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 Corrections
Ruling Number 2021-5188
January 15, 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 Numbers 11552/11568/11569. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Numbers 11552/11568/11569, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [the "agency"] employed Grievant as a Lieutenant at one of its Facilities. She began working for the Agency in June 2015. No evidence of prior active disciplinary action was introduced during the hearing.
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> On March 13, 2020 at approximately 9:20 p.m., a Corrections Officer discharged a less than lethal weapon at an inmate. Grievant was supposed to ensure that the inmate was placed in the restrictive housing unit in accordance with the Agency's policies. At 9:20 a.m. on March 14, 2020, the inmate had not been placed in the restrictive housing unit. Before leaving the Facility, Grievant had assigned Sergeant R to move the inmate to the restrictive housing unit.
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> Grievant was at her home and in the process of going to sleep. The Warden called Grievant and told Grievant to return to the Facility to complete the task of placing the inmate in the restrictive housing unit. The Warden gave this instruction three times. Grievant refused to return to the Facility because she was exhausted. Grievant knew that if she attempted to drive to the Facility, she might endanger herself and other drivers. Grievant told the Warden she had assigned Sergeant R to complete the task.

[1] Decision of Hearing Officer, Case Nos. 11552/11568/11569 ("Hearing Decision"), November 30, 2020, at 2-3.

> If an inmate believed he was experiencing a medical emergency, the inmate could file an emergency medical grievance. A corrections officer was to deliver the grievance to the Medical Unit. Staff in the Medical Unit were expected to answer the grievance within eight hours so the inmate could receive treatment within 24 hours.
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> On April 4, 2020, Inmate L submitted an emergency grievance requesting medical treatment. Nurse K believed it was necessary to see Inmate L in the Medical Unit. Nurse K called Grievant and asked that Inmate L be escorted to the Medical Unit. Grievant told Nurse K, "that's not essential, he can come over tomorrow." Nurse K sent another nurse to Inmate L's cell to speak to him while Inmate L was in his cell.
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> On April 4, 2020 at approximately 8:45 p.m., Inmate M set a fire inside his cell causing significant damage to the cell door. The fire burned a 6-inch by 8-inch hole in the cell door window. The hole was large enough for Inmate M to stick his arm and shoulder through the hole. Grievant did not notify the Major. The Warden was not notified.

On March 31, 2020, the agency issued to the grievant a Group II Written Notice ("Return-to-Work Written Notice") for failure to follow instructions to return to the facility to ensure the inmate was in restrictive housing.[2] On May 1, 2020, the agency issued to the grievant two additional Group II Written Notices, both citing failure to follow policy (respectively, the "Medical Emergency Written Notice" and the "Cell Fire Written Notice").[3] The Cell Fire Written Notice indicated termination of the grievant's employment based on accumulation of discipline.[4] The grievant timely grieved each of these disciplinary actions and EDR consolidated them for a single hearing,[5] held on November 10, 2020.[6] In a decision dated November 30, 2020, the hearing officer determined that the Return-to-Work Written Notice must be reversed,[7] but the Medical Emergency and Cell Fire Written Notices were both warranted.[8] Finding no mitigating circumstances as to those Written Notices, the hearing officer concluded that termination was supported based on accumulation of discipline under DHRM Policy 1.60, *Standards of Conduct*.[9]

The grievant now appeals the hearing decision to EDR.

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[2] Agency Ex. 1.
[3] Agency Exs. 2, 3.
[4] Agency Ex. 3.
[5] *See* EDR Ruling No. 2021-5130.
[6] *See* Hearing Decision at 1.
[7] *Id.* at 3-4.
[8] *Id.* at 4-5.
[9] *Id.* at 5, 6; *see generally Rules for Conducting Grievance Hearings* § VI(B)(3).

DISCUSSION

By statute, EDR has 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."[10] 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.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] 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"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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 her request for administrative review, the grievant maintains that she did not engage in the conduct cited by the Medical Emergency Written Notice, and that other employees accused of the same conduct were not disciplined.[17] She also claims that neither offense was intentional misconduct[18] and that she received unduly harsh discipline on May 1 in retaliation for her refusal to return to work, as cited by the Return-to-Work Written Notice issued to her a few weeks earlier.[19]

Consideration of Evidence

The grievant contends that she did not decline to escort Inmate L to medical staff, as the Medical Emergency Written Notice alleged and as the hearing officer found. Acknowledging that

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[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] Request for Administrative Review at 1-2.
[18] *Id.* at 3.
[19] *Id.*

hearing testimony conflicted as to the conversation between the grievant and Nurse K, the grievant argues that the discrepancy reflects a miscommunication between them, not a refusal to facilitate medical care in violation of agency policy.[20]

Upon a thorough review of the record, evidence supports the hearing officer's finding that, when Nurse K asked for Inmate L to be escorted to the medical unit, the grievant responded, "That's not essential, he can come over tomorrow."[21] Nurse K testified that she asked the grievant to bring Inmate L to the medical unit based on the medical emergency he had filed, and the grievant asked, "Why does he need to be seen?"[22] Nurse K further testified that the grievant said that the trip to medical was "not essential" and that Inmate L could receive medical evaluation the next day.[23] While the grievant maintains she merely asked for clarification whether the escort was essential, Nurse K specifically rejected that version of events in her testimony,[24] and the hearing officer found her testimony credible.[25] Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.[26]

Mitigation

The grievant argues that she should not have received the Medical Emergency Written Notice at the Group II level because other employees accused of the same misconduct were not subject to the same level of discipline. More generally, she contends that both Group II Written Notices upheld by the hearing officer were unduly harsh because she did not intentionally violate any policies.[27] 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]."[28] 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

[20] *Id.* at 2.
[21] Hearing Decision at 3.
[22] Hearing Recording Pt. I at 21:35-22:35.
[23] *Id.* at 25:10-25:35.
[24] *Id.* at 28:35-29:25.
[25] Hearing Decision at 5.
[26] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[27] The grievant argues that her lack of intent means that she did not commit misconduct. Request for Administrative Review at 3. DHRM Policy 1.60, *Standards of Conduct*, generally describes offenses at the Group I, Group II, or Group III level without regard to the intent of the employee who commits the offense. However, intent or lack thereof may be relevant as a factor in aggravation or mitigation of the penalty that would ordinarily be imposed.
[28] Va. Code § 2.2-3005(C)(6). As with all defenses, the grievant carries the burden to prove mitigating factors by a preponderance of the evidence. *Rules for Conducting Grievance Hearings* § VI(B)(2).

that are found to be consistent with law and policy."[29] 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.[30]

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.[31] 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."[32] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[33] and will reverse the determination only for clear error.

In this case, the hearing officer determined that no mitigating circumstances existed to reduce or reverse either of the Written Notices issued on May 1. Upon a thorough review of the record, EDR cannot say that this conclusion was in error. The grievant did present evidence to suggest that multiple other security employees also refused to escort Inmate L when asked by medical staff (other than Nurse K).[34] However, when asked why these employees were not similarly held responsible for the policy violation, the facility warden testified that the nature of what other employees may have said was unclear and seemed to have been "lost in translation" between units, whereas the grievant expressly refused Nurse K's direct request.[35] It appears that in considering the totality of this evidence, the hearing officer did not find that it proved inconsistent discipline as a mitigating factor.[36] No error is apparent from this conclusion. Further,

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[29] *Rules for Conducting Grievance Hearings* § VI(A).
[30] *Id.* § VI(B).
[31] 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).
[32] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[33] "'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.*
[34] Grievant's Ex. 8, at 43.
[35] *See* Hearing Recording Pt. II at 41:45-44:50.
[36] The grievance procedure does not require that a hearing officer specifically discuss every argument made by a party or the testimony of each witness who testifies at a hearing; thus, mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand. EDR notes that the grievant also argues that, as to the Cell Fire Written Notice, "there were several other incidents when a minor fire occur[red] and there [were]

while the hearing officer made no explicit findings as to the grievant's intent to violate policy, EDR finds nothing in the record that would have required him to do so, much less to find that her lack of specific intent pushed the agency's disciplinary actions outside the bounds of reasonableness. Accordingly, EDR will not disturb the hearing decision on these grounds.

Retaliation

Finally, the grievant argues that the two Written Notices upheld by the hearing officer were issued in retaliation for the events underlying the earlier Return-to-Work Written Notice. Because the agency proved that the grievant engaged in misconduct warranting two Group II Written Notices, as explained above, the grievant had the burden at the hearing to demonstrate by a preponderance of the evidence that these actions were nevertheless a pretext for retaliation that would not have occurred but for the grievant's protected activity.[37]

On this issue, the hearing officer found that "[t]he evidence showed that the Warden took disciplinary action because he believed Grievant failed to comply with policy and not as a form of retaliation."[38] The warden testified extensively about each of the three Written Notices, explaining his view that the offenses in both the Medical Emergency Written Notice and the Cell Fire Written Notice constituted failure to follow agency policy.[39] The usual level of discipline for the offense of failure to follow policy is a Group II Written Notice, as indicated by DHRM Policy 1.60.[40] Despite effectively rejecting the rationale for the Return-to-Work Written Notice, the hearing officer nevertheless found that this incident did not prove pretext in the agency's decision to issue the standard penalty for the grievant's future failures to follow policy. EDR cannot conclude that the hearing officer's conclusion in this regard was in error or otherwise unreasonable. Accordingly, EDR declines to disturb the hearing decision on this basis.[41]

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.[42] Within

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no notifications . . . and there was no formal discipline for those reporting staff and/or Watch Commander." Request for Administrative Review at 2. Although the grievant's exhibits included fire-related incident reports by other employees, EDR cannot conclude that this evidence required the hearing officer to find that these incidents were comparable to the grievant's offense, such that the agency's action against the grievant would have exceeded the bounds of reasonableness. *See* Grievant's Ex. 10 at 61-63. EDR has reviewed nothing in the record or the grievant's submission that warrants remand for further consideration by the hearing officer.

[37] *See Rules for Conducting Grievance Hearings* § VI(B)(1); Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)). In the state grievance context, participation in the grievance process is one example of a protected activity. *See* Va. Code § 2.2-3004(A).

[38] Hearing Decision at 6.

[39] *See*, *e.g.*, Hearing Recording Pt. I at 2:06:00-2:12:45.

[40] *See* DHRM Policy 1.60, Att. A, *Examples of Offenses Grouped by Level*.

[41] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

[42] *Grievance Procedure Manual* § 7.2(d).

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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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