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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2020-4981
October 1, 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 11355. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11355, as found by the hearing officer, are as follows:[2]

> The Department of Corrections [the "agency"] employs Grievant as a Lieutenant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Under the Agency's count practice, corrections officers counted the number of inmates and then called the Lieutenant to report the number counted. The Lieutenant then entered that information into VACORIS. VACORIS has a census number of inmates. If the total number entered by the Lieutenant did not match the number of inmates VACORIS lists, the Lieutenant was supposed to call the officers and ask them to conduct a second count. If the total count of the second count matched the number of inmates listed in VACORIS, then a third physical count was conducted to corroborate the second count.
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> On August 6, 2018, Grievant was in charge of taking count at the facility. Corrections officers throughout the facility counted each inmate and then called Grievant to inform her of the count number. Grievant entered the numbers she received from the corrections officers. The numbers Grievant entered into

[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. 11355 ("Hearing Decision"), August 19, 2019, at 2-3.

VACORIS differed from the count record that VACORIS showed for the Facility. Grievant did not instruct the corrections officers to conduct a second physical count of inmates and provide her with that information.

On November 29, 2018, the agency issued to the grievant a Group I Written Notice, citing her failure to follow required procedures in the circumstance where a verbal count does not match the census number listed in VACORIS.[3] The grievant grieved the Written Notice, and a hearing was held on August 7, 2019.[4] In a decision dated August 19, 2019, the hearing officer determined that the agency had presented sufficient evidence to support a Group I Written Notice for unsatisfactory work performance.[5] Accordingly, he upheld the agency's discipline and found no circumstances to warrant a reduced penalty under the applicable mitigation standard.[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 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.

In her request for administrative review, the grievant challenges the hearing officer's decision to sustain the agency's disciplinary action at the Group I level. The grievant contends that the discipline issued was too harsh, given that she did not know she was violating a required policy and she did not receive any notices of improvement needed before receiving a Group I Written Notice – unlike another employee also disciplined for an inmate-count violation. The grievant contends that her offense was not so severe that she could not similarly have been provided with at least one notice of improvement needed to correct her count practices. The grievant does not appear to dispute the hearing officer's conclusions that her conduct was in fact inconsistent with

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[3] Agency Ex. 1. The hearing decision acknowledged certain procedural irregularities associated with the Written Notice, namely an initial failure to fully consider mitigating circumstances and mailing of the Written Notice to an incorrect address. *See* Hearing Decision at 3. However, the hearing officer concluded that, "[t]o the extent the Agency may have failed to provide Grievant with procedural due process, the grievance hearing process cures that defect." *Id.* at 4. While the grievant on appeal asserts her disagreement with this conclusion, she does not allege that the earlier procedural issues prejudiced or harmed her opportunity to be heard. Accordingly, EDR perceives no error in the hearing officer's conclusion with respect to the grievant's due process rights.
[4] Hearing Decision at 1.
[5] *Id.* at 4.
[6] *Id.* at 5.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

agency policy and that the agency had discretion to issue a Group I Written Notice under those circumstances.[10] Thus, EDR takes the grievant's arguments on appeal to relate to the hearing officer's determination that mitigation was not warranted in this case.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] 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.[13] 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.[14] 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.

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]."[15] 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."[16] 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.[17]

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.[18] Even if the hearing officer does not sustain all of the agency's charges and finds that

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[10] The grievant notes that no policy required disciplinary action at the Group I level under the circumstances. However, assuming the grievant is correct, the agency's decision to issue a Group I Written Notice when other, lesser actions were also permitted does not, in itself, render its chosen disciplinary action inconsistent with policy or otherwise unwarranted.
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.
[15] Va. Code § 2.2-3005(C)(6).
[16] *Rules for Conducting Grievance Hearings* § VI(A).
[17] *Id.* § VI(B)(1).
[18] 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

mitigation is warranted, he or she may reduce the penalty only "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."[19] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[20] and will reverse the determination only for clear error.

In this case, the hearing officer concluded that no mitigating factors existed such that reduction of the disciplinary action was required in light of the mitigation standard applicable at the hearing stage.[21] The grievant contends that the penalty for her conduct should have been lower than a Group I Written Notice, primarily because she did not know the applicable requirements and because another employee received more lenient and/or progressive discipline for a similar offense, allowing him more opportunity to learn from mistakes. However, after careful consideration of the record on review, EDR finds that facts in the record support the hearing officer's conclusion that the penalty imposed did not exceed the bounds of reasonableness.

While an employee's lack of notice of a rule may be considered a mitigating circumstance, an employee may be presumed to have notice of rules that have been made available to her.[22] Here, it is undisputed that the required procedures regarding inmate count were available to the grievant in the agency's Operating Procedure (OP) 410.2,[23] which clearly articulated the appropriate response to inaccurate or "unreconciled" inmate counts.[24] The facility warden testified that it was the grievant's very lack of knowledge of these policies that raised concern about her competence at the rank of lieutenant.[25] Therefore, evidence supports the hearing officer's determination that the grievant's lack of knowledge of the required practices for unreconciled inmate counts was not a mitigating factor in this instance.

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).

[19] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[20] "'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.*

[21] To the extent that the hearing officer did not discuss potential mitigating evidence presented by the grievant, there is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties. Thus, mere silence as to any specific piece of evidence does not necessarily constitute a basis for remand. *See*, *e.g.*, EDR Ruling No. 2018-4611.

[22] *See Rules for Conducting Grievance Hearings* § VI(B)(2) n.26.

[23] While the grievant contends that Operating Procedure 410.2 is not relevant to the proposed offense of "unsatisfactory work performance," that policy articulates the specific performance standards that the agency alleged the grievant was required to follow in the context of counting inmates. *See* Agency Ex. 9. Thus, it was appropriate for the hearing officer to consider OP 410.2 in determining whether the grievant's behavior constituted misconduct and whether the resulting discipline was warranted and appropriate under all the facts and circumstances.

[24] *See* Hearing Decision at 3; Agency Ex. 9.

[25] Hearing Recording at 1:10:10-1:10:40 (Warden's testimony).

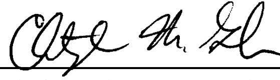
Facts in the record also support the conclusion that the agency's disciplinary approach to another employee was not a basis under the mitigation standard to reduce the penalty imposed in this case. The grievant points to a former employee of the same rank who was counseled for mishandling inmate count procedures before he received a Written Notice for repeating the offense, whereas the grievant was given a Written Notice for a first offense that she contends was less serious.[26] However, evidence supported the agency's view that the grievant's offense was more severe because the purported comparator failed to properly document the number of inmates accounted for, whereas the grievant failed to properly ascertain the number of inmates actually present.[27] Accordingly, the two employees were not similarly situated for disciplinary purposes.

The grievant disagrees, arguing that her offense was not as severe as the agency portrayed it and that the other employee's offense may actually have been worse.[28] However, where the evidence is subject to varying interpretations, conclusions as to the weight of respective witnesses' testimony 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.[29] Further, even if the hearing officer found the grievant's view of the discipline more reasonable, he lacked authority to mitigate the penalty by substituting his own judgment for the agency's discretion to manage and maintain employee discipline and efficiency.[30] Thus, EDR cannot say that the hearing officer abused his discretion in finding that the Group I Written Notice issued to the grievant did not exceed the bounds of reasonableness. Absent evidence that the agency might have imposed lesser discipline under the circumstances, EDR finds no basis to disturb the hearing officer's decision to uphold disciplinary action against the grievant at the Group I level.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration 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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

[26] *See* Grievant's Request for Administrative Review at 1-2.
[27] *See* Agency Ex. 7; Hearing Recording at 26:50-29:05 (Major's testimony), 58:20-59:30 (Warden's testimony).
[28] *See* Grievant's Request for Administrative Review at 3.
[29] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[30] *See* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings* § VI(B)(2).
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).



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