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## ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2021-5253
June 9, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11643. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

## FACTS

The relevant facts in Case Number 11643, as found by the hearing officer, are as follows:[1]

> The Department of Transportation [the "agency"] employed Grievant as a District Survey Manager at one of its locations. Grievant had been employed by the Agency for 31 years and eleven months. Grievant had prior active disciplinary action. On March 23, 2020, Grievant received a Group II Written Notice for failure to follow policy.
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> Grievant reported to the Supervisor. Mr. W reported to Grievant. Mr. R and Mr. T reported to Mr. W. Mr. Z was the project manager.
>
> The Agency could only enter private property with the landowner's permission or by following a statutorily mandated notification process requiring two waiting periods. The Agency had a mandatory owner property tracking sheet. The tracking sheet was to be used to track all permission and intent letters sent to property owners and was to be stored in the survey research folder for each project. Notes of property owners' requests were stored in an electronic spreadsheet.
>
> The Extension Project included eight privately owned properties. Initial work on the Extension Project was performed by Contractor R. The Agency had a valid Right of Entry from December 5, 2016 to March 5, 2017. The Agency needed to enter the properties to locate borings as part of a soil boring survey. A second

[1] Decision of Hearing Officer, Case No. 11643 ("Hearing Decision"), April 19, 2021, at 2-4 (footnotes omitted).

Right of Entry letter was sent in April 2020. The work began on June 9, 2020 and half of the sites had been collected. The process was halted due to heat advisories and difficult terrain to access.

The Agency's permission to enter the Extension Project ended June 26, 2020. This information was available to anyone reading the Agency's tracking spreadsheet. This meant that VDOT staff could not enter Extension Project property without the permission of the owners or completion of a notification process requiring two waiting periods.

On July 6, 2020, the Supervisor spoke with staff including Mr. W. They discussed completion of the Extension Project. They discussed having Contractor R complete the work. The Supervisor did not set a due date for completing the work. Grievant was not at work on July 6, 2020.

On July 6, 2020, Mr. W sent Mr. Z an email with a copy to Grievant. The email stated, "Right of entry – It seems it has expired. *** Yes, it expired June 26, 2020."

Grievant returned to work on July 7, 2020. Grievant received a copy of an email sent by Mr. W indicating that the Right of Entry expired on June 26, 2020. Grievant thought the work had been completed by July 1, 2020. He was shocked that the work remained unfinished. Grievant did not want to use Contractor R to complete the work.

On July 7, 2020, Grievant spoke with Mr. R. about the project. Grievant asked Mr. R if he could get the job done in a timely fashion. Mr. R said he would be able to complete the project by the end of the week or possibly by the beginning of the next week. Mr. R told Grievant the vegetation was less dense in the remaining areas that needed collection and he had access to enter the gate and could drive on the property to reduce the amount of equipment that had to be carried in and out of the property.

On July 8, 2020, Grievant received a proposal from Contractor R "to provide for 3D location of up to twenty-seven (27) as-drilled boring sites." The scope of services included, "[Contractor R] will attempt to contact property owners by phone to extent the Right of Entry that previously expired on June 26, 2020." Grievant replied to Contractor R "to consider negotiations ended and this task closed and that the department will pursue alternative methods to complete the task."

On July 8, 2020, Mr. R and Mr. H entered the properties in the Extension Project. The Agency did not have owner permission to enter several of the properties in the Extension Project. Grievant did not contact the property owners to obtain permission to enter the property. He did not assign anyone else responsibility

for obtaining permission from the property owners. Grievant did not follow the notification procedures to obtain a Right of Entry.

On July 10, 2020, Grievant sent an email to the Supervisor and Mr. W stating:

> We took care of the [Extension Project] request without your involvement or assistance as far as I know, so next week the group will go back to their existing responsibilities.

On September 30, 2020, the Supervisor received a telephone call from the Assistant District Commissioner reporting that a property owner had complained to the Deputy District Engineer that a survey team had entered private property after the Intent to Enter Date had expired.

On November 17, 2020, the agency issued to the grievant a Group II Written Notice with termination for failure to follow instructions and/or policy.[2] The Written Notice charged that the grievant directed a survey to be performed on July 8, 2020, "being fully aware that the Right of Entry expired on June 26, 2020, and needed to be extended."[3] The grievant timely grieved this disciplinary action, and a hearing was held on March 29, 2021.[4] In a decision dated April 19, 2021, the hearing officer determined that the agency "presented sufficient evidence to show that Grievant violated the Agency's Survey Manual thereby justifying the issuance of a Group II Written Notice."[5] The hearing officer further concluded that no mitigating circumstances existed to reduce 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 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.

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[2] Agency Ex. 1; *see* Hearing Decision at 1. The agency terminated the grievant's employment based on accumulation of discipline. *See* Agency Ex. 1.
[3] Agency Ex. 1.
[4] Hearing Decision at 1.
[5] *Id.* at 5.
[6] *Id.* at 5-6.
[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).

In his request for administrative review, the grievant maintains that his behavior as described in the Written Notice "did not constitute misconduct," that "the agency's discipline was inconsistent with law and policy," and that mitigating circumstances would have justified "a reduction of the disciplinary action."[10] The grievant contends that "his unintentional omission" regarding the expired right of entry "would not support the harsh remedy of termination."[11]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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 this case, the hearing officer concluded that the grievant failed to follow the agency's policies with respect to permissions from and notices to property owners, as required by state law.[16] Specifically, the hearing decision references the agency's Survey Manual and its provision that if completion of a survey "is going to exceed the duration indicated on the ROE (Permission or Intent) letter, another letter shall be sent 30 days prior to the end of the original letters date unless the property owner is contacted and provides written permission for time extension."[17] The hearing officer found that "Grievant knew or should have known that permission to enter the properties had already expired," and yet "he instructed Mr. R to enter the property to have the work done. Grievant did not obtain permission from the property owners. He did not delegate to his subordinates the responsibility for obtaining Right of Entry into the properties."[18] These findings are based upon evidence in the record,[19] and accordingly we find no error in the hearing officer's determination that the grievant failed to follow the agency's policy – normally a Group II offense.[20] Further, the grievant identifies no provision of law or policy with which the agency's discipline might not be consistent, and upon a thorough review of the record, EDR perceives none. Accordingly, we will not disturb the hearing decision on these grounds.

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[10] Request for Administrative Review at 1.
[11] *Id.*
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.
[16] *See* Va. Code § 33.2-1011; *see* Hearing Decision at 4.
[17] Hearing Decision at 4; Agency Ex. 11 at 299.
[18] Hearing Decision at 4-5.
[19] *See, e.g.*, Agency Exs. 6, 11.
[20] DHRM Policy 1.60, *Standards of Conduct*, Att. A: Examples of Offenses Grouped by Level.

Nevertheless, the grievant contends that "there are mitigating circumstances justifying a reduction of the disciplinary action."[21] 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]."[22] 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."[23] 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.[24]

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.[25] 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."[26] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[27] and will reverse the determination only for clear error.

In this case, as explained above, the hearing officer sustained the agency's charge of failure to follow policy based upon evidence in the record. Thus, he appropriately determined that the agency's decision to issue a Group II Written Notice, the standard penalty for failure to follow policy under DHRM Policy 1.60, did not exceed the bounds of reasonableness. The grievant disagrees on grounds that he was "a very strong and good employee for over 30 years."[28] Although

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[21] Request for Administrative Review at 1.
[22] Va. Code § 2.2-3005(C)(6).
[23] *Rules for Conducting Grievance Hearings* § VI(A).
[24] *Id.* § VI(B).
[25] 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).
[26] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[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] Request for Administrative Review at 2.

it cannot be said that length of service and prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, EDR has long held that it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[29] The weight of an employee's length of service and history of satisfactory performance 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. Here, we note that the grievant's separation was based on accumulation of discipline, in light of a prior Group II Written Notice issued to grievant on March 23, 2020.[30] In light of the grievant's ultimate burden to prove factors in mitigation, we cannot say that the grievant's service record was so extraordinary that it would require mitigation of the standard penalty for a second Group II offense pursuant to DHRM Policy 1.60. Even if the hearing officer had found the grievant's view of the appropriate discipline to be the more reasonable one, he nevertheless lacked authority to mitigate the penalty by substituting his own judgment for the agency's discretion to maintain an effective workforce consistent with law and policy.[31] Thus, we find no error in the hearing officer's conclusion that termination of the grievant's employment was within the bounds of reasonableness.

## 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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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[29] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[30] Agency Ex. 14.
[31] *See* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings*§ VI(B)(2).
[32] *Grievance Procedure Manual* § 7.2(d).
[33] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[34] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).