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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5107
June 25, 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 11514. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11514, as found by the hearing officer, are as follows:²

1. The Grievant is employed by the Agency as a Corrections Officer (“C/O”) in a state prison facility (the “Facility”).
2. Accordingly, civility in the workplace, appropriate behavior, orderly conduct and discipline by staff are critical.
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4. On November 20, 2019 at approximately 10:00 p.m., the Grievant on his break met another female correctional officer (“S”) employed at the Facility (who was off duty at the time) in the vicinity of the unoccupied assigned Warden’s house which is on Facility property in a secluded area, consisting of about ½ an acre.
5. The Grievant of course was in uniform as he was working while “S” was in plain clothes.

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. 11514 (“Hearing Decision”), March 14, 2020, at 2-4.

6. The Grievant's wife (the "Wife") somehow found out that the Grievant was meeting with "S" and arrived at the location to confront "S" and the Grievant.
7. The Wife discovered the Grievant and "S" sitting in "S's" car with the car lights off. A scuffle and physical aggression and/or violence between each of "S", the Grievant and the Wife ensued. The Wife's dress was ripped and a car ran over the Grievant's foot.
8. The Wife was also employed by the Facility but like "S" was off duty and in plain clothes at the time of the incident.
9. The Grievant has an active Group II Written Notice for Workplace Violence which was issued on September 3, 2019 and expires on September 3, 2022.
10. In violation of applicable policy, the Grievant admits to smoking while with "S", admits that he met with "S" in a dark secluded area on Facility premises, admits that he grabbed the Wife and pulled the Wife out of the car in which he was meeting with "S", etc.
11. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

On March 5, 2020, the grievant was issued a Group III Written Notice with termination for violating DHRM Policy 2.35, *Civility in the Workplace*, and agency Operating Procedures 135.5, *Workplace Violence*, and 320.6, *Tobacco Products and Smoking*.³ The grievant timely grieved the disciplinary action and a hearing was held on May 1, 2020.⁴ In a decision dated May 14, 2020, the hearing officer determined that the "Grievant's conduct on November 20, 2019 could clearly constitute a Group III offense as asserted by the Agency," and thus the "Agency's action concerning the grievant is upheld."⁵ The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary action.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 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

³ Agency Ex. 1; *see* Hearing Decision at 1.

⁴ *See* Hearing Decision at 1. As a result of the Commonwealth's state of emergency due to the COVID-19 pandemic, all parties agreed to attend the hearing remotely.

⁵ *Id.* at 5, 9.

⁶ *Id.* at 6-8.

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

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

decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. 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 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.

In the hearing decision, the hearing officer made the following factual findings about the grievant's behavior:

The Wife discovered the Grievant and "S" sitting in "S's" car with the car lights off. A scuffle and physical aggression and/or violence between each of "S", the Grievant and the Wife ensued. The Wife's dress was ripped and a car ran over the Grievant's foot.

....

In violation of applicable policy, the Grievant admits . . . that he met "S" in a dark secluded area on Facility premises[and] admits that he grabbed the Wife and pulled the Wife out of the car in which he was meeting with "S" . . .¹⁴

In his request for administrative review, the grievant contends that he was "not violent at all" and that there is "no physical evidence" to show that he engaged in workplace violence.

EDR has thoroughly reviewed the hearing record and found evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and

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 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 Hearing Decision at 4.

policy. According to the agency's Operating Procedure ("OP") 135.5, *Workplace Violence*, "[p]rohibited conduct includes, but is not limited to . . . [i]njuring another person physically[and e]ngaging in behavior that creates a reasonable fear of injury to another person."¹⁵ Testimony from multiple witnesses at the hearing was consistent with the hearing officer's description of the grievant's conduct. For example, Sergeant B testified that, though the grievant was cooperative when he and Sergeant C arrived at the scene of the incident, the argument between the grievant and his wife was physical.¹⁶ Likewise, Sergeant C testified that he had to "physically separate" the grievant and his wife in order to prevent the situation from "getting out of control."¹⁷ The Warden explained that, in his judgment, the grievant's behavior "create[d] a reasonable fear of injury to another person" in violation of OP 135.5,¹⁸ and further noted that acts of physical violence or fighting are Group III offenses pursuant to OP 135.1, *Standards of Conduct*.¹⁹

The grievant does not contest that the altercation with his wife involved physical contact, but there is some evidence that he was attempting to defuse the situation. At the hearing, for instance, the grievant testified that he pulled his wife out of the car by her waist and grabbed her arms in order to prevent her from striking "S" and damaging "S's" vehicle.²⁰ The grievant also provided the agency with a written statement explaining that he was "trying to break [his wife and "S"] apart."²¹ Nonetheless, it is within the hearing officer's sole authority to determine the significance of the context in which the grievant acted. 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. 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.²²

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. 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 hearing decision on this basis.

¹⁵ Agency Ex. 4, at 28. The Written Notice charged the grievant with violating multiple agency policies; in his request for administrative review, the grievant only appears to contest the workplace violence charge. *See* Agency Ex. 1.

¹⁶ Hearing Recording at 45:29-46:06 (Sergeant B's testimony) (grievant's wife "got her hands on him" and "he pushed her away from him").

¹⁷ *Id.* at 29:30-30:15 (Sergeant C's testimony).

¹⁸ *Id.* at 1:33:04-1:33:39 (warden's testimony).

¹⁹ *Id.* at 1:35:10-1:35:44 (warden's testimony); *see* Agency Ex. 3, at 21.

²⁰ Hearing Recording at 2:39:15-2:39:40, 2:41:40-2:41:56 (agency's cross-examination of grievant).

²¹ Agency Ex. 10, at 45.

²² *See, e.g.*, EDR Ruling No. 2014-3884.

Mitigation

The grievant also appears to assert that the hearing officer erred by not mitigating the Written Notice or his termination. Specifically, the grievant argues that, prior to the incident, he spoke with his supervisor about his stressful relationship with his wife and his feeling that he was not receiving support from the agency. 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 the rules established by [EDR].”²³ The *Rules for Conducting Grievance Hearings* (the “*Rules*”) provide that “a hearing officer is not a ‘super-personnel officer’” and that “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.”²⁴ 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.²⁵

Thus, the issue of mitigation is only reached by a hearing officer if he or she 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 totally unwarranted.²⁶ EDR will review a hearing officer’s mitigation determination for abuse of discretion,²⁷ and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard. Furthermore, and especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.²⁸ It is the extremely rare case that would warrant

²³ Va. Code § 2.2-3005(C)(6).

²⁴ *Rules for Conducting Grievance Hearings* § VI(A).

²⁵ *Id.* § VI(B).

²⁶ 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).

²⁷ “‘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.*

²⁸ Comparable case law from the Merit Systems Protection Board provides that “whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative” Lewis v. Dep’t of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.²⁹

In this instance, the hearing officer acknowledged and considered four mitigating factors in his analysis:

1. the Grievant's years of service to the Agency;
2. the often difficult and stressful circumstances of the Grievant's personal work environment;
3. the separation from his Wife; and
4. the Wife initiating the confrontation.³⁰

The hearing officer concluded that those factors could not reasonably justify mitigating the disciplinary action taken by the agency.³¹ 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.'"³² Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's 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.³³ 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.³⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁵



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²⁹ The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." *Parker v. Dep't of the Navy*, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see Berkey v. U.S. Postal Serv.*, 38 M.S.P.R. 55, 59 (1988) (citations omitted).

³⁰ Hearing Decision at 6-8.

³¹ Additionally, the hearing officer noted that the grievant previously received a Group II Written Notice for workplace violence, *id.* at 7, which could reasonably be considered as an aggravating factor here.

³² EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

³³ *Grievance Procedure Manual* § 7.2(d).

³⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁵ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).