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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5196
February 1, 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 11579. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11579, as found by the hearing officer, are as follows:[1]

> Grievant was employed [by the Department of Corrections (the "agency")] as a Corrections Officer for approximately 10 years (6/7/2010 to 7/20/2020). In addition to the current termination Notice that is the subject of this case, Grievant had accumulated four active Group II Notices for failure to follow supervisors' instructions, perform assigned work or otherwise comply with all applicable written policies and procedures.
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> At approximately 5:30 a.m. on July 7, 2020, correctional officers were in muster (queuing up) to receive their duty assignments. The muster was conducted by the Watch Commander, a very experienced female Captain. Grievant should have been but was not in the muster. Grievant was in Tower 3. His post assignment that day was to Unit 2. He was instructed to report to Tower 2. Grievant went instead to the armory window and demanded in a loud voice to speak to the Watch Commander that was conducting the muster.
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> Grievant's loud outburst at the armory window was disruptive and interfered with the count that was underway in master control.

[1] Decision of Hearing Officer, Case No. 11579 ("Hearing Decision"), December 17, 2020, at 3-4 (citations omitted).

The Watch Commander left the count and spoke to Grievant at the armory window and ordered him to immediately go to unit 2 his duty assignment. She assured him that she would talk to him at his duty station when she finished the count to resolve his concerns. Grievant refused and argued with the Watch Commander in a loud and aggressive manner. Grievant also threatened to go home if he was not assigned the shift he expected. Grievant eventually went to his assigned post.

Grievant's delay in immediately going to his assigned post disrupted agency operations: it delayed the count and could have resulted in overtime for the night shift personnel he and other officers were relieving.

All witnesses who overheard Grievant's argument with the Watch Commander confirmed that Grievant was loud and aggressive. The Hearing Officer credits their testimony over the Grievant's assertion in the due process procedure that the Captain was loud, argumentative, and unprofessional.

Witnesses confirmed, and the Hearing Officer finds that corrections officers are required to promptly obey all lawful commands unless the order placed them or others in harm's way and to raise any concerns the officer may have with the order at the appropriate time and place.

Grievant purposely failed to promptly follow a lawful order from his superior officer and argued about his compliance with the order at the wrong place and time.

The overwhelming weight of the witnesses' testimony was that they had not experienced or observed assignment preferences given to white officers. Moreover, this finding is supported by a black lieutenant (Agency Witness 3) whom Grievant claimed was aware of the preference for white officers. The witness testified credibly that white officers were not preferentially assigned duty posts. The Hearing Officer finds that assignment preferences were not given to white officers.

According to that same witness, Grievant's refusal to promptly obey the Watch Commander's order was insubordination.

Since approximately 2009, the correctional facility where Grievant worked followed a system that a Watch Commander sent an email to all officers asking for volunteers for upcoming shifts. Officers routinely volunteer for specific shifts but were not guaranteed they would be assigned to the shift they had volunteered for. Assignments were based on the needs of the facility. And it was left to the Watch Commander to assign or reassign any officer to a duty station that met the needs of the institution.

The record in this case indicates that between May of 2018 and August of 2019 Grievant received four Group II Notices for failure to follow a supervisor's instruction, perform assigned work or otherwise comply with applicable written policy or procedure.

There is no evidence to remotely suggest that these Notices demonstrate that he was targeted because of his race and or national origin.

There is no evidence in this case regarding Grievant's national origin.

On July 20, 2020, the agency issued a Group II Written Notice to the grievant for failure to follow instructions and/or policy, disruptive behavior, insubordination, and violation of DHRM Policy 2.35, *Civility in the Workplace*.[2] The grievant was terminated based upon his accumulation of disciplinary action.[3] The grievant timely grieved the disciplinary action and a hearing was held on October 8, 2020.[4] In a decision dated December 17, 2020, the hearing officer determined that the "Grievant's conduct was insubordinate, disruptive, disrespectful, and severe."[5] The hearing officer further concluded that the discipline was appropriate based, in part, on the grievant's history of receiving formal discipline for failure to follow instructions, perform assigned work, and comply with applicable policies and procedures.[6] Finally, the hearing officer found no circumstances warranting mitigation of the disciplinary action, specifically addressing the grievant's contention that his termination had a discriminatory or retaliatory motive.[7] As a result, the hearing officer upheld the agency's issuance of the Group II Written Notice with termination.[8]

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."[9] 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.[10] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] 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"[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

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[2] Agency Ex. 1, at 1-4.
[3] *Id.*; *see* DHRM Policy 1.60, *Standards of Conduct*, at 9 (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[4] *See* Hearing Decision at 1.
[5] *Id.* at 8.
[6] *Id.*
[7] *Id.* at 9-10.
[8] *Id.* at 10.
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.

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] 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 this case, the grievant sent an email to EDR with the subject line "Administrative Review/Unfair Treatment and Miscommunication," attaching a two-page document from the hearing record that recounts his version of the events that led to the issuance of the Written Notice and explains his belief that the discipline should not have been issued.[16] The grievant's email message contained no further explanation of the grounds for his appeal. The grievance procedure provides that a request for administrative review submitted to EDR "must refer to a particular mandate in state or agency policy . . . [or] a specific requirement of the grievance procedure with which the hearing decision is not in compliance."[17] Although EDR does not generally strictly construe this requirement, a grievant must, at the very least, identify the basis on which he believes the decision does not comply with policy or the grievance procedure. Without that information, EDR cannot conduct a review of a hearing decision or the hearing record to determine whether the decision complies with policy and the grievance procedure.

In addition, after the 15-calendar-day deadline had passed, the grievant's advocate sent an email message to EDR that appears to challenge the hearing officer's conclusion that the disciplinary action did not have a discriminatory motive, as well as his determination that mitigation was not warranted.[18] The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** EDR within 15 calendar days of the date of the original hearing decision."[19] The hearing officer's decision specifically advised the parties of this requirement.[20] EDR has typically permitted an appealing party to submit additional briefing material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the 15 calendar days can be considered by EDR on administrative review.

Based on the content of the document attached to the grievant's timely request for administrative review, EDR interprets that submission as a general challenge to the hearing officer's findings of fact regarding the alleged misconduct. There is evidence to support the hearing officer's determination that the grievant engaged in the behavior described on the Written Notice, that his behavior constituted misconduct, that the discipline was consistent with law and policy,

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[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.
[16] *See* Agency Ex. 2, at 7-8.
[17] *Grievance Procedure Manual* 7.2(a).
[18] The submission from the grievant's advocate also included approximately 40 pages of attachments, which appear to be a copy of a portion of the grievant's exhibits that were admitted into the record at the hearing.
[19] *Grievance Procedure Manual* § 7.2(a).
[20] Hearing Decision at 11.

and that there were no mitigating circumstances warranting reduction of the discipline.[21] Having reviewed the hearing decision and the record in this case, we find no grounds to conclude that the hearing officer's factual findings were not based on the evidence in the record. Accordingly, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Moreover, even considering the specific arguments regarding discrimination and mitigation presented in the grievant's untimely submission, EDR finds no basis to conclude that the hearing officer's decision does not comply with policy or the grievance procedure. For example, the hearing officer noted and explicitly addressed the grievant's allegation that the disciplinary action was discriminatory, finding "no evidence to remotely suggest" that discrimination was a factor in the agency's decision.[22] To the extent the grievant suggests that the hearing officer failed to properly consider evidence in support of a claim of discrimination, the grievant has not cited any such evidence in either the initial appeal or the untimely submission.

Regarding mitigation, the grievant alleges that the hearing officer failed to consider his length of employment, prior satisfactory work performance, and stressors in the grievant's personal life, which together rendered termination unreasonable in this case. It cannot be said that length of service and prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, but 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.[23] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and it 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 otherwise satisfactory performance becomes. Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. DHRM Policy 1.60, *Standards of Conduct*, provides that an employee's accumulation of "[a]second active Group II Notice normally should result in termination."[24] Though it is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline, EDR also acknowledges that certain circumstances may require this result.[25]

In this case, the mitigating factors cited by the grievant on administrative review are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group II Written Notice with termination for conduct that was determined by the hearing officer to be terminable due to its severity. Indeed, 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.'"[26]

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[21] *E.g.*, Agency Exs. 3, 8, 10, at 15-25, 74-76, 78-80.
[22] Hearing Decision at 9-10. The hearing officer noted that, though the grievant alleged discrimination based on his race and national origin, there was no evidence in the record to establish his national origin. *Id.*at 8.
[23] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[24] DHRM Policy 1.60, *Standards of Conduct*, § B(2)(b). 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).
[25] 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).
[26] *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21; *e.g.* EDR Ruling No. 2014-3777.

EDR has found no specific evidence of mitigating factors presented in the record that were not addressed in the decision, and nor has the grievant identified any on administrative review. 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.[27]

For these reasons, EDR declines to disturb the decision on the grounds cited in the grievant's administrative review submissions.

CONCLUSION AND APPEAL RIGHTS

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.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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[27] *See*, *e.g.*, EDR Ruling Number 2017-4407; EDR Ruling No. 2015-4096.
[28] *Grievance Procedure Manual* § 7.2(d).
[29] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[30] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).