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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5139
August 28, 2020

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Numbers 11517/11530. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

On March 11, 2020, the grievant received a Group I Written Notice for unsatisfactory performance and a Group II Written Notice for failure to follow instructions and/or policy.[1] The grievant's employment was terminated in conjunction with the Group II Written Notice due to her accumulation of disciplinary action.[2] The grievant timely grieved the disciplinary actions on March 16, 2020.[3] Prior to her receipt of the Written Notices, the grievant had initiated a separate grievance on March 5, 2020, broadly alleging that agency management had engaged in discrimination and retaliation that had created a hostile work environment over the course of her employment.[4] EDR consolidated the March 5 grievance with the March 16 grievance challenging the Written Notices.[5] Following the appointment of a hearing officer, a hearing on both grievances was held on June 24, 2020.[6]

The relevant facts in Case Numbers 11517/11530, as found by the hearing officer, are as follows:

> The Agency employed Grievant as a policy review specialist, with several years of tenure. She has a prior, active Group II Written Notice from 2017, issued by a prior supervisor.

[1] Agency Exs. 2, 3.
[2] Agency Ex. 2; *see* DHRM Policy 1.60, *Standards of Conduct*, at 9 (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[3] Agency Ex. 1, at 1-2.
[4] *Id.* at 3-9.
[5] *Id.* at 15-18 (EDR Ruling Nos. 2020-5065, 2020-5081).
[6] *See* Decision of Hearing Officer, Case Nos. 11517/11530 ("Hearing Decision"), July 2, 2020, at 1.

The Group I Written Notice issued March 11, 2020, for the Grievant charged unsatisfactory performance:

> On September 25, 2019, [Grievant] received a Notice of Improvement Needed/Substandard Performance because she failed to comply with the job requirement to respond to revision packets and final manuals within 30 days of receipt and failed to pull and review the required number of new applications from the applicant waitlist on multiple occasions. On November 6, 2019, [Grievant] received a copy of her Performance Evaluation. She received an overall rating of Below Contributor due to her continued failure to maintain timeliness in reviewing procedures and completing the review process. Since that time, [Grievant] has failed to respond to revisions and final manuals within the required 30 calendar days over 20 times.

As for circumstances considered, the Written Notice, in Section IV, stated:

> A review of [Grievant's] response to the Notice of Intent to Take Formal Disciplinary Action and her employment history fail to justify mitigation. {Grievant] received a Notice of Improvement Needed on September 25, 2019, and received an overall rating of Below Contributor on her Performance Evaluation on November 6, 2019. She currently has an active Group II Written Notice dated September 2017. During her due process meeting on February 28, 2020, [Grievant] was insubordinate and failed to follow repeated supervisory instructions to turn in her office ID badge and keys, stop typing on her computer, and stop re-arranging files on her desk. [Grievant's] supervisor and the Department's Employee Relations Manager had to instruct to turn in her office ID badge and keys over a dozen times before she finally did so, and [Grievant] stated multiple times that she would not leave unless she could call DHRM during the meeting. Because of [Grievant's] failure to cooperate and follow instructions, the process lasted well over 1 ½ hours.

The Group II Written Notice issued March 11, 2020, for the Grievant charged failure to follow instructions and/or policy:

> Repeated failure to follow supervisor's instructions regarding contacting supervisor directly to advise of unscheduled absences or tardiness; meeting requests/calendar entries; providing final provider packages to support staff; pulling information from OLIS; refraining from exhibiting unprofessional behavior and disruptive behavior. See attached Notice of Intent to Take Formal Disciplinary Action for details.

As for circumstances considered, the Written Notice, in Section IV, repeated the circumstances considered for the Group I Written Notice. The attached letter (Notice of Intent to Take Formal Disciplinary Action), dated February 28, 2020, from her direct supervisor, included more details . . . .

The Agency's witnesses credibly testified consistently with the charges and circumstances described in the Written Notices and the Grievant either confirmed or did not challenge the essential facts. The supervisor (the department Director) who issued the Written Notices became the Grievant's direct supervisor because her prior supervisor became afraid of the Grievant's aggressive behavior and response to supervision. She testified exhaustively regarding the circumstances leading to the issuance of the two Written Notices, and she was, likewise, cross-examined exhaustively.

The Agency's EEO/ER manager and the Grievant's direct supervisor were present at the September 19, 2019, Notice of Improvement Needed meeting. Also present at the meeting were the claimant's then-supervisor and the HR manager. The Grievant's direct supervisor, the EEO/ER manager, and the HR manager testified to the Grievant's inappropriate conduct that led to the change of the Grievant's direct supervisor. The then-supervisor provided three pages of typed notes of the meeting. The witnesses present at the meeting testified that the Grievant exhibited aggressive and threatening behavior, to the point that the HR manager, a black male with a long tenure in human relations management, was afraid of what the Grievant might do. This evidence went uncontroverted. The HR manager testified that in his decades long career in human resources, including the Army, he never observed anyone respond in such an aggressive manner when receiving a disciplinary action. The Grievant's then-supervisor elected not to supervise directly the Grievant after this interaction. The department director took over direct supervision as of September 25, 2019.

The Grievant's annual performance evaluation of November 6, 2019, resulted in an overall below contributor rating. Ultimately, the Grievant's supervisor notified the Grievant of an intent to issue discipline. At the February 28, 2020, meeting to discuss the Agency's concerns and disciplinary intention, the Grievant was informed of administrative suspension pending the Agency's disciplinary determination. At the February 28 meeting, the Grievant became so disruptive and noncompliant that the supervisor and the EEO Director were on the verge of calling police enforcement to intervene.

The Grievant testified that the Agency's management has degraded during her tenure, creating for her a hostile environment. The Agency, she asserted, did not heed her claims of a hostile environment and did not investigate her accusations. The Grievant testified that the Agency was more professional when she was hired. The associate director at the time provided a recommendation letter for the Grievant. The Grievant's experience at the Agency changed after she challenged her pay level under a prior supervisor. The Grievant challenged her supervisors and the Agency regarding her perceptions of poor management, poor supervision, and retaliation against her. The Grievant testified that her conduct

> has been mischaracterized and that her supervisors do not understand her as a black woman; she was not part of the clique; and that the discipline against her is retaliatory. The Grievant also sought medical attention for her work anxiety.
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> A former employee of the department testified on the Grievant's behalf, and she testified that she believed the department and Agency were not managed well, that there was improper fraternization and cronyism, creating a hostile work environment, all leading her to leave in January 2019 for other career opportunities. She testified that in her opinion the Grievant was very professional, while supervisors were not.[7]

In a decision dated July 2, 2020, the hearing officer determined that the "Grievant did not carry out her duties and assignments described in the Written Notices" and that "such behavior violated the applicable expectations and instructions of her supervisor."[8] The hearing officer further concluded that the "Grievant ha[d] not presented sufficient evidence to show that the Agency's evaluation of [her] performance and behavior was motivated by improper factors," but that "the Agency's assessment of poor performance, poor attendance, and failure to comply with instruction" was instead based "the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant."[9] Finding no mitigating circumstances warranting reduction of the disciplinary action, the hearing officer upheld the issuance of both Written Notices and the grievant's termination.[10] The grievant now appeals the hearing decision to 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 . . . ."[11] 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.[12] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[13] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Grievant's Submissions to EDR

The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** EDR within 15 calendar days of the date of the original hearing decision."[14] The hearing officer's decision specifically advised the parties of this requirement.[15] EDR has typically permitted an appealing party to submit additional briefing

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[7] *Id.* at 3-6 (citations omitted).
[8] *Id.* at 6.
[9] *Id.* at 8.
[10] *Id.* at 8-9.
[11] Va. Code §§ 2.2-1202.1(2), (3), (5).
[12] *See Grievance Procedure Manual* § 6.4(3).
[13] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[14] *Grievance Procedure Manual* § 7.2(a).
[15] Hearing Decision at 11.

material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the 15 calendar days can be considered by EDR on administrative review.

In this case, the grievant submitted her request for administrative review on July 17, 2020, the final day of the 15-calendar-day appeal period. After the deadline had passed, the grievant sent EDR an amended appeal document that is largely identical to her original request for administrative review, but with some additional arguments challenging the hearing decision. To the extent the grievant's amended appeal raises issues that were not presented in her request for administrative review received on July 17, 2020, EDR is unable to consider them in this ruling because they are untimely.

The grievant has also provided EDR with a decision from the Virginia Employment Commission ("VEC") addressing her request for unemployment benefits, asking that the document be "placed into the record." Leaving aside that this submission is untimely because the grievant sent the VEC decision to EDR after the 15-calendar-day appeal period had passed, Virginia law states that information provided to the VEC and decisions rendered by the VEC cannot be used in any other judicial or administrative proceeding.[16] As such, the VEC decision is inadmissible in this grievance hearing and has no bearing on whether the hearing officer abused his discretion or exceeded the scope of his authority under the grievance procedure in upholding termination of the grievant's employment.

Due Process

In her request for administrative review, the grievant contends that "the agency violated [her] due process rights," and that EDR confirmed in a February 28, 2020 ruling that the agency "had not only failed to comply with EDR policies in relation to ensuring . . . due process, but had failed to provide the required evidence to substantiate [termination]."[17] As an initial matter, no such document from EDR appears in the hearing record, nor is EDR aware of a ruling issued in relation to the grievant's case on February 28, 2020. The grievant may be referring to a March 26, 2020, compliance ruling that addresses the issues raised in her March 16, 2020 dismissal grievance challenging her receipt of the Written Notices and her termination.[18] That ruling discussed the grievant's arguments regarding alleged due process deficiencies prior to her termination, but made no determinations about the substance of those claims; the ruling merely stated that the grievant would have an opportunity to present any evidence about the agency's disciplinary process, including due process, to the hearing officer.[19]

With regard to the grievant's general contention that she did not receive adequate pre-disciplinary due process, EDR notes that constitutional due process, the essence of which is

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[16] *Rules for Conducting Grievance Hearings* § IV(D); *see* Va. Code § 60.2-623(B) ("Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties. Neither such information, nor any determination or decision rendered under the provisions of §§ 60.2-619, 60.2-620 or § 60.2-622, shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title . . . .").

[17] Request for Administrative Review at 2. Other than this assertion, the grievant does not provide further description or content as to the basis for her due process argument.

[18] Agency Ex. 1, at 10-14 (EDR Ruling No. 2020-5072).

[19] *Id.* at 12-14.

"notice of the charges and an opportunity to be heard,"[20] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[21] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[22] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[23] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[24]

In this case, the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Under these circumstances, EDR is persuaded by the reasoning of many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies, to the extent any occurred here.[25] Accordingly, EDR finds no error in the hearing decision with respect to this issue and declines to disturb the decision on this basis.

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[20] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).

[21] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[22] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). The pre-disciplinary notice and opportunity to be heard need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-46. State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1).

[23] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[24] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[25] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein). Nothing in this ruling should be read to conclude that the agency's pre-disciplinary process did in fact violate the grievant's due process rights or that its process was otherwise deficient.

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant argues that the hearing officer erred in upholding the Written Notices and her termination, though she does not appear to dispute his factual conclusions about her conduct that led to the issuance of those disciplinary actions. Many of her arguments revolve around her assertions that agency management engaged in discrimination and retaliation that created a hostile work environment, and that this was the true reason for the agency's decision to terminate her employment. The grievant appears largely to reiterate the arguments and evidence she presented at the hearing in support of her position that the agency's actions had a discriminatory and retaliatory motive. Thus, EDR broadly interprets the grievant's claims as amounting to an assertion that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence in the record.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[26] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[27] 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.[28] 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.[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. 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.

Evidence regarding misconduct

The hearing officer considered the evidence and determined that "[t]he Agency's witnesses credibly testified consistently with the charges and circumstances described in the Written Notices."[30] As a result, he found that "the Grievant did not carry out her duties and assignments described in the Written Notices" and that "[s]uch behavior violated the applicable expectations and instructions of her supervisor."[31] The hearing officer also observed that, pursuant to DHRM Policy 1.60, "unsatisfactory work performance is a typical Group I offense; failure to follow supervisor's instructions is normally a Group II offense."[32] Accordingly, based on the evidence in the record, the hearing officer concluded that the agency had "met its burden of proof of the offenses and level of discipline—Group I and Group II, with termination," and thus there was "no basis" for him to reverse those disciplinary actions.[33] Significantly, the

[26] Va. Code § 2.2-3005.1(C).
[27] *Grievance Procedure Manual* § 5.9.
[28] *Rules for Conducting Grievance Hearings* § VI(B).
[29] *Grievance Procedure Manual* § 5.8.
[30] Hearing Decision at 5.
[31] *Id.* at 6.
[32] *Id.*
[33] *Id.* at 6-7, 9.

hearing officer noted that "the Grievant either confirmed or did not challenge the essential facts" alleged in the Written Notices at the hearing,[34] and EDR observes that she has not done so on administrative review.

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notices, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. With regard to the Group II Written Notice, the agency presented evidence to show that the grievant's supervisor instructed the grievant on multiple occasions to contact the supervisor directly when she had unplanned absences from work or would be late to the office,[35] to provide the supervisor with access to view her electronic work calendar,[36] and to refrain from blocking time on her electronic calendar when she was performing work tasks that did not preclude her from meeting with the supervisor as needed.[37] The evidence further demonstrates that the grievant did not comply with any of these instructions as expected.[38]

As to the charge on the Group I Written Notice, the agency presented a September 25, 2019 Notice of Improvement Needed/Substandard Performance noting the grievant's failure to respond to revision packets and final manuals within 30 days of receipt and her failure to pull and review the required number of new applications from the applicant waitlist on multiple occasions.[39] The grievant's annual performance evaluation for 2018-2019 rated her a "Below Contributor" overall, based in part on the performance deficiency described in the Notice of Improvement Needed.[40] The evidence in the record shows that, after she received these two documents, the grievant continued to fail to respond to revisions and final manuals within the required timeframe on multiple occasions, which led the agency to issue the Group I Written Notice for unsatisfactory work performance.[41]

To the extent the grievant is alleging that the hearing officer improperly credited the testimony of the agency's witnesses instead of her own evidence, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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, as is the case here.[42] For these reasons, EDR declines to disturb the hearing officer's determination that the issuance of the Written Notices was warranted and appropriate under the circumstances.

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[34] *Id.* at 5.
[35] Hearing Recording at Track 1, 1:38:34-1:46:30 (Director's testimony); Agency Ex. 16, at 2-11; Agency Ex. 17, at 24-26.
[36] Hearing Recording at Track 1, 1:54:38-2:06:00 (Director's testimony); Agency Ex. 15, at 3, 5; Agency Ex. 17, at 2, 7-10, 24-26.
[37] Hearing Recording at Track 1, 2:06:02-2:15:42 (Director's testimony); Agency Ex. 17, at 1-7, 11-12, 19, 24-26.
[38] *See supra* notes 35-37.
[39] Agency Ex. 9, at 1-2.
[40] Agency Ex. 13.
[41] Hearing Recording at Track 1, 2:27:43-2:30:00 (Director's testimony); Agency Ex. 14; Agency Ex. 19, at 1-14.
[42] *See, e.g.*, EDR Ruling No. 2014-3884.

Evidence regarding discrimination, retaliation, and workplace harassment

At the hearing, the grievant argued that agency management had engaged in discrimination and retaliation that created a hostile work environment throughout much of her employment, culminating in the issuance of the Written Notices and her termination. On administrative review, she has identified a number of alleged errors in the hearing officer's consideration of the evidence regarding management's conduct during her tenure with the agency. In particular, the grievant alleges that the hearing officer erred by not concluding that her complaints of discrimination, retaliation, and workplace harassment were improperly investigated by the agency, and by also not concluding that the Director and other members of management engaged in further discriminatory and retaliatory acts because she had raised concerns about her treatment.

The hearing officer addressed the grievant's claims regarding discrimination, retaliation, and workplace harassment at length:

> The Grievant passionately asserts racial and retaliatory animus as motivating the Agency's discipline. She also complains that the Agency did not launch investigations for her voiced concerns over retaliation and discrimination (which includes different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin or sex). . . . .
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> The Grievant engaged in protected activity by expressing her responsive views to the Agency regarding her job performance and questioning her pay level. The Grievant asserts that the discipline she has experienced stems from retaliation for her frank and sharp expressions to the Agency. The Agency's discipline and termination certainly is a materially adverse action. However, the Grievant does not satisfy the burden of proof of showing that the Agency's assessment of the Grievant' work performance, attendance, and compliance with supervisor's instructions was retaliatory or discriminatory. There is no evidence of disparate treatment of the Grievant—other employees exhibiting similar deficiencies without consequence, for example.
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> The Agency has addressed a noticeable performance and compliance deficiency. Grievant has not presented sufficient evidence to show that the Agency's evaluation of the Grievant's performance and behavior was motivated by improper factors. Rather, the Agency's assessment of poor performance, poor attendance, and failure to comply with instruction all appear based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.
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> . . . The Grievant's conclusory assertion that all of her supervisors throughout her tenure acted with racial animus is supported only by speculation and conjecture. Some of the supervisors involved were identified as African American. She does not show any facts that plausibly suggest that her most recent supervisor's

> decision to discipline and terminate was mere pretext and motivated by race or retaliation.[43]

Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. As discussed above, the agency presented sufficient evidence to support its decision to issue the Written Notices to the grievant and terminate her from employment. The evidence in the record supports the hearing officer's conclusion that the agency's decision to discipline the grievant did not have a discriminatory or retaliatory motive.[44] EDR has reviewed nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motivation for issuing the discipline was in any way unreasonable or inconsistent with the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and we cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case.

In conjunction with her general challenge to the hearing officer's findings regarding discrimination, retaliation, and workplace harassment, the grievant also asserts that the agency "did not uphold their responsibility . . . to ensure a safe and hostile free work environment by refusing to properly and objectively investigate her repeated claims of retaliation and discriminatory practices."[45] Whether the agency's investigation of and response to the grievant's complaints (or lack thereof) was consistent with DHRM policy were issues properly before the hearing officer to the extent they had bearing on the matters grieved. The grievant had an opportunity to present evidence to the hearing officer in support of her argument that agency management had engaged in discrimination and retaliation that created a hostile work environment, which included the agency's alleged failure to conduct an appropriate investigation of those matters or otherwise respond to her concerns. The hearing officer assessed the grievant's evidence and concluded that she had not met her burden of proof to show that the agency's actions and decisions were motivated by discrimination or retaliation. As discussed above, there is no basis for EDR to conclude that the hearing officer's assessment of these claims was unreasonable or inconsistent with the actual evidence in the record, and we therefore find no error in the decision on these grounds. Accordingly, EDR is unable to second-guess the hearing officer's factual determinations as to these claims.

In addition, the grievant appears to argue in her appeal that the hearing officer erred by not addressing whether the agency failed to provide her with a reasonable accommodation under the Americans with Disabilities Act. In the decision, the hearing officer noted that the grievant "sought medical attention for her work anxiety."[46] Although there is some evidence in the record to indicate that the grievant sought treatment prior to her termination,[47] EDR has not identified any further argument or evidence on the issue of whether the agency failed to accommodate her

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[43] Hearing Decision at 7-8.

[44] The evidence in the record supporting the issuance of the Written Notices is discussed in more detail above. *See also, e.g.,* Hearing Recording at Track 1, 1:21:16-1:22:34, 2:13:46-2:14:18 (Director's testimony that she treats people the same regardless of their race or sex, that the grievant's behavior was "unprofessional," "scary," and "erratic," and that her purpose in meeting with the grievant was not to harass her but to provide supervision support), Track 1, 5:31:01-5:31:21 (HR manager's testimony that the Director's and the then-supervisor's behavior in a meeting with the grievant was not discriminatory or aggressive).

[45] Request for Administrative Review at 4. Elsewhere in her appeal, the grievant suggests that the agency never investigated her complaints. *Id.* at 3-4.

[46] Hearing Decision at 6.

[47] Grievant's Ex. 2.

medical condition. Because there does not appear to be anything in the record for the hearing officer to have considered about the grievant's alleged disability or reasonable accommodation, EDR finds no error in the decision as to this issue.[48]

Hearing officers must make "findings of fact as to the *material issues* in the case"[49] and determine the grievance based "*on the material issues* and grounds in the record for those findings."[50] EDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and concludes that most of the alleged errors in the hearing officer's assessment of the evidence were either not material or are simply factual findings on which the grievant disagrees with the hearing officer's conclusions or impact of the findings. As a result, EDR cannot find that remanding the case to the hearing officer for reconsideration of any specific factual issues alleged by the grievant would have an effect on the ultimate outcome of this case. More importantly, the hearing officer clearly assessed the evidence presented by the parties and found that the agency had met its burden of showing that the grievant had engaged in the conduct described in the Written Notice, that her behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. The hearing officer also found that the grievant had not presented sufficient evidence to support her allegations of discrimination, retaliation, and workplace harassment. EDR's review of the hearing record demonstrates that there is evidence to support those findings.

In conclusion, and although the grievant may disagree with the decision, there is 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. 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 on the grounds raised by the grievant relating to the hearing officer's consideration of the evidence.[51]

Mitigation

The grievant further appears to challenge the hearing officer's decision not to mitigate the discipline or her termination. More specifically, she argues that the hearing officer "documented that he would not have taken the actions that the agency took regarding [the] grievant[']s alleged misconduct," and that the HR manager testified he would have felt frustration as the grievant did at the agency's alleged failure to respond to her complaints.[52] The grievant also asserts that the

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[48] Although the grievant further contends that another employee received accommodation for "anxiety due to workplace stress," Request for Administrative Review at 3, she has not identified any evidence in the record to support this assertion and EDR has not identified any such evidence.

[49] Va. Code § 2.2-3005.1(C) (emphasis added).

[50] *Grievance Procedure Manual* § 5.9 (emphasis added).

[51] The grievant further alleges that the agency directed the grievant not to "question the agency's administration regarding their non-compliance with EDR policy as well as acquiesce to their repeated and ongoing violations of her due process rights without question." Request for Administrative Review at 4. The nature of this argument is unclear. EDR's review of the hearing record did not disclose any evidence about such an instruction, the "EDR policy" allegedly involved, or a connection to the matters before the hearing officer: the agency's issuance of the two Written Notices, the grievant's termination, and the grievant's allegations of discrimination and retaliation.

[52] Request for Administrative Review at 2, 3-4; *see* Hearing Recording at Track 1, 5:43:19-5:44:30 (HR manager's testimony that he would be frustrated if he filed a complaint of discrimination and it was not investigated).

agency's investigation of her complaints (or lack thereof) was not conducted in compliance with DHRM policy, and that the hearing officer should have mitigated the discipline on this basis.[53]

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]."[54] 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."[55] 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.[56]

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 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.[57] DHRM Policy 1.60, *Standards of Conduct*, provides that an employee's accumulation of "[a]second active Group II Notice normally should result in termination."[58] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[59]

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[53] *Id.* at 4.
[54] Va. Code § 2.2-3005(C)(6).
[55] *Rules for Conducting Grievance Hearings* § VI(A).
[56] *Id.* § VI(B)(1).
[57] 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).
[58] DHRM Policy 1.60, *Standards of Conduct*, § B(2)(b). Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).
[59] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. U.S. Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.[60] Although the hearing officer noted that he "may have reached a different level of discipline" than the agency, there is "no requirement for an Agency to exhaust all possible lesser sanctions" before terminating an employee who has engaged in misconduct for which termination is warranted under DHRM policy.[61] This analysis is consistent with the grievance procedure; EDR has previously held that a hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[62] Even considering the grievant's remaining allegations about the agency's investigation of, or failure to investigate, her complaints as arguments 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. As such, EDR will not disturb the hearing officer's decision on these grounds.

Relief Requested by the Grievant

Finally, we note that in her request for administrative review, the grievant seeks an order from the hearing officer for the agency to "secure an independent party to properly investigate" her claims of retaliation and workplace harassment.[63] Under the grievance procedure, a hearing officer has the authority to reduce or remove a disciplinary action if the evidence does not demonstrate that the action was warranted and appropriate under the circumstances.[64] In cases where an agency has misapplied or unfairly applied policy, "the hearing officer may order the agency to reapply the policy from the point at which it became tainted."[65] When a hearing officer determines that discrimination or retaliation has occurred, "the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[66] There may be some circumstances where a hearing officer could appropriately order an agency to conduct an independent investigation of an employee's complaint of discrimination or retaliation, in keeping with their authority to order relief; in this case, however, the hearing officer determined that the evidence did not support a conclusion that discrimination or retaliation had occurred. As a result, EDR finds no basis to remand the case to the hearing officer for consideration of whether such an order is warranted here.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision on the grounds cited in the grievant's request for administrative review. To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed

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[60] Hearing Decision at 8-9.
[61] *Id.* at 8, 9.
[62] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[63] Request for Administrative Review at 5.
[64] *See Rules for Conducting Grievance Hearings* § VI(B).
[65] *Id.* § VI(C)(1).
[66] *Id.* § VI(C)(3). Significantly, the *Rules* specifically state that, when ordering relief from discrimination or retaliation, "the hearing officer should avoid providing specific remedies that would unduly interfere with management's prerogatives to manage the agency." *Id.*

the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

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.[67] 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.[68] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[69]

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