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SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5027
January 15, 2020

The Department of Corrections ("the agency") 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 reconsideration decision in Case Number 11344-R. For the reasons set forth below, EDR must remand the reconsideration decision with instructions to uphold the grievant's dismissal.

FACTS

The relevant facts in Case Number 11344, as found by the hearing officer, were recited in EDR's first administrative review in this matter, and they are incorporated herein by reference.[2]

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"), and a separate Group III Written Notice for fraternization ("Fraternization Written Notice").[3] Following a grievance hearing, the hearing officer issued a decision upholding the Computer Misuse Written Notice, but only at the Group II level.[4] The hearing officer upheld the Fraternization Written Notice at the Group III level, which supported the grievant's removal based on the accumulation of both Written Notices.[5] Despite finding that the grievant lacked

[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] EDR Ruling No. 2020-4965, at 1-4 (citing Decision of Hearing Officer, Case No. 11344 ("Hearing Decision"), July 18, 2019, at 2-3).

[3] Agency Exs. 1, 2. Both Written Notices charged that "[o]ver the course of several months [the grievant] allowed an offender to utilize his state computer and his [agency] computer account . . . ." *Id.* The Computer Misuse Written Notice added that during this time, "the offender was able to create a yahoo internet account in which he obtained pornography." Agency Ex. 1, at 1. The Fraternization Written Notice separately cited the grievant for providing the inmate with access to information on Amazon's website. Agency Ex. 2, at 1.

[4] Hearing Decision at 4. The hearing officer's reasoning for reduction to Group II was based on the ordinary penalty for the offense of failing to follow policy. *Id.*

[5] *Id.* at 5-6, 7.

"informed notice" of the agency's computer policies, the hearing officer determined that the availability of the written policies foreclosed lack of notice as a mitigating factor.[6]

Following the grievant's request for administrative review, EDR remanded the hearing decision for reconsideration.[7] EDR concluded that evidence in the record supported the hearing officer's conclusion that the grievant lacked "informed notice" of the standards giving rise to the Computer Misuse Written Notice.[8] EDR's ruling clarified that a hearing officer is not required to presume sufficient notice of written rules where such a presumption would be "inappropriate or rebutted by other evidence" in a particular case.[9] Thus, EDR remanded the case 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."[10] However, EDR reasoned that further reduction of the level of either Written Notice may still result in removal based on accumulation, "[a]bsent evidence that the agency might have imposed lesser discipline under the circumstances."[11]

On November 25, 2019, the hearing officer issued a reconsideration decision[12] that reiterated his previous conclusion that the grievant was "poorly trained" on the agency's policies as to inmate computer access.[13] Declining to presume that the grievant had adequate notice of those policies, the hearing officer concluded:

> Based on the facts and circumstances of this case, the Agency's managerial judgment has not been properly exercised. The Agency's disciplinary action exceeds the limits of reasonableness and should be mitigated. Grievant's work performance was satisfactory to the agency. He attempted to limit the Inmate's access to the Internet but was distracted by his other duties. Grievant's supervisor had a chance to correct his behavior, but failed to do so. There is little likelihood that Grievant will permit in the future another inmate to access the Internet. The consequences to the Agency were not so significant as to prohibit Grievant's reinstatement.[14]

Based on these facts and circumstances, the hearing officer concluded that the Computer Misuse Written Notice with removal must be reversed.[15] The hearing officer also concluded that the evidence did not support the agency's intention to terminate the grievant on the Fraternization Written Notice alone.[16] Thus, the hearing officer ordered the agency to reinstate the grievant.[17]

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[6] *Id.* at 6-7.
[7] *See* EDR Ruling No. 2020-4965.
[8] *Id.* at 6-9.
[9] *Id.* at 9.
[10] *Id.* at 9-10.
[11] *Id.* at 11.
[12] Reconsideration Decision of Hearing Officer, Case No. 11344-R ("Reconsideration Decision"), Nov. 25, 2019.
[13] *Id.* at 1.
[14] *Id.* at 2-3.
[15] *Id.*
[16] *Id.* at 4.
[17] *Id.* at 5.

The agency has requested that EDR administratively review the reconsideration decision.

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."[18] 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.[19] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[20] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency raises several challenges to the reconsideration decision. First, the agency maintains that the grievant did not receive "poor training" on the relevant information security policies that prohibited the grievant from allowing his inmate clerk to use the grievant's computer in the course of that work. Second, the agency argues that the Fraternization Written Notice is sufficient to uphold the grievant's removal despite not indicating termination. Finally, the agency argues that the hearing officer erred by failing to consider aggravating circumstances in his mitigation analysis.

Lack of Notice

In its first administrative review, EDR identified record support for the hearing officer's conclusions that the grievant did not receive adequate training on policies that were "poorly written and confusing," and he therefore "lacked 'informed notice' that allowing the inmate to use an internet-connected computer for non-internet work assignments was prohibited by" the agency's Operating Procedure 310.2.[21] 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. Therefore, the hearing officer's conclusions regarding the record evidence as to the grievant's training on the relevant rules in this case are not susceptible to being overturned. To the extent that the agency's arguments challenge these determinations, EDR will not reconsider these issues upon its second review.[22] In addition, for the reasons addressed in its prior ruling, EDR will not disturb the hearing officer's decision not to presume that the grievant had adequate knowledge of OP 310.2.[23] The hearing

[18] Va. Code §§ 2.2-1202.1(2), (3), (5).
[19] *See Grievance Procedure Manual* § 6.4(3).
[20] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[21] *See* EDR Ruling No. 2020-4965, at 6-9.
[22] *See Grievance Procedure Manual* § 7.2(c) ("Administrative review decisions are final and nonappealable."). The agency points to evidence that it provided the grievant "with ample training, opportunities, and experience for him to become fully aware of the expectations and requirements governing policy and computer usage." However, it is not apparent from the record whether the agency's training or practices specified a categorical prohibition on inmate use of internet-connected computers, including for supervised clerking duties. In addition, because the hearing officer appears to have concluded that the policies at issue did not elucidate the grievant's responsibilities, EDR declines to disturb the reconsideration decision based on the agency's argument that the grievant failed to read the relevant policies. *See* Reconsideration Decision at 2.
[23] Applying EDR's prior ruling, the reconsideration decision found that OP 310.2 "appears targeted to information technology specialists and not Grievant," "is unclear as to who is responsible for preventing violations," and "is

officer's consideration of the grievant's lack of notice as a potentially mitigating factor was supported by record evidence.

As a result, the remaining issues meriting discussion in this second administrative review are whether the record supports the hearing officer's determinations, upon reconsideration, that (1) the Computer Misuse Policy must be reversed due to mitigating circumstances, and (2) the Fraternization Written Notice does not independently support removal.

Mitigation

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[24] The *Rules for Conducting Grievance Hearings* ("*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."[25] 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.[26]

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.[27] Where the hearing officer sustains the charges but finds that mitigation is warranted, he or she may reduce the penalty to the maximum reasonable level sustainable under law and policy.[28] EDR, in turn, reviews a hearing officer's mitigation determination for abuse of discretion[29] and will reverse the determination only for clear error.

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contradicted by other policy provisions that do contemplate offender Internet usage, especially in a supervised work context." Reconsideration Decision at 2.

[24] Va. Code § 2.2-3005(C)(6).

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

[26] *Id.* § VI(B).

[27] 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).

[28] *See* Lachance v. Devall, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

[29] "'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.*

As relevant to the hearing officer's consideration of mitigating and aggravating factors, his initial decision included the following findings of fact:

- The record contained no evidence of prior active disciplinary action against the grievant.
- The grievant's training on OP 310.2 was "not in-depth," and he "rarely had the opportunity to study the policy given the Facility's severe understaffing."[30]
- When the inmate was using the grievant's computer, he had access to everything the grievant could access, including the internet and the agency's VACORIS network.[31]
- The grievant "typically watched the Inmate" and "stood beside the Inmate or was within close proximity to the Inmate" when the inmate was using the grievant's computer. However, "[o]n 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."[32]
- The inmate used an email account to view pornography "when Grievant was distracted from the computer."[33]
- The inmate "printed the pornographic images and kept them in his cell."[34]

Based on these facts, the original hearing decision concluded that if the grievant "had received adequate training on the policy, he would have complied with the policy."[35] On remand, in addition to the notice considerations already addressed, the hearing officer further found that the grievant "attempted to limit the Inmate's access to the Internet but was distracted by his other duties."[36] He also concluded that the likelihood of future violation was low, noting that the grievant's supervisor had not taken opportunities to correct the grievant's behavior, and the grievant's work performance had previously been satisfactory.[37] Finally, the hearing officer concluded that the effects of the grievant's conduct on the agency were "not so significant as to prohibit reinstatement."[38]

The hearing officer's consideration of specific mitigating and aggravating circumstances complies with EDR's instructions on remand and is supported by facts in the record. As addressed in EDR's prior ruling, the grievant testified that he sometimes was responsible for the duties of three positions at once, which burdened his time and attention.[39] He also testified that he almost always watched the inmate, though he occasionally would have to leave his office to respond to urgent matters that he felt took priority.[40] In written statements to the agency, the grievant claimed that he "would look back regularly" when he had to step away.[41]

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[30] Hearing Decision at 2.
[31] *Id.*
[32] *Id.* at 3.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 7.
[36] Reconsideration Decision at 2.
[37] *Id.*at 2-3.
[38] *Id.*at 3.
[39] Hearing Recording Pt. I at 2:01:05-2:01:40, 2:22:50-2:23:55 (Grievant's testimony).
[40] *Id.* at 2:12:23-2:13:55 (Grievant's testimony).
[41] Agency Ex. 8, at 1. In the grievant's initial report to the agency, he stated that he left his office for a discussion with his supervisor and instructed the inmate to exit with him, but the grievant later learned that the inmate had returned to use the grievant's computer during the discussion. *See* Grievant's Ex. 2.

The agency contends that the hearing officer "failed to account for aggravating circumstances," citing the pornographic images the inmate was able to print from the grievant's computer.[42] The agency also cites the inmate's "access" to records pertaining to other inmates and to agency employees, as well as to outside sources online.[43] The hearing officer's findings of fact expressly reference these considerations. However, he did not find that the inmate in fact viewed the personal information of any specific inmates or employees. And while the agency has clear interests in preventing access to pornography from state computers, the evidence in the record does not speak to how the material printed in this case may have disrupted or threatened the agency's operations.[44] Thus, EDR finds nothing to suggest that the hearing officer's consideration of mitigating and aggravating factors was in any way unreasonable or not based on the actual evidence in the record.

In addition, EDR cannot find that the hearing officer clearly erred in determining that, considering all the facts and circumstances surrounding the Computer Misuse Written Notice, formal discipline would not have been reasonable at any level. To the extent that the agency's discipline was based on rules of which the grievant lacked adequate notice, such discipline would not be more reasonable at a the level of a Group I or II than at a Group III. Even if the grievant arguably was on notice that he must supervise the inmate's work, neither hearing decision indicated that the Computer Misuse Written Notice could potentially be sustained on that basis. To the contrary, the hearing officer found as a factual matter that the grievant "typically" or "usually" watched the inmate on the computer at close proximity,[45] but at times "was forced to leave his office to attend to urgent matters"[46] presented by "his other duties."[47] At such times, the hearing officer found, the grievant "would regularly look back at the Inmate to ensure he was performing his duties properly."[48] These findings of fact, supported by the grievant's largely undisputed testimony, are not consistent with formal discipline related to supervision; thus, EDR cannot say that the hearing officer should have determined such discipline to be reasonable. While the agency may reasonably disagree with the hearing officer's conclusions on this issue, 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.[49]

Accordingly, EDR declines to disturb the hearing officer's reversal of the Computer Misuse Written Notice due to mitigating circumstances.

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[42] Request for Administrative Review at 5.
[43] *Id.*
[44] When asked about how the inmate's computer misuse affected the agency, the warden was unable to describe any particular negative consequences of the alleged misconduct. Hearing Recording Pt. II at 42:40-43:48 (Warden's testimony).
[45] Hearing Decision at 3.
[46] *Id.*
[47] Reconsideration Decision at 2.
[48] Hearing Decision at 3.
[49] *See, e.g.*, EDR Ruling No. 2014-3884.

Fraternization Written Notice

Like the original hearing decision, the reconsideration decision upheld the Fraternization Written Notice as a Group III offense.[50] However, the hearing officer reasoned that the agency failed to carry its "burden of proof to show that the Group III Written Notice for fraternization was intended to remove Grievant from employment."[51] Because the Fraternization Written Notice "did not indicate Grievant would be removed" despite being issued as a Group III, the hearing officer "infer[red] that the Agency did not intend for Grievant to be removed by the Group III Written Notice for fraternization."[52]

However, neither the grievance procedure nor any other DHRM policy imposes the heightened burden of proof the hearing officer appears to have applied to the agency in this regard. In hearings on formal discipline, the grievance procedure requires an agency to prove by a preponderance of the evidence that the grievant engaged in the behavior alleged on the written notice, that the behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. Here, the hearing officer concluded that the grievant engaged in the conduct alleged on the Fraternization Written Notice and that this conduct constituted misconduct consistent with a Group III Written Notice. DHRM Policy 1.60, *Standards of Conduct*, provides that a Group III Written Notice generally should result in termination – the discipline imposed in this case.[53] Where a Group III Written Notice has been sustained and the agency has removed the grievant from employment, an agency cannot be required to offer additional proof of intent to terminate.

To support his inference that termination was not the agency's intent, the hearing officer appears to rely solely on the advisory language in the agency's due process notice ("Termination possible, however will seek to demote and transfer as an option").[54] However, the probative value of this language is negated, or at least rendered moot, by the agency's ultimate decision to terminate. While the grievant points to the warden's hearing testimony to the effect that he did not intend to dismiss the grievant on the basis of the Fraternization Written Notice alone, the reconsideration decision makes no mention of this testimony. 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. Here, the reconsideration decision gives no suggestion of the weight, if any, assigned to the warden's testimony on this point. Thus, where the agency has (1) proven the basis for its Group III Written Notice and (2) demonstrated an intent to terminate the grievant's employment (by actually doing so) and maintained this intent in its request for administrative review,[55] EDR cannot independently accept the warden's testimony as credible evidence that the agency's filing is incorrect and that, in fact, it intended to depart from the usual penalty for a Group III Written Notice.

Because the hearing officer sustained the Fraternization Written Notice at the Group III level and identified no factual basis to depart from the agency's decision to dismiss the grievant

[50] Reconsideration Decision at 4.
[51] *Id.*
[52] *Id.* at 5.
[53] DHRM Policy 1.60, *Standards of Conduct*, at 9.
[54] *Id.* at 4 (citing Grievant's Ex. 6).
[55] Agency's Request for Administrative Review at 4.

from employment, consistent with the standard penalty for such an offense, EDR must remand the reconsideration decision with instructions for the hearing officer to issue an order upholding the grievant's termination.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer with instructions to issue a second reconsideration decision upholding the agency's termination of the grievant's employment. 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 or first reconsideration decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[56] 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.[57] 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.[58] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[59]

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