Issue: Administrative Review of Hearing Officer's Decision in Case No. 10282; Ruling Date: August 29, 2014; Ruling No. 2015-3953; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2015-3953
August 29, 2014

The Department of Corrections (the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10282. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10282, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Captain at one of its Facilities. The purpose of his position was to "provide security and supervision of adult offenders." He worked sometimes as the Watch Commander at the Facility when other senior managers such as the Warden were not at the Facility. As Watch Commander, Grievant was the highest ranking security employee and in charge of the Facility. Grievant had been employed by the Agency for approximately 17 years.
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> Grievant's Post Order provided, "[c]ontact your supervisor on any matter not covered in the Post Orders and for clarification of items that may be unclear. Do not guess or assume anything."
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> VACORIS is the Agency's electronic database containing information such as reports of events occurring at each prison. It is possible for staff of one prison to read the reports written by staff of another prison. If facility employees enter scandalous or unseemly information into VACORIS and that information is viewed by employees of another facility, employees at the first facility may feel they are at risk of ridicule.
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> DOC Operating Procedure 038.1 governs Reporting Serious or Unusual Incidents. An Incident is defined as:

[1] Decision of Hearing Officer, Case No. 10282 ("Hearing Decision"), July 14, 2014, at 2-7 (citations omitted).

> An actual or threatened event or occurrence outside the ordinary routine that involves the life, health, and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit.

Incident Reports (IR) are different from Internal Incident Reports (IIR) under the Agency's practices. An IIR would be written by those observing an incident. A supervisor would take IIRs written by employees and create an Incident Report. The Incident Report along with the IIRs would be included in VACORIS and presented to Agency managers.

Internal Incident Reports are typically entered into VACORIS but the Facility's practice is to allow handwritten IIRs on some occasions.

On Saturday December 14, 2013, Grievant was working at the Facility as the Watch Commander. The Warden was at his home and was not working. Grievant had questions about certain issues so Grievant called the Warden several times at his home.

On Sunday December 15, 2013 at approximately 7:30 a.m. or 8 a.m., the Offender was being escorted from his Housing Unit through the Breezeway and into the Medical Waiting Area. The Offender claimed to have had a seizure and needed medical assistance. The Offender was seated in a wheelchair and wearing restraints. The Lieutenant, Sergeant I, and the Officer were escorting the Offender. They entered the Medical Waiting Area.

Grievant was making rounds in the Medical Unit and was accompanied by Sergeant T as they exited the Medical Unit and entered the Medical Waiting Area and met the Offender as well as the employees escorting him. Officer W was inside the Medical Unit initially but he also entered the Medical Unit Waiting Area with Grievant.

Several nursing employees of the Medical Unit walked through the Medical Unit Waiting Area and into the Breezeway. As the employees passed through the Medical Unit Waiting Area, the Offender spoke to them in an offensive manner. He was not otherwise disruptive.

Grievant wanted to discern the Offender's problems or concerns and asked the Offender "What's going on?" Grievant put his hand on the Offender's shoulder. The Offender put his head down and did not answer Grievant. Officer W did not like the fact that the Offender was not responding to Grievant's questions. Officer W approached the Offender and yelled, "When the Captain

asks you a question you better answer!" Officer W began to slap the Offender in the face with the palm of his open hand and the back of his hand. Officer W was slapping the Offender from right to left and from left to right. Officer W slapped the Offender many times, possibly six to eight times.

Grievant told Officer W to stop and moved in a position to block some of Officer W's blows. Officer W hit Grievant as he continued to try to slap the Offender. The Lieutenant initially had his back to Officer W but turned and observed Officer W. He told Officer W to stop. Sergeant T told Officer W to stop.

Officer W stopped hitting the Offender. Grievant instructed Officer W to leave the Medical Unit Waiting Area and go to the Medical Unit Control Room. Officer W remained at the Facility in the Medical Unit Control Room and worked the rest of his shift until 6 p.m.

Officer W's behavior was a simple assault and battery of the Offender. Officer W's behavior was a criminal act and such a conclusion should have been obvious to all of the staff who observed Officer W.

Grievant and some of the other employees moved the Offender into the Medical Unit. Nurse S asked the Offender about his concerns. The Offender said that he had had a seizure. None of the security staff told the medical staff that the Offender had been slapped by Officer W. The nursing staff examined the Officer but without the knowledge that Officer W had slapped the Offender.

Grievant and Lieutenant went to the Watch Commander's office and began to look over the Agency's policies regarding how to report the incident. Grievant looked at DOC Operating Procedure 038.1 and was confused regarding how he was to report Officer W's behavior. He asked for help from the Lieutenant but neither could discern how to properly report the incident. Grievant decided he would not notify the Warden until the following Monday morning when the Warden returned to the Facility.

On December 15, 2013 at 8:49 a.m., the Lieutenant wrote an IIR in VACORIS stating that the Offender said he had had a seizure and was escorted to the Medical Unit for assessment. The Lieutenant wrote that the Offender was returned to his cell after the assessment. The Lieutenant did not write about Officer W assaulting the Offender.

Grievant chose not to report the incident to Ms. S who was working as the Administrative Duty Officer on December 15, 2013. He did not report the incident to her "due to the nature of the incident."

Grievant left the Facility for the day at approximately 3 p.m. on December 15, 2013.

At approximately 4 p.m. on December 15, 2013, the Offender falsely reported to the LPN that he had been sexually assaulted by Agency employees. Lieutenant M2 ordered that the Offender be taken to the Medical Unit for evaluation as required by the federal Prison Rape Elimination Act. The Offender refused to leave his cell to go to the Medical Unit. The Lieutenant recorded on video tape the Offender's statement that he refused to leave his cell. Lieutenant M2 called Lieutenant M1 who instructed Lieutenant M2 to obtain incident reports from staff. Lieutenant M1 was the Facility Investigator.

On December 15, 2013 at 6:03 p.m., the Lieutenant wrote a second IIR in VACORIS stating that he had not seen anyone sexually assault the Offender. The Lieutenant did not mention Officer W assaulting the Offender.

On December 15, 2013 at 5:39 p.m., Sergeant I wrote an IIR in VACORIS stating that he had not seen anyone sexually assaulting the Offender. Sergeant I did not mention Officer W assaulting the Offender.

On December 15, 2013 at 5:36 p.m., Sergeant T wrote an IIR in VACORIS stating that the Offender was not sexually assaulted. Sergeant T did not mention Officer W assaulting the Offender.

The Officer filed an IIR in VACORIS at 5:50 p.m. and again at 6:07 p.m. on December 15, 2013 indicating that the Offender was not sexually assaulted. The Officer did not disclose that Officer W had slapped the Offender earlier that morning.

On December 16, 2013, the QMHP observed that the Offender's face had become swollen. He contacted Lieutenant M1 at approximately 10:03 a.m. and said that the Offender claimed to have been assaulted by staff. Lieutenant M1 notified the Warden who directed that the Offender be taken to the Medical Unit for evaluations. While waiting for the Offender to arrive at the Medical Unit, Lieutenant M1 called Grievant at his residence and told Grievant that he had received a report of injuries to the Offender and that the Offender had alleged he was assaulted. Lieutenant M1 asked if there was any more information Grievant could give him. Grievant said the Offender had a seizure the day before and had been brought to the Medical Unit.

On December 16, 2013, the Major took a picture of the Offender at approximately 10 or 10:30 a.m. The picture showed the Offender's face and that his face was heavily swollen and bruised. The Offender caused much of the injuries to himself later in the day on December 15, 2013 and after Officer W had hit him.

Between 11 a.m. and noon on December 16, 2013, Grievant called the Facility and spoke with the Warden. Grievant said there was something he needed to talk about with the Warden. Grievant told the Warden of the physical assault on the Offender by Officer W. The Warden asked why he was just learning about this now. Grievant said he wanted to talk to the Warden personally.

On December 16, 2013 at 1:39 p.m., the Warden sent the Special Investigation Unit Head a picture of the Offender. The Investigator was working at another Facility and was contacted at 2:09 p.m.

At 3:37 p.m. on December 16, 2013, Lieutenant M1 sent the Warden an email stating:

> Based on a report from staff, [Offender] was examined by medical and interviewed today at approximately 10:00 a.m. During this interview, the offender alleged that he had been assaulted by staff yesterday morning, just inside the entrance to medical. Subsequent interviews with staff have indicated that [Offender] was assaulted by [Officer W] and was stopped by the other staff present. Incident reports continue to be received from all staff present during this incident. All information, includ[ing] the available video, will be forwarded to SIU as directed.

All of the employees involved in the incident were asked to come to the Facility and fill out internal incident reports.

On December 16, 2013, Grievant wrote a handwritten IIR describing Officer W slapping the Offender. Grievant added, "I take responsibility for failure to report in a timely manner in accordance with policy."

On December 16, 2013, the Lieutenant wrote a handwritten IIR describing Officer W smacking the Offender.

On December 16, 2013, Sergeant I wrote a handwritten IIR describing Officer W smacking the Offender.

On December 16, 2013, Sergeant T wrote a handwritten IIR describing Officer W smacking the Offender.

On December 17, 2013, the Officer wrote a handwritten IIR stating that Officer W smacked the Offender several times on December 15, 2013 at approximately 7:35 a.m.

The Investigator began his interviews of employees knowledgeable of the incident on December 18, 2013.

> If Grievant had reported the incident immediately to the Warden, the Warden would have contacted the Special Investigations Unit to have an investigator begin investigation on Sunday. A picture of the Offender could have been taken to document his limited injuries from the assault.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant engaged in acts that undermined the effectiveness of the agency, finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice with termination.[2] The grievant now seeks administrative review from 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."[3] 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.[4]

Inconsistency with Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with agency policy. Specifically, he asserts that the hearing officer's findings of fact are not sufficient to support a determination that the grievant's actions were contrary to agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[5] The grievant has requested such a review. Accordingly, his policy claims will not be discussed further in this ruling.

Hearing Officer's Findings of Fact

In his request for administrative review, the grievant claims that the evidence in the record does not support hearing officer's determination that his actions on December 15 undermined the effectiveness of the agency. Specifically, the grievant asserts that the hearing officer did not make a factual determination as to whether he had actually failed to follow any of the policies listed on the Written Notice. He also asserts that the evidence presented by the agency did not establish that he had undermined the agency's effectiveness.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record

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[2] *Id*. at 7-9.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[6] Va. Code § 2.2-3005.1(C).

for those findings."[7] 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.[8] 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.[9] 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.

It appears the grievant correctly points out that the hearing officer did not make a factual determination as to whether he failed to comply with a particular agency policy. In the hearing decision, the hearing officer assessed the evidence presented by the parties relating to the agency's reporting policies and determined that the grievant "knew of his obligation to report immediately Officer W's assault to the Warden."[10] While acknowledging that agency policies "conflict[] regarding how [the grievant] was to report the incident," and that "it [was] clear" those policies "would cause Grievant to question how to report the incident," the hearing officer found that the "[t]he significance of the incident should have made Grievant realize any delay in reporting would be detrimental to the Agency."[11] Whether linked to specific policy requirement, the hearing officer determined that the grievant was under a duty to report the incident and failed to do so.

Additionally, there is evidence in the record to support the hearing officer's factual conclusions regarding the grievant's failure to report the incident on December 15. The Major, for example, testified that while this incident could have been considered any one of several types of incidents, some of which could have been reported in different ways, the grievant should have reported the incident on December 15.[12] The Warden expressed a similar opinion,[13] and the grievant himself acknowledged that he should have reported the incident on December 15.[14] The Warden further explained that agency employees are "trained to take the safe way and report" incidents like the one that occurred here whenever there is confusion as to what is required by policy.[15]

The grievant's Security Post Order stated that he should "[c]ontact [his] supervisor on any matter not covered in the Post Orders and for clarification of any items that may be unclear.

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[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] Hearing Decision at 8.
[11] *Id.*
[12] Hearing Recording at 2:08:12-2:08:40, 2:09:49-2:10:44, 2:11:43-2:12:24, 2:24:50-2:25:24.
[13] *Id.* at 3:04:42-3:04:55.
[14] *Id.* at 5:34:46-5:34:51; *see* Agency Exhibit 4-D at 3-4, Agency Exhibit 13 at 5, Agency Exhibit 14.
[15] *Id.* at 3:05:53-3:06:33.

Do not guess or assume anything."[16] The grievant asserts that his actions were consistent with this directive because "they do not say you are to get clarification immediately from anyone"; essentially, the grievant claims that calling the Warden on the following day was an appropriate response under the circumstances.[17] While the hearing officer did not directly state as much, he clearly found this unpersuasive in concluding that any confusion about the reporting policy did "not excuse [the grievant's] failure to contact the Warden immediately" to report the incident.[18] The hearing officer's determination on this issue is supported by witness testimony establishing that the Warden encouraged employees to call him about issues that arise at the facility[19] and that the grievant had contacted the Warden several times on the day before the incident to discuss other matters.[20] While the grievant explained that he did not want to bother or aggravate the Warden at home about the incident,[21] the hearing officer concluded that the facts showed the "Grievant's desire to wait until the following day to speak with the Warden rather than further annoying the Warden [was] untenable" under the circumstances.[22]

There is conflicting evidence in the record on the question of what the grievant was required to do on December 15 in order to comply with the agency's reporting policy. Weighing the 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.[23] Here, there are facts in the record to support the hearing officer's finding that the grievant should have reported the incident to the Warden on December 15 instead of waiting until the following day. While this issue was contested at the hearing, we do not find that the hearing officer's factual findings on this point are unsupported by the evidence in the record or otherwise constitute an abuse of discretion. EDR cannot substitute its judgment for that of the hearing officer on this issue, and we decline to disturb the hearing decision on this basis.

The grievant further argues that the evidence presented by the agency does not demonstrate that the grievant's actions undermined the effectiveness of the agency. In the hearing decision, the hearing officer concluded that "[o]ne of [the agency's] missions is to ensure the safety of offenders," and that "[b]y failing to timely report Officer W's actions, Grievant undermined the Agency's ability to decide how best to protect other staff and inmates . . . and begin a timely investigation."[24] Officer W's "extreme" behavior "may have posed an immediate risk to other employees or inmates," and the grievant did not provide agency management with "the opportunity to address that risk."[25] The hearing officer found that the grievant "undermined the Agency's ability to begin an investigation," which would have included "obtaining pictures

[16] Agency Exhibit 6 at 7.
[17] *See* Hearing Recording at 5:21:12-5:21:28 (testimony of grievant).
[18] Hearing Decision at 8.
[19] Hearing Recording at 2:36:22-2:37:17 (testimony of Warden).
[20] *Id.* at 5:02:40-5:02:58 (testimony of grievant).
[21] *Id.* at 5:02:40-5:03:19, 5:04:13-5:04:30.
[22] Hearing Decision at 8.
[23] *See, e.g.*, EDR Ruling No. 2012-3186.
[24] Hearing Decision at 7.
[25] *Id.*

of the Offender's actual condition following the assault."[26] Based on these conclusions, the hearing officer determined that the grievant undermined the effectiveness of the agency by failing to report the incident to the Warden on December 15.

The grievant argues that the Special Investigator did not travel to the facility for forty-eight hours after the incident was reported, and thus the grievant's failure to report immediately had no negative effect on the agency's ability to investigate the situation. While the Special Investigator did not travel to the facility in person until December 18, there is evidence to suggest that the grievant's failure to report the incident on December 15 did indeed delay the agency's ability to carry out the investigation. Both the Warden and the Special Investigator, for example, testified at the hearing that they began investigating the incident on December 16 when it was reported.[27] In addition, the Warden testified that, if the grievant had reported the incident on December 15, photographs of the Offender's condition would have been taken that day to record the extent of the Offender's injuries immediately after the incident occurred.[28] The Warden also explained that the delay in reporting prevented the agency from gathering incident reports and determining the facts of the incident, created doubt as to what had actually occurred between the Offender, Officer W, and the other staff who were present, and precluded a timely reporting of the incident to the Special Investigator and agency management for appropriate action.[29] Based on EDR's review, there is evidence in the record to support the hearing officer's factual findings and conclusions. [30]

The grievant further asserts that "it was [the grievant's] responsibility to decide how [Officer W] was to be deployed, even after the incident occurred," and thus his failure to report on December 15 did not undermine the effectiveness of the agency by depriving it of the ability to address Officer W's misconduct. DHRM Policy 1.60, *Standards of Conduct*, states that agency management may "immediately remove an employee from the workplace . . . when the employee's continued presence . . . may be harmful to the employee, other employees, clients, and/or patient" or "may constitute negligence in regard to the agency's duties to the public and/or other employees."[31] At the hearing, the grievant testified that, after the incident, he was concerned about Officer W's continued presence in the workplace and his potential to harm other employees or offenders.[32] While the grievant would ordinarily have the responsibility as a supervisor to assign employees within the facility, it is clear that agency management has the authority to make decisions of this nature as they relate to employee misconduct and disciplinary action, which was the case here. Based on the evidence in the record, it was not unreasonable for the hearing officer to conclude that Officer W "may have posed an immediate risk to other

[26] *Id.* at 7-8.
[27] Hearing Recording at 10:43-11:33 (testimony of Special Investigator), 2:31:41-2:32:57 (testimony of Warden).
[28] *Id.* at 4:38:58-4:39:30.
[29] *Id.* at 4:35:30-4:38:34.
[30] Hearing Decision at 7.
[31] DHRM Policy 1.60, *Standards of Conduct*, § C(1). "Management may also immediately remove an employee from the workplace . . .when he/she is under investigation for alleged criminal conduct that is related to the nature of his/her job or to the agency's mission." *Id.* § C(2). This could arguably be the case here, as well, although it ultimately makes little difference about what provision of the policy could have been cited to justify the administrative suspension of Officer W.
[32] Hearing Recording at 5:11:53-5:12:47.

employees or inmates" and that the grievant's failure to report the incident undermined the effectiveness of the agency because it endangered other employees and offenders at the facility.[33]

EDR must show deference to the hearing officer's findings of fact absent some indication that they are not supported by the evidence in the record or otherwise constitute an abuse of discretion. Here, there is evidence to support the hearing officer's conclusion that the grievant's failure to report the incident on December 15 undermined the effectiveness of the agency. Other individuals, had they been in the hearing officer's position, may not have reached the same conclusion as the hearing officer in this case. The test, however, is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case. Because the hearing decision in this case meets that standard, EDR cannot substitute its judgment for that of the hearing officer. Accordingly, we decline to disturb the hearing decision on this basis.

Standard of Responsibility Applied to the Grievant

The grievant also argues that the agency and the hearing officer "held [the grievant] to a higher standard because of his rank," and that policy does not contemplate that supervisory staff may be disciplined more severely than their subordinates for the same type of misconduct. The hearing officer considered the grievant's argument that DHRM Policy 1.60, *Standards of Conduct*, "does not permit the Agency to hold employees of higher rank to a higher standard than employees of a lower rank" in the hearing decision.[34] He determined that "[t]he offenses listed in [the policy] are not all-inclusive and the Agency has discretion to elevate disciplinary action based on an employee's position of authority."[35]

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. As discussed above, the Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[36] DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees."[37] The *Rules for Conducting Grievance Hearings* require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline.[38] Here, the agency appears to have determined that the grievant's misconduct was more severe based, in part, on his position as a supervisor.[39] Because policy permits an agency to hold supervisory employees to a higher standard than non-supervisory employees, the hearing

[33] Hearing Decision at 7.
[34] *Id.* at 8.
[35] *Id.*
[36] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[37] Policy Ruling of the Department of Human Resource Management, Case No. 9746, Sept. 24, 2012, at 2.
[38] *Rules for Conducting Grievance Hearings* VI(B)(2) (stating that "a hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances").
[39] The Written Notice states that "[a]s the ranking officer [the grievant] had an even greater responsibility to follow the policy to report . . . ." Agency Exhibit 1 at 3.

officer did not err in deferring to the agency's weighing of that factor. We decline to disturb the decision on this basis.

Mitigation

The grievant further alleges that the hearing officer erred in determining that the grievant was not disciplined inconsistently as compared to other similarly situated employees. Specifically, he alleges that the hearing officer's conclusion that the grievant was not similarly situated to other employees is not supported by the evidence in the record and that the grievance procedure does not contemplate that a hearing officer may consider whether the agency issued the discipline "for an improper purpose."

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]."[40] 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."[41] 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.[42]

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 totally unwarranted.[43] EDR will review a hearing officer's mitigation determination for abuse of

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[40] Va. Code § 2.2-3005(C)(6).
[41] *Rules for Conducting Grievance Hearings* § VI(A).
[42] *Id*. § VI(B).
[43] 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).

discretion,[44] 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.[45] At the hearing, the grievant argued that he was disciplined inconsistently as compared to two other similarly situated agency employees. The hearing officer summarized the evidence presented by the grievant on this point as follows:

> Grievant presented evidence about Mr. G, a newly hired Institutional Program Manager. In July 2013, Mr. G learned that two officers were fighting each other. Mr. G failed to report the incident to the Warden. When questioned initially, Mr. G lied about what he knew. Eventually Mr. G told the truth to the Warden. Mr. G was given a Group III Written Notice and sought a voluntary demotion. Grievant presented evidence of Sergeant H who in September 2012 was given a Group III with demotion but not removed from employment. Sergeant H observed one inmate attempting to strangle another inmate but failed to report the incident.[46]

The hearing officer evaluated the evidence relating to mitigation and determined that the "Grievant was removed for failing to timely report staff abuse of an offender" while "[t]he other employees were disciplined regarding conflict between two employees and conflict between two inmates."[47] He appears, therefore, to have determined that an incident of officer-on-offender abuse was more serious than an incident of offender-on-offender or officer-on-officer abuse. The hearing officer further noted that "[s]imple disparities in disciplinary action are not sufficient to mitigate circumstances in themselves"[48]; in other words, the fact that the grievant was disciplined more harshly than other employees does not, in and of itself, demonstrate that he "was improperly distinguished from other employees."[49] There is evidence in the record to support the hearing officer's conclusion that the comparator employees did not engage in conduct that was similar to that for which the grievant was disciplined.[50] Based on EDR's review of the hearing record, there is 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 we cannot conclude that the hearing officer's decision not to mitigate constitutes an

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[44] "'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.*

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

[46] Hearing Decision at 9.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* Hearing Recording at 3:14:54-3:16:19, 3:25:07-3:26:07 (testimony of Regional Operations Chief).

abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

With respect to the grievant's assertion that the hearing officer determined that mitigating the disciplinary action required him to demonstrate "some improper motive on the part of the agency," this argument fails. The hearing decision explicitly identifies several examples of mitigating circumstances, including whether "the agency has consistently applied disciplinary action among similarly situated employees" and whether "the disciplinary action was free of improper motive."[51] It appears that the hearing officer considered whether the comparator employees were similarly situated to the grievant, as discussed above, and also whether the agency issued the disciplinary action based on an improper motive. The hearing officer's determination that the agency had not "singled out Grievant for disciplinary action with removal for an improper purpose" was not a part of his consideration of whether other similarly situated employees had been treated differently.[52] The hearing officer effectively determined that while the grievant was "treated different[ly] for his delay in reporting"[53] as compared with the comparator employees, this fact did not demonstrate that the discipline was driven by an improper motive. The hearing officer's determination is consistent with the provisions of the *Rules* regarding mitigation,[54] and there is no basis for EDR to interfere with the hearing officer's conclusion on this point. We decline to disturb the decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[55] 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.[56] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[57]

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[51] Hearing Decision at 8.
[52] *Id.* at 9.
[53] *Id.*
[54] *See Rules for Conducting Grievance Hearings* § VI(B)(2).
[55] *Grievance Procedure Manual* § 7.2(d).
[56] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[57] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).