearing officer's discussion of agency policy is inconsistent with the language of the policies themselves.

However, it would also be unreasonable for agencies to specify every work expectation for employees in written policy. If, for example, an agency's policy states that a certain task must be completed but contains no deadline for completion, the agency could present evidence about its practice and expectations for completion of the task to support the issuance of discipline for failing to follow the policy or complete assigned work. Depending on all the facts and circumstances. evidence of this nature could be sufficient to support a factual conclusion that disciplinary action was warranted and appropriate under the circumstances. The determination as to whether the grievant failed to follow OP 920.6 and/or D12 policy's provisions dealing with the completion of major violation reports depends, in part, on the evidence in the record relating to the agency's application of those policies in the grievant's workplace.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[18] 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.[19] 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.[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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

At the hearing, the parties presented conflicting evidence about the expectations and deadline for completion of major violation reports. The Supervisor testified that, when an offender commits a major violation, the probation officer should immediately discuss the matter with his supervisor.[21] The Supervisor clarified that the office's practice is to complete a major violation report "in a timely manner."[22] When questioned more closely, the Supervisor said that the probation officer should speak with his supervisor about a major violation report when an offender is initially charged, but that it would also be acceptable to do so after the offender is

[15] Agency Exhibit 7 at 6.
[16] Agency Exhibit 4.
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.
[19] *Rules for Conducting Grievance Hearings* § VI(B).
[20] *Grievance Procedure Manual* § 5.8.
[21] Hearing Recording at 9:15-9:41, 32:40-33:22, 36:27-37:19 (testimony of Supervisor).
[22] *Id.* at 42:07-42:39 (testimony of Supervisor).

convicted of the charged offense.[23] Furthermore, the Chief testified that there is no deadline in policy for filing a major violation report, but that it should be done "promptly."[24]

On the other hand, the grievant testified that his practice was to file a major violation report after an offender had been sentenced, that he had done so for years, and that he had never been directed to do otherwise.[25] The grievant further explained that, in his understanding, the Supervisor's description of completing a major violation report "promptly" after the violation meant filing the report after the offender had been sentenced.[26] Here, the Offender had not yet been sentenced when the incident that prompted the Written Notice at issue in this case occurred.[27] The grievant also presented evidence that two other agency employees had filed major violation reports several months after the conviction of offenders and testified that these employees were not disciplined.[28] The grievant's evidence about this issue was unrebutted by the agency.

In cases involving discipline, the agency is required to show by a preponderance of the evidence that the issuance of the disciplinary action was warranted and appropriate under the circumstances.[29] As stated above, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties. 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. EEDR 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.[30] EEDR has thoroughly reviewed the hearing record and cannot find record evidence that would suggest the hearing officer abused his discretion in making the factual conclusion that the agency had not carried its burden of demonstrating that the grievant failed to complete a major violation report consistent with the applicable provisions of OP 920.6 and/or D12 policy. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.[31]

Grievant's Review of VACORIS

The agency further asserts that the hearing officer erred by stating that OP 920.1 "does not specify a deadline for looking at VACORIS" to review an offender's supervision history.[32]

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[23] *Id.* at 44:15-45:14 (testimony of Supervisor).
[24] *Id.* at 1:14:53-1:15:08, 1:25:58-1:26:02 (testimony of Chief).
[25] *Id.* at 1:55:51-1:56:42, 1:59:26-1:59:41, 2:14:40-2:15:20 (testimony of grievant).
[26] *Id.*at 2:14:40-2:15:20 (testimony of grievant).
[27] *See* Agency Exhibit 8.
[28] Hearing Recording at 2:20:10-2:24:02 (testimony of grievant); Grievant Exhibit 3.
[29] *Grievance Procedure Manual* § 5.8.
[30] *See, e.g.*, EDR Ruling No. 2012-3186.
[31] The agency also appears to claim that the grievant failed to comply with management's instruction to complete the major violation report when he returned to work on December 27, 2016 because the report was not filed until the following day. This argument misrepresents both the charge against the grievant and the evidence in the record. The Written Notice does not charge the grievant with failing to file the report when directed to do so and no witness testified that the grievant, when ordered to complete the report, failed to do so in a timely manner.
[32] Hearing Decision at 5.

This argument appears to challenge the grievant's assertion that he believed the Offender's prior probation officer had already filed a major violation report after the Offender was charged in April 2016.[33] The agency argues that the grievant's claim was "obviously deceptive" because the report would have appeared in VACORIS if it had filed by the former probation officer. The agency appears to argue that, had the grievant reviewed VACORIS, he would have known that a major violation report had not been completed by the previous probation officer.

In support of this position, the agency contends that the grievant was required to meet with the Offender within ten working days of being assigned to supervise him and that OP 920.1 directs employees to review VACORIS prior to meeting with an offender. The agency argues that, read in conjunction, these policy provisions require a probation officer to review VACORIS within ten working days of when he is assigned to supervise an offender. OP 920.1 states that employees "should review background material such as . . . VACORIS information" before meeting with an offender, but does not appear to mandate such a review.[34] Moreover, and regardless of any factual dispute over the grievant's awareness of the former probation officer's actions or the requirements for reviewing VACORIS under OP 920.1, hearing officers must make "findings of fact as to the material issues in the case"[35] and determine the grievance based "on the material issues and grounds in the record for those findings," as discussed above.[36] In this case, the grievant was not charged with failing to review the Offender's VACORIS record, but rather with failing to file a major violation report in a timely manner.[37] As a result, the grievant's review of the Offender's VACORIS record was not a material issue in this case such that the outcome would change if the case were remanded to the hearing officer for further consideration of the facts on this issue. Accordingly, EEDR will not disturb the hearing decision on this basis.

Instruction from the Chief

The agency also contends that the hearing officer erred in concluding that the grievant did not disregard the Chief's instruction to contact him and/or be available after the Offender was arrested on December 18, 2016, and asserts that the grievant's "intentional disregard" of the Chief's message justified the issuance of a Group II Written Notice for failure to follow instructions. In the hearing decision, the hearing officer found that the "Grievant did not receive [the Chief's] messages but he was aware of being contacted by the Chief," and that this evidence was "not sufficient to support a Group II Written Notice."[38] In other words, the hearing officer concluded that the grievant had not actually received the Chief's directive to contact him or otherwise remain available, and thus, his conduct did not amount to a failure to follow instructions.

The evidence presented by the agency shows that the Deputy Chief attempted to contact the grievant on Sunday, December 18, was unable to reach him, and left a voicemail and sent text messages asking the grievant to contact her.[39] The Deputy Chief testified that, in her

[33] *See id.* at 4; *see* Hearing Recording at 1:48:02-1:48:56 (testimony of grievant).
[34] Agency Exhibit 6 at 4 (emphasis added).
[35] Va. Code § 2.2-3005.1(C) (emphasis added).
[36] *Grievance Procedure Manual* § 5.9 (emphasis added).
[37] Agency Exhibits 1, 2.
[38] Hearing Decision at 5.
[39] Hearing Recording at 51:28-52:23 (testimony of Deputy Chief).

messages, she referred to the incident and explained that she needed to talk to the grievant about the Offender immediately.[40] The Deputy Chief said that the grievant contacted her on Monday, December 19, told her "I am off today," and did not say when he would get back to her.[41] The Deputy Chief explained that she did not ask the grievant to respond to the information about the Offender's new charge or make any other attempts to contact him.[42] The grievant testified that he received the Deputy Chief's message that there was an issue with the Offender.[43] He further stated that he returned her call, told her that he was off that day, and did not ask about what had happened.[44] The grievant also stated that the Deputy Chief did not tell him what had happened with the Offender or give him any instruction to be available or take additional action.[45]

When the Chief testified, he explained that he called the grievant on Monday, December 19, at his home phone number and also sent text messages to the grievant, but was unable to reach him.[46] The Chief testified that, in his messages, he told the grievant to keep communications open in case the Chief or others needed information, and that the Supervisor would complete the report because the grievant was on vacation.[47] The Chief stated that he made no additional attempts to contact the grievant between December 19 and the day the grievant returned to work the following week.[48] The grievant testified that he did not receive or listen to the Chief's messages himself, that his children listened to the message on his home phone and told him the Chief had called, and that he did not know the reason for the Chief's call.[49] The grievant said he did not return the Chief's message because he was on approved leave.[50]

The evidence, as a whole, supports the hearing officer's conclusion that the grievant did not himself receive the Chief's message to "keep communications open," and that he was not aware of the message's content.[51] In addition, agency management made no additional attempts to contact the grievant after the Chief's phone and text messages on December 19. It is also clear, however, that the grievant was aware the Chief had attempted to contact him, and intentionally did not return the Chief's call.[52] The hearing officer found that, "when a supervisor contacts an employee at home, it is reasonable for an agency to expect an employee to respond immediately."[53] EEDR agrees with this assessment. The grievant's absence from work on approved leave did not excuse his decision not to return the Chief's call, and the grievant's actions accordingly constituted misconduct that warranted the issuance of discipline. However, the evidence does not show that the grievant actually received the Chief's instruction to return his message or otherwise be available during his vacation. In the absence of such evidence, EEDR cannot dispute the hearing officer's determination that the grievant's failure to contact the

[40] *Id.* at 53:00-53:28 (testimony of Deputy Chief).
[41] *Id.* at 52:25-52:39, 53:30-53:51 (testimony of Deputy Chief).
[42] *Id.* at 52:40-52:58, 53:56-54:43 (testimony of Deputy Chief).
[43] *Id.* at 2:16:55-2:17:23 (testimony of grievant).
[44] *Id.* at 2:17:26-2:17:58 (testimony of grievant).
[45] *Id.* 2:19:22-2:19:42 (testimony of grievant).
[46] *Id.* at 58:40-59:02 (testimony of Chief).
[47] *Id.* at 59:05-1:00:07 (testimony of Chief). The report was ultimately completed by the grievant after he returned to work. *See* Grievant Exhibit 1.
[48] Hearing Recording at 1:00:08-1:00:39 (testimony of Chief).
[49] *Id.* at 1:43:49-1:44:15, 2:18:29-2:19:12 (testimony of grievant).
[50] *Id.* at 1:44:08-1:44:15 (testimony of grievant); *see* Grievant Exhibit 2.
[51] Hearing Decision at 5.
[52] *Id.*
[53] *Id.* at 4.

Chief or keep a line of communication open did not rise to the level of a Group II offense for failure to follow instructions.[54]

Under these circumstances, EEDR cannot conclude that the hearing officer abused his discretion or otherwise erred in finding that the evidence presented by the agency was insufficient to support the issuance of a Group II Written Notice. As discussed above, 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. Here, the hearing officer determined that the grievant "should have responded to the Chief's messages," and that his decision not to do so constituted unsatisfactory work performance that warranted a Group I Written Notice.[55] Based on the discussion above, EEDR concludes that the hearing officer's findings on this issue are based upon evidence in the record and the material issues of the case. EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.

Aggravating Circumstances

Finally, the agency asserts that, in reducing the disciplinary action to a Group I Written Notice, the hearing officer failed to consider "the considerable aggravating circumstances associated with the Grievant's misconduct in this case." This argument appears to be premised on the idea that, had the grievant reported the Offender's conviction to the Supervisor, such action "may have prevented . . . the murder" committed by the Offender. It is unclear whether the agency is alleging that the hearing officer should have considered whether the grievant's misconduct constituted a Group I offense that was properly elevated to a Group II because of its impact on the agency's operations, or whether the agency disputes the hearing officer's analysis of mitigating and aggravating circumstances.

Elevation of Offense

If construed as a claim that the grievant's misconduct should have been considered a Group I offense that was properly elevated to a Group II, the agency's argument is unpersuasive. Attachment A to DHRM Policy 1.60, *Standards of Conduct*, allows an agency to elevate an offense normally designated as a Group I offense to the Group II level "where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency," but cautions that management will bear the burden of establishing "its legitimate, material business reason(s) for elevating the discipline . . . ."[56] When assessing whether a grieved disciplinary action was warranted and appropriate under the facts and circumstances, a hearing officer is required to assess whether the action was consistent with the *Standards of Conduct*.[57] In making this determination, the hearing officer should consider an agency's stated grounds for selecting the level of disciplinary action taken.

[54] *Id.* at 5.
[55] *Id.* at 4.
[56] DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[57] *See Rules for Conducting Grievance Hearings* § VI(B)(1).

Here, the charges set forth on the Written Notice indicate that the grievant was disciplined for failing to follow policy and failing to follow a supervisor's instructions,[58] both of which are categorized as Group II offenses.[59] At the hearing, the agency argued that the grievant's alleged misconduct should be considered as Group II offenses.[60] The agency offered no evidence that the alleged misconduct constituted unsatisfactory performance, or some other Group I offense, that was elevated to a Group II due to "an unusual and truly material adverse impact on the agency." Due to the absence of any evidence in the record on that issue, EEDR will not disturb the hearing decision on this basis.

Mitigating Circumstances

With regard to mitigation, hearing officers, by statute, 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]."[61] The *Rules for Conducting Grievance Hearings* further state that a hearing officer must "give deference to the agency's consideration and assessment of any . . . aggravating circumstances" that might demonstrate mitigation of the discipline is not warranted.[62] "The agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances."[63] Aggravating circumstances, therefore, are properly considered by the hearing officer only as a part of his mitigation analysis where they are relevant to the question of whether the discipline should be reduced. In this case, the hearing officer determined that "no mitigating circumstances exist[ed] to reduce further the disciplinary action."[64] Consequently, there was no reason for him to consider evidence of any aggravating circumstances that may have been presented by the agency. There is nothing to indicate that the hearing officer's consideration of mitigating and aggravating circumstances was flawed in any way or is otherwise not supported by the evidence in the record. Consequently, if the agency's argument concerning aggravating circumstances is interpreted as a challenge to the hearing officer's mitigation analysis, EEDR finds no basis to disturb the hearing decision.

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.[65] 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.[66] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[67]

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[58] Agency Exhibits 1, 2.
[59] *See* DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[60] *E.g.*, Hearing Recording at 2:43:17-2:47:22.
[61] Va. Code § 2.2-3005(C)(6).
[62] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[63] *Id.*
[64] Hearing Decision at 6.
[65] *Grievance Procedure Manual* § 7.2(d).
[66] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[67] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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