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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4945
July 9, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11311. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11311, as found by the hearing officer, are as follows:²

Grievant worked at the Facility. She met the Principal on April 12, 2018 who also worked at the Facility. Grievant did not report to the Principal and she was not in his chain of command.

The Principal reported to the Administrator. Grievant reported to the Developmental Specialist.

....

On July 19, 2018, the Principal sent Grievant an email using his Agency computer to ask Grievant for her personal cell phone number. The Principal began sending Grievant text messages from July 19 to July 22, 2018 with Grievant replying frequently. They sent text messages outside of normal work hours. The Principal sent texts discussing his personal interests, family, and pets. He

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Decision of Hearing Officer, Case No. 11311 (“Hearing Decision”), May 28, 2019, at 2-9 (citations omitted). The Hearing Decision includes several text messages in block quotes. As reproduced in this ruling, the block quotes are reformatted to reflect discrete texts as they appear in the record.

complimented Grievant on her beauty and attractiveness. He sent Grievant photos himself and his son and dog. . . .

The Principal asked Grievant to meet at Restaurant 2. Grievant agreed and they met at Restaurant 2 on Sunday July 22, 2018. . . . During the date, the Principal told Grievant that he has a girlfriend who lived with him, but that it was not a good relationship. He told Grievant he was in the process of ending his relationship with the girlfriend but that it would take time because she had no education, job, or family in the area. The Principal asked Grievant to continue to date him. Grievant told the Principal, "No, absolutely not." Grievant was insulted and deeply offended by the Principal's suggestion that they date while he continued his relationship with his girlfriend.

The Principal changed the topic of conversation from having an affair to Grievant's career goals. He asked her where she saw herself at [the agency]. He said he saw her holding a leadership position in the future.

On Monday July 23, 2018, Grievant was sick and took the day off. She believed the Principal was "grooming her for sex." This made her ill.

At 7:55 a.m. on July 23, 2018, the Principal sent Grievant a text:

[I]t was further than I recognized
It wasn't intentional...all I can do is say I'm sorry

Grievant replied:

You think i go around telling randoms Im gonna dream about them
and other nonsense?
You took it further.
You basically told me you flirted with me because im the first
attractive coworker you had. And the worst part is you are totally
unaware of how douchie and misogynistic that is of you

On July 26, 2018, Grievant left a voicemail for the Principal apologizing for calling him names. She was worried that because she had rejected his advances, he might use his position of power to retaliate against her at work.

Grievant made an effort to avoid the Principal at work. On August 9, 2018, the Principal lurked and stared at Grievant while she worked at the Facility. This made Grievant feel uncomfortable.

At some point, the Principal blocked Grievant's cell phone number so she could not send text messages to his personal cell phone.

On August 22, 2018 at 4:27 p.m., Grievant sent the Principal several text messages from a phone number ending in 358 including:

I have never spoken negatively about u to anyone
At work
I dont trust someone who only speaks to call me a c—t
Pretty [shady]

. . . Grievant [then] sent the Principal text messages from a phone number ending in 059 beginning at 7:12 p.m. and end[ing] at 7:17 p.m.:

You obviously did not have a mother who was present in your life
And did not grow up having any close relationship to females
Cuz u got no clue what it is like to be a woman who is only valued
for the way she looks
And how degrading it is to be appreciated by a man only cuz youre
attractive
And if u treated people with respect. There would be no drama

On August 28, 2018 at 8:05 p.m., Grievant sent the Principal a text from a phone with the number ending 830:

I miss you
Im sorry for the s—t i said

On Saturday September 1, 2018 at 9:17 a.m., Grievant sent the Principal a “selfie” picture from a phone with the number ending 525 and with the message:

Dumbest man alive.....
In too deep with your own s—t to allow the possibility of
something authentic

At 2:48 p.m., Grievant sen[t] text messages from a phone with the number ending 781:

Idk why you’re letting some slut bag use you
If it were a satisfying arrangement, you wouldn’t have been up my
ass at work

At 7:37 p.m., Grievant sent the Princip[al] a picture of Grievant with the title “Damaged goods for sure”. She added a message, “I hope you took antibiotics before you rescued yr hoe.” Grievant used a phone with the number ending 708.

On Sunday September 2, 2018, Grievant sent the Principal text messages from a phone with a number ending in 601:

You're not even the type of person I thought you were. I thought u
were independent like me
You're a douche whose somebody's sugar daddy
Gross
U prob got stds from yr hood rat too
F—k that s—t

At 9:21 p.m., Grievant sent the Principal text messages from the phone number ending 249:

I guess i need to accept that you're not the guy for me
And you're not the person I thought you were nor do you have the
capacity
To make me happy

On September 5, 2018 at 5:30 p.m., Grievant sent the Principal text messages from a phone number ending 345:

We could be kicking it having drinks, good conversation, and a
good time right now
Idk why you are wasting your life with an unhealthy situation
that's only going to lead to stress and problems
Plus if we were hanging out your son would probably think you're
a lot
Cooler and want to spend more time with you

....

On September 7, 2018 at 7:53 p.m., Grievant sent the Principal a text message, "That's okay. I am not upset with you anymore. I won't be a bitch to u anymore."

On September 9, 2018 at 10:03 p.m., Grievant sent the Principal text messages from a phone number ending 981:

Well i guess you were just feeling me out to see if i was down to
hang out with you
While you're in your weird ass situation
Which im not
If you wanted to be with me. You'd be with me

On September 11, 2018 at 6:03 p.m., Grievant sent the Principal text messages from a phone number ending 940:

I miss you. Have a nice night
It would be so nice to hear from you and not every other guy
I'll remove the nonsense from my life if you remove the nonsense
from yours
On the real tho, if my house gets f—king treed this weekend and I
lose
My slate roof. Will u come help me

On [Wednesday] September 12, 2018 beginning at 3:52 p.m. and ending at 4:55 p.m., Grievant sent [] the Principal a text message from a phone with the number ending 455:

I need to speak with you as soon as possible. I am very upset
Im not bullsh—tting around. Its important
Please call me to clarify
Im a good person and you know that. I would never do anything to
damage
Your reputation
I am so upset
I think your a decent person and I would like to give you the
Opportunity to explain before I assume what was told to me today
is true Please give me the respect i deserve and call me
Please call me. I am literally sick to my stomach

. . . [A]t 6:14 p.m., Grievant sent the Principal a text message from the phone number ending with 702:

I never imagined you were this big of an asshole

At 6:19 p.m. Grievant sent the Principal a text message from a phone number ending 402:

I guess I should go around trashing your reputation, because
apparently
That is what you have done to me
And u dont even have the decency to speak to me about it

At 7:33 p.m., Grievant sent the Principal text messages from a phone number ending 574:

I am upset because I was informed by somebody that a CO
At [location] is going around saying he has hooked up with me

I don't know anyone at [location]
And I don't even know any COs period and would never hook up
with a f—king CO
You are the only person I have ever talked to at work
So I immediately thought you were behind it
Maybe I overreacted. But I am so upset and dont know how this
Rumor got started. I don't know any COs
I guess I shouldn't pay it any attention. But i was so upset because
I am so serious about my professional image
I thought you had something to do with it
I really need to talk to you as a friend. I'm really upset about this
I have never talked to anyone outside of work accept [sic] you
I am so upset. Why would someone makeup that s—t and why
Would anyone pay any attention to it
People are always f—king jealous of me every where I work
I cant stand gossip

In mid-September 2018, the Principal contacted the Administrator to express his concern about Grievant. The Principal told the Administrator that he and Grievant began to develop a relationship and then they met and broke off the relationship. The Principal said it was best not to have a relationship with Grievant since they work together and the Principal had a girlfriend. The Principal told the Administrator that he started getting “nasty” text messages from Grievant. The Administrator told him not to respond to Grievant and that hopefully “it would resolve itself.”

On September 20, 2018 from 7:11 p.m. until 7:17 p.m., Grievant sent the Principal several text messages from a phone with the telephone number ending 924:

Today was the most awkward day. I was putting my allergy
eyedrops
In when you knocked on the door. There is a rodent living in my
classroom
Either its a sign we should just be together
Or I really need to find another job
I dont have a problem with you. I just want to do my job, help the
[inmates], and leave

On Friday, September 21, 2018 from 6:53 a.m. to 8:10 a.m., Grievant sent the Principal text messages from a phone with a number ending 548:

I am quitting my job because of you. I dont enjoy work when you
are there
You have bad energy

You're inconsiderate as f—k and all around total douche who never had
Any regard for me
You're f—king toxic and you have no consideration for my feelings
Couldnt even call me back when I was upset
I am quitting. I am done. F—k you
Youre a selfish douche
And you probably wouldnt know how to f—k me right anyways
You're a dick. Totally into yourself. I am quitting that suck ass job
Because I can't stand your bad energy

From 9:20 a.m. to 9:46 a.m., Grievant sent the Principal text messages:

I knew that you were going to shoot down me getting computers
F—k you. More concerned with your pettiness than helping the [inmates]
You prob put a f—king mouse in my classroom too
I f—king quit. I cant stand you
Seriously f—k you
Why are you being such an ass. I have never done anything to you at work
Is that what you want? For me to f—king quit.

From 12:50 p.m. until 12:53 p.m., Grievant sent the Principal text messages:

Maybe im f—ked up but at least i dont have some weird boyfriend living with me
Meanwhile im texting my coworkers I want to be in their bed
And meeting them places
So f—k you. I don't treat people like that
You just wanted to f—k me cuz if you cared about my feelings you'd be talking to me

From 6:11 p.m. to 6:56 p.m., Grievant sent the Principal text messages from a phone with a number ending 345:

Maybe if you talked to me like a normal person and resolved your drama
I wouldn't trip out on all types of conspiracy theories when my computers aren't
Being replaced and when [name] tells me crazy rumors because she is
Jealous of me

Im really starting to hate that place
My exhusband is flying a trip to [location] tomorrow. We are
going to dinner
You made it clear how you feel. So I guess im gonna move on

On September 24, 2018 at 7 p.m., Grievant sent the Principal text messages from a phone with the number ending 695:

Everything about our encounter was painful to me. I am letting it
go. I will be chill
I am asking that you please be courteous and continue to support
me at work
Dont forward my emails. Just let me know who to contact next
time
I was just trying to get it straight so [name] wouldn't give me s—t
about the master pass
I am very sick with my allergies and on steroids. I wont bother you
anymore

On September 26, 2018 at 5:22 p.m., Grievant sent the Principal several text messages from a phone with a number ending 651:

I guess your invite for me to speak at graduation was about as
sincere
As all of your other interactions with me. What a f—king joke
And i never would have flipped had you shown any consideration
for my feelings

[On] September 27, 2018, the Facility Correctional Education Graduation Ceremony was held. The Principal spoke at the graduation and recognized staff members including teachers and administrative staff but not Grievant. During the ceremony, the Principal stared at Grievant. The Administrator was on the stage with Grievant during the graduation. The Principal pointed out Grievant to the Administrator. The Principal said he was concerned about Grievant being there today and indicated that Grievant's presence at the graduation upset the Principal.

On September 27, 2018 beginning at 7:46 p.m. until 8:03 p.m., Grievant sent the Principal text messages from a phone with a number ending 267:

I really enjoyed graduation today. It was a reminder of all that I
have accomplished in my life
And how transformative education has been in my sense of self,
self confidence, and independence.
And also of the misogyny that i experience every day, in particular
in the workplace

From men in positions of power who only value [] me for my appearance
So thank you for reinforcing my passion of continuing to empower the demographic
Of [inmates] that we work with
I dont need your resources or collaborations if you want to be a dick
Ive always been an underdog and I thrive in that role

Sometime towards the end of September 2018, the Principal complained to the Administrator that Grievant continued to send him offensive text messages and that [the] matter was escalating. The Administrator concluded that he and the Principal should meet with Grievant and the Developmental Specialist in October 2018 to resolve the conflict. The Administrator contacted the Developmental Specialist and told the Developmental Specialist[] of Grievant’s concerns and asked to have the group meet. A meeting date was set but later canceled due to a conflict with the Developmental Specialist’s schedule. The second date was selected but at that point in time the Principal had been placed on suspension for matters unrelated to Grievant’s contact with him. The meeting did not occur.

On December 11, 2018, the Department of Corrections (the “agency”) issued to the grievant a Group III Written Notice of disciplinary action with termination. Citing the agency’s Operating Procedures 145.3 and 135.1, the Written Notice specified that the grievant’s conduct “constituted sexual harassment and workplace harassment.”³ The grievant timely grieved her termination, and a hearing was held on May 7, 2019.⁴ In a decision dated May 28, 2019, the hearing officer determined that the Group III Written Notice issued to the grievant “must be upheld” because “the [a]gency . . . presented sufficient evidence to show that Grievant engaged in workplace harassment of the Principal.”⁵ The hearing officer also found no mitigating circumstances meriting reduction of the disciplinary action.⁶

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁷ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁸ The

³ Agency Ex. 1 at 1-2.

⁴ Hearing Decision at 1.

⁵ *Id.* at 1, 11.

⁶ *Id.* at 12.

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

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

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

Misconduct under Agency Harassment Policies

In her request for administrative review, the grievant argues that the hearing officer erred in upholding the Group III Written Notice in part because the conduct for which she was fired lacked a nexus to the workplace sufficient to implicate agency harassment policies.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹¹ 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.¹² 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.¹³ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the hearing officer made appropriate factual determinations that the grievant engaged in at least a substantial part of the behavior charged on the Group III Written Notice,¹⁴ that her behavior constituted misconduct,¹⁵ and that the discipline was consistent with law and policy.¹⁶ Specifically, the hearing officer found that the grievant “engaged in workplace harassment” in violation of the agency’s Operating Procedure 145.3, which defines such harassment as follows:

Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:

- Has the purpose or effect of creating an intimidating, hostile, or offensive work environment.

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ Hearing Decision at 4-9.

¹⁵ *Id.* at 10-11.

¹⁶ *Id.* To the extent that the grievant separately requests a policy review based on a failure to comply with applicable harassment policies, EDR has reviewed the grievant’s submission and is unable to find any argument, not otherwise addressed herein, that raises any way in which agency policy was not properly applied by the hearing officer. Accordingly, EDR has no basis to conclude that the hearing decision misapplies or is inconsistent with policy.

- Has the purpose or effect of unreasonably interfering with the employee's work performance.
- Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against other qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is a violation of DOC operating procedures.¹⁷

On review of the hearing record, EDR finds evidence to support the hearing officer's conclusion that the grievant's text messages to the Principal constituted workplace harassment as defined by the agency. Persisting over the course of approximately two months, many of the grievant's text messages¹⁸ seemed to pursue a relationship with the Principal while directing denigrating, hostile, and offensive insults at him during the same period. Although the grievant argues that her texts were "mostly defensive and responsive in nature,"¹⁹ the hearing officer could reasonably reject that characterization of messages such as: "Dumbest man alive..... In too deep with your own s—t to allow the possibility of something authentic," "I hope you took antibiotics before you rescued yr hoe," "U prob got stds from yr hood rat too," "you probably wouldn't know how to f—k me right anyways," and "seriously f—k you."

In addition, the record supports the hearing officer's conclusion that these messages were unwelcome. The Principal blocked the grievant's phone number and other numbers she used to text him,²⁰ declined to interact with her,²¹ made two separate complaints about her texts to his supervisor, and expressed discomfort to his supervisor about the grievant's presence at an agency function they were all attending.

The same evidence supports the hearing officer's conclusion that the grievant's conduct had the effect of creating a hostile and offensive work environment for the Principal. The Principal's complaints to his supervisor and apparent discomfort when the grievant was present are consistent with the fact that the grievant's texts to the Principal frequently arose from or focused on their work environment. For example, the grievant accused the Principal of starting inappropriate rumors about her at work, putting a rodent in her classroom at work, sabotaging her request for the agency to repair her classroom computers, and generally making her want to

¹⁷ Agency Ex. 4 at 36.

¹⁸ The grievant alleges that the agency relied on fabricated evidence provided by the Principal that contained many texts she never sent and that omitted the Principal's own communications, making it appear that she spent months texting him insults unprompted. The Hearing Decision relied solely on the texts that the grievant acknowledged sending, and this administrative review does likewise. *See* Grievant Ex. 28; Hearing Recording 7:30:00-7:31:00.

¹⁹ Grievant's Appeal, at 7.

²⁰ The hearing officer was entitled to consider and accept as credible the list of blocked phone numbers that the Principal had provided to the agency's investigator. *See* Agency Ex. 7 at 148-62.

²¹ While the Hearing Decision did not resolve whether the grievant received texts from the Principal akin to her own, her acknowledged texts from August 22, September 11, September 12, and September 21 describe the Principal as being "silent" or refusing to talk to her. *See* Hearing Decision at 4, 6, 7, 8.

quit her job. Her final texts to the Principal, in which she called him a “dick,” related to an agency function they both attended. Based on the totality of the evidence, the hearing officer reasonably concluded that the grievant’s texts to her coworker off-hours were distracting for agency staff during working hours.

These findings are not undermined by the Principal’s failure to appear and testify at the hearing.²² Contrary to the grievant’s arguments on appeal, the hearing officer’s conclusions as to the effects of the grievant’s conduct did not rest solely on statements the Principal made outside the proceedings. In light of the evidence as a whole, direct testimony from the Principal was not necessary to support the inference that he did not welcome the grievant’s insults and was distracted by them at work. His supervisor testified to arranging with the grievant’s own supervisor to jointly intervene with her, after the Principal complained a second time about her continuing insults and expressed discomfort about being in her presence. Further evidence that the Principal may have contributed to the hostility would not diminish the significance of these facts, considering the acknowledged content of the grievant’s texts.

The grievant further argues on appeal that the hearing decision is defective because it relies on hearsay evidence, *i.e.*, statements by the Principal who was not present at hearing, to justify the disciplinary action. Even if this evidence is considered hearsay, which is not apparent,²³ no provision of the grievance procedure or state policy would prevent such hearsay evidence to be used to support a disciplinary action at a grievance hearing. Consequently, the grievant’s assertions about hearsay evidence, which is admissible in grievance hearings, does not serve as an appropriate basis for remand here.

After a thorough review of the record, EDR can find nothing to indicate that the hearing officer’s consideration of the evidence regarding the grievant’s misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Because the hearing officer’s findings in this case 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. Accordingly, EDR declines to disturb the hearing decision.

²² The circumstances of the Principal’s absence did not authorize the hearing officer to draw the adverse inferences for which the grievant advocates on appeal. Because the Principal was not an employee of the agency at the time of the hearing, neither the agency nor the hearing officer had the authority to compel him to testify; further, no evidence suggests that the agency failed to make a good-faith effort to procure his testimony. *See Rules for Conducting Grievance Hearings* §§ IV(E), V(B). In any event, the inferences the grievant urges – that the Principal participated equally in the texting and that his disclosure of the texts was malicious – do not undermine the hearing officer’s ultimate conclusion that the grievant’s texts constituted workplace harassment and reasonably merited termination.

²³ To the extent the Principal’s perceptions and state of mind (as reflected in his supervisor’s hearing testimony) were offered to prove the truth of a matter and, therefore, considered hearsay at all, such testimony would likely satisfy certain exceptions to court-based evidentiary rules, such as a present-sense impression or then-existing mental or emotional condition. *See Va. Sup. Ct. R. 2:803.*

Mitigation

The Principal's absence from the hearing also did not prevent the hearing officer from properly considering mitigation. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."²⁴ 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."²⁵ 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.²⁶

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.

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 unconscionably disproportionate, abusive, or totally unwarranted.²⁷ EDR will review a hearing officer's mitigation determination for abuse of discretion,²⁸ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.²⁹ 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. While the grievant testified that

²⁴ Va. Code § 2.2-3005(C)(6).

²⁵ *Rules for Conducting Grievance Hearings* § VI(A).

²⁶ *Id.* § VI(B)(1).

²⁷ 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).

²⁸ "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.*

²⁹ Hearing Decision at 12.

she sent many of her hostile texts in response to what she viewed as attacks by the Principal, even assuming that such facts are true, EDR cannot find that this evidence would mandate mitigation of the disciplinary action such that the hearing officer's mitigation determination was an abuse of discretion.³⁰

Even considering those arguments advanced by the grievant in her request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record.³¹ As such, EDR will not disturb the hearing officer's decision on this basis.

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.³² 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.³³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁴



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³⁰ The grievant seeks mitigation based also on her advocate's assertions that the agency has treated other harassing employees more leniently. However, no facts in evidence compelled the hearing officer to draw that conclusion.

³¹ See, e.g., EDR Ruling Number 2017-4407; EDR Ruling No. 2015-4096.

³² *Grievance Procedure Manual* § 7.2(d).

³³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).