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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5712
June 14, 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 12105. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 12105, 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 Agency in a Level 2 secure Facility as the Food Services Director.
>
> The Grievant was required to strictly adhere to all applicable Agency policies and procedures.
>
> As Food Services Director, Grievant was responsible for supervising numerous subordinates, including both Agency employees and inmates who worked under her in the kitchen.
>
> The Grievant, as a supervisor, is held to a higher standard when it comes to compliance with Agency policies and procedures and is expected to set an example to her subordinates.
>
> The Grievant performed an important vital function for the Facility as Food Services Director, with significant and substantial training invested in the Grievant by the Agency in all aspects of her employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all her duties and responsibilities.

[1] Decision of Hearing Officer, Case No. 12105 ("Hearing Decision"), May 12, 2024, at 3-6 (paragraph numbering, internal citations, and footnotes omitted). Page numbers refer to the page number listed on the bottom of each page of the decision. Because Page 1 is a cover page that is not part of the published version of the decision, reference to the actual published version will reflect the first page of that version as Page 2.

The Facility is one of two institutions in the Commonwealth which receives inmates from maximum security facilities who need medical treatment. The Grievant's role in maintaining the safety and security of inmates, staff and the public was paramount, particularly when the Grievant was assigned to the Food Services Director post.

Certain policy violations by Grievant, specified below, opened the door to possible inmate coercion and blackmail of the Grievant, as asserted by the Warden.

Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards Grievant's duties pertaining to any Food Services Director post.

Despite this critical need, Grievant committed serious violations of the Agency's policies and protocols as specified below.

The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

Written Notice 1 (Inappropriate Language)

Grievant "trash-talked" in the kitchen, called inmates perverts, cussed out inmates and used profanity in the kitchen.

In her SIU audio interview, Grievant admitted that she cussed out inmates; used profanity in the kitchen; talked trash; and called the inmates perverts.

Written Notice 2 (IT)

Grievant allowed inmates to use her VITA tagged computer.

In her SIU audio interview, Grievant admitted that she allowed an inmate who functioned as a clerk to use her computer; and Grievant admitted this was not right.

Inmates could have used these basic policy violations to blackmail or coerce the Grievant.

Written Notice 3 (Falsification)

Grievant admits that she allowed clerks to proofread and correct grammar concerning performance evaluations on DOC employees. . . .

Written Notice 4 (Fraternization)

Agency policy prohibits fraternization or non-professional relationships with inmates or probationers/parolees who are within 180 days of the date following their discharge from DOC custody or termination from supervision (the Prohibited Period).

Grievant spoke on her telephone to a former inmate subject to the Prohibited Period (MH).

Grievant also participated in 3-way telephone conferences with MH.

Grievant discussed Facility gossip with MH in these calls.

In her SIU audio interview, Grievant at first denied any such 3-way conference calls but later admitted to the same.

Grievant allowed inmates access to and to read confidential DOC employee performance evaluations.

In her SIU audio interview, Grievant admitted permitting certain inmates to access, read and correct these evaluations.

In her SIU audio interview, Grievant admitted that this was not right.

Inmates could have used these basic policy violations to blackmail or coerce the Grievant.

On February 27, 2024, the agency issued to the grievant a Group II Written Notice ("Written Notice 1") citing inappropriate language, a Group II Written Notice ("Written Notice 2") for information security violations, a Group III Written Notice ("Written Notice 3") citing falsification of records, and a Group III Written Notice ("Written Notice 4") citing fraternization with a former inmate.[2] The agency also terminated the grievant's employment as of the same date.[3] The grievant timely grieved this disciplinary action, and a hearing was held on May 7, 2024.[4] In a decision dated May 12, 2024, the hearing officer did not sustain Written Notice 3 but upheld Written Notices 1, 2, and 4, supporting termination.[5] The hearing officer further concluded that no mitigating circumstances existed to further reduce the agency's disciplinary actions.[6] The grievant now appeals the hearing decision to EDR.

[2] Agency Exs. 1-4; Hearing Decision at 2.
[3] Agency Exs. 3, 4.
[4] *See* Hearing Decision at 2.
[5] *Id.* at 15.
[6] *Id.* at 11-15.

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."[7] 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.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant challenges the hearing decision on grounds that her termination was inconsistent with how other employees were treated. She also argues that the hearing decision did not summarize the testimony of her witnesses at the hearing.[10]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] 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.[13] 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.[14] 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.

Applying this standard to the present matter, and upon a thorough review of the record, EDR finds that there is evidence to support the hearing officer's conclusions that the grievant engaged in the misconduct cited in Written Notices 1, 2, and 4, and that those disciplinary actions were consistent with law and policy. Indeed, the hearing officer found that the grievant admitted to the conduct charged in each of these three written notices. There is evidence in the record to

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[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] The agency argues that the grievant's request for administrative review does not meet the minimum requirements for an administrative review. *See Grievance Procedure Manual* § 7.2(a). EDR interprets the grievant's appeal to challenge the hearing officer's consideration of her evidence, particularly as to her claim that other employees who engaged in comparable misconduct were not disciplined as harshly. We therefore accept the grievant's request as sufficient to comply with the grievance procedure.
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.

support these findings,[15] and the grievant's request for administrative review does not appear to challenge them.

These findings are not undermined by the absence of "a summarization of evidence that includes the testimonies of [the grievant's] witnesses," as claimed by the grievant in her request for review. There is no requirement under the grievance procedure that the hearing decision specifically address each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular exhibits, testimony, and/or other evidence does not necessarily constitute a basis for remand. Here, although the hearing decision did not summarize or explicitly address any witness testimony, we find no indication that the hearing officer failed to consider this evidence when making his written findings. Weighing the evidence and rendering factual findings on the material issues 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.[16]

Because there is no basis to disturb the hearing officer's findings that the agency met its burden of proof, we assess the grievant's remaining assignment of error as a mitigation claim.

Inconsistent 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]."[17] 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."[18] 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.[19]

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.[20] Where the hearing officer does not sustain all of the agency's charges and finds that

[15] *See, e.g.*, Agency Ex. 11.
[16] *See, e.g.*, EDR Ruling No. 2014-3884.
[17] Va. Code § 2.2-3005(C)(6).
[18] *Rules for Conducting Grievance Hearings* § VI(A).
[19] *Id.* at § VI(B)(1).
[20] 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

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."[21] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[22] and will reverse the determination only for clear error.

In her request for administrative review, the grievant appears to argue that other employees engaged in similar misconduct but received more lenient discipline or no discipline. 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."[23] As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[24] Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show that the agency improperly considered the "consistency of the penalty with those imposed upon other employees for the same or similar offenses."[25] 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.[26] 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."[27] 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

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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).

[21] *Rules for Conducting Grievance Hearings* § VI(B)(1).

[22] "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 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.").

[23] *Rules for Conducting Grievance Hearings* § VI(B)(2).

[24] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

[25] *E.g.*, Singh v. U.S. Postal Serv., 2022 M.S.P.B. 15, at 6, 13-15 (2022) (overruling the "more flexible approach" EDR has cited in the past from *Lewis v. Dep't of Veterans Affairs*, 113 M.S.P.R. 657 (2010), and instead going back to a more rigid analysis that requires the relevant offenses to be of the same or similar kind).

[26] *E.g.*, *Singh*, 2022 M.S.P.B. at 7; *Lewis*, 113 M.S.P.R. at 665.

[27] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.

have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.[28]

Although the hearing decision did not include specific findings as to whether the grievant was disciplined more harshly than similarly-situated employees, we cannot find that this omission is a basis for remand given the scarcity of probative evidence and argument presented on this issue. A finding of inconsistent discipline would have required the grievant to prove that specific other employees were situated similarly to her for purposes of the particular misconduct alleged, and yet received lesser or no disciplinary actions. The grievant did not present documentary evidence at the hearing. Although she elicited testimony that other employees may have used profane language in the workplace, as charged in Written Notice 1, no such testimony was offered in detail that might reasonably have supported a comparison, for purposes of mitigation, to the specific allegations charged against the grievant that were upheld by the hearing officer.[29] Accordingly, we interpret the omission of this issue from the hearing decision to reflect the hearing officer's assessment that the issue had not been sufficiently developed to make findings or satisfy the grievant's burden of proof. Therefore, 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. 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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[28] *See, e.g.*, EDR Ruling No. 2024-5636.
[29] *See* Agency Exs. 1; *see, e.g.*, Agency Exs. 11, 15; Hearing Recording Pt. I at 29:20-30:10; Hearing Recording Pt. II at 5:00-6:15.
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).