JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5698
May 16, 2024

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 12030. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 12030, as found by the hearing officer, are as follows:[1]

> The grievant has been an employee of the [Department of Corrections (the "agency")] for over ten years. He has consistently received performance evaluations of "contributor" or better. On July 27, 2023, the grievant was working as a corrections sergeant for the agency. His posting was at a mental health treatment facility operated by the agency with concurrent certification by the Department of Behavioral Health and Disability Services for the Commonwealth of Virginia.
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> A certain inmate (referred to herein as W) was incarcerated in a cell on the unit patrolled by the grievant. W had a history of volatile and self-injurious behavior. His behavior included removing his colostomy bag and inserting items into the bag itself or the stoma in his body. These behaviors made W what the agency termed as an "at risk" inmate. The agency used a special form to inform staff of essential information regarding such inmates (Form 730_F13). The form was completed by a mental health clinician and kept posted immediately adjacent to the cell of each such inmate. In the case of W, his "At Risk" form for July 27, 2023, specified that he was to be provided no paper items.
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> During the evening of July 27, the grievant found W to be agitated in his cell. The grievant was familiar with W and aware of his fondness for reading. In an effort to calm W, the grievant provided him with a page from a newspaper. This

[1] Decision of Hearing Officer, Case No. 12030 ("Hearing Decision"), Apr. 2, 2024, at 2-3.

directly contradicted the directions found on his Form 730_F13. The form directed W not be allowed reading material. The newspaper had the desired effect on W. No adverse consequences to W came about from the newspaper being provided to him.

When other staff discovered that W was in possession of the newspaper page in violation of the orders from the clinician, an investigation ensued. Video footage established that the grievant had provided the newspaper to W on July 27. The grievant met with his major, a unit manager, and the human resource director for the facility on August 4. He provided a written statement in response to the preliminary allegations against him. None of the other employees asked any questions of the grievant. The grievant made one additional statement during the meeting. The major made a notation of that statement. No other notes were made during the meeting.

The assistant warden processed the information about the July 27 incident, including that coming from the August 4 meeting. On August 11 he issued the disciplinary action which is the subject of this case.

On August 11, 2023, the agency issued to the grievant a Group III Written Notice with demotion, transfer, and pay reduction.[2] The grievant timely grieved the disciplinary action, and a hearing was held on March 27, 2024.[3] In a decision dated April 2, 2024, the hearing officer determined that the Group III Written Notice and accompanying disciplinary actions must be upheld and that no mitigating circumstances existed to reduce the agency's chosen penalties.[4] 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."[5] 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.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant appears to argue that his action of giving reading material to the inmate did not present more of a safety risk to the inmate than if he had not done so, and was in fact an attempt to respond to an existing safety risk. He also challenges

[2] Grievant Ex. 1; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1-2.
[4] *Id.* at 3-5.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

the hearing officer's decision to credit the judgment of the assistant warden of his facility that a Group III Written Notice was appropriate for the offense. Finally, he contends that the hearing officer should have considered a facility staffing shortage to be a mitigating factor.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] 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.[10] 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.[11] 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.

Misconduct Sustained

As the hearing officer noted, there is no dispute that the grievant gave newspaper to the inmate;[12] the issue on appeal is how this action constituted misconduct. The hearing officer reasoned as follows:

> Agency Operating Procedure 730.5 requires a coordination of efforts between clinicians and security staff, allowing inmates only those privileges determined appropriate by a mental health clinician. Those privileges are the ones specified on form 730_F13. The agency further relies on Operating Procedure 425.4, which requires the living conditions for an inmate on safety status to conform to that status, unless specific property items need to be removed immediately or certain activities denied. The grievant clearly ignored the directions of the notification form for [the inmate]. By doing so he violated both of those agency policies.[13]

These findings are supported by evidence in the record. The agency presented a form 730_F13 dated July 27, 2023, completed by the facility's medical staff, which indicated that the inmate in question was allowed to have "[o]nly those items and privileges as checked below," which did not include "Writing Paper" or "Reading Material" as checked items.[14] The same indications, or lack thereof, appear on forms dating consecutively back to July 23, 2023.[15] At the hearing, the agency's

[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 3.
[13] *Id.*
[14] Agency Exs. at 9; Hearing Recording at 50:20-51:25 (Major's testimony); *see* Hearing Recording at 17:35-18:15 (Lieutenant's testimony that non-medical security staff did not determine the indications on the form or have permission to modify them).
[15] Agency Exs. at 10-13; Hearing Recording at 51:35-54:30 (Major's testimony).

Mental Health Supervisor testified that he and other agency clinicians complete the form for particular inmates on at least a daily basis based on a medical risk assessment for self-harm or harm to others.[16] He further confirmed that, where the Form 730_F13 indicates that reading material is not a permissible item for the inmate to have on a particular day, no employee should provide reading material, even if the employee makes an independent judgment that doing so would serve the interests of the inmate or safety in general.[17]

On appeal, the grievant maintains that, if he had refused to provide the inmate with reading material, "the threat of physical harm was still present."[18] Even assuming the evidence supports this argument, the agency is authorized to create and enforce requirements to manage competing safety considerations and other risks, in the discretion of its management.[19] While EDR has no grounds to doubt the grievant's claim that his true intent was to support such safety interests, or even that his actions in fact had a de-escalating effect, we find no error in the hearing officer's analysis of how existing agency policies should have applied to the grievant's actions under the circumstances. Accordingly, we will not disturb the hearing officer's determination that the grievant's actions constituted misconduct.

Level of Discipline

Disciplinary levels and their appropriate applications are defined by DHRM Policy 1.60, *Standards of Conduct*. Under Policy 1.60, a Group III Written Notice is merited for

> acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; indicate significant neglect of duty; result in disruption of the workplace; or other serious violations of policies, procedures, or laws.[20]

Although a failure to follow policy might ordinarily merit discipline at the Group II level, Group III discipline may be warranted by the type of policy involved, as well as other aggravating circumstances, if proven by the agency.

In this case, the hearing officer found that, given the misconduct sustained, disciplinary action was permissible at the Group III level because the grievant "violat[ed] a safety rule where there is a threat of physical harm" because "the action of the grievant in providing the newspaper posed a threat to the safety of the inmate and could have resulted in an interference of agency

[16] Hearing Recording at 1:35:25-1:38:40 (Mental Health Supervisor testimony).
[17] *Id.* at 1:38:40-1:42:00 (testimony that employee should call a clinician if they believe circumstances call for deviation from instructions on the form).
[18] Request for Administrative Review at 1.
[19] *See* Va. Code § 2.2-3004(B) (agencies' "[m]anagement reserves the exclusive right to manage the affairs and operations of state government" under the grievance statutes).
[20] DHRM Policy 1.60, *Standards of Conduct* at 8-9.

operations."[21] Although the hearing officer acknowledged that the agency could have issued discipline at only the Group II level, he determined that it was appropriate to defer to the judgment of agency management, in part because the issuing manager had "a background as a mental health clinician prior to his becoming a security officer."[22]

In his request for administrative review, the grievant argues that discipline at the Group III level was motivated by the agency's allegation that he had stated an intent to "cover up" his misconduct – a charge he strongly denies.[23] However, the hearing officer expressly declined to sustain that allegation or to uphold discipline on that basis:

> For the agency to rely on this statement as an aggravating factor . . ., it has the burden of proving it by a preponderance of the evidence. I do not find that the agency has met that burden. I do find, however, that any consideration of that statement . . . [was] harmless error. The event of July 27, by itself, was sufficient to support a Group III Written Notice.[24]

Because the hearing officer credited the grievant's argument but upheld discipline on other grounds, EDR cannot find that the grievant's challenge in this regard presents a basis to disturb the hearing decision.

Although the grievant also challenges the hearing officer's assessment on grounds that the issuing manager "is not now and has never been a security officer,"[25] EDR cannot find that this argument undermines the hearing officer's decision to credit the manager's judgment as a former mental health clinician. Moreover, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[26]

Mitigation

Finally, the grievant argues that the conduct charged on the Group III Written Notice was justified by the agency's failure "to provide adequate staffing for these 'at-risk' inmates," because this staffing shortage "directly affected the grievant's decision to issue the reading material as there

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[21] Hearing Decision at 3-4; *see* DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped by Level (noting "safety/health infractions that endanger[] the employee and/or others" as an example of misconduct meriting discipline at the Group III level).
[22] Hearing Decision at 4.
[23] *See id.*
[24] *Id.*
[25] Request for Administrative Review at 2.
[26] *See, e.g.*, EDR Ruling No. 2020-4976.

were not enough staff present at the facility to cover all the security posts" if the situation were to escalate into a cell extraction.[27] In light of the above analysis, EDR interprets this reasoning as an argument that the hearing officer should have mitigated the agency's discipline.

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[28] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[29] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[30]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[31] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[32] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[33] and will reverse the determination only for clear error.

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[27] Request for Administrative Review at 2.
[28] Va. Code § 2.2-3005(C)(6).
[29] *Rules for Conducting Grievance Hearings* § VI(A).
[30] *Id.* at § VI(B)(1).
[31] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).
[32] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[33] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A

In his decision, the hearing officer addressed the staffing issue, concluding:

> I do not accept this justification by the grievant for his actions. His explanation was that he believed providing the newspaper could prevent a situation later that evening where the inmate deteriorated to an extent requiring further intervention by multiple staff members. I do not fault the grievant for his intentions. What I do find to have been improper was his choosing not to defer to the written directions of the mental health staff and substituting his judgment for theirs.[34]

Again, EDR finds no error in the hearing officer's analysis. Even assuming that the grievant was acting in what he believed were the best interests of the inmate and his work facility, it does not follow that such belief necessarily overrides the agency's requirements. While the grievant may disagree with the agency's view of what the situation called for, neither he, nor the hearing officer, nor EDR is empowered to overrule the agency's judgment in this regard, provided it is within the bounds of reasonableness. Here, the hearing officer accepted as reasonable the agency's position that security employees are required to strictly follow the inmate limitations documented by its clinical staff, and the grievant failed to do so. EDR finds no basis to disturb the hearing decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision in this matter.[35] 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.[36] 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.[37] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[38]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").

[34] Hearing Decision at 5.

[35] To the extent the grievant's request for administrative review raises any arguments not explicitly address in this ruling, EDR has thoroughly reviewed the hearing record and concludes that no basis for remand is apparent.

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

[37] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[38] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).