EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2020-4965
September 27, 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 11344. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

The relevant facts in Case Number 11344, as found by the hearing officer, are as follows:[2]

> The Department of Corrections [the "agency"] employed Grievant as a Corrections Lieutenant at one of its facilities. He had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant received in-service training regarding Operating Procedure 310.2 but that training was not in-depth. He had access to the policy through the Agency's intranet but rarely had the opportunity to study the policy given the Facility's severe understaffing.
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> Grievant was assigned a computer which was located in his office. Grievant had a unique password and login identification to access the Agency's intranet and Internet. When Grievant logged into his computer account, he had access to VACORIS and the Internet. Anyone using his account would have the same access he had.

[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. 11344 ("Hearing Decision"), July 18, 2019, at 2-3.

The Inmate began working as a clerk for Grievant in October or November 2016. The Inmate's job consisted of filing applications, writing memorandums, and picking up supplies. He typed memoranda and other nonsecurity documents using Word software. The Inmate had training in information technology.

Grievant typically watched the Inmate when the Inmate was using Grievant's computer and computer account to type memoranda. Grievant usually stood beside the Inmate or was within close proximity to the Inmate. On some occasions, Grievant was forced to leave his office to attend to urgent matters. Grievant would regularly look back at the Inmate to ensure he was performing his duties properly.

Grievant would have the Inmate check on job assignments using VACORIS as Grievant watched the Inmate.

In November 2018, the Inmate asked Grievant if he could print off pornography if he could find a way around getting caught. Grievant told the Inmate "absolutely not!"

Grievant allowed the Inmate to access the Internet to look up book prices so that he could print them off to call his mother and have his mother order the books for him.

At the Inmate's request, a friend of the Inmate uploaded pornography into an email account and gave Grievant assess to the account. While working for Grievant, the Inmate would enter the email account and view the pornography when Grievant was distracted from the computer. The Inmate printed the pornographic images and kept them in his cell. Another inmate learned that the Inmate had pornography in his cell and notified Grievant. Grievant reported the claim to Agency managers who began an investigation. The Agency found pornography in the Inmate's possession and the images matched some of the images loaded into the email account.

The Agency Investigator interviewed the Inmate. The Inmate said that Grievant did not know anything about the pornography in the email account.

Grievant was honest and cooperative throughout the Agency's investigation.

On March 5, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for computer/internet misuse (Computer Misuse Written Notice), as well as a separate Group III Written Notice for fraternization (Fraternization Written Notice).[3] Both written notices charged: "Over the course of several months [the grievant] allowed an

[3] Agency Exs. 1, 2.

offender to utilize his state computer and his [agency] computer account."[4] Referencing agency Operating Procedure ("OP") 310.2, the Computer Misuse Written Notice alleged that the grievant had allowed the inmate to conduct official agency business on the grievant's computer, which privilege the inmate had then used to obtain and print pornography from the internet.[5] The Fraternization Written Notice alleged that the grievant had used the internet to look up information for the inmate related to personal purchases.[6]

The grievant timely grieved his removal, and a hearing was held on June 28, 2019.[7] In a decision dated July 18, 2019, the hearing officer determined that the grievant's conduct cited in the Computer Misuse Written Notice as a violation of OP 310.2 supported only a Group II Written Notice, not a Group III with removal.[8] However, the hearing officer found that the Fraternization Written Notice was supported as a Group III offense.[9] Accordingly, the hearing officer upheld the grievant's removal based on the accumulation of the Group II and Group III Written Notices.[10]

The hearing officer further determined that mitigation was not warranted under the circumstances in this case:

> The Hearing Officer agrees with Grievant's characterization of the Agency's policy [as poorly written and confusing] and that the Agency failed to adequately train Grievant on the policy. This conclusion, however, is not sufficient to mitigate the disciplinary action. The mitigation standard is set by EDR, not the Hearing Officer. Grievant is deemed to have adequate knowledge of the Agency's policies once they are placed on the Agency's intranet. Because Grievant is deemed to have knowledge of the Agency's policy, the Agency's failure to write a clear policy and properly train Grievant on that policy does not make the Agency's disciplinary action exceed the limits of reasonableness.[11]

Accordingly, the hearing officer recommended as follows:

> The Hearing Officer does not agree with the Agency's decision to remove Grievant from employment. The Agency's Information Technology policy consisted of 24 pages replete with computer jargon. The policy is difficult to read and understand. If Grievant had received adequate training on the policy, he would have complied with the policy. Although Grievant received notice of the policy, his notice was not an informed notice. The Hearing Officer recommends the Agency make Grievant eligible for immediate rehire.[12]

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[4] *Id.*
[5] Agency Ex. 1.
[6] Agency Ex. 2.
[7] Hearing Decision at 1.
[8] *Id.* at 4.
[9] *Id.* at 4-5.
[10] *Id.* at 5-6, 7.
[11] *Id.* at 6.
[12] *Id.* at 7. EDR is not aware of any plans by the agency to follow the hearing officer's recommendation to make the grievant eligible for rehire notwithstanding his upheld termination.

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."[13] 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.[14] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[15] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that the hearing officer erred in not mitigating the grievant's termination despite finding that the grievant did not receive informed notice of the requirements of OP 310.2 under which he was disciplined. The grievant further argues that the hearing officer erred in upholding termination by accumulation of Written Notices even though the agency evinced no intention to ground its disciplinary decision on the Fraternization Written Notice.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[17] 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.[18] 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.[19] 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.

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[13] Va. Code §§ 2.2-1202.1(2), (3), (5).
[14] *See Grievance Procedure Manual* § 6.4(3).
[15] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[16] Va. Code § 2.2-3005.1(C).
[17] *Grievance Procedure Manual* § 5.9.
[18] *Rules for Conducting Grievance Hearings* § VI(B).
[19] *Grievance Procedure Manual* § 5.8.

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]."[20] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[21] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[22]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[23] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, he or she "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[24] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[25] and will reverse the determination only for clear error.

In this case, the hearing officer considered as mitigating factors both that the agency's OP 310.2 was "poorly written and confusing" and that the agency failed to adequately train the grievant as to its requirements.[26] As a factual matter, the hearing officer found that what in-service training the grievant received as to the policy "was not in-depth."[27] Further, the hearing officer

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[20] Va. Code § 2.2-3005(C)(6).
[21] *Rules for Conducting Grievance Hearings* § VI(A).
[22] *Id.* § VI(B).
[23] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).
[24] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[25] "'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.*
[26] Hearing Decision at 6. Hearing officers may consider as mitigating circumstances, among other things, "whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule." *Rules for Conducting Grievance Hearings* § VI(B)(2).
[27] Hearing Decision at 2.

concluded that the grievant "rarely had the opportunity to study the policy given the Facility's severe understaffing,"[28] but he "would have complied with the policy" had he received "adequate training."[29] The hearing officer noted that OP 310.2 "consisted of 24 pages replete with computer jargon" such that the grievant lacked "informed notice" of its specific requirements.[30]

On review of the hearing record, EDR finds support for the hearing officer's conclusion that, considering all the facts and circumstances, the grievant lacked "informed notice" that allowing the inmate to use an internet-connected computer for non-internet work assignments was prohibited by OP 310.2. The grievant testified as follows:

- OP 310.2 was not in effect during the grievant's most recent onboarding process, and its specific requirements were not covered in any depth during his yearly in-service training. He has no special training in computers.[31]
- The grievant received no additional training in any area upon being promoted to lieutenant: "Everything I did, I figured out on my own. I was self-taught, I guess you'd say. Didn't nobody show me nothing. I went to the computer and had to figure it out."[32] He did not realize there was any difference between the computers at his facility, *i.e.* internet-connected staff computers and stand-alone computers for inmate use.[33]
- The grievant's supervisor knew the offender used the grievant's computer for work purposes yet gave no indication that this arrangement was against agency policy.[34]
- His facility was "totally understaffed," with the grievant sometimes performing his own duties, the duties of a sergeant, and the duties of an officer all at once due to personnel shortages. But he considered this overload to "come along with the job." Because of these demands on his work time, it would have been "pretty difficult" to devote adequate attention to the specifics of OP 310.2 while also satisfying his other work obligations.[35]

The grievant further testified that when he reviewed OP 310.2 in more depth after his separation, he found the policy "extremely confusing, unless you're an IT guy or something."[36] As the hearing officer noted, OP 310.2, *Information Technology Security*, is 24 pages long, and it defines 40 terms.[37] Its substantive headings are: Organizational Responsibilities; Access to

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[28] *Id.*
[29] *Id.* at 7.
[30] *Id.*
[31] Hearing Recording Pt. I at 1:53:20-1:54:50 (Grievant's testimony).
[32] *Id.* at 2:31:55-2:32:30.
[33] *Id.* at 2:45:30-2:46:05.
[34] On at least one occasion, the grievant's supervisor saw the offender at the grievant's computer, supervised by the grievant. The evidence reflects that the supervisor simply verified that the inmate was performing clerk duties and reminded the grievant not to permit the inmate to use the internet in the course of his work. *See id.*at 2:04:40-2:05:15; Agency Ex. 11. The supervisor, who was also terminated in connection with these events, asserted in a sworn statement that he did not train the grievant as to any computer policies, "including offender access to computers." Grievant's Ex. 5.
[35] Hearing Recording at 2:00:55-2:01:20, 2:22:50-2:23:55.
[36] Hearing Recording Pt. I at 2:06:30-2:06:50.
[37] *See* Agency Ex. 6.

[Agency] Information Technology Resources; Usage of [Agency] Technology Resources; and Information Technology System Management. These categories ascribe responsibilities to various actors, including the agency itself, the agency's Technology Services Unit, employees and "users," outside agencies, and other external entities and individuals. Many of the policy's provisions appear to be directed to members of the agency's Technology Services Unit.[38]

The Access category does not address offender access. The Usage category, which includes ten parts, lists "Official Use" as Part B; Part B has 12 subparts. Subpart 6 (on page 9 of 24) provides that a facility warden must ensure that offenders do not have access to the intra- or internet, except with approval from higher authorities:

> The Organizational Unit Head will ensure employees, contractors, volunteers, interns, and authorized users shall NOT allow offenders to have access (supervised or unsupervised) to any [agency] Information Technology Resource connected to the agency's network/systems, or resource that can access the Internet. Any exception must be unequivocally approved by the [Chief Information Officer] and Deputy Director.[39]

Subpart 6 then sets forth six clarifications, including a reference to a separate policy that directly relates to the grievant's conduct in this case:

> Offenders are strictly prohibited from any access to [agency] Information Technology Resources on the agency's network/systems or resources that can access the Internet. Information technology resources not on the agency's network/system or resources that do not have Internet access may be utilized by offenders in accordance with [OP] 310.3, *Offender Access to Information Technology*. . . .
>
> Offenders shall not have direct, unsupervised access to output and storage peripherals such as printers, scanners, DVD burners, and copy machines unless to perform specific educational or job tasks.

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[38] The variety of topic headings included in OP 310.2 covers the following: policy applicability, the organizational structure of the agency's Technology Services Unit, that Unit's interaction with other units, terms of access to the agency's information technology resources, account validation, remote access, external access requests, software applications, the agency's network logon banner, official use, password security, workstation security, use of internet services, email, viruses, security incident reporting, criminal history information, telephones, photo storage, software and hardware authorization, wireless equipment security, encryption and data security, and security awareness training.

[39] Agency Ex. 6 at 9. OP 310.2 defines the "Organizational Unit Head" as the "person occupying the highest position in a[n agency] unit, such as a correctional facility . . . ." *Id.* at 2. The policy does not define "Information Technology Resource," though it defines "Information Technology" as "[e]quipment or interconnected system or subsystem used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information; this term includes computers, peripherals, software, firmware, and similar procedures, services, and related resources." *Id.*

> Offenders must be under constant sight supervision of [agency] staff when performing such tasks. At a workstation in a controlled area with locked doors (such as VCE shops or CTE classrooms) offender use of information technology equipment is allowed under the general supervision of a trained employee.[40]

Subpart 12 of Part B addresses prohibited uses. Its 27-item list, though not exhaustive, does not cite offender use of information technology.[41] Part E, "Internet Services Usage," also contains no provisions citing offender use. It lists "activities supporting . . . [j]ob functions" as an example of authorized use.[42]

In turn, OP 310.3, *Offender Access to Information Technology*, is a five-page policy with a stated purpose to "establish[] controls that provide offenders regulated access to state owned computers for use in re-entry, education, training, and work programs in the [agency]."[43] Section IV(A) of the policy provides, in part:

> Information Technology (IT) systems resources are provided for use by employees and offenders in conjunction with the operation of and participation in authorized programs and activities. . . .
>
> Offenders shall only be permitted to use IT resources to perform approved job assignments, educational, instructional, research, and specific career and technical education duties as defined in this operating procedure.[44]

Section IV(B) of OP 310.3 provides limitations on offender access:

> Offenders are prohibited from using computers assigned to a specific employee, computers used for general administrative purposes, or any technology resources tagged with VITA/NG identification . . . .
>
> Offenders are strictly prohibited from unauthorized internet access. Offender internet access shall be strictly controlled and monitored at all times. . . .
>
> The approved use of technology resources by offenders shall be:
>
> (a) [l]imited to use for instructional/career purposes, research . . ., reentry and facility work assignments as stated by the program
> (b) [l]imited to only access stand-alone computers and isolated offender use networks[.][45]

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[40] *Id.* at 9.
[41] *Id.* at 11-12.
[42] *Id.* at 14-15.
[43] Grievant's Ex. 3 at 1.
[44] *Id.* at 2.
[45] *Id.* at 3.

Section IV(C) provides that staff supervisors of offenders must "[p]rovide clear instruction on the expectations regarding internet use, including how and when they can navigate and which sites they may access."[46]

In sum, the agency's prohibitions on offender access to internet-connected machines are (1) inconspicuously placed in a policy that appears targeted to information technology specialists, (2) unclear as to who is responsible for preventing violations, and most importantly (3) contradicted by other policy provisions that do contemplate offender internet usage, especially in a supervised work context. As to the expectation for employees to learn these computer policies, the warden testified: "The same thing pops up on [the grievant's] computer that pops up on mine. When you hit 'accept,' vicariously you accept whatever it is that you accept. I mean, if you want to shortcut it and not read it, you know, that's not what I do, but I can't tell him what to do."[47] Thus, the agency's policies, in conjunction with testimony that the grievant's training on these policies was minimal at best, support the hearing officer's conclusion that the grievant lacked "informed notice" of the requirements that gave rise to the Computer Misuse Written Notice indicating termination as the appropriate discipline.

However, despite finding that the grievant lacked effective notice of the policy requirements for which he was disciplined, the hearing officer concluded that mitigation of the grievant's termination was not available under EDR's rules. Although lack of adequate notice may serve as a basis for mitigation under the *Rules*, the hearing officer asserted that a grievant "is deemed to have adequate knowledge of the Agency's policies once they are placed on the Agency's intranet," even if the agency fails to "write a clear policy and properly train" employees on its requirements.[48] This standard, the hearing officer reasoned, was established by EDR and, thus, he had no choice but to follow it despite his apparent concerns about notice.[49]

The *Rules* do not require so stringent a notice presumption as the hearing officer applied in this case. Under the *Rules*, "an employee *may* be presumed to have notice of written rules if those rules had been distributed or made available to the employee."[50] While such a presumption may often, or even typically, be appropriate under the particular circumstances of a case, the *Rules*' permissive language also allows for situations in which the presumption is inappropriate or rebutted by other evidence, as determined by the hearing officer.

Therefore, while the *Rules* promulgated by EDR permitted the hearing officer to presume adequate notice in this case based on the agency's distribution of OP 310.2, he was not required to do so. Accordingly, EDR will remand the case back to the hearing officer to determine (1) whether a presumption of adequate notice should be applied in this case; (2) if not, whether constructive notice was deficient to the point of being a mitigating circumstance; and (3) if so, whether the mitigating circumstances in total are sufficient to warrant reduction of the agency's disciplinary action.

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[46] *Id.* at 3-4.
[47] Hearing Recording Pt. II at 40:55-41:15; *see also* Agency Ex. 15.
[48] Hearing Decision at 6.
[49] *Id.*
[50] *Rules for Conducting Grievance Hearings* § VI(B)(2) n.26 (emphasis added.)

As additional guidance on remand, the *Rules* do not suggest that the discipline imposed will automatically exceed the limits of reasonableness whenever notice is deficient. Even if the hearing officer finds that an employee lacked notice of a standard and the potential discipline for violating it, the hearing officer must still consider all facts and circumstances to determine whether "managerial judgment has been properly exercised within the tolerable limits of reasonableness."[51] Accordingly, the *Rules*' notice provision does not require or even permit a hearing officer to mitigate discipline simply on the basis that an agency failed to provide the employee with prior notice that particular conduct could result in the specific discipline imposed (although such notice is certainly a good management practice).[52]

Thus, if the hearing officer determines based on all relevant facts and circumstances that notice to the grievant case was lacking, he must then consider whether the agency's disciplinary action exceeds the limits of reasonableness and should be mitigated due to the lack of notice and in light of *all other surrounding facts and circumstances*.[53] In this case, for example, other relevant circumstances may include the seriousness of the offense and its effect on the agency's operations, the grievant's performance and disciplinary record and overall ability to perform his duties going forward, whether he is likely to repeat the offenses upheld here, whether an alternate sanction would adequately deter similar future violations by the grievant or others, and whether the agency adequately considered mitigating circumstances in the first instance.[54] Here, because the hearing officer erroneously attributed his mitigation determination to a mandatory presumption of notice, the hearing decision must be remanded for further explanation and/or reconsideration of the issue of notice and the mitigation standard, consistent with this ruling.

Accumulation

The grievant further argues that the hearing officer erred in upholding termination by accumulation of Written Notices even though his decision reduced the Computer Misuse Written Notice to a Group II (which does not support termination on its own) and the agency evinced no intention to ground its disciplinary decision on the Fraternization Written Notice upheld as a Group III.

DHRM Policy 1.60, *Standards of Conduct*, provides that both a single Group III Written Notice and/or a second active Group II Written Notice "normally" warrant termination, unless

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[51] *Id.* § VI(B)(2).

[52] *See, e.g.*, DHRM Policy 1.60, *Standards of Conduct*, § B ("The Commonwealth's disciplinary system typically involves the use of increasingly significant measures to provide feedback to employees so that they may correct conduct or performance problems."); c*f.* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 674 S.E.2d 563 (2009) (in the due process context, declining to recognize "a new substantive right not to be fired at all if the employer does not warn the employee of each specific example of misbehavior for which the employee could be fired").

[53] *See Rules for Conducting Grievance Hearings* § VI(B)(2) (citing Douglas v. Veterans Admin., 5 M.S.P.R. 280, 302 (1981)).

[54] While the warden at the grievant's facility testified that he initially advocated for mitigated discipline, both the Computer Misuse Written Notice and the Fraternization Written Notice indicate that the agency declined to consider any mitigating circumstances or background information in imposing the selected discipline. *See* Agency Exs. 1, 2; Hearing Recording Pt. 2 at 4:10-4:20 (Warden's testimony).

mitigating circumstances exist.[55] While not mandatory, EDR generally does not disturb decisions by hearing officers to uphold termination where the hearing officer has sustained multiple Written Notices that can be accumulated to support removal, consistent with DHRM policy.[56] This approach promotes efficiency for all parties, since requiring reinstatement under such circumstances would not prevent the agency from simply re-terminating the grievant's employment on an accumulation theory.[57] Relying on accumulation as an alternative theory may not be appropriate in all circumstances; *e.g.*, where mitigating circumstances exist or where the agency has indicated it would have imposed a less severe penalty for fewer or less serious charges.

Here, the record does not support the grievant's contentions that the agency did not wish to terminate the grievant's employment where the Computer Misuse Written Notice was sustained only at a Group II level. While the warden testified that he advocated to mitigate discipline down from removal, his recommendation not to terminate was overruled by the regional administrator.[58] He further testified that he believed the computer-related offense alone was terminable,[59] and he would not have pursued mitigation had he understood the grievant's position that he did not read or understand the applicable policies.[60] In addition, EDR notes that even if the hearing officer had reduced the Fraternization Written Notice to the Group II level as well, the accumulation principle would still support the agency's decision to terminate the grievant's employment. Likewise, if, on remand, the hearing officer were to fully rescind the Computer Misuse Written Notice based on mitigating factors, the grievant's termination would still be upheld based on the hearing officer's determination that the evidence supported the Fraternation Written Notice at a Group III level, which normally carries termination. Absent evidence that the agency might have imposed lesser discipline under the circumstances, EDR finds no basis to disturb the hearing officer's decision that the grievant's removal could properly be upheld based on accumulation of Written Notices.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision considering whether the evidence is consistent with a presumption that the grievant had adequate notice of the requirements giving rise to the agency's disciplinary actions against him and, if not, whether any lack of notice merits mitigation of discipline.

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[55] DHRM Policy 1.60, *Standards of Conduct*, §§ B(2)(b), B(2)(c); *see also* Agency OP 135.1, *Standards of Conduct*. EDR notes that, because DHRM Policy 1.60 permits or even encourages termination based on accumulation and the hearing decision upheld Written Notices for Group II and III offenses, the hearing officer's statement that "there is no basis to support Grievant's removal" in this case, Hearing Decision at 6, is erroneous. However, because the hearing officer nevertheless upheld the grievant's removal based on accumulation, such error is harmless.

[56] *See, e.g.*, EDR Ruling No. 2016-4282; EDR Ruling No. 2015-3999; EDR Ruling No. 2012-3040.

[57] *See, e.g.*, EDR Ruling No. 2016-4282.

[58] Hearing Recording Pt. II at 4:10-10:20 (specifying that the warden did not initially support termination for either Written Notice, or the combination of them).

[59] *Id.* at 12:50-13:16.

[60] *Id.* at 39:25-41:20.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[61] 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.[62] 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.[63] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[64]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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