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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2025-5853
May 5, 2025

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 Numbers 12222 and 12232. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Numbers 12222 and 12232, as found by the hearing officer, are as follows:[1]

> The Agency employed the Grievant as a security manager, without other active, formal disciplinary actions.
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> **Written Notices A and B**
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> The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notices A and B. These Group II Written Notices arise from the same incident on August 10, 2024. The two written notices are confusingly duplicative of content. The written notice designated herein as "A" pertains to the Grievant's uncivil conduct toward his subordinate employee when the subordinate employee tried to remind the Grievant to act properly in his capacity as the highest-ranking staff member. The written notice designated herein as "B" pertains to the Grievant's failure to comply with applicable policy for use of force.
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> The Agency presented security video of the incident that shows and corroborates the Grievant's activity and conduct of engaging in the use of force as the highest-ranking staff member, contrary to established policy as detailed in the written notices. The interim superintendent and superintendent testified to the applicable policies and expectations of the Grievant's position as the highest-

[1] Decision of Hearing Officer, Case Nos. 12222 and 12232 ("Hearing Decision"), Mar. 5, 2025, at 9-12 (internal citations omitted).

ranking staff member present at the August 10, 2024, use of force for restraint of the resident. The superintendent specifically testified to her training of staff, including the Grievant, that reinforced SOP 2.18, setting forth the parameters and procedure for use of force as well as the role of the highest-ranking staff member present.

The video of the incident clearly shows that the housing unit coordinator physically indicated to the Grievant, by holding him, not to engage in the restraint of the resident, as she and others present were lower-ranking staff members. The housing unit coordinator testified, on the Grievant's behalf, to her actions and intent to remind the Grievant that, as the highest-ranking staff member, he should step back and only observe and supervise. The housing unit coordinator testified, however, that the Grievant did not pull or shove her during the encounter. The Grievant simply disregarded her efforts and side-stepped her to enter the resident's room to engage in the restraint of the resident.

The Grievant testified that his conduct of engaging in the use of force was appropriate for the circumstances, and that he and others have done that before without consequence. The Grievant testified that this incident was not a planned use of force. Rather, he was responding to what he considered the resident's criminal possession of contraband—tobacco.

The Grievant denied that he pulled or shoved his lower-ranking colleague (the housing unit coordinator), as charged. The colleague testified that the Grievant did not place his hands on her or pull or shove her. The housing unit coordinator testified that the Grievant side-stepped her as he was entering the resident's room for the restraint. Upon review of the video evidence, I agree that the testimony and evidence does not prove by a preponderance of the evidence that the Grievant pulled and/or shoved his colleague when side-stepping her to enter the resident's room. For this reason, the Agency has failed to prove the uncivil conduct charged in Written Notice A as to the violation of the civility policy. Accordingly, Written Notice A must be reversed and rescinded, as the conduct charged is not proved.

An area supervisor testified for the Grievant that he was unaware of other instances of a highest-ranking staff member being disciplined for use of force. The area supervisor also testified that he did not understand that permission was required for retrieving contraband from a resident. The area supervisor also testified, on cross-examination, that this resident in question was known to have aggressive tendencies.

A former superintendent testified for the Grievant, and he stated that he had never experienced unprofessional or discourteous behavior from the Grievant. The former superintendent trusted the Grievant to make sound decisions, and the Grievant could be counted on for his hard work and dedication.

A former security coordinator also testified for the Grievant. He admitted that he has been counseled about engaging in restraints when serving as the highest-ranking staff member, but he does not believe permission is required to retrieve contraband from a resident.

The former security coordinator also testified for the Grievant. He testified that with shortage of staff, there are instances when the highest-ranking staff member has to be involved in use of force. He also admitted that he has been reprimanded under SOP 2.18, and that he used the Grievant as a witness at his own grievance hearing.

The Agency witnesses also testified that mitigation was considered, recognizing the Grievant's existing work record, but aggravating factors weighed against mitigating the Group II offense down to a lesser discipline.

Regarding Written Notice B, I find that based on the totality of the evidence and testimony, the Grievant failed to follow applicable policy when engaging in the use of force on August 10, 2024. The Agency has proved this charged misconduct and this failure to comply with policy properly constitutes a Group II offense.

Written Notice C

The Agency witnesses testified consistently and credibly about the charged series of conduct instances that the Agency combined into one Group II Written Notice.

The Director of Education and Rehabilitative Care testified to her review of available information and found the Grievant's pattern of conduct incredibly concerning regarding his disrespect of the agency and the juveniles in its custody. The most upsetting to her was the Grievant's interaction with the watch commander confirming the Grievant's more aggressive approach with residents. The Director testified that the Grievant, as a supervisor, is expected to mold behavior. The Director testified that, while any one instance detailed in the Written Notice may not alone justify a Group II offense, the combined instances of conduct included in Written Notice C justify the issuance of the Group II level offense. In response to the Grievant's cross-examination, the Director testified that the discipline was not issued until December because the Grievant was out on leave between August and December 2024.

As detailed in the written notice, the Grievant displayed a lack of professionalism and disrespect towards superiors, subordinates and residents in violation of DJJ's SOP Vol Iv-4.1- 1.01 – Incident reports, Staff Code of Conduct and Administrative directive A- 2024-001 as well as DHRM policies 1.60 and 2.35. His lack of professionalism was on display in two series of emails written to the

director of security (his supervisor) and two of his subordinates where he complained about communication, shift assignments, and another subordinate's failure to come to work. It was also displayed in conversations he had with his supervisor when he referred to another coworker as the supervisor's "minion" and continued to demand more information about an employee's medical status after he was told that documentation had been given to human resources (HR). A couple days later it was displayed in a text message to his supervisor accusing her of leaving her staff "high and dry" and stating, "if this is how your team is going to run when teammates are in need then I don't want to be on this team." The supervisor testified that she communicated these issues to HR on August 8, 2024, however, the other matters occurred and the Grievant was placed on paid disciplinary leave (PDL) and no immediate action was taken.

As a result of the delay, HR became aware in October 2024 of an additional instance of the Grievant displaying disrespect. This time it was toward the residents and the treatment methods used by the Agency. The watch commander testified that she had a shocking conversation with him the first time she met him on July 12. During the course of the conversation, he repeatedly stated a believe that physical "discipline" was necessary to keep youth in line and that he preferred the methods used at another facility. The watch commander testified it was critical to the therapeutic model for there to be consistency and such an attitude would undermine the success of the model. She expressed this to the Grievant and he expressed his disagreement, stating his belief and experience is to "whoop ass."

The Grievant also failed to properly document a use of force incident. As explained by the Chief of Security and the Deputy Director of Education and Rehabilitative Care, entry of these incidents in BADGE is required to ensure that proper notifications and reviews are made whenever there is a use of force incident. This instance demonstrated a failure to perform his duties and make decisions in the best interest of the Agency.

On December 2, 2024, the agency issued to the grievant two Group II Written Notices, each with suspension, citing failure to follow instructions and/or policy, violating safety rules, inappropriate use of force toward a resident, and violating DHRM Policy 2.35, *Civility in the Workplace*.[2] On December 20, 2024, the agency issued a third Group II Written Notice with termination, citing failure to follow instructions and/or policy, unsatisfactory performance, and violating DHRM Policy 2.35.[3] The grievant timely grieved these disciplinary actions, and a consolidated hearing was held on February 25, 2025.[4] In a decision dated March 5, 2025, the hearing officer found that one of the December 2 Written Notices (Written Notice B) and the December 20 Written Notice (Written Notice C) was consistent with law and policy and upheld

[2] Agency Exs. at 6-11; Hearing Decision at 1.
[3] Agency Exs. at 71-73; Hearing Decision at 1.
[4] *See* Hearing Decision at 1.

those Written Notices.[5] However, the hearing officer rescinded the other December 2 Written Notice (Written Notice A), finding that the agency had not met its burden of proof regarding the alleged misconduct.[6] The hearing officer further concluded that, although the agency did not terminate the grievant for the issuance of the December 2 Written Notices, the two upheld Written Notices cumulatively support termination.[7] Finally, the hearing officer concluded that no mitigating circumstances existed to reduce the agency's disciplinary actions.[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.

In his request for administrative review, the grievant raises a number of challenges to the hearing decision. The grievant argues that the termination should have been overturned because the hearing officer rescinded Written Notice A. The grievant argues that the agency's intent was only to terminate the grievant upon the issuance of Written Notice C, the third issued Written Notice. He asserts that, if the agency's intent was only to terminate after a third written notice, and only two written notices are being upheld, it would follow that the termination should be rescinded per the agency's rationale. Additionally, the grievant contests the hearing officer's basis for rescinding Written Notice A but not Written Notice B. Specifically, he points out that the hearing officer believed Written Notices A and B to be duplicative in content, and that if A was rescinded, B should also have been rescinded on the same justification.

Regarding the factual findings, the grievant calls into question the validity of the alleged conversation between him and the watch commander, arguing that there was a lack of a proper investigation into the alleged conversation, that no official incident report was made, and that the Deputy Director who testified was unable to explain how she verified the conversation. The grievant also asserts bias in the hearing officer's decision, pointing out that a portion of the hearing decision directly replicates the agency's written closing argument almost verbatim.

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[5] *Id*. at 11-13.
[6] *Id*. at 10.
[7] *Id*. at 14.
[8] *Id.* at 13-14.
[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).

Regarding mitigation, the grievant argues that the hearing officer failed to consider concerns of disparate treatment compared to his coworkers. Specifically, he mentions a security manager who, despite being found guilty of a DUI charge, was not suspended, whereas the grievant was not found guilty of his DUI charge but nonetheless was suspended without pay. He adds that the security coordinator who testified had been informally disciplined in the past but never received a formal written notice. Finally, he mentions the Superintendent of his facility who testified was verbally reprimanded for an alleged civility violation, whereas the grievant was issued a Group II Written Notice for his own alleged civility violations.

Cumulative and Duplicative Written Notices

The grievant argues that the agency's intent was to only terminate him after three cumulative written notices. Specifically, he argues that the agency already stated its rationale to only terminate after three written notices, pointing to the agency's written closing argument where it states that "termination was appropriate due to the other Group IIs already issued."[12] He also contests the hearing officer's finding that the agency did not indicate an intent of a lesser penalty with Written Notice C.[13]

As the hearing officer properly notes, two Group II Written Notices support termination.[14] Per the *Rules for Conducting Grievance Hearings*, "[w]hen the hearing officer sustains fewer than all of the agency's charges, the hearing officer 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 or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges."[15] Here, there is insufficient evidence to suggest that the agency indicated that it desires a lesser penalty be imposed on fewer charges. While the Written Notices themselves indicate that termination was only implemented after the third, the hearing officer correctly finds that the agency elected termination with Written Notice C, which was upheld, and did not indicate a desire to impose a different discipline on lesser charges.[16] The imposition of termination with Written Notice C was consistent with policy with a second Group II (Written Notice B) upheld. EDR has not been made aware of any different intent of the agency following the rescission of Written Notice A. Indeed, in its rebuttal to the grievant's request for administrative review, the agency states that it never expressed a desire to reduce the discipline following the rescission of Written Notice A.[17] For the foregoing reasons, EDR will not disturb the hearing decision on this basis.

The grievant also questions the hearing officer's finding that Written Notices A and B were duplicative in content, and that he found Written Notice A to be unsubstantiated, but conversely

[12] Request for Administrative Review at 2-3; Agency Closing Argument at 4.
[13] Request for Administrative Review at 4.
[14] Hearing Decision at 14; DHRM Policy 1.60, *Standards of Conduct*, at 11.
[15] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[16] Hearing Decision at 14.
[17] Rebuttal to Request for Administrative Review at 2.

upheld Written Notice B.[18] After a review of the Written Notices, EDR can confirm that these two Written Notices are almost identical, with the main difference being different policy violations cited between the two.[19] However, it is this distinction that appears to have prompted the hearing officer to differentiate the two Written Notices. Specifically, the hearing officer determined that Written Notice A disciplined the grievant for violating DHRM Policy 2.35, *Civility in the Workplace*, for allegedly using force on a subordinate employee. Conversely, the hearing officer determined that Written Notice B disciplined the grievant for using force on a resident of the facility.[20] The hearing officer treated these two Written Notices as two separate charges, upholding the charge for using force on a resident but rescinding the charge for using force on a subordinate employee.[21] While the grievant feels both should be rescinded if they are in fact duplicative in content and one was rescinded, it appears that the hearing officer appropriately used his discretion in differentiating the two Written Notices based on the specific conduct charged arising from the same incident. Therefore, EDR will not disturb the hearing decision on these grounds.

Factual Findings

The grievant asserts that the agency proffered insufficient evidence in support of the allegations mentioned in Written Notice C. Specifically, the grievant claims that no proper investigation was conducted regarding the alleged conversation between him and the watch commander, and that the conversation was not documented on an official incident report. He adds that the Deputy Director testified that she did not allow the grievant to provide his side of the allegations and issued discipline solely based on the written statement of the watch commander.[22]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[23] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[24] 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.[25] 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.[26] 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.

[18] Request for Administrative Review at 3.
[19] Agency Exs. at 6, 9.
[20] Hearing Decision at 9-10.
[21] *Id*. at 10-11.
[22] Request for Administrative Review at 4.
[23] Va. Code § 2.2-3005.1(C).
[24] *Grievance Procedure Manual* § 5.9.
[25] *Rules for Conducting Grievance Hearings* § VI(B).
[26] *Grievance Procedure Manual* § 5.8.

In the hearing, the Deputy Director did in fact testify that, upon using Written Notice C, the only evidence she reviewed regarding the alleged conversation between the grievant and the watch commander was the written statement made by the watch commander, and that she was not aware of the July 2024 incidents at issue until she assumed her current role in November 2024.[27] However, she also asserted that the grievant had a chance to provide his side of the allegations via his due process response.[28]

While the grievant contests the basis of the allegations regarding the conversation at issue, it appears that the conversation is supported by the evidence proffered by the agency. The Deputy Director did admit that she only reviewed the witness statement of the watch commander in issuing the discipline, but the watch commander also confirmed through her testimony at hearing that the conversation and the alleged misconduct within the conversation took place.[29] Finally, while the grievant questions the circumstances of the alleged conversation, he does not appear to question or assert that the conversation did not happen.[30]

The hearing officer found that, due to the agency's testimony and the grievant "not credibly deny[ing] or refut[ing] the occurrences in Written Notice C," the agency met its burden of proof regarding the misconduct charged in that Written Notice.[31] 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 alleged conversation cited in Written Notice C and that the subsequent disciplinary action was consistent with law and policy.[32] While the grievant questions the basis on which the Deputy Director substantiates the conversation, 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. Further, 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.[33] For the foregoing reasons, EDR declines to disturb the hearing decision on this basis.

Bias

The grievant also claims that the hearing decision indicates bias of the hearing officer, pointing out that a portion of the hearing decision almost verbatim copies a portion of the agency's written closing argument.[34]

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[27] Hearing Recording Pt. 2 at 53:15-53:35, 54:40-57:05, 1:03:10-1:05:05 (Deputy Director testimony).
[28] *Id*. at 1:10:50-1:11:10.
[29] *Id*. at 26:35-33:10 (Watch Commander testimony).
[30] *See id*. at 39:45-47:55 (Grievant's cross-examination of Watch Commander).
[31] Hearing Decision at 12.
[32] *See, e.g.*, Hearing Recording Pt. 2 at 55:20-1:00:35 (Deputy Director testimony); *id*. at 26:35-33:10 (Watch Commander testimony); Agency Exs. at 59-62, 85.
[33] *See, e.g.*, EDR Ruling No. 2020-4976.
[34] Request for Administrative Review at 5.

An EDR hearing officer is responsible for, among other things, "[c]onducting the hearing in an equitable and orderly fashion" and

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing[s] Program Administration.[35]

Section III(G) of the *Rules for Conducting Grievance Hearings* provides that a hearing officer must recuse himself "in any hearing in which the [hearing officer's] impartiality might reasonably be questioned," unless the parties are advised of the basis for the potential recusal and "the parties consent to the hearing officer's continued service . . . ."[36] Grounds for recusal include situations in which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."[37]

EDR's approach to recusal is generally consistent with the manner in which the Court of Appeals of Virginia approaches the judicial review of recusal cases.[38] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[39] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[40] The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.[41]

EDR has thoroughly reviewed the hearing audio and full record in this matter and identified no failure by the hearing officer to conduct the proceeding in an equitable fashion. While the hearing officer's decision does copy verbatim a significant portion of the agency's closing argument,[42] such findings are nonetheless supported by evidence in the record and agency testimony. Specifically, the portions copied almost verbatim relate to the misconduct charged in Written Notice C. As was discussed previously, such misconduct has been substantiated by evidence in the record and agency witness testimony.[43] There is insufficient evidence to meet the grievant's burden of proving the hearing officer's personal bias or prejudice.

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[35] *Rules for Conducting Grievance Hearings* § II.
[36] *Id.* § III(G) (alteration in original) (internal quotation marks and citation omitted).
[37] *Id.*
[38] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.
[39] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").
[40] EDR Ruling No. 2012-3176.
[41] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[42] *See* Hearing Decision at 11-12; Agency Closing Argument at 3-4.
[43] *See, e.g.*, Hearing Recording Pt. 2 at 55:20-1:00:35 (Deputy Director testimony); *id*. at 26:35-33:10 (Watch Commander testimony); Agency Exs. at 71-85.

Disparate Treatment

Finally, the grievant asserts that the hearing officer did not properly consider the disparate treatment of three named coworkers in comparison to the grievant.[44] For the first coworker, the grievant asserts that, while this coworker was allegedly found guilty of a DUI charge and yet did not receive any kind of suspension, the grievant was found not guilty for his DUI charge but still received a 90-day suspension without pay.[45] Regarding the two other coworkers, the grievant asserts that they were given "progressive" discipline, such as verbal and written counseling, despite the grievant allegedly not receiving any form of progressive or informal discipline before being issued the three Group II Written Notices.[46] Specifically, he notes that a security coordinator was "counseled for being involved in incidents" compared to the grievant's Group II Written Notice for use of force.[47] Finally, he notes that the Superintendent of his facility was only verbally reprimanded for allegedly using profanity during a meeting, comparing that to his own alleged misconduct of sending unprofessional emails.[48] Regarding the grievant's claims of disparate treatment in general, the hearing officer did not address any specific assertion but broadly dismissed the claims as "scant allegation[s] of others' similar conduct."[49]

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]."[50] 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."[51] 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.[52]

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

[44] Request for Administrative Review at 1.
[45] *Id*.
[46] *Id*. at 2.
[47] *Id*.
[48] *Id*.
[49] Hearing Decision at 14.
[50] Va. Code § 2.2-3005(C)(6).
[51] *Rules for Conducting Grievance Hearings* § VI(A).
[52] *Id.* at § VI(B)(1).
[53] 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."[54] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[55] and will reverse the determination only for clear error.

The grievant argues that the Written Notices were inconsistent with DHRM Policy 1.60, *Standards of Conduct*, in that no corrective action or progressive discipline preceded formal discipline. Contrary to the grievant's argument, DHRM policy does not mandate corrective action prior to the issuance of a written notice;[56] moreover, the grievant's former supervisor testified about her efforts to communicate issues to the grievant by way of verbal and written feedback, including two counseling memorandums.[57] Accordingly, we cannot find that the grievant has presented a basis to remand the hearing decision's findings as to the lack of progressive 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."[58] As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[59] 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."[60] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove

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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).

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

[55] "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.").

[56] DHRM Policy 1.60, *Standards of Conduct*, at 7 (stating that while counseling is typically the first level of corrective action, it is "not a required precursor to the issuance of Written Notices").

[57] *See* Hearing Recording Pt. 1 at 2:25:20-2:29:25 (Chief of Security testimony); Agency Exs. at 86-90.

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

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

[60] *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).

a legitimate explanation for the disparate treatment.[61] 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."[62] 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.[63]

The grievant's claim about another employee who was charged with a DUI is irrelevant due to the fact that the none of the disciplinary actions addressed in the decision related to the grievant's DUI charge. While the agency did suspend the grievant for 90 days without pay upon being notified that he was charged with a Class I Misdemeanor,[64] this charge was ultimately remedied by the agency granting the grievant backpay for the period of suspension.[65] Indeed, the agency asserted during the hearing that the grievant was not disciplined for the DUI charge.[66] For these reasons, the hearing officer did not err in failing to consider the disparate treatment claim regarding the grievant's DUI charge.

The grievant also claims disparate treatment when compared to the Superintendent of his facility. The grievant specifically alleges during his testimony that the Superintendent was verbally reprimanded for being unprofessional and/or using profanity during a meeting.[67] While the alleged charge is somewhat similar to the grievant's charge relating to the sending of professional emails, there is insufficient comparability of the grievant and the Superintendent's positions. Further, even if the alleged civility violation by the Superintendent was true and that she was only given verbal counseling, a single incident such as this is substantially different than the basis of the Group II Written Notice at issue, which was issued pursuant to several other alleged violations in addition to the sending of unprofessional emails.[68]

More importantly, the grievant has not provided sufficient evidence of the Superintendent's alleged civility violation. The Superintendent also testified that she was unaware of any such civility violations against her.[69] As stated previously, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are the kinds of determinations reserved solely to the hearing officer, and there is insufficient evidence that the

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[61] *E.g.*, *Singh*, 2022 M.S.P.B. at 7; *Lewis*, 113 M.S.P.R. at 665.
[62] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[63] *See, e.g.*, EDR Ruling No. 2024-5672.
[64] Grievant Exs. at 62.
[65] Hearing Recording Pt. 3 at 1:03:50-1:07:30 (Agency cross-examination of Grievant). While the grievant asserts he was disciplined with the 90-day suspension without pay and was not initially granted relief via backpay upon his "not guilty" verdict, the grievant was ultimately able to get such relief after contesting the issue through a separate grievance. *Id*.
[66] *Id*. at 1:04:00-1:05:00.
[67] Hearing Recording Pt. 3 at 48:30-49:10 (Grievant testimony).
[68] *See* Hearing Recording Pt. 2 at 59:35-1:00:35 (Deputy Director testimony).
[69] Hearing Recording Pt. 1 at 1:21:20-1:22:35 (Superintendent's testimony).

hearing officer abused his discretion in finding the Superintendent's testimony credible.[70] For the foregoing reasons, the hearing officer did not err in failing to consider the disparate treatment claim regarding the Superintendent's alleged civility violation and verbal discipline.

Finally, the grievant claims disparate treatment in comparison to a security coordinator. Here, it does not appear that there is sufficient evidence in the record to carry the grievant's burden as to the nature of the charges being similar, or that the grievant and the security coordinator hold similar positions.[71] The security coordinator also testified that he had been verbally counseled in the past for incidents but this happened in the earlier years of his 17-year tenure with the agency.[72] After a review of the record, there seems to be no other evidence regarding the alleged instances of improper use of force by the security coordinator, nor regarding any subsequent discipline or lack thereof. For these reasons, the hearing officer did not err in failing to further consider or address the disparate treatment claim regarding the security coordinator's alleged incidents and lack of formal discipline.

Ultimately, 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 him for purposes of the particular misconduct alleged, and yet received lesser or no disciplinary actions. The grievant did not present documentary evidence or testimony 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. 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. For the foregoing reasons, 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.[73] 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.[74] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[75]

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[70] *See generally* Hearing Decision at 11.
[71] *See* Hearing Recording Pt. 2 at 2:50:05-2:50:45 (Security Coordinator testimony).
[72] Hearing Recording Pt. 2 at 2:51:10-2:51:50.
[73] *Grievance Procedure Manual* § 7.2(d).
[74] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[75] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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