



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 State Police
Ruling Number 2021-5271
June 30, 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 11630. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

On October 27, 2020, the agency issued to the grievant three Written Notices: (1) a Group II Written Notice for failure to follow instructions and/or policy based on his alleged failure to report without delay an accident on February 4, 2019 involving his state-issued vehicle;¹ (2) a Group III Written Notice for making a false official statement on February 7, 2019 regarding the nature of the vehicle accident;² and (3) a second Group III Written Notice for making a false official statement on March 14, 2019 regarding the nature of the vehicle accident.³ The grievant was terminated due to his accumulation of disciplinary actions.⁴

The grievant timely grieved the agency’s discipline and a hearing was held on March 8, 2021.⁵ In a decision dated May 24, 2021, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the misconduct charged on the three Written Notices and upheld the grievant’s termination.⁶ The hearing officer further found no circumstances warranting mitigation of the disciplinary actions or the grievant’s termination.⁷ The grievant has requested that EDR administratively review the hearing officer’s decision.

¹ Agency Ex. 2b, at 10.

² *Id.* at 11.

³ *Id.* at 12.

⁴ *See id.* at 10-12; *see* DHRM Policy 1.60, *Standards of Conduct*, at 8-10.

⁵ Decision of Hearing Officer, Case No. 11630 (“Hearing Decision”), May 24, 2021, at 1.

⁶ *Id.* at 1, 5-8.

⁷ *Id.* at 8.

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”⁸ 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.⁹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁰ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹² 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.¹³ 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.¹⁴ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In his request for administrative review, the grievant alleges that the hearing officer erred in his consideration of mitigating factors.¹⁵ Specifically, the grievant asserts that the agency “produced fraudulent documents” in connection with a criminal proceeding that occurred prior to his termination and arose out of the same conduct that led to the discipline.¹⁶ The grievant believes that this issue “tainted the firing process and rendered the firing to be an illegal procedure” that warranted mitigation.¹⁷ The grievant appears to allege that a Vehicle Crash/Damage Report (Form SP-155) and/or a Police Crash Report (Form FR300) were created in connection with the criminal proceeding with the intent to “justify and strengthen [its] administrative charges” against him.¹⁸ The grievant therefore contends that the agency acted in “bad faith” throughout the investigative

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code §§ 2.2-1201(14), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

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

¹⁴ *Grievance Procedure Manual* § 5.8.

¹⁵ The grievant also characterizes this issue as an “error of law.” Request for Administrative Review at 1. To the extent the grievant is alleging that the hearing officer’s decision is contradictory to law, EDR lacks the authority to address that claim in this ruling. The grievant may appeal the decision to the appropriate circuit court on the basis that it is contradictory to law. Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ Request for Administrative Review at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 1-2.

process that led to the issuance of the disciplinary actions, which he argues warranted mitigation of the Written Notice(s) and his termination.¹⁹

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].”²⁰ 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.”²¹ 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.²²

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.²³ 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.”²⁴ EDR, in turn, will review a hearing officer’s mitigation determination for abuse of discretion²⁵ and will reverse the determination only for clear error.

In the hearing decision, the hearing officer addressed the evidence regarding mitigation as follows:

Grievant presented evidence suggesting that the Agency unnecessarily pursued criminal charges against him and created documents it failed to disclose which ultimately resulted in the charges against him being dismissed. Although Grievant’s evidence was significant, it would not constitute a mitigating factor under the Rules for Conducting Grievance Hearings. Grievant’s remedy, if any, would be outside of

¹⁹ *Id.* at 2.

²⁰ Va. Code § 2.2-3005(C)(6).

²¹ *Rules for Conducting Grievance Hearings* § VI(A).

²² *Id.* § VI(B).

²³ 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).

²⁴ *Rules for Conducting Grievance Hearings* § VI(B)(1).

²⁵ “‘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.*

the grievance hearing process. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.²⁶

Having thoroughly reviewed the evidence in the record regarding the grievant's claims, EDR cannot find that the hearing officer clearly erred in his consideration of the evidence about potential mitigating circumstances. Significantly, the grievant has not challenged on administrative review the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notices or that the behavior constituted misconduct. The grievant instead contends that the hearing officer should have mitigated the disciplinary action and/or his termination based on the agency's alleged improper actions involving matters that occurred as part of a criminal proceeding prior to his termination. The grievant had the burden to prove factors in mitigation by a preponderance of the evidence.²⁷

The hearing officer clearly considered the grievant's arguments regarding this issue and found no basis for mitigation under the *Rules for Conducting Grievance Hearings*.²⁸ The hearing officer's discussion appears to reflect that he did not find that the grievant had presented evidence to establish that bad faith or fraud occurred that had any bearing on the termination. To the extent the hearing officer did not directly address all of the evidence in the record on this matter in detail, 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 or other evidence does not necessarily constitute a basis for remand. Moreover, EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact. Determinations of disputed facts 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 [their] 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.'"²⁹ As a result, we find no error in the hearing officer's reasoning or conclusion that the grievant failed to prove any mitigating factors by a preponderance of the evidence.

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 -- or, as in this case, two Group III Written Notices and a Group II Written Notice -- dismissal is an inherently reasonable outcome.³⁰ 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.³¹

²⁶ Hearing Decision at 8.

²⁷ *Rules for Conducting Grievance Hearings* § VI(B)(2).

²⁸ Hearing Decision at 8.

²⁹ EDR Ruling No. 2014-3777 (citing *Davis v. Dep't of Treasury*, 8 M.S.P.R. 317 (1981)); see *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21.

³⁰ 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).

³¹ 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

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. Although the grievant disagrees with the hearing officer's analysis of mitigating factors, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. Accordingly, we decline to disturb the decision on these grounds.

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

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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).

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).