

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11079; Ruling
Date: February 15, 2018; Ruling No. 2018-4672; Agency: Department of Juvenile
Justice; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2018-4672
February 15, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 11079. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11079, as found by the hearing officer, are as follows:¹

The Department of Juvenile Justice employed Grievant as a Juvenile Corrections Officer at one of its facilities. She had been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced.

Grievant was responsible for conducting resident checks. To check a resident, Grievant was obligated to look through the window of the resident’s room, observe the resident, and then record her observation. A clipboard with a paper Confinement Monitoring Sheet was attached to the resident’s door so Grievant could easily record her observations.

Resident M was locked inside a room with a door that opened into a dayroom. The door to Resident M’s room had a window enabling juvenile correctional officers to see inside the room. Inside the room was a bench where Resident M could sit.

Resident M was supposed to be checked every five minutes because Resident M was at risk of injuring himself. On April 18, 2017, Grievant completed the Confinement Monitoring Form by signing her initials and writing the code “5” for the times of 6:20 p.m., 6:25 p.m., 6:30 p.m., 6:35 p.m., 6:40 p.m., 6:45 p.m., 6:50 p.m., 6:55 p.m., 7:00 p.m. and 7:05 p.m. Code “5” meant that Grievant observed Resident M standing at the door. Grievant signed her initials and wrote code “2” for the times of 7:10 p.m. and 7:15 p.m. Code “2” meant

¹ Decision of Hearing Officer, Case No. 11079 (“Hearing Decision”), January 5, 2018, at 2-4.

calm/alert. At 7:15 p.m., Grievant wrote "Resident hitting himself" in the comments section of the form.

Grievant did not look into Resident M's room at 5:20 p.m., 5:25 p.m., or 5:30 p.m. She made entries at those times to "cover" for Officer F who was supposed to have completed the checks but had left without doing so.

At approximately 6:24 p.m., Grievant looked into Resident M's room. Resident M was standing at the door. At approximately 6:28 p.m., Grievant looked into Resident M's room. Resident M was standing in front of the door. Grievant wrote on the Confinement Monitoring Sheet for Resident M.

At approximately 6:32 p.m., Grievant walked past Resident M's door, but she did not look inside. She was speaking with other residents. At approximately 6:34 p.m., Grievant walked past Resident M's door, but did not look inside. She walked near the door and stood to talk to other residents, but did not look inside Resident M's door.

Resident M bit his arm at approximately 6:39 p.m. and began other self-injurious behavior. At approximately 6:41 p.m., Grievant opened the door to Resident M's room and gave him a snack. Resident M sat down in his room and began eating his snack. He also began spreading his blood on the wall of his room. He continued self-injurious behavior.

At approximately 6:45 p.m., Grievant walked past Resident M's room and glanced in the door. Resident M was standing in front of the door.

At approximately 6:48 p.m., Grievant walked past Resident M's room and glanced inside the door. Resident M was standing in front of the door.

At approximately 6:51 p.m., Grievant walked past Resident M's room and glanced inside the door. Resident M was standing in front of the door.

At approximately 6:51 p.m., Resident M bit his forearm and spat the blood on the wall. He continued to bite himself and spit blood for several minutes. He hit himself in the face and smeared blood over his face.

At approximately 6:54, Grievant and another employee walked past Resident M's door. Grievant did not glance inside the room. If she had looked inside the room, she would have seen Resident M seated with blood splattered about him.

At approximately 6:54 p.m., another employee looked inside Resident M's room and then walked away without taking any action. If he had looked closely, he would have observed Resident M seated with blood splattered about him.

At approximately 6:56 p.m. Grievant walked out of the office and past Resident M's door. She did not glance inside the room. If she had looked inside

the room, she would have observed Resident M seated with blood splattered about him.

At approximately 6:59, Resident M continued to bit himself and wipe his blood on the walls.

At approximately 7 p.m., Grievant walked past Resident M's door, but did not glance inside. If she had looked inside, she would have seen Resident M seated, holding his neck, and looking at his blood splattered on the bench and walls.

At approximately 7:01 p.m. another employee and Grievant approached Resident M's door. The other employee looked inside and then walked away. Grievant lifted the Confinement Monitoring Sheet and appeared to make entries on the sheet. She did not glance inside the room. If she had looked inside the room, she would have seen Resident M seated on a bench and holding his neck with blood splattered about him.

At approximately 7:02 p.m., Grievant placed papers on the door of Resident M's room. She did not look inside the room. Resident M was seated with blood splattered about him. Grievant walked away from the room.

At approximately 7:08 p.m., Grievant walked by the door of Resident M's room twice. She did not glance inside. If she had looked inside his room, Grievant would have observed Resident M seated on the bench with blood on his face and splattered around him.

At approximately 7:09 p.m., Grievant walked to Resident M's door and looked directly inside. She observed Resident M standing at the door facing her. She recognized that he was in distress. She unlocked and opened his door. She walked inside the room and escorted Resident M out of the room and out of the unit.

On July 21, 2017, the grievant was issued a Group III Written Notice with termination for falsifying records.² The grievant was also issued a second Group III Written Notice with termination on July 21, 2017 for unsatisfactory performance, failure to follow instructions, and violation of a safety rule.³ The grievant timely grieved the disciplinary actions and a hearing was held on October 4, 2017.⁴ In a decision dated January 5, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant falsified records and upheld the issuance of the first Group III Written Notice and the grievant's termination.⁵ The hearing officer further determined that the second Written Notice was "not materially different from the facts and reasoning giving rise to" the first Written Notice, that there was "no basis to

² *Id.* at 1.

³ *Id.*

⁴ *See id.*

⁵ *Id.* at 5.

take disciplinary action a second time for the same facts and reasoning,” and rescinded the second Group III Written Notice.⁶ The grievant 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 her request for administrative review, the grievant alleges that the hearing officer erred in not mitigating the agency’s disciplinary action because the agency did not apply disciplinary action to her consistent with other similarly situated employees. In support of her position, the grievant claims that another employee (“Employee 1”) was responsible for completing five-minute checks of Resident M and did not do so, and that two additional employees (“Employee 2” and “Employee 3”) observed Resident M’s behavior and did not take action. The grievant argues that none of these three employees received disciplinary action for their role in the incident.

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].”⁹ 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.”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 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”

⁶ *Id.*

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code § 2.2-3005(C)(6).

¹⁰ *Rules for Conducting Grievance Hearings* § VI(A).

¹¹ *Id.* § VI(B)(1).

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 totally unwarranted.¹² EEDR 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 with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.¹⁴ In the hearing decision, the hearing officer assessed the evidence and found that the grievant had not been singled out for discipline or treated differently than other similarly situated employees.¹⁵ Specifically, the hearing officer considered the evidence relating to mitigating circumstances and found that the Employee 2 and Employee 3, who allegedly observed Resident M's behavior, "were not similarly situated" to the grievant because the grievant "was responsible for completing timely observation and writing on the Confinement Monitoring Sheet what she observed," while they "did not have these duties."¹⁶

At the hearing, one witness testified that other employees who may have seen Resident M's behavior without reporting it could be subject to corrective action, but Employee 2 and Employee 3 did not falsify the Confinement Monitoring Sheet; only the grievant wrote on the sheet that she had performed checks of Resident M without actually doing so.¹⁷ At the hearing, Employee 2 testified that he glanced into Resident M's room and did not notice any blood or injury, and further clarified that he did not perform a check of Resident M to be noted on the Confinement Monitoring Sheet because he did not work in the unit, but was only in the unit responding to an unrelated incident.¹⁸

Although the hearing officer does not appear to have discussed the grievant's allegation that Employee 1 was responsible for performing checks of Resident M as part of his mitigation analysis, 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. Moreover, one witness explained that employees in a unit should work together to decide who is responsible for completing resident checks, and that the grievant apparently took that responsibility for Resident M because her name is the only one that appears on the Confinement Monitoring Sheet.¹⁹ In other words, there is evidence that Employee 1 did not perform checks of Resident M because

¹² 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).

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.*

¹⁴ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ Hearing Decision at 6.

¹⁶ *Id.*

¹⁷ Hearing Recording at 3:01:58-3:04:16 (testimony of Employee J).

¹⁸ *Id.* at 3:17:46-3:18:23 (testimony of Employee 2).

¹⁹ *Id.* at 2:08:28-2:10:04 (testimony of Employee J).

the grievant had accepted that responsibility. 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 the evidence about Employee 1 because he did not find it to be credible and/or persuasive as a mitigating factor.

Having conducted a review of the hearing record, EEDR finds that that the evidence in the record is sufficient to support the hearing officer's conclusions as to potential mitigating factors. Although the agency's decision to issue a Group III Written Notice for violation of a safety rule to the grievant without disciplining other employees who allegedly observed Resident M's behavior may have presented an issue of inconsistent discipline, the hearing officer rescinded that Written Notice.²⁰ The Written Notice at issue in this ruling instead concerns the grievant's falsification of the Confinement Monitoring Sheet.²¹ While the falsification charge is undoubtedly related to the grievant's, and other employees', observations of Resident M, the evidence in the record does not indicate that the comparator employees in question were responsible for documenting checks of Resident M on the Confinement Monitoring Sheet, nor is there evidence that they falsified a document.

Though the grievant clearly disagrees with the hearing officer's mitigation decision, 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. Based on EEDR's review of the record, it appears that the evidence presented at the hearing was sufficient to support the hearing officer's decision not to mitigate the discipline and that his determination was otherwise not arbitrary or capricious. Accordingly, EEDR will not disturb the hearing officer's mitigation decision on that basis.

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.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴



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²⁰ Hearing Decision at 5.

²¹ *Id.* at 4-5; see Agency Exhibit 1 at 1.

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).