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 Department of Motor Vehicles
Ruling Number 2021-5238
May 12, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11603. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11603, as found by the hearing officer, are as follows:[1]

> . . . Grievant was an Assistant Manager at a Northern Virginia Customer Service Center (CSC). Grievant had 15 years of service with the DMV.
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> The CSC Assistant Manager organizational objectives are to assist the manager to hire, train, mentor, and guide CSC staff members to serve customers in a timely manner, comply with all state, federal, and Motor Vehicle Code of Virginia, rules, policies, and procedures, and ensure effective delivery of customer service operations.
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> Assistant Manager positions "are assigned to small, medium, and larger CSC's to supervise CSC staff, and for managing the customer service center functions (facilities, staff, services, safety, security, assets, information, and finances) in accordance with statutory and agency administrative rules, regulations, and procedures. CSC's also "assumes the duties and responsibilities of the CSC Manager in his/her absence."
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> Grievant's duties include interpreting and effectively explaining "statutory requirements and existing or new\revised operational policies and procedure to CSC staff... Ensure documents are verified and transactions are processed accurately in accordance with agency policies/procedures... and" [m]onitor

[1] Decision of Hearing Officer, Case No. 11603 ("Hearing Decision"), March 10, 2021, at 3-6 (citations omitted).

customer service and staff compliance when processing transactions in accordance with policies [and] procedures[.]

The Assistant Manager position held by Grievant was an important and integral leadership position to effectively manage the CSC. As such, it was reasonable for upper DMV management to expect Grievant to lead by example and follow all relevant DMV policies and procedures.

Grievant had a prior record of failing to follow DMV policies. On January 21, 2020, Grievant was issued a Group I Written Notice with a 5-day suspension for failure to follow policy by changing the sales price and placing an administrative stop on the customer's vehicle account. That same day Grievant was issued a counseling memorandum for failing to report to upper management that the CSC was not following DMV policy regarding odometer readings. The memo reminded Grievant that "As a leader it is your responsibility to ensure compliance with policies and procedures at all times[."]

Significantly, the CSC manager who was aware of the practice and failed to stop it or report it to upper management received a more severe penalty, Group II Written Notice with suspension.

Less than two months later, Grievant failed to follow DMV policy again which, after investigation and an opportunity to give her explanation to the charges made against her, led to Grievant's termination.

On March 2, 2020, a customer came into the CSC seeking a 30-day extension to renew their vehicle registration that had expired on February 29, 2020. Because the customer's tags had expired policy prohibited the extension. Grievant's subordinate, a Customer Service Representative (CSR) at the service counter correctly explained the policy to the customer and correctly advised the customer that she could get three-day trip permit to complete needed emissions work on the vehicle. The customer insisted on speaking to a manager and Grievant became involved.

After speaking with the customer, Grievant ordered the CSR subordinate to ignore the policy, issue new plates, cancel the old tags, and issue an original registration for 30 days. In other words, fool the DMV system to make it appear that the customer had just purchased the vehicle and needed tags.

The CSR was so dismayed by the transaction, that she reported it to the manager of the CSC who in turn took it up to upper management.

The incident was investigated and grievant was interviewed. Grievant responded to management's inquiry "I understand the accusation to be that I encouraged a customer to exploit a policy loophole; I merely confirmed their eligibility for services." This explanation was false.

Grievant clarified that she did not remember the customer and yet opined that the customer was most likely elderly or disabled and that she exercised her discretion in approving the transaction to avoid having the customer return to the CSC during the covid pandemic.

The DMV remained open for business as the Governor on March 2, 2020, and the DMV Commissioner on March 3, 2020 issued guidelines for state employees to continue serving the public safely. DMV Offices were not shut down because of the covid pandemic until on or around March 18, 2021. Grievant's explanation that she approved the policy end run to protect the customer from exposure to covid is false.

In July 2020, LS who was investigating the charges, contacted the customer to determine whether the customer came to the CSC to turn in her tags to get a new registration or whether Grievant decided the pathway to circumvent the policy. The customer told LS that Grievant informed her that she could get the extension she wanted by turning in her tags and requesting new tags as if she had just purchased the vehicle.

Grievant denied that she informed the customer of the way to circumvent the policy. She told LS, the manager that was investigating the charge that "I have no idea how the customer knew" of the work-around. Grievant's denial was demonstrably false and evasive, and she knew it.

LS testified that in 2019 CSC personnel, including Grievant was advised that it was against policy to offer new registration work around to assist customers seeking to renew their registration after it had expired. Grievant acknowledged she understood the directive.

Throughout the administrative handling of the charges against her, Grievant was fully informed of the facts supporting the charges and given an opportunity to respond which she took.

There is no evidence that Grievant was targeted for termination by her supervisors. Indeed, with respect to the January 21, 2020 incident described above, Grievant and her manager received Group Notices and suspension for not following policies.

Agency witnesses testified objectively and without animus and their testimony was consistent with documentary evidence submitted by both parties. It is clear from their testimony and the documents that the number one priority at the CSC's is to follow policies and procedures.

Management's motivation in terminating Grievant's employment was that "[Grievant] has an active Written Notice for failure to follow policy. She and her manager both received Group Notices and suspensions for not following policies. Moreover, [Grievant] has been counseled to refrain from doing the very thing she did here: providing customers with policy end-runs to receive extensions. Again,

> most disturbing is that we believe she has not been forthright. Management has lost faith in her and feels it has little choice but to end the employment relationship[.]"

On August 21, 2020, the agency issued to the grievant a Group III Written Notice with termination for failure to follow policy/instructions as well as deception and lack of candor.[2] The grievant timely grieved the disciplinary action, and a hearing was held on December 8, 2020.[3] In a decision dated March 10, 2021, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the charged misconduct and upheld the disciplinary action.[4] The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.[5]

The grievant now appeals the 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 . . . ."[6] 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.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant, through counsel, raises a number of alleged issues with the hearing officer's decision. First, she contends that she did not receive adequate due process because the agency relied upon disciplinary action issued to another employee in deciding the appropriate level of offense and attempted to present evidence about that disciplinary action at the hearing.[9] The grievant also objects to the hearing officer's factual conclusions, specifically his determination that she received notice in 2019 that the charged misconduct was contrary to policy, as well as the lack of discussion in the decision about her affirmative defenses of inconsistent discipline, discrimination, and retaliation.[10] Finally, the grievant alleges that termination was an unreasonable penalty in this case and that the disciplinary action should have been mitigated to, at most, a Group II offense.[11]

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[2] Agency Ex. 2; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 8-11.
[5] *Id.* at 11-12.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Request for Administrative Review at 1-2.
[10] *Id.*at 2-3.
[11] *Id.* at 3. In addition to these matters, the grievant's counsel also alleges that EDR failed to provide a copy of the recording of the hearing. *Id.* at 1. After EDR received the grievant's request for administrative review, her counsel confirmed that they had received a copy of the recording. EDR allowed time for the grievant's counsel to submit any supplemental briefing following review of the hearing recording, but none was received.

Due Process

The grievant objects to the agency's disciplinary action in part on grounds that the agency improperly considered disciplinary action of another employee when deciding to issue her the Group III Written Notice with termination.[12] Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[13]

As relevant here, the pre-disciplinary notice and opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct her behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[14] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[15] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[16]

Here, the grievant contends that the agency erroneously considered a prior Written Notice issued in 2014 to another employee when deciding to issue the Group III Written Notice. At the hearing, the agency attempted to introduce documentary and testimonial evidence about the 2014 Written Notice.[17] Upon objection by the grievant's counsel, the agency withdrew its documentary

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[12] Request for Administrative Review at 1-2. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard," is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974). Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

[13] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). The Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[14] *Loudermill*, 470 U.S. at 545-46.

[15] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[16] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[17] Hearing Recording at 2:00:53-2:03:36, 2:16:38-2:16:43.

evidence and the hearing officer excluded testimony on the matter.[18] In the decision, the hearing officer considered the grievant's due process claim:

> Grievant's argument assumes that the agency relied on [the 2014 Written Notice] in making its decision to terminate Grievant's employment. This assertion is not supported by the evidence; no witness testified that the agency relied on [the 2014 Written Notice] in making its decision to terminate Grievant's employment. Rather the evidence shows that Grievant was apprised of the charges against her and given multiple opportunities to dispute the charges and she availed herself of the opportunities. In short, there is no evidence of a denial of due process. The inclusion of [the 2014 Written Notice], at best, merely evidences a sloppy compilation of the Agency's exhibit book.[19]

The grievant disagrees, alleging that the agency's attempt to offer evidence about the 2014 Written Notice demonstrates that management improperly considered it as part of the grievant's disciplinary history when determining that a Group III Written Notice with termination was the appropriate penalty for the misconduct at issue in this case. No testimony in the record confirms whether the 2014 Written Notice was considered. The apparent error, to the extent there was error, was exposed at the hearing and evidence about the 2014 Written Notice was excluded from the record. Moreover, EDR is unable to identify any evidence that suggests the agency failed to provide the grievant with notice of the charges against her and an opportunity to respond to those charges before she received the Group III Written Notice.

Significantly, the grievant also had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency's witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Indeed, the grievant does not argue otherwise, and it is clear that the hearing officer did not consider evidence about the 2014 Written Notice in making a decision on the merits of the Group III Written Notice. EDR is persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[20] Accordingly, EDR finds no procedural basis on which to disturb the hearing decision.

Hearing Officer's Consideration of Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[21] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[22] 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.[23] Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the

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[18] *Id.*
[19] Hearing Decision at 11.
[20] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).
[21] Va. Code § 2.2-3005.1(C).
[22] *Grievance Procedure Manual* § 5.9.
[23] *Rules for Conducting Grievance Hearings* § VI(B).

evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[24] 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.

Proof of Misconduct

In her request for administrative review, the grievant primarily disputes the hearing officer's factual conclusions. In particular, she contends that she was unaware that the type of transaction for which she was disciplined was prohibited, that the COVID-19 pandemic was in fact a public health concern at the time of the offense on March 2, 2020, and that she did not recall the details of the incident due to the agency's delay in investigating the matter.[25] In addition, she contends that her behavior cannot be considered misconduct because an agency witness acknowledged that it was legal to perform the transaction that prompted the discipline.[26]

The Group III Written Notice issued to the grievant in this matter charged her with failure to follow policy/instructions by "disclos[ing] to a customer a system loophole that allowed the customer to receive a prohibited 30-day extension" of their registration.[27] The Written Notice further charged that the grievant displayed a lack of candor by providing "evasive, inconsistent, and unbelievable" answers to questions from management about the transaction with the customer.[28] The hearing officer sustained these charges, finding that the customer's "registration renewal should have been denied" and the grievant "circumvented the policy by canceling the customer's existing tags and issuing new ones."[29] The hearing officer further found that the customer learned of the work-around from the grievant, and that the grievant's explanation of the transaction when questioned by management was "demonstrably false."[30] Regarding the grievant's lack of candor specifically, the hearing officer noted that the grievant, "as an assistant manager, was required to adhere to all policies and procedures . . . and ensure that her subordinates also followed all policies and procedures."[31]

Evidence in the record supports the hearing officer's findings. An employee at the grievant's CSC reported the transaction to management the day it occurred: March 2, 2020.[32] Management later contacted the customer, who reported that they went to the CSC to request an extension on their registration to address an emissions issue.[33] Because the customer's registration was expired, the grievant advised the customer that the only way to complete the transaction was by surrendering their existing license plates and requesting new ones, which the customer agreed to do.[34] At the hearing, an agency witness testified that the grievant's actions were inconsistent

[24] *Grievance Procedure Manual* § 5.8.
[25] Request for Administrative Review at 2-3.
[26] *Id.* at 3.
[27] Agency Ex 2.
[28] *Id.*
[29] Hearing Decision at 9.
[30] *Id.*at 10.
[31] *Id.*
[32] Agency Ex. 7.
[33] Agency Ex. 8.
[34] *Id.*; *see* Agency Ex. 9.

with agency policy addressing registration renewals and extensions for emissions testing.[35] According to the witness, the customer was not eligible for a registration extension because their registration had already expired; the customer could have been offered a three-day trip permit to address any emissions issues and return to the CSC to renew their registration.[36] The witness testified that agency policy does not allow a customer to surrender their existing license plates and request new license plates as a way of extending their vehicle's registration when the registration cannot otherwise be renewed or extended under policy.[37]

When initially asked about the transaction, the grievant stated that she did not "specifically remember the customer" and had "no idea how the customer knew" that they could surrender their license plates and request new ones.[38] The grievant later explained that she "merely confirmed [the customer's] eligibility for services" and, while maintaining that she did not remember the customer, recounted that the customer had not previously received an emissions extension and that the customer was "most likely elderly or disabled."[39] The grievant later stated that she would not contradict the customer's account of the transaction because she did not remember it herself and "acknowledge[d] that telling a customer how to get around the system is ill-advised and should be avoided at all costs."[40] One of the agency's witnesses explained that the agency determined the grievant was not being truthful because of the inconsistencies in these statements to management.[41]

Although the grievant disagrees, the hearing officer was entitled to evaluate the testimony of the witnesses on these matters and to accept the agency's interpretation of these events as more persuasive. Taken together, the above evidence supports the hearing officer's finding that the grievant failed to follow agency policy, normally a Group II offense,[42] and made false statements to management about the transaction with the customer. At the hearing, the agency also presented testimony that it elevated the disciplinary action to a Group III offense because the grievant was untruthful[43] and that it has consistently issued Group III Written Notices for dishonesty.[44] The hearing officer agreed with the agency's assessment that discipline at the level of a Group III offense was justified here.[45]

Nevertheless, the grievant objects that the hearing officer failed to consider certain evidence that may have supported her claims. In particular, the grievant maintains that "her recollection of the events was not perfect" because of the delay between the transaction and March 2, 2020, and her discussions about the incident with management in July 2020.[46] The grievant further alleges that "there were concerns about" COVID-19 in early March, which led her to exercise her discretion to prevent the customer from having to make a return trip to the CSC.[47] She also contends that she had not received prior training or instruction that processing the transaction

[35] Hearing Recording at 1:33:03-1:33:31 (Deputy Director's testimony); *see* Agency Exs. 4, 16, 17.
[36] Hearing Recording at 1:17:36-1:21:51 (Deputy Director's testimony); *see* Agency Ex. 4, at 4.
[37] Hearing Recording at 1:21:52-1:22:15 (Deputy Director's testimony).
[38] Agency Ex. 8, at 1.
[39] *Id.* at 2-3.
[40] Agency Ex. 10, at 1.
[41] Hearing Recording at 2:20:26-2:22:01 (Employee Relations Analyst's testimony).
[42] DHRM Policy 1.60, *Standards of Conduct*, Att. A: Examples of Offenses Grouped By Level.
[43] Hearing Recording at 1:45:20-1:45:27 (Director's testimony).
[44] *Id.* at 2:20:39-2:20:58 (Employee Relations Analyst's testimony).
[45] *See* Hearing Decision at 11-12.
[46] Request for Administrative Review at 3.
[47] *Id.*

in the manner that she did was contrary to policy, and that "the customer was within their legal rights to voluntarily surrender the plates."[48]

Many of these matters are directly addressed in the hearing officer's decision. For example, regarding the COVID-19 pandemic, the hearing officer found that the agency was "open for business" on March 2, 2020 and that its offices were not closed due to the pandemic until approximately March 18, 2020.[49] As a result, the hearing officer determined that the grievant's explanation of "protect[ing] the customer from exposure to [COVID-19] is false."[50] In addition, the hearing officer noted that, in 2019, the grievant "was advised that it was against policy to offer new registration work around to assist customers seeking to renew their registration after it had expired."[51] As to the customer's "right to surrender her current plates and get new ones," the hearing officer found that the grievant had an "obligation to follow all [agency] policies" and she did not have the "right to pick and choose which policy to follow for the alleged benefit of the customer."[52]

To the extent the hearing officer did not directly address all of the evidence in the record on the matters cited by the grievant in her request for administrative review, EDR cannot find that such silence creates grounds for reconsideration. There is no requirement under the grievance procedure that the hearing decision specifically address each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular testimony and/or other evidence does not necessarily constitute a basis for remand. EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact. 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.[53] Accordingly, EDR declines to disturb the ruling on these grounds.

Retaliation

The grievant further maintains that "she was singled out for disciplinary action and facing discriminatory and retaliatory treatment as a result of . . . reporting her supervisor['s] . . . involvement in covering up leave abuse by a co-worker."[54] In support of this position, the grievant argues that the transaction with the customer "did not rise to the level of an investigation and issuance of proposed disciplinary action" until after she "engaged in protected activity by reporting violation of leave by a coworker[] and [the supervisor's] complicity in the leave abuse."[55] Though

[48] *Id.*
[49] Hearing Decision at 5.
[50] *Id.*
[51] *Id.* at 5-6. Two witnesses testified at the hearing that they met with the grievant in November 2019 and discussed issues with following policy, including the specific matter that issuing new license plates to customers as an alternate method of extending an expired registration was prohibited. Hearing Recording at 47:20-48:18, 55:16-57:12 (District Manager's testimony), 1:51:15-1:51:50 (Director's testimony).
[52] Hearing Decision at 10.
[53] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[54] Request for Administrative Review at 2.
[55] *Id.* at 2-3.

the grievant characterizes the agency's discipline as "discriminatory," she has not described, and EDR has not identified, any protected status to support a claim of discrimination.[56] As a result, we will address this issue as one of retaliation based on the grievant's alleged protected activity. To prevail at a hearing on a claim that the agency's disciplinary action was improperly motivated by retaliation, a grievant must ultimately prove by a preponderance of the evidence that, but for her engagement in an activity protected from such retaliation, the agency would not have taken its disciplinary action against her.[57]

Specifically, the grievant points to her testimony at the hearing that she reported a concern about leave abuse and her supervisor in July 2020 and that management contacted her about the issue with the customer soon thereafter.[58] She clarified that she believed management was retaliating against her for raising the alleged leave abuse issue and that her supervisor was involved in the investigation of the customer transaction.[59]Assuming the grievant's conduct here was protected activity for retaliation purposes,[60] the hearing officer found that there was "no evidence that Grievant was targeted for termination by her supervisors"[61] and that the agency had proven a legitimate, non-retaliatory reason for issuing its disciplinary action; namely, the grievant's ongoing failure to comply with agency policy and her dishonesty during its investigation of the incident.[62] Therefore, the grievant bore the burden to prove that the agency's stated reason for issuing discipline and terminating her employment was a pretext for retaliation.[63]

Upon a thorough review of the record, EDR cannot find that the hearing officer's conclusion about this issue is a basis for remand. Although the grievant offered evidence to support her suspicions about management's motives, one of the agency's witnesses testified that the grievant's supervisor was not involved in the decision to issue discipline to the grievant.[64] EDR has not identified evidence in the record to suggest that this statement was false or to credibly support a conclusion that the agency's stated explanation for disciplining the grievant was pretextual. As a result, EDR cannot say that the hearing officer was required to find that, but for the grievant's reporting of concerns about her supervisor, the agency would not have issued the Group III Written Notice. Considering that the grievant bore the burden to prove retaliation by a preponderance of the evidence,[65] as the hearing officer noted, EDR will not disturb the hearing decision on this basis.

Mitigation

Finally, the grievant argues that the hearing officer failed to properly consider mitigating factors. In particular, she argues that "a lesser penalty than termination" was appropriate because

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[56] *See*, *e.g.*, DHRM Policy 2.05, *Equal Employment Opportunity*.
[57] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[58] Hearing Recording at 3:13:31-3:14:42 (Grievant's testimony).
[59] *Id.* at 3:20:02-3:21:02 (Grievant's testimony).
[60] By state law, "employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000(A).
[61] Hearing Decision at 6.
[62] *Id.*
[63] *See Nassar*, 570 U.S. at 360.
[64] Hearing Recording at 1:46:26-1:46:48 (Director's testimony).
[65] *See Rules for Conducting Grievance Hearings* § VI(B)(1).

the offenses of failure to follow policy and lack of candor are generally Group II offenses.[66] The grievant also contends that termination was "not a reasonable outcome" due to her 15 years of service.[67]

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]."[68] 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."[69] 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.[70]

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.[71] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "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."[72] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[73] and will reverse the determination only for clear error.

Contrary to the grievant's argument on administrative review, the hearing decision discussed at some length whether it would be appropriate to mitigate the discipline issued in this case based on the grievant's length of service.[74] The hearing officer described several aggravating factors that he found outweighed the grievant's length of service: she was manager at CSC in a position of trust, she "exploited a loophole to circumvent [agency] policy," and she "lost the trust

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[66] Request for Administrative Review at 3.
[67] *Id.*.
[68] Va. Code § 2.2-3005(C)(6).
[69] *Rules for Conducting Grievance Hearings* § VI(A).
[70] *Id.* § VI(B).
[71] 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).
[72] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[73] "'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.*
[74] Hearing Decision at 11.

and confidence of [agency] management" due to concerns about her veracity and ability to comply with law and policy.[75] The hearing officer further noted that an agency witness testified to the agency's consistent practice of issuing Group III Written Notices for offenses related to dishonesty.[76]

EDR cannot find that the hearing officer clearly erred in his consideration of the evidence about potential mitigating circumstances. In this case, the grievant's claim that her length of employment should have been considered as a mitigating factor is unpersuasive. Though it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[77] The weight of an employee's length of service will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that length of employment becomes. In this case, the grievant's length of employment is not so extraordinary that it would clearly justify mitigation of the agency's decision to issue a Group III Written Notice for conduct that was determined by the hearing officer to be terminable due to its severity. As to the grievant's argument that a Group II Written Notice would have been a more appropriate punishment, DHRM Policy 1.60 states that an employee's accumulation of a "second active Group II Written Notice normally should result in termination."[78] Because the grievant had a prior active Group II Written Notice from January 21, 2020,[79] termination would therefore have been permissible under policy whether the grievant had received a Group II or a Group III Written Notice.

In conclusion, 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 an inherently reasonable outcome.[80] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EDR also acknowledges that certain circumstances may require this result.[81] Here, EDR perceives no error in the hearing officer's reasoning or his conclusion that the grievant failed to prove by a preponderance of the evidence that mitigation was warranted. Thus, we cannot say that the hearing officer abused his discretion in finding that the agency's Group III Written Notice with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

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[75] *Id.*
[76] *Id.*; *see* Hearing Recording at 2:20:39-2:20:58 (Employee Relations Analyst's testimony).
[77] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[78] DHRM Policy 1.60, *Standards of Conduct*, at 8-9.
[79] Agency Ex. 12.
[80] 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).
[81] For example, 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. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).

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.[82] 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.[83] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[84]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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