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ADMINISTRATIVE REVIEW

In the matter of the Virginia Museum of Fine Arts
Ruling Number 2021-5194
February 2, 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 11605. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11605, as found by the hearing officer, are as follows:[1]

> During the time relevant to this proceeding (the "Period"), the Grievant was employed by the [Virginia Museum of Fine Arts (the "museum" or the "agency")] as one of four Watch Commanders. The Grievant has worked with MG, another Watch Commander, for approximately 9 years.
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> The Grievant is white and MG is black.
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> The position of each of the Grievant and MG as a Special Conservator of the Peace ("SCOP") is a sworn law enforcement position[;] the SCOPs have powers of arrest and carry guns.
>
> The Grievant, in the important Watch Commander role, supervises numerous other law enforcement officers and security personnel.
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> According to his Employee Work Profile ("EWP"), the Grievant coordinates and supports the museum's public safety and property protection programs by providing leadership and supervision to SCOP Officers, Console Operators and Museum Associates who patrol galleries and other designated posts.

[1] Decision of Hearing Officer, Case No. 11605 ("Hearing Decision"), December 9, 2020, at 4-8 (internal citations and enumeration omitted).

Job requirements include "[e]xtensive knowledge of applicable laws, rules and regulations pertaining to the responsibilities and professional conduct of sworn, armed Special Conservators of the Peace and the methods used in accident and claims investigations. A demonstrated ability to exercise mature, independent judgment, prepare complete and effective reports, and communicate clearly and concisely both orally and in writing. Strong customer service skills. Supervisory experience. Exceptional communication and interpersonal skills. Knowledge and experience with business computer user applications."

Concerning his job responsibilities of supervision and leadership to security staff, amongst other things, the EWP provides, "In the absence of the Manager of Security Services and/or Assistant Manager of Security Services, act as the primary Security Manager for the Museum and Security Staff."

Concerning the Qualitative Performance Measures, the EWP provides, in part, "**Managing People/Managing Diversity:** Provides strong leadership skills, effective training, ongoing feedback and clear direction to employees. Delegates responsibilities appropriately. Encourages teamwork. Appropriately manages conflict. Thoughtfully completes performance reviews on subordinates in a timely manner. Actively participates in efforts to diversify the work force and audiences."

The Agency's strategic plan over the past 5 years has focused on building racial equity in the workplace. The [museum] has striven to engender a communal appreciation of art for all people no matter the race or background. It has tried hard to embrace and reflect the community it serves.

This noble effort has been undertaken amidst a lot of racial tension and strife both within the City and the confines of the museum. For example, the museum has been beset by both protesters and counter-protesters regarding Confederate monuments and memorabilia on its grounds. Accordingly, it is extremely important that law enforcement be seen as unbiased and a reflection of the highest ideals of the people it serves, to whom the public can look with confidence for protection and leadership in difficult and stressful frontline situations.

MG found himself in such a testing predicament on the night of Thursday, August 20, 2020, when around 3 a.m. during his 12-hour shift as Watch Commander, from 7:30 p.m. to 7:30 a.m., between 100 [and] 300 agitated protesters had him and his security staff "out of our comfort zone" and "on our heels," as he characterized it, ready to take action to protect museum property.

At approximately 7:15 a.m. on August 21, 2020, MG was in the control room with one of the console operators, AC, who is a woman and black. The Grievant came into the room and greeted MG calling him a "brown cow," in the presence of AC, an employee they both supervised.

> MG was shocked and asked the Grievant, "did you just call me a Black Cow?" He then said "no." He then said "no a brown cow."
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> MG told the Grievant, as Agency policy dictates, that the Grievant should address MG by his name or his rank and MG said that he would, as he always had, address the Grievant in the same manner. The Grievant and MG had a working relationship but did not kid around or have any kind of friendship or familiarity outside of work.
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> MG, who has been with the Agency 18 years, serving 10 years as a Watch Commander, interpreted the Grievant's name-calling as a racial slur which deeply angered, offended, and hurt him. The Deputy Director of Security Services, who is also black, was particularly troubled that this happened to MG, whom the Deputy Director says focuses on his work and bothers no one. The Deputy Director also interprets the comment as a racial slur, as did all 6 Agency witnesses who testified credibly at the hearing. The Grievant did not testify and the Grievant called no witnesses for his case-in-chief.
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> MG is adamant that the Grievant was "clear and precise," stating to MG when he entered the console operators' room, "Good morning Brown Cow." Throughout the Period and these proceedings, the Grievant has been consistent in this position, which is substantially corroborated by A[C].
>
> The operational needs of the security and law enforcement component of this facility depend on the cooperation and trust of all members functioning as a cohesive unit without any racist tendencies or animus on the part of any member. Further, tolerance of such proclivities in the current law enforcement environment would present significant risk management challenges to the Agency.
>
> This behavior also adversely affects the morale of other employees.

On September 10, 2020, the agency issued to the grievant a Group III Written Notice with termination for violation of DHRM Policy 2.35, *Civility in the Workplace*.[2] The grievant timely grieved this action, and a hearing was held on November 20, 2020.[3] In a decision dated December 9, 2020, the hearing officer determined that the agency's "actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances" and "consistent with law and policy."[4] The hearing officer further concluded that there were "no mitigating circumstances justifying a . . . reduction or removal of the disciplinary action."[5]

The grievant has requested that EDR administratively review the hearing officer's decision.

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[2] Agency Ex. 2; *see* Hearing Decision at 1.
[3] Hearing Decision at 1.
[4] *Id.* at 9.
[5] *Id.* at 20.

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 a 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 his request for administrative review, the grievant objects to the hearing officer's findings as to precisely what he said to MG. According to the grievant, he used the phrase "how now brown cow?" as an "archaic greeting";[9] he did not intend to call MG personally a brown cow, to cause any racial offense, or to otherwise be disrespectful. The grievant argues that, in the absence of such intent, his words could not constitute an offense under DHRM Policy 2.35, particularly a Group III offense.[10] In addition, the grievant asserts that the agency failed to afford due process and apply progressive discipline prior to terminating the grievant's employment.[11] The grievant also contends that both the agency and the hearing officer failed to consider mitigating factors that should have reduced the penalty imposed in this case.[12]

In addition to these arguments, the grievant submitted a supplemental brief asserting that he intended no offense by his statement to MG and would have preferred to testify at the hearing to that effect.[13] He also references a verbal observation by the hearing officer regarding the hearing officer's own research of the phrase "how now brown cow."[14]

Procedural Issues

Scope of Administrative Review

To the extent that the grievant seeks to offer his own statements as new evidence at this stage, EDR finds no basis to consider such statements upon administrative review. First, pursuant to the *Rules for Conducting Grievance Hearings*, "[t]he evidentiary record is generally closed at the conclusion of the hearing . . . . After the hearing officer closes the evidentiary record, additional evidence generally may not be admitted."[15] Second, requests for administrative review must be

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[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Request for Administrative Review at 5.
[10] *Id.* at 3-5.
[11] *Id.* at 9-10.
[12] *Id.* at 10.
[13] Grievant's Submission of Additional Information at 1.
[14] *Id.* at 2.
[15] *Rules for Conducting Grievance Hearings* § IV(G). While the *Rules* provide a "narrow exception" for newly discovered evidence that "was in existence at the time of the hearing, but was not known (or discovered) by the party

"***received by*** EDR within 15 calendar days of the date of the original hearing decision."[16] Here, with the hearing decision issued on December 9, 2020, and accounting for holiday office closures,[17] a timely request for administrative review must have been received by EDR on or before December 28, 2020. The grievant filed his supplemental brief on January 5, 2021. Therefore, to the extent the supplemental briefing raises new issues not presented in its initial request, they are untimely and EDR declines to consider them.

That said, the original timely request for administrative review presented arguments as to both the grievant's intent and as to the nature of the phrase "how now brown cow." Further, the email referenced in the grievant's supplemental brief is already part of the record.[18] Therefore, this ruling considers the supplemental brief to the extent it merely presents additional argument as to evidence already in the record or issues raised in the original request for administrative review.

Pre-Disciplinary Due Process

The grievant objects to the agency's disciplinary action in part on grounds that the agency "denied [him] due process by not presenting him with a due process letter setting forth the allegations against him and permitting him an opportunity to respond."[19] 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.[20]

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until after the hearing officer closed the evidentiary record,"[15] this standard would not apply to the grievant's own testimonial statements. With respect to the grievant's assertion that he would have preferred to offer testimony at the hearing, EDR notes that the record suggests no constraint on the grievant's choice at that time whether to testify, and the grievant points to none.

[16] *Grievance Procedure Manual* § 7.2(a).

[17] If the appeal deadline falls on "a day on which the state office where the request for administrative review is to be filed is closed during normal business hours, the appeal may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state office is closed." *Id.*

[18] *See* Grievant's Ex. 1; Agency Ex. 11.

[19] Request for Administrative Review at 9. 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.

[20] 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."

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 his 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."[21] 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.[22] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[23]

Here, the grievant appears to contend he did not have an adequate opportunity to respond to the charges against him prior to his termination. Even assuming for the sake of argument that the grievant did not receive due process prior to receiving the Group III Written Notice, it appears that he 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 there is no indication that he proceeded to hearing without a sufficient understanding of the charges against him.[24] 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.[25] Accordingly, EDR finds no procedural basis on which to disturb the hearing decision.

Proof of Misconduct

The grievant objects to the hearing officer's conclusions as to both the precise nature of the conduct at issue and whether such language constitutes misconduct under DHRM Policy 2.35, *Civility in the Workplace*. The grievant maintains that he said "how now brown cow?" to MG as a "common whimsical saying" that does not connote name-calling or racial offense.[26] Further, he contends that misconduct under Policy 2.35 must be "intentionally and deliberately offensive."[27]

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

[22] 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))).

[23] 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).

[24] The evidence indicates that the grievant offered his version of the underlying events in an email to the agency on the day they occurred. *See* Grievant's Ex. 1.

[25] *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).

[26] Request for Administrative Review at 4.

[27] *Id.* at 2.

Because no intent to offend can be inferred from the evidence, he argues, the hearing officer's finding of misconduct is without a basis in the record.

The hearing officer found that the grievant "greeted MG calling him a 'brown cow,'"[28] and evidence in the record supports this finding. MG testified that the grievant said to him: "good morning, brown cow."[29] Witness AC testified that she was also in the room and heard the grievant say to MG: "hey brown cow."[30] The grievant himself has maintained that he greeted MG by saying "how now brown cow."[31] Thus, the crux of the dispute is whether the grievant's words amounted to offensively "calling" MG, a Black employee, a "brown cow."

The hearing decision directly addresses this question, noting that misconduct under Policy 2.35 must be evaluated objectively from the point of view of a "reasonable person."[32] Even assuming that the grievant's precise words were "how now brown cow," the hearing officer reasoned that these words amounted to a racially offensive comment under the circumstances:

> That Grievant did not intend offense is beside[] the point. Each of the Agency witnesses were gravely offended by what the Grievant did, calling MG a brown cow, and the hearing officer finds that the nominal "reasonable person," were he to witness the episode, a white Watch Commander calling a black Watch Commander a "brown cow" in front of a subordinate, . . . would be likewise offended.
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> Accordingly, the Grievant's heavy reliance in this case on the etymology of the phrase "How now brown cow" . . . is misplaced for a number of reasons. First, the hearing officer has found on the evidence presented that the Grievant did in fact call MG a "brown cow." Second, even on the Grievant's version of events, all 5 of the black witnesses testified that they knew nothing of the history of the phrase "How now brown cow," had never heard the expression before and are reasonably offended by it when used by a white man to address a Watch Commander in an off-hand, unexpected manner in a law enforcement work environment. Similarly, the Grievant's and MG's white supervisor . . . found this phrase offensive. . . .[33]

EDR perceives no error in this analysis. In evaluating whether an objective "reasonable person" would find the grievant's words offensive in context, the hearing officer cited the testimony of six agency witnesses, all of whom confirmed their belief that the grievant called MG a "brown cow" and that it was offensive to do so.[34] Moreover, as the hearing officer pointed out,

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[28] Hearing Decision at 7.
[29] Hearing Recording Pt. V at 7:30-9:20.
[30] Hearing Recording Pt. VI at 5:15-9:55.
[31] Grievant's Ex. 1; Agency Ex. 11; *see* Hearing Decision at 14.
[32] Hearing Decision at 13, 15; *see* DHRM Policy Guide – *Civility in the Workplace: Policy 2.35 Prohibited Conduct Behaviors* at 1.
[33] Hearing Decision at 15.
[34] *See* Hearing Recording Pt. II at 3:25-5:20, 6:15-7:10, 19:40-21:15 (testimony of witness JC); Hearing Recording Pt. V at 8:20-9:20, 13:00-22:55, 28:20-28:40, 44:50-47:50 (testimony of witness MG); Hearing Recording Pt. VI at

no witness testified to the contrary.[35] The grievant argues that the phrase "how now brown cow" is benign in general usage and is "a nonsensical grouping of words that makes sense only when repeated aloud as an elocution exercise."[36] However, the hearing officer's reasoning makes clear that he evaluated the significance of the words under the particular circumstances in which the grievant used them – *i.e.* directing them at a Black coworker, with no apparent reason to invoke an elocution exercise.[37] EDR cannot find that the hearing officer's analysis of the grievant's comment in context lacked a basis in the record or was otherwise in error.

In addition, contrary to the grievant's argument, misconduct under Policy 2.35 is not necessarily conditional on the intent of the accused employee. To support his reading of the policy, the grievant cites an extensive list of examples of prohibited conduct, which he says establish the policy's focus on intentional behavior. However, EDR cannot agree that the examples offered rely on specific intent. While the intent of the accused is certainly relevant to any such charge and may be an aggravating factor in determining the appropriate penalty, we find nothing in the policy to support the grievant's assertion that "Policy 2.35 specifically requires that the declarant actually intended to offend."[38] Similarly, we do not interpret the policy to support the grievant's assertion that "[o]ffensiveness depends not in the ear of the hearer, but in the intention of the declarant."[39] Policy 2.35 prohibits discriminatory and non-discriminatory "harassment." Discriminatory harassment is "[a]ny unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race" or other protected class; non-discriminatory harassment is "any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class."[40] Neither definition requires specific intent by the accused. Here, the hearing officer determined that the grievant engaged in unwelcome verbal conduct, directed at the grievant's Black coworker, that a reasonable person would view as racially denigrating under the circumstances. This determination was based on substantial testimonial evidence in the record, and accordingly EDR will not disturb the decision on this basis.

6:20-9:55 (testimony of witness AC); *id.* at 16:50-16:58 (testimony of witness SS); *id.* at 19:50-21:00 (testimony of witness AC); *id.* at 31:55-34:55, 43:55-51:30, 1:35:20-1:36:00 (testimony of witness KW).

[35] The hearing officer noted that the grievant did not offer testimony at the hearing to support his view of the statement. Hearing Decision at 15.

[36] Request for Administrative Review at 7.

[37] *See* Hearing Decision at 15-16.

[38] Request for Administrative Review at 4. EDR notes that, as defined by Policy 2.35, "bullying" expressly includes an element of intent. *See* DHRM Policy 2.35, *Civility in the Workplace*, at 6. However, bullying is only one type of conduct prohibited by the policy, see *id.* at 2, and does not appear to be at issue in this case.

[39] Request for Administrative Review at 7.

[40] DHRM Policy 2.35, *Civility in the Workplace*, at 6. EDR notes that "harassment" under the policy need not rise to the level of "severe or pervasive" conduct that would be necessary to sustain a "hostile work environment" under federal antidiscrimination laws. The framework of Policy 2.35 can help agencies to address both discriminatory and non-discriminatory harassment before such misconduct escalates to a severe or pervasive level.

Level of Discipline

Consistency with Law and Policy

The grievant further argues that his comments to MG did not warrant a Group III Written Notice with termination. DHRM Policy 1.60, *Standards of Conduct*, provides that Group III offenses are generally appropriate for "acts of misconduct of a most serious nature that severely impact agency operations."[41] Illustrative examples include threatening others, excessive unauthorized absences, unauthorized use of state records, and sleeping during work hours.[42] State policy also explicitly recognizes that the range of misconduct under DHRM Policy 2.35 may vary in severity and effect on the workplace and that such misconduct may constitute a Group I, II, or III offense, depending on its nature.[43]

The hearing officer found that the agency's issuance of a Group III Written Notice with termination was warranted because Policy 2.35 allows discipline at the Group III level and because the grievant held a supervisory position and was therefore held to a higher standard of conduct.[44] The grievant disagrees, pointing to other cases in which state employees received lower levels of discipline for offensive statements.[45] However, even assuming that these decisions should be considered instructive in the present matter,[46] none suggest that the Group III Written Notice issued to the grievant in this case was inconsistent with policy standards. Policy 2.35 and its associated guidance permit agencies to assess the severity of an offense and its effect on the workplace in selecting the appropriate level of discipline.[47] These determinations are fact-specific and subject to substantial discretion by agency management; thus, disciplinary actions are not necessarily comparable across agencies.[48] Here, as the hearing officer found, agency witnesses offered extensive testimony about the agency's direct involvement with racial tension in the community

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[41] DHRM Policy 1.60, *Standards of Conduct*, Att. A.
[42] *Id.*
[43] *Id.*; *see* DHRM Policy 2.35, *Civility in the Workplace*, at 5; *see*, *e.g.*, EDR Ruling No. 2020-5003 ("[A]n employee who is disciplined for engaging in workplace harassment will not usually be disciplined for each individual incident of harassing behavior, any one of which could amount to a finding of misconduct. Rather, the employee would be disciplined for the ongoing course of harassing conduct as a whole, which amounts to many different actions or inactions over time.").
[44] Hearing Decision at 16-17.
[45] *See* Request for Administrative Review at 7-8.
[46] EDR notes that, of the three specific cases cited by the grievant, two predate Policy 2.35, which was first promulgated effective January 1, 2019. The oldest case cited also applied an older (1993) version of DHRM Policy 1.60, *Standards of Conduct*, which listed "obscene or abusive language" as an example of a Group I offense. *See* Va. Dep't of Transp. v. Stevens, 53 Va. App. 654, 662 (2009). However, Policy 1.60's associated guidance no longer lists "abusive" language as an example of a Group I offense, and instead affirms that violations of Policy 2.35 (such as abusive language) are subject to discipline at any level, "depending on the nature of the offense." DHRM Policy 1.60, *Standards of Conduct*, Att. A, at 2. As to the other case that predates Policy 2.35, EDR does not read the hearing officer's decision in that matter to find that Group III discipline was excessive for the use of a racial slur. *See* Decision of Hearing Officer, Case Nos. 10463, 10464, Nov. 7, 2014; EDR Ruling No. 2015-4055.
[47] *See* DHRM Policy 2.35, *Civility in the Workplace*, at 5.
[48] For example, the grievant cites a recent hearing decision in a matter involving an employee of the Virginia Department of Aging and Rehabilitative Services who received a Group I Written Notice for referring to a client in internal documents as a "smart ass." *See* Decision of Hearing Office, Case No. 11457, Feb. 14, 2020. The hearing decision does not indicate that the inappropriate comments had a racial connotation or that the comments circulated.

during the events at issue, as well as about how their morale was adversely affected by what they perceived as a racial slur in the workplace.[49] Although agencies' discretion to issue appropriate discipline under Policy 2.35 is limited by the general parameters of Policy 1.60, here the hearing officer relied on evidence in the record to determine that the agency's disciplinary choices were within policy limits, and EDR cannot find that his analysis was erroneous, unreasonable, or otherwise inconsistent with the grievance procedure.

Consideration of Mitigating Factors

The grievant additionally argues that the hearing officer failed to properly consider mitigating factors. In particular, the grievant cites his lack of notice that his words would be considered offensive, his service record, and the absence of any evidence of intentional conduct.[50] 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]."[51] 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."[52] 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.[53]

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.[54] 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

[49] Hearing Recording Pt II at 14:45-16:40, 37:00-38:16 (testimony of witness JC); Hearing Recording Pt. V at 6:00-6:40, 28:55-29:48, 30:15-30:35 (testimony of witness MG); Hearing Recording Pt. VI at 12:10-12:55 (testimony of witness AC); *id.* at 21:05-23:05 (testimony of witness AC); *id.* at 26:55-30:05, 41:35-42:10, 1:03:05-1:06:40 (testimony of witness KW); *see* Hearing Decision at 6, 8.
[50] Request for Administrative Review at 10.
[51] Va. Code § 2.2-3005(C)(6).
[52] *Rules for Conducting Grievance Hearings* § VI(A).
[53] *Id.* § VI(B).
[54] 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).

the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[55] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[56] and will reverse the determination only for clear error.

The grievant contends generally that the agency's disciplinary action exceeds the bounds of reasonableness, and specifically that the agency and the hearing officer failed to consider certain factors that should have reduced the level of discipline. Contrary to the grievant's argument, however, 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 service record, as well as "the demands of the Grievant's work environment" and "the Grievant's asserted absence of intent to offend."[57] Noting EDR's well-established instructions that "it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support" a mitigation finding, the hearing officer appropriately explained that he "must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction" that might outweigh management's authority to manage the affairs and operations of state government.[58]

Again, EDR cannot find that the hearing officer clearly erred in his consideration of the evidence about potential mitigating circumstances. As to intent and lack of notice, the grievant had the burden to prove factors in mitigation. As noted above, the hearing officer determined based on the evidence presented that the grievant directed a comment at MG that a reasonable person would interpret as racially offensive. Such comments are prohibited by Policy 2.35. To prove he did not know his comment could reasonably be considered racially offensive under the policy, the grievant would have needed to demonstrate as much by a preponderance of the evidence. Although the grievant submitted an email he wrote explaining his lack of intent,[59] the hearing officer assigned relatively little weight to the grievant's statement because it was never subject to cross-examination.[60] EDR perceives no error in this reasoning and the conclusion that the grievant failed to prove any mitigating factors by a preponderance of the evidence. Thus, EDR 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. As such, EDR will not disturb the hearing officer's decision on this basis.

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[55] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[56] "'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.*
[57] Hearing Decision at 18.
[58] *Id.* at 18, 19.
[59] Grievant's Ex. 1.
[60] Hearing Decision at 15.

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.[61] 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.[62] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[63]

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