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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5040
January 30, 2020

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 11426. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11426, as found by the hearing officer, are as follows:[2]

> The Department of Corrections ["the agency"] employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency on September 10, 2010. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Department prohibits employees from bringing tobacco products into the Facility because inmates gaining access to tobacco products can use them as a substitute for money.
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> On July 11, 2019, Grievant was in uniform reporting to work at the Facility. He had two cans of smokeless tobacco. One can was full and the other one was empty or almost empty. He had $167.00. Grievant entered the security check point. The security officer patted down Grievant but failed to require him to empty the contents of his uniform pockets into a separate container. Grievant passed through the security checkpoint with the tobacco and money.

[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. 11426 ("Hearing Decision"), December 27, 2019 at 2-3.

> Grievant went to the shift briefing room where several employees were waiting to go to their posts once the outgoing shift had ended. Some employees left the briefing room to assist with count. This was a common practice. Grievant and the other employees on his shift not involved in count remained in the briefing room.
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> Grievant was standing next to the door connecting the briefing room to the rest of the Facility. He stood there for several minutes. Two K9 officers and their drug detection dog entered the briefing room through a door on the other side of the room. Grievant saw the dog and reacted immediately. He moved from the left side of the door to standing in front of the doorway facing as if he were leaving the room. He hesitated and then turned so that his back was against the right side of the doorway. After a few seconds, he moved to his right to pass through the doorway and into a hallway. He continued walking to his post.
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> Other employees remained in the room once the dog entered. They stood as the dog passed each one to determine whether an employee was in possession of illegal drugs.
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> The Lieutenant observed Grievant leaving the briefing room. The Lieutenant became concerned. Two corrections sergeants relieved Grievant of his post and he was taken to a conference room. Grievant agreed to be scanned by the dog. The drug detection dog alerted to Grievant even though he was not in possession of any narcotics. Grievant was subjected to a search and the tobacco and money were found in his possession.

On August 9, 2019, citing its Operating Procedures 445.1, *Employee, Visitor and Offender Searches*, and 135.1, *Standards of Conduct*, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for "introducing contraband, specifically two cans of smokeless tobacco and $167.00 in cash."[3] The grievant timely grieved his termination, and a hearing was held on December 13, 2019.[4] In a decision dated December 27, 2019, the hearing officer determined that the agency's disciplinary action must be upheld.[5] The hearing officer also found no mitigating circumstances meriting reduction of the disciplinary action.[6]

The grievant has appealed 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 . . .

[3] Hearing Decision at 1; Agency Ex. 1.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 4.
[6] *Id.* at 4-5.

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.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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.

In his request for administrative review, the grievant appears to argue that the hearing officer failed to properly consider certain evidence in mitigation, namely RapidEye video showing several officers leaving the briefing room prior to the K9 inspection and examples of other employees who introduced contraband to their facilities and were not separated.[14] 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

[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).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] *See* Request for Administrative Review at 1-2.
[15] Va. Code § 2.2-3005(C)(6).
[16] *Rules for Conducting Grievance Hearings* § VI(A).

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] 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."[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 found that the grievant "went to the shift briefing room where several employees were waiting to go to their posts once the outgoing shift had ended. Some employees left the briefing room to assist with count. This was common practice."[21] As to the grievant, however, the hearing officer determined that he left the briefing room only after K9 officers and their drug-detection dog entered; the grievant "saw the dog and reacted immediately" by leaving the room.[22] The hearing officer noted that "[o]ther employees remained in the room once the dog entered."[23] He concluded that the grievant's reaction to the dog as apparent on video "is consistent with someone who knew he was in possession of contraband and wished to avoid being revealed."[24] The hearing officer's conclusions in this regard are based on evidence in the record.[25] The grievant appears to argue that many other officers ("more than eight"[26] according to the grievant) left the briefing room prior to the K9 inspection; thus, it was

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[17] *Id.* § VI(B)(2). "The grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the 'exceeds the limits of reasonableness' standard." *Id.*

[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 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] Hearing Decision at 2.

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.* at 4.

[25] *See* Agency Ex. 7; Hearing Recording at 25:50-27:01 (Investigator's testimony), 1:43:50-1:45:05 (Assistant Warden's testimony).

[26] Request for Administrative Review at 1.

inconsistent and/or unfair to search only the grievant.[27] However, the agency offered its reasoning for searching the grievant in particular: his abrupt departure seemed to be a reaction to seeing the K9 dog.[28] The findings of fact in the hearing decision indicate that the hearing officer found this explanation credible and reasonable. 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] Thus, EDR perceives no error in the scope of the video evidence considered by the hearing officer, as it is not apparent what bearing additional video would have on the hearing officer's mitigation analysis.

The grievant additionally argues that the disciplinary action should have been mitigated because other agency employees who brought tobacco into their facilities received less severe disciplinary actions.[30] To support this argument at the hearing, the grievant offered text messages to the effect that another employee at his facility was given only a written counseling about having tobacco; also, an employee at a different facility was given a Group I Written Notice approximately five years ago.[31] The hearing officer concluded that the evidence did not show that these employees were sufficiently similarly situated to the grievant to establish inconsistent discipline as a mitigating factor.[32]

This conclusion is supported by the record. As the hearing officer reasoned, the employee at the grievant's own facility claimed he simply forgot to remove cigarettes from his pockets; agency management apparently found that employee's account credible, whereas the Assistant Warden testified that he did not believe the grievant had forgotten he had two cans of tobacco and a substantial amount of cash on his person.[33] While the grievant may disagree with the agency's judgment, EDR cannot say that the hearing officer clearly erred in accepting the agency's perceptions of employees' credibility. As to the employee at another facility, even assuming that such employees could be similarly situated, the hearing officer noted evidence distinguishing the other employee's situation from the grievant's offense.[34] In light of the high mitigation standard and the grievant's burden to meet it, EDR perceives no error in the hearing officer's conclusion that the agency's discipline did not exceed the bounds of reasonableness.

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[27] *Id.*
[28] Hearing Recording at 1:43:50-1:45:05 (Assistant Warden's testimony).
[29] *See, e.g.*, EDR Ruling No. 2020-4976.
[30] *See* Request for Administrative Review at 1-2.
[31] Grievant's Ex. 2, at 1-2, 5.
[32] Hearing Decision at 5.
[33] Hearing Recording at 1:41:10-1:43:40 (Assistant Warden's testimony).
[34] The hearing decision quoted the other employee's texts, which asserted that the five-year-old offense was "signed off on by a warden that's retired" and that the warden "owed me a pretty big favor on some sh–t that happened that I fixed too." Grievant's Ex. 2, at 2. To the extent that the hearing officer concluded that these assertions called into question this employee's comparison to the grievant, EDR discerns no clear error. *See* Hearing Decision at 5.

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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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