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 University of Virginia
Ruling Number 2020-4998
November 6, 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 11332. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

## FACTS

The relevant facts in Case Number 11332, as found by the hearing officer, are as follows:[2]

> The University of Virginia ["the University"] employed Grievant as a Police Officer. He began working for the University on June 27, 2016. Grievant had prior active disciplinary action. He received a Group III Written Notice with a ten workday suspension on January 18, 2018.
>
> Chief S began [as] Police Chief at the end of July 2018. He replaced the Interim Chief. Chief S created different expectations for staff. According to Lieutenant T, "Guys were told to cut down on running radar and traffic enforcement; we want to be in community engagement."
>
> Sergeant N reported to Lieutenant T who reported to Captain M.
>
> The Driver's motor vehicle license was suspended. She had five active suspensions with the most recent in April 2013. She had failed to pay court costs

[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. 11332 ("Hearing Decision"), Sept. 27, 2019, at 2-7 (citations omitted).

and fees. In the early morning of November 22, 2018, she was driving a silver Nissan ("the suspect vehicle").

Grievant was driving a marked patrol vehicle ("Patrol vehicle") with police lights. . . .

At approximately 3:46 a.m., the suspect vehicle was on Ivy Road approaching Emmet Street. As the Driver approached the intersection while on Ivy Road, Ivy Road had three lanes in the Driver's direction. The lane on the right was for vehicles turning right onto Emmet Street. The middle lane was for vehicles passing through the intersection and continuing on Ivy Road. The left lane was for vehicles turning left onto Emmet Street. The suspect vehicle approached the intersection in the center lane and slowed. The vehicle moved partially into the right lane and then continued to turn right from Ivy Road onto Emmet Street. The light was red. The Driver disregarded a "No Turn On Red" sign at the street light and turned right onto Emmet Street. Grievant observed the Driver's disregard of the traffic sign. The Patrol vehicle turned right onto Emmet Street from Ivy Road following the suspect vehicle. . . .

The suspect vehicle turned right onto Sprigg Lane at approximately 3:46:51 a.m. and the Patrol vehicle followed. . . . The suspect vehicle slowed near the end of Sprigg Lane but then turned around and drove over the circle at the end of Sprigg Lane. The Driver began driving at a high rate of speed out of Sprigg Lane in the direction of Emmet Street. The suspect vehicle passed the Patrol vehicle. Grievant had activated the blue lights on the Patrol vehicle and then activated his siren. Grievant turned the Patrol vehicle around and began pursuing the suspect vehicle at a high rate of speed. Grievant read the license plate of the suspect vehicle but had not yet identified the Driver as female. Grievant could not see into the suspect vehicle.

At approximately 3:47:30 a.m., the suspect failed to stop at the stop sign on Sprigg Lane and turned left onto Emmet Street heading northbound. The Patrol vehicle followed the suspect vehicle. The suspect vehicle travelled at an excessive rate of speed well above the 40 mph speed limit on Emmet Street.

Grievant told the Dispatcher: "Passing Arlington Blvd, speed 75."

Sergeant N asked over the radio: "What's the reason for the stop?" Grievant replied: "Was unable to maintain lane."

The Patrol vehicle exceeded 90 miles per hour as Grievant drove on Emmet Street after passing Arlington Boulevard.

Sergeant N asked: "What's your location?" Grievant replied: "I'm up on the bypass now, getting ready to go eastbound. Struck the curb twice. Can you see

if the county has (not audible) Pantops. On the bypass, passing Meadowbrook Heights. Going about 75. All over the road. Getting ready to hit Rugby Ave., he's going about 50. . . ."

The Dispatcher asked: "Are you on Rugby now?" Grievant replied: "10-4, he just took off on me again. We're turning on to Rose Hill. On Amherst Street, white male driver. Alright we're stopped here on Rose Hill, a white female. Grievant said: All right, we're at Augusta Street, a residence (not audible), 46-ECC release traffic."

Once the Driver stopped the suspect vehicle and exited the vehicle, Grievant realized inside the suspect vehicle was a four-year-old child. The Driver informed Grievant she did not have a license to drive. Grievant asked her if that was the only reason she ran and the Driver said, "Yes." Grievant told the Driver the only reason he tried to stop her was because she was "all over the road." Grievant asked the Driver if she knew he was behind her when they were on Sprigg Lane and the Driver said she was scared and knew she did not have a license. Grievant told the Driver that the Driver almost wrecked about four times. Grievant did not perform field sobriety tests on the Driver. Grievant arrested the Driver. The distance of the pursuit was between three and four miles.

Grievant completed an Arrest Information Sheet. He reported that he charged the Driver with felony child endangerment, felony eluding, and driving without a license. . . .

Grievant presented evidence of prior pursuits by Grievant and other police officers. Grievant initiated a pursuit on June 20, 2017. His reason for initial contact was "reckless driving by speed 58 MPH in posted 35 MPH zone." His reason for the pursuit was, "Hit & Run immediately after activating emergency equipment to stop the vehicle." Grievant's highest speed during the pursuit was 60 mph in a 35 mph zone.

Officer P initiated a pursuit on July 7, 2017. A motorcycle travelling southbound entered the officer's radar at 78 mph in a 25 mph zone. After activating the patrol vehicle headlights, the speeding motorcycle accelerated. Officer P activated his emergency lights and siren and advised the dispatcher that he was in pursuit of the southbound vehicle. Sergeant S contacted Officer P by radio to request information about the reason for the stop. Officer P notified Sergeant S that the reason was speeding and that his current speed was 96 mph.

Officer T initiated a pursuit on March 30, 2018. The reason for initial contact was "No tail light on the rear." The reason for the pursuit was, "Motorcycle failed to yield to activation of emergency equipment." The highest speed while in pursuit was 75 mph in a 25 mph zone. A supervisor ordered termination of the pursuit.

> Officer M initiated a pursuit on May 25, 2018. The reason for initial contact was, "entered the parking lot of Afghan Kabob from Masie at a high rate of speed too close to the front of my patrol vehicle." The reason for the pursuit was "driver re-entered vehicle and took off." The highest speed while in pursuit was 98 mph in a 55 mph zone. A supervisor ordered termination of the pursuit.
>
> Officer D initiated a pursuit on July 21, 2018. The reason for the initial contact was, "Headlights Off." The reason for the pursuit was, "Failure to yield." The highest speed while in pursuit was 90 in a 45 mph zone. A supervisor ordered Officer D to stop the pursuit.
>
> Officer D initiated a pursuit on August 26, 2018. The reason for the initial contact was, "Possible DUI driver." The reason for the pursuit was, "No Headlights or rear lights." The highest speed while in pursuit was 45 mph in a 45 mph zone. Officer D was counseled regarding this pursuit.

On January 24, 2019, the University issued to the grievant a Group III Written Notice of disciplinary action with removal.[3] Citing the University's Written Directive E-8.0 in particular, the Written Notice specified that the grievant "failed to use sound judgment when he used a state vehicle to engage in a vehicular pursuit at speeds far above the posted speed limit without reasonable justification."[4] The grievant timely grieved this disciplinary action, and a hearing was held on June 26, 2019.[5] In a decision dated September 27, 2019, the hearing officer determined that discipline for failure to follow Directive E-8.0 was supported, though only at the level of a Group II offense.[6] Moreover, in consideration of mitigating circumstances, the hearing officer further reduced the disciplinary action to a Group I Written Notice.[7] Based on the accumulation of the Group I Written Notice with a prior active Group III Written Notice, however, the hearing officer upheld the grievant's removal.[8]

The grievant now appeals the hearing decision to EDR.[9]

## 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

[3] University Ex. 2.
[4] *Id.* at 1.
[5] Hearing Decision at 1.
[6] *Id.* at 1, 8-9.
[7] *Id.* at 9-10.
[8] *Id.* at 10.
[9] The University has not appealed the hearing officer's decision. As such, the hearing officer's determinations as to the appropriate level of disciplinary action and whether the record evidence supported reducing the disciplinary action to a Group I based on consideration of mitigating factors are not at issue and will not be addressed in this appeal.

matters related to . . . procedural compliance with the grievance procedure."[10] 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.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] 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 upholding the disciplinary action as a Group I Written Notice because (1) the University's Code of Conduct and Ethics for police officers required the conduct for which the grievant was disciplined; (2) his conduct did not violate Policy E-8.0; and (3) other similarly situated employees involved in vehicle pursuits did not receive corrective action as a result of their actions.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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.

*Misconduct Under Agency Policies*

Here, the hearing officer made appropriate factual determinations that the grievant pursued the suspect vehicle at a high speed not justified under Directive E-8.0.[17] That policy provides, in relevant part, that an officer's high-speed[18] pursuit is justified only when he has reasonable grounds to believe that:

---

[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] Hearing Decision at 7-9.
[18] Directive E-8.0 defines high speed as 20 miles per hour or more above the posted speed limit. *See* University Ex. 6, at 2. The parties do not dispute that the grievant was pursuing the suspect vehicle at high speed as defined by this policy.

a. The suspect presents a clear and immediate threat to the safety of other persons; or
b. The suspect has committed or is attempting to commit a violent felony; or
c. The necessity of immediate apprehension outweighs the level of danger created by the pursuit.[19]

The hearing officer concluded that the high-speed pursuit in this case created danger to the grievant, the suspect driver, the young child in her vehicle, and "other drivers and property along the pursuit route."[20] Evidence in the record supports this determination. Prior to the pursuit, evidence of potential danger was limited to the grievant's contention that the suspect vehicle changed lanes erratically as it approached an intersection and violated a "no turn on red" signal.[21] During the pursuit, however, it is undisputed that the grievant was following the suspect vehicle at 75 miles per hour on a street where the posted limit was only 40 miles per hour; at one point, the two vehicles were traveling on the same street at more than 90 miles per hour.[22] Also during the pursuit, the grievant reported that the suspect vehicle "[s]truck the curb twice" and was "[a]ll over the road."[23] Thus, the evidence supports the hearing officer's determination that the pursuit created danger and that this danger "exceeded the necessity of immediate apprehension of the Driver,"[24] placing the pursuit outside the bounds of high-speed pursuits permitted by Directive E-8.0.

In his request for administrative review, the grievant alleges that he believed the suspect driver was intoxicated or otherwise impaired. Such driver impairment, he argues, "creates a serious threat to public safety" that outweighed the danger caused by the pursuit, which was especially low because vehicle and pedestrian traffic was "extremely light" in the 3:00 a.m. hour when the pursuit occurred.[25] However, the hearing officer appears to have accorded little or no weight to the grievant's alleged concerns about impaired driving, noting that none of the grievant's reports mentioned driving under the influence as his reason for the stop or pursuit.[26] While the grievant may disagree with this reasoning, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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

[19] University Ex. 6, at 4-5.
[20] Hearing Decision at 8.
[21] *See* Grievant's Ex. 4, at 5; Grievant's Ex. 5, at 1; Grievant's Ex. 7, at 1; Hearing Recording at 5:56:50-6:04:40 (Grievant's testimony). EDR notes that the hearing officer made no factual determination as to whether the suspect driver was operating the vehicle as erratically as the grievant described in testimony.
[22] *See* Grievant's Ex. 1, at 1 (listing 95 miles per hour as the "[h]ighest speed attained by officer while in pursuit"); Grievant's Ex. 4, at 5 (recounting the grievant's observation of his speedometer showing speeds of 75 and then 92 miles per hour); Hearing Recording at 6:18:03-6:23:03 (Grievant's testimony).
[23] University Ex. 14, at 9; *see* Hearing Recording at 6:22:40-6:23:03 (Grievant's testimony).
[24] Hearing Decision at 8.
[25] Request for Administrative Review at 1-2; *see* Grievant's Exs. 16, 17.
[26] Hearing Decision at 4-5, 9.

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.[27]

To the extent the grievant argues that the agency's Written Directive A-3.0 nevertheless required his conduct notwithstanding Directive E-8.0,[28] this reconciliation of the two policies' mandates is not consistent with the agency's interpretation of its policies. Directive A-3.0 directs officers to enforce the law "[w]ith no compromise for crime,"[29] and the grievant maintains that, in keeping with this mandate, he was seeking to enforce laws as to driving under the influence and eluding law enforcement. However, the "no compromise" language adopted in Directive A-3.0 is not reasonably read to preclude the agency from issuing more specific policies to balance the various aspects of its public-safety mission, such as Directive E-8.0's consideration of the dangers inherent in a high-speed pursuit. More generally, an agency's interpretation of its own policies is afforded great deference. EDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference unless that interpretation is clearly erroneous or inconsistent with the express language of the policy.[30] Here, EDR cannot find either that the agency's interpretation of Directive E-8.0 is erroneous in light of any other policy, or that the hearing officer's apparent acceptance of that interpretation was unreasonable. Indeed, Directive E-8.0's specific provisions as to high-speed pursuits appear to be clearly applicable to the underlying facts in this case, without conflicting with the more general code of conduct governing the grievant as described in Directive A-3.0.

Accordingly, EDR perceives no basis to disturb the hearing officer's determination that the grievant engaged in the conduct charged and that this conduct constituted misconduct to an extent justifying a Group II Written Notice.

*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]."[31] 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."[32] 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

[27] *See, e.g.*, EDR Ruling No. 2020-7976; EDR Ruling No. 2014-3884.
[28] Request for Administrative Review at 1.
[29] *See id.*; Grievant's Ex. 17, at 2.
[30] *See, e.g.*, EDR Ruling No. 2019-4803; EDR Ruling No. 2012-3336.
[31] Va. Code § 2.2-3005(C)(6).
[32] *Rules for Conducting Grievance Hearings* § VI(A).

mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[33]

Because reasonable people 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.[34] 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."[35] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[36] and will reverse the determination only for clear error.

Here, the hearing officer exercised his mitigation authority to reduce the agency's disciplinary action to a Group I Written Notice, based on two specific mitigating factors: (1) certain prior pursuits of fleeing motorists did not result in disciplinary action, even when they were contrary to agency policy; and (2) the sergeant involved did not stop the grievant's high-speed pursuit even though he should have been aware that the grievant's basis for the stop did not justify the pursuit.[37] However, the hearing officer also recognized an aggravating factor that the circumstances should have led the grievant to abandon the pursuit on his own judgment – particularly when the vehicle speeds exceeded 90 miles per hour, which only the grievant knew at the time.[38]

The grievant maintains that other similarly situated employees involved in vehicle pursuits did not receive corrective action as a result of their conduct. However, the hearing officer considered and apparently accepted the evidence presented on this issue to justify mitigating the disciplinary action from a Group II Written Notice.[39] Nevertheless, the hearing officer reasoned that the grievant's continued pursuit of the suspect vehicle even after exceeding

---

[33] *Id.* § VI(B)(1).

[34] 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).

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

[36] "'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.*

[37] Hearing Decision at 9-10.

[38] *Id.*

[39] *Id.* The hearing officer noted that the prior pursuits occurred before a new police chief shifted the department's enforcement priorities away from traffic, but it was "unclear" how aware the grievant was of this shift. *Id.*

the posted speed limit by 50 miles per hour constituted unsatisfactory performance.[40] Pursuant to DHRM Policy 1.60, *Standards of Conduct*, unsatisfactory work performance may merit a Group I Written Notice.[41] While the grievant contends that the hearing decision "did not fully consider the extent of the disparity" in the University's application of Directive E-8.0,[42] the hearing officer's mitigation authority was limited to reducing the penalty to the maximum reasonable level sustainable under law and policy. In light of DHRM Policy 1.60, EDR cannot find that the hearing officer abused his discretion in concluding that a Group I Written Notice did not exceed the bounds of reasonableness in this instance.

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 decision on this basis.

## CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[40] *Id.*
[41] DHRM Policy 1.60, *Standards of Conduct*, Attachment A at 1 (listing "unsatisfactory work performance" as an example of a Group I offense).
[42] Request for Administrative Review at 2.
[43] *Grievance Procedure Manual* § 7.2(d).
[44] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[45] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).