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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2020-5052
March 3, 2020

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)¹ administratively review the hearing officer’s decision in Case Number 11447. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11447, as found by the hearing officer, are as follows:²

The Virginia Department of Transportation [the “agency”] employs Grievant as an Operations Program Manager at one of its locations. Grievant has been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility had cameras recording the events at the Facility. The recording system retained video images for 30 days on a computer system within the Agency. If an employee wanted to search the video, the employee could access the recording and view it on a monitor at the Facility. If the employee wanted to search video older than 30 days, the Agency had to obtain the prior video from the Contractor who monitored the video system and then provide it to the employee wanting to conduct the search.

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. 11447 (“Hearing Decision”), February 6, 2020, at 2-4 (internal citations omitted).

Facility supervisors had aimed the camera views towards employees to monitor their behavior. This led to numerous complaints by employees and numerous investigations of employees.

The Manager began working for the Agency in August 2018. He was concerned about the employee culture at the Facility. He wanted to change the aim of the cameras away from employees and to entry/exit ways. He wanted to limit who had access to view prior recordings.

The Manager contacted the Contractor and asked the Contractor to change the access profiles of staff so that only the Manager and the Systems Engineer had access to video playback. The Contractor altered the access profiles of employees at the Facility (other than the Manager and Systems Engineer) to remove their authority to access video history. The Contractor, however, failed to remove access to video history from a control station. Thus, an employee using the control station monitor could view video history even though the employee may not have a separate authority to view video history. The Manager was not aware that the Contractor had not removed access to video history through the control station monitors.

On August 20, 2018, the Manager sent employees including Grievant an email stating, in part:

I had a chance to review the [location] security camera setup this past week at both [locations.] I see the purpose of those cameras to be twofold. First and foremost, for our staff to maintain a heightened level of Security Awareness in and around the crucial infrastructure at the tunnels. Second, the cameras can aid in piecing together facts after a significant event and allow subject matter experts to pick out crucial lessons learned.

After reviewing our current [location] security camera setup, I have decided to make the following changes. All video feed workstations that currently have LIVE video feed will continue to display that feed. No changes there. As stated above, I want to keep that heightened level of security awareness. The search function, however, that enables an individual to go back in time and record and/or view video will be deactivated for most. We have far too many personnel with that access. I view this feature as very sensitive and therefore only a select few will have access, much like access to black box following an aircraft mishap is restricted.

Camera positioning will also be reviewed and adjusted for peak security awareness. I noticed several camera position angles that were not optimum to monitor doorways and access to sensitive equipment, etc.

Lastly, all requests for video searches, recording and changes to the [location] security setup will need to go through me as the Facility Manager.

[Systems Engineer] will work with [Contractor] in the coming days to make the modifications to the workstations and the camera positions. Please accommodate that team as they come through.

Grievant was aware of the Manager's instruction. He complied with the instruction on September 17, 2018 by asking for permission to view video history to determine how an Agency van was damaged.

On March 27, 2019, Mr. D was supposed to be in training with other staff. Grievant entered the training session location and noticed that Mr. D was not present. Later in the shift, Mr. D reported to the training. Grievant asked Mr. K to inform Mr. D to stop by Grievant's office to explain why he was late and why he had not obtained permission to take leave. Mr. K sent Mr. D an email asking Mr. D to "Please touch base with me or [Grievant] before you leave today." Later in the day, Mr. K informed Grievant that Mr. D had left for the day and was not responding to cell phone calls.

Grievant wanted to confirm the time Mr. D reported to the training. Grievant and Mr. K used gate access information to determine that Mr. D arrived at the Facility at 12:26 p.m. Grievant wanted to confirm this time, so he and Mr. K accessed the control station video recording. They looked at the video history to confirm the time Mr. K arrived at the Facility. Mr. K wrote a report about Mr. D and indicated Mr. D's action had been confirmed by "camera data." The Manager reviewed the report and became concerned Grievant had violated his instruction to obtain permission to view video history.

On July 30, 2019, the grievant was issued a Group I Written Notice for failure to follow instructions.³ The grievant timely grieved the disciplinary action and a hearing was held on February 3, 2020.⁴ In a decision dated February 6, 2020, the hearing officer determined that the agency had presented sufficient evidence to support the issuance of the Group I Written Notice because the grievant "knew he was to obtain permission from the Manager before viewing video history" and "failed to do so . . . thereby acting contrary to the Manager's request."⁵ The hearing officer also found no mitigating circumstances warranting reduction of the discipline.⁶ 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

³ *Id.* at 1; Agency Ex. 1, at 1.

⁴ *See* Hearing Decision at 1.

⁵ *Id.* at 5. The hearing officer noted that failure to follow a supervisor's instructions is normally a Group II offense, but the "[t]he Agency reduced the disciplinary action to a Group I Written Notice." *Id.*

⁶ *Id.* at 5-6.

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 either 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 his request for administrative review, the grievant essentially challenges the hearing officer’s decision not to mitigate the Written Notice. More specifically, the grievant contends that three other agency employees engaged in similar misconduct by reviewing camera footage without the Manager’s approval and either were not disciplined or were disciplined less harshly.¹⁰ The grievant also argues that the hearing officer should have mitigated the disciplinary action because he determined that there was “evidence that the Manager engaged in an improper motive when issuing [the] disciplinary action.”¹¹

Under 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].”¹² The *Rules for Conducting Grievance Hearings* (the “*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.”¹³ 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.¹⁴

Thus, the issue of mitigation is only reached if the hearing officer 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.

Importantly, because reasonable persons may disagree over whether or 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 a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management’s discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Request for Administrative Review at 2-3.

¹¹ Hearing Decision at 5; Request for Administrative Review at 3.

¹² Va. Code § 2.2-3005(C)(6).

¹³ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁴ *Id.* § VI(B)(1).

totally unwarranted.¹⁵ EDR will review a hearing officer's mitigation determination for abuse of discretion,¹⁶ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Inconsistent Discipline

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.¹⁷ While the hearing officer did not specifically discuss evidence presented at the hearing about similarly situated employees, he did find that "no mitigating circumstances exist[ed] to reduce the disciplinary action."¹⁸

At the hearing, several witnesses testified about their knowledge of other employees who had allegedly reviewed video footage without approval in violation of the Manager's instruction. The Manager himself explained that two other employees were disciplined for accessing camera recordings. The first comparator was a probationary employee, received a probationary evaluation about the incident from the Manager, and later resigned.¹⁹ According to the Manager, the second comparator received a Group I Written Notice that was mitigated to a formal counseling.²⁰ The Manager noted that the second comparator reported to the grievant, was present during the incident for which the grievant was disciplined, engaged in the behavior at the direction of his supervisor (*i.e.*, the grievant), and later acknowledged that his conduct was improper.²¹ While the grievant argues that a third comparator also reviewed camera footage and did not receive corrective action, that employee's testimony at the hearing indicates that he was present when the first comparator accessed the video recordings, but denied participating in the behavior himself.²² Most importantly, the Manager testified that the third comparator was not disciplined because he did not have notice of the policy that approval was required before reviewing video recordings.²³

To the extent this evidence was not specifically addressed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to particular testimony and/or other evidence does not necessarily constitute a basis for remand in this case. In

¹⁵ The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).

¹⁶ "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.*

¹⁷ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

¹⁸ Hearing Decision at 6.

¹⁹ Hearing Recording at 49:54-52:06 (Manager's testimony). A human resources manager testified that she was aware of the incident with the first comparator, and that the matter would have resulted in termination if it had progressed and he had not resigned. *Id.* at 2:16:07-2:17:23 (human resource manager's testimony).

²⁰ *Id.* at 52:07-52:33 (Manager's testimony).

²¹ *Id.* at 52:33-53:25 (Manager's testimony).

²² *Id.* at 1:58:45-2:01:08 (third comparator's testimony).

²³ *Id.* at 1:14:59-1:15:57 (Manager's testimony).

addition, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. Here, it would appear that the hearing officer did not address the evidence presented about the three comparator employees because he did not find it credible and/or persuasive on the issue of whether the agency had disciplined the grievant more harshly than other similarly situated employees. Indeed, EDR's review of the hearing record indicates that the evidence is insufficient to demonstrate that the three comparators were similarly situated to the grievant. The first comparator was a probationary employee at the time he accessed the camera footage and later resigned from the agency. The second comparator reported to the grievant, was present with the grievant during the incident on March 27, 2019, and participated in their review of camera footage at the grievant's direction. The third comparator was not aware of the policy that the Manager's approval was required to access video recordings. Under these circumstances, EDR finds that the three comparator employees were not similarly situated to the grievant, with the result that mitigation on that basis was not warranted here.

Improper Motive

The grievant further argues that the hearing officer's determination that "the Manager engaged in an improper motive when issuing [the] disciplinary action"²⁴ supports a conclusion that the Written Notice exceeded the limits of reasonableness in this case, and thus it should have been mitigated.²⁵ In the hearing decision, the hearing officer discussed the Manager's original allegation that the grievant "a[cc]essed the security system through the local security workstation via a technical 'back door.'"²⁶ The hearing officer found that the "Grievant did not access a 'back door' to view the video history and there [was] no reason to believe Grievant knowingly refrained from disclosing the ability to access video history on the control room workstations."²⁷ While the hearing officer concluded that "the Manager's original statements raise[d] concern about the Manager's motive,"²⁸ he noted that the agency mitigated the discipline to a Group I Written Notice when it could have addressed the grievant's misconduct—failure to follow a supervisor's instructions—as a Group II offense.²⁹ The hearing officer further acknowledged that other agency managers had considered the grievant's allegations about the Manager's motive during the management steps and found that the disciplinary action was warranted and appropriate.³⁰ In other words, the hearing officer determined that the grievant had engaged in misconduct that justified the issuance of a Group I Written Notice regardless of any initial motive or misunderstanding by the Manager.

The hearing officer has the sole authority to weigh the evidence, determine credibility, and make factual findings when the evidence presented conflicts or is subject to varying interpretations. In this case, the hearing officer determined that the grievant had engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy.³¹ While the hearing officer also found that the grievant had presented evidence to establish some level of improper motive, the basis for this determination is

²⁴ Hearing Decision at 5.

²⁵ Request for Administrative Review at 3.

²⁶ Agency Ex. 1, at 6; *see* Hearing Decision at 5.

²⁷ Hearing Decision at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

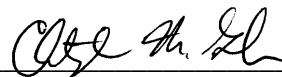
³¹ *See id.* at 5. The grievant has not challenged the hearing officer's findings about these matters.

unclear. EDR has not identified any evidence in the record to show that the Manager's decision to discipline the grievant was based on a discriminatory, retaliatory, or otherwise unlawful motive. Indeed, the hearing officer did not make such a conclusion. The hearing officer instead found that the Manager initially alleged the grievant had improperly accessed or manipulated the agency's computer system to access the recording system, and that the evidence actually showed the "Manager blamed Grievant for the Contractor's mistake" of "fail[ing] to implement the Manager's instruction" to restrict employees' access to camera footage.³² To the extent the Manager's allegation about the method the grievant used to review the video recording was inaccurate, such a finding would not, by itself, support a conclusion that mitigation was warranted based on an improper (*i.e.*, unlawful) motive. Accordingly, EDR finds that the evidence in the record about the Manager's alleged improper motive does not demonstrate that the discipline exceeded the limits of reasonableness in this case.

In conclusion, there is nothing to indicate that the hearing officer's mitigation analysis was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion here. 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.'"³³ In this case, there does not appear to have been sufficient evidence in the record regarding either inconsistent discipline of similarly situated comparator employees or the Manager's alleged improper motive that the hearing officer may have relied upon to support mitigation. Accordingly, EDR cannot conclude that his mitigation analysis was flawed in these respects and declines to disturb the decision.

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.³⁴ 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.³⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁶



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³² Hearing Decision at 5.

³³ EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

³⁴ *Grievance Procedure Manual* § 7.2(d).

³⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁶ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).