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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2022-5298
September 10, 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 11672. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11672, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [the "agency"] employed Grievant as a Captain at one of its facilities until he was demoted to Sergeant and moved to another Facility. He received a 15 percent disciplinary pay reduction.
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> Grievant began working for the Agency in 2009. He was promoted to Sergeant in June 2015 and received a ten percent pay increase. Grievant was promoted to Lieutenant in August 2017 with a ten percent pay increase. He became a Captain in February 2020. He sometimes worked as Watch Commander at the Facility. No evidence of prior active disciplinary action was introduced during the hearing. He received an overall rating of "Contributor" on his October 2019 annual performance evaluation.
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> Grievant received three Notices of Improvement Needed/Substandard Perform during his tenure. Two of those notices were issued by the Major.
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> In May 2020, Grievant complained to the Former Warden about the behavior of the Assistant Warden in a meeting. Grievant said the Assistant Warden's behavior "made the atmosphere incredibly hostile."

[1] Decision of Hearing Officer, Case No. 11672 ("Hearing Decision"), August 2, 2021, at 2-3 (citations omitted).

> Grievant filed a complaint against Captain W when Captain W drafted employees from his shift for coverage because Captain W was having a cookout.
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> On occasion, Grievant would refer to inmates as fat cows or wh--es. He made these comments to insult the inmates. He made these comments to some of his subordinates and not directly to the inmates. Sergeant H testified she heard Grievant make these comments "very often" and at least once per week and once per shift. Sergeant T told the Investigator, "I heard [Grievant] make a comment referring to an inmate as a 'cow'."
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> Grievant expressed to subordinates his displeasure with the Major and Assistant Warden. He referred to them as stupid and not knowing their jobs. While speaking to his subordinate female staff, Grievant referred to female employees including Captain W, the Major, and the Assistant Warden as "bi—hes, c—ts, and wh—es." The Lieutenant told the Investigator that Grievant's comments were sporadic but became more intense in the week of October 3, 2020 after Captain W drafted a few officers from Grievant's shift. By drafting officers from Grievant's shift and having them work on Captain W's shift, Captain W made it more difficult for Grievant to have an adequate number of employees on his shift. Sergeant T told the Investigator that Grievant "might have called someone a bi—h."
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> The Agency alleged but did not establish that Grievant "played favorites" for an impermissible reason. Grievant denied giving preference to employees for any reason other than competency.

On December 9, 2020, the agency issued to the grievant a Group III Written Notice with demotion, transfer, and disciplinary pay reduction for using derogatory and offensive language and favoritism.[2] The grievant timely grieved the disciplinary action and a hearing was held on July 12, 2021.[3] In a decision dated August 2, 2021, the hearing officer found that the agency had "presented sufficient evidence to support the issuance of a Group III Written Notice."[4] While the hearing officer upheld the grievant's transfer, the hearing officer partially reversed the grievant's demotion to Sergeant and directed that he be demoted only one level to a Lieutenant.[5] The hearing officer additionally directed that the disciplinary pay reduction be recalculated accordingly and that the grievant be provided any back pay.[6] The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.[7] The grievant now appeals the 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

[2] Agency Exs. at 1-4; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 5.
[5] *Id.* at 5-6. The agency has not appealed the hearing officer's decision on this issue. Accordingly, EDR will not address whether the hearing officer's determination complied with the grievance procedure or state policy.
[6] *Id.* at 6.
[7] *Id.*

. . . 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.

In his request for administrative review, the grievant has argued that the hearing officer "failed to apply the proper evidentiary standard, failed to consider the background circumstances, and ignored the deprivation of my due process rights and my right to equal protection."[11] For example, the grievant asserts that he was prevented from questioning certain witnesses and that the agency has taken inconsistent disciplinary action against him. The grievant additionally identifies claims regarding discrimination and retaliation that he argues were not properly assessed by the hearing officer. The grievant has also submitted a new exhibit (a disciplinary action issued to another individual) and requests that it be considered.[12] The grievant's claims are addressed separately below.[13]

Due Process – Witness Issues

The grievant contends that the hearing failed to satisfy his due process rights because he had no opportunity to elicit testimony from two witnesses: the individual who submitted the original complaint against him ("Complainant") and the Assistant Warden who issued the Written Notice he received.[14] While the Complainant appeared on the agency's witness list,[15] the Assistant Warden was not listed by either the grievant or the agency as a potential witness. The grievant also did not seek an order from the hearing officer compelling either witness to appear at the hearing.[16] Given that the grievant does not appear to have actually sought to have either individual appear as a witness, EDR cannot find that the grievant was improperly prevented from questioning either witness.

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[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Request for Administrative Review at 1.
[12] The agency has also sought to have a hearing decision related to the disciplinary action considered in response.
[13] To the extent this ruling does not address any specific issue raised in the grievant's appeal, 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. For example, the grievant asserts that the agency violated state policy by "leaving [him] out of work for 57 days" on pre-disciplinary leave. Request for Administrative Review at 1. While DHRM Policy 1.60 provides an initial limit of 15 work days for pre-disciplinary leave, the policy also allows that time to be extended. DHRM Policy 1.60, *Standards of Conduct*, at 11. Further, given that the grievant was paid during the timeframe, there would be no basis to award any relief for this issue as the grievant has identified no adverse impact as a result of the extended pre-disciplinary leave.
[14] Request for Administrative Review at 1.
[15] At the time of the hearing, the Complainant was no longer an agency employee. Hearing Decision at 6.
[16] Although the Code of Virginia does not provide grievance hearing officers with subpoena authority, the hearing officer can issue orders for the appearance of witnesses. *See* Va. Code § 2.2-3005(C). If an agency employee, like the Assistant Warden, is ordered to appear and does not, the hearing officer may draw an adverse inference. *Rules for Conducting Grievance Hearings* § V(B) (stating that the hearing officer may draw an adverse when a party "has failed to make available relevant witnesses as the hearing officer or EDR had ordered"). As the grievant did not seek a witness order for the Assistant Warden, there would be no basis for the hearing officer to take an adverse inference against the agency. As the Complainant was no longer an agency employee at the time of the hearing, neither the hearing officer nor the agency would have had the authority to compel their attendance at the hearing.

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals 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.[17] In this context, 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.[18] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[19]

Here, it appears that the grievant, represented by counsel, participated in a hearing before an impartial decision-maker, where he had the opportunity to present evidence relevant to the agency's accusations against him and to question all witnesses called. As a matter of the grievance procedure, EDR perceives no procedural impairment due to the grievant's inability to question the Complainant and the Assistant Warden. To support its accusations against the grievant, the agency's witnesses included the investigator who investigated the original complaint and another employee who observed (and testified about) the grievant's conduct, corroborating the original complaint. Both witnesses were subject to live cross-examination by the grievant. Because it appears that the grievant participated in a full and fair hearing with the opportunity to question the adverse witnesses presented by the agency to carry its burden of proof, EDR will not disturb the hearing decision based on the absence of the Complainant and Assistant Warden from the hearing.[20]

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer failed to apply the proper evidentiary standard. The grievant appears to assert that the evidence was

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[17] 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). Significantly, 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."

[18] 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))).

[19] 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).

[20] As due process is also a potential legal matter, the grievant has the right to appeal the hearing decision to the applicable Circuit Court to question whether the determination is contradictory to law. Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

insufficient to determine that he had engaged in misconduct. In addition, the grievant disputes the hearing officer's findings and reasserts his claims of discrimination and retaliation. Thus, EDR interprets the grievant's claims as amounting to an assertion that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence in the record.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[21] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[22] 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.[23] 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.[24] 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 upon 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.

Evidence regarding misconduct

The hearing officer considered the evidence and determined that "Grievant would refer to inmates as fat cows or wh—es . . . to some of his subordinates and not directly to the inmates."[25] In addition, the hearing officer found that the grievant "expressed to subordinates his displeasure with the Major and Assistant Warden. He referred to them as stupid and not knowing their jobs. While speaking to his subordinate female staff, Grievant referred to female employees including Captain W, the Major, and the Assistant Warden as 'bi—hes, c—ts, and wh—es.'"[26] Based on these factual findings, the hearing officer determined that the grievant's behavior violated DHRM Policy 2.35, *Civility in the Workplace* and the agency's Operating Procedure 135.2.[27] The hearing officer found that the grievant's comments "were unwelcome and showed hostility towards other staff," "offended several of his subordinate female employees," and "undermined staff morale."[28] Accordingly, the record evidence presented was "sufficient to support the issuance of a Group III Written Notice."[29] The hearing officer addressed the grievant's denial of the conduct as follows:

> Grievant denied calling inmates and other employees offensive names. The Agency, however, has presented sufficient evidence to support its basis for disciplinary action. The Agency conducted an investigation that revealed several employees confirming Grievant's behavior. Although the Lieutenant was no longer

[21] Va. Code § 2.2-3005.1(C).
[22] *Grievance Procedure Manual* § 5.9.
[23] *Rules for Conducting Grievance Hearings* § VI(B).
[24] *Grievance Procedure Manual* § 5.8.
[25] Hearing Decision at 3.
[26] *Id.*
[27] *Id.* at 5.
[28] *Id.*
[29] *Id.*

> employed by the Agency at the time of the hearing, the Agency's investigator assessed the Lieutenant's credibility and found her assertions credible. The Agency's witnesses at the hearing were credible and sufficient to support the Agency's decision to issue disciplinary action.[30]

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy. To the extent the grievant is alleging that the hearing officer improperly credited the testimony of the agency's witnesses instead of his own testimony, conclusions as to the credibility of witnesses 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.[31] For these reasons, EDR declines to disturb the hearing officer's determination that the issuance of the Written Notice was warranted and appropriate under the circumstances.

Evidence regarding discrimination and retaliation

The grievant asserts that the disciplinary action he received was the result of discrimination and/or retaliation. In his request for administrative review, the grievant states that "DOC applies a double-standard in investigating, prosecuting and punishing violations of its policies. Employees who are members of a protected class are given carte blanche to violate policies, cover for each other and conspire to seek retribution on whistleblowers. Even when these protected class members are found to have violated DOC policies they are given the proverbial 'slap on the wrist.'"[32] In addition, the grievant claims that when he informed his facility's human resources officer that he was the victim of discrimination, she told him, "White male isn't a protected class."[33]

While law and policy prohibit discrimination on the basis of race and gender regardless of the status of the victim, the grievant had the burden of proof to establish a claim of discrimination.[34] The hearing decision made no findings as to a claim of discrimination, which appears to be due to the lack of evidence on this topic presented at hearing. Upon reviewing the record, EDR cannot find any evidence ignored by the hearing officer that would demonstrate that the Written Notice

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[30] *Id.* at 6.
[31] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[32] Request for Administrative Review at 3.
[33] *Id.* at 1.
[34] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

the grievant received was the result of unlawful discrimination.[35] Accordingly, EDR perceives no basis to remand for further consideration of this claim.[36]

The grievant has additionally asserted a claim of retaliation. He states that he reported the Assistant Warden for violations of the civility policy in May and September 2020; he also states that he reported the Assistant Warden and other managers to human resources for a variety of violations in October 2020.[37] The grievant states that the Written Notice he received was the result of a retaliatory motive because of his reporting the Assistant Warden and other managers.[38] To prevail at a hearing on a claim that the agency's disciplinary action was improperly motivated by retaliation, a grievant must ultimately prove by a preponderance of the evidence that, but for his engagement in an activity protected from such retaliation, the agency would not have taken its disciplinary action against him.[39] The hearing officer considered the evidence in the record and found that the decision to take disciplinary action against the grievant was not in retaliation for protected activity.[40]

Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. As discussed above, the agency presented sufficient evidence to support its decision to issue the Written Notice to the grievant. The evidence in the record supports the hearing officer's conclusion that the agency's decision to discipline the grievant did not have a retaliatory motive.[41] EDR has reviewed nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motivation for issuing the discipline was in any way unreasonable or inconsistent with the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and we cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case. Considering that the grievant bore the burden to prove retaliation by a preponderance of the evidence,[42] EDR will not disturb the hearing decision on this basis.

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[35] In the grievant's request for administrative review, he cites to a federal precedent outside the Fourth Circuit related to a court's analysis of the prima facie elements of a discrimination claim. Request for Administrative Review at 2. Without deciding whether such precedent is applicable in a grievance proceeding, the result here is not determined by any dispute about the prima facie elements of a discrimination claim. The grievant had the burden of proof and presented little evidence to support his claim regardless of the chosen proof scheme. The claim consequently fails. For additional information regarding the Fourth Circuit's approach to (and non-position on) the topic raised by the grievant, see, e.g., McNaught v. Va. Cmty. Coll. Sys., 993 F. Supp. 2d 804, 816-20 (E.D. Va. 2013).

[36] The grievant asserts both due process and equal protection claims related to his arguments. *See* Request for Administrative Review at 3. While EDR perceives no error by the hearing officer as a matter of the grievance procedure, the grievant has the right to assert his claims on such legal matters to the appropriate Circuit Court. Va. Code § 2.2-3006(B); *Grievance Procedure Manual* 7.3(a).

[37] Request for Administrative Review at 1.

[38] *Id.* at 2.

[39] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).

[40] Hearing Decision at 5.

[41] The hearing officer did determine that the level of demotion raised a question that the Assistant Warden was acting out of personal dislike. *Id.* The hearing officer awarded partial relief by reducing the level of demotion. *Id.* at 5-6.

[42] *See Rules for Conducting Grievance Hearings* § VI(B)(1). EDR's analysis of these claims is based on a review of the evidence admitted into the hearing record by the hearing officer.

Mitigation

The grievant appears to contend that the disciplinary action he received was the result of inconsistent application of policy in that other employees were allegedly treated differently for similar behavior.[43] 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]."[44] The *Rules for Conducting Grievance Hearings* (the "*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."[45] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[46]

Thus, the issue of mitigation is only reached if the hearing officer first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or 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, described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[47] EDR will review a hearing officer's mitigation determination for abuse of discretion,[48] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[49] Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show "enough similarity between both the nature of the misconduct

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[43] Request for Administrative Review at 2-3.
[44] Va. Code § 2.2-3005(C)(6).
[45] *Rules for Conducting Grievance Hearings* § VI(A).
[46] *Id.* § VI(B)(1).
[47] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).
[48] "'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.*
[49] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently . . . ."[50] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[51] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[52] Therefore, in making a determination whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.[53] EDR has thoroughly reviewed the hearing record and found nothing to indicate that the hearing officer's mitigation analysis was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature 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. EDR has previously held that a hearing officer "will not freely substitute [his or her] 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.'"[54] EDR's review of the record does not find that there was sufficient evidence in the record regarding inconsistent discipline of similarly situated employees that the hearing officer may have relied upon to support mitigation. As such, EDR will not disturb the hearing officer's decision on these grounds.

Newly Discovered Evidence

In addition to his request for administrative review, the grievant submitted an additional document that was not part of the hearing record. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[55] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[56] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

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[50] *E.g.*, Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 663-64 (2010) (applying a "more flexible approach" in determining whether employees are comparators following *Williams v. SSA*, 586 F.3d 1365 (Fed. Cir. 2009)).
[51] *E.g.*, *Lewis*, 113 M.S.P.R. at 665.
[52] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[53] Hearing Decision at 6. However, the hearing officer did reduce the grievant's demotion at least in part due to an apparent inconsistency in agency disciplinary practices. *Id.* at 5. As stated before, the agency has not appealed this portion of the hearing decision. Accordingly, EDR makes no findings as to whether the hearing officer's determinations were consistent with state policy or the grievance procedure.
[54] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[55] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[56] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[57]

Here, assuming the evidence as having been discovered post-hearing, EDR perceives no basis to conclude that it is material or that it would be likely to produce a new outcome. The additional document produced concerns a disciplinary action issued to another employee for using offensive language in the workplace during a single incident and becoming loud with a colleague. While we cannot say that such evidence is entirely irrelevant, it would not provide a sufficient basis for a hearing officer to determine that mitigation is appropriate on the basis of inconsistent discipline based on the mitigation standard described above. The disciplinary action issued to the other employee concerns conduct that is not sufficiently similar to the behavior that led to the grievant's Group III Written Notice. This additional document describes a single incident, whereas the grievant's behavior is stated to have occurred multiple times. Additionally, nothing in this additional document appears to be similar to the demeaning, hostile, and gender-based comments utilized by the grievant that the hearing officer determined "undermined staff morale."[58] Given that this new evidence would be unlikely to impact the outcome of this case, we have no basis to remand to the hearing officer for consideration of the evidence.

The grievant has additionally questioned the agency's failure to produce this record as a violation of the grievance procedure and a matter of noncompilance. Prior to the hearing, the grievant's attorney sought production of disciplinary actions issued in similar circumstances, and the agency produced certain records. EDR inquired of the agency and the grievant while this ruling was pending about the reason why this new document was not produced during the hearing phase and any explanation of the circumstances, to which both parties responded.[59] The information provided to EDR describes the reason for nondisclosure of the document as a result of the search run in the agency's system. While the grievant has asserted the agency's conduct was in bad faith, EDR finds no merit in the claim.[60] Even if we consider this a matter of noncompliance, the appropriate remedy would be remanding the case to the hearing officer to consider this additional

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[57] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[58] *See* Hearing Decision at 5.
[59] The grievant has asserted in his submission that EDR is biased, pointing, in part, to an email communication correcting the agency's representative that a response was not needed that day. The grievant appears to state that he was not given similar allowances. EDR has provided the grievant the same opportunities to provide submissions in support of his appeal and we have received no less than eight different emailed submissions from him since receiving his original ruling request. The grievant has not sought nor has EDR denied additional time to submit anything further. EDR has received and considered all of the grievant's submissions in this ruling.
[60] The grievant has pointed to the agency's advocate's questioning of the comparator employee as a basis to suggest that the representative knew that the record existed and, consequently, inferring bad faith. EDR reviewed the hearing record and understands the grievant's argument. If we assume the grievant's argument is correct and the agency's representative was aware of this document at the time of hearing, then there is a reasonable question as to why the document was not disclosed at the time to correct the document production. However, as described above, this is a minor matter of noncompliance that would be easily corrected if the issue concerned a document that was material. Given that this document is not material to the outcome of the case, we cannot find any basis to remand or otherwise disturb the hearing decision.

evidence.[61] There is no basis to find that the agency has engaged in substantial noncompliance that would warrant EDR awarding such relief to the grievant.[62] Because the additional evidence has no bearing on the outcome of this matter, as explained above, there is no basis to further address the matter of noncompliance.

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.[63] 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.[64] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[65]

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[61] Although the grievance statutes grant EDR the authority to render a decision on a qualifiable issue against a noncompliant party in cases of substantial noncompliance with procedural rules, EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.
[62] *See Grievance Procedure Manual* § 6.3.
[63] *Id.* § 7.2(d).
[64] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[65] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).