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 2025-5881
May 22, 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 Number 12225. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 12225, as found by the hearing officer, are as follows:[1]

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Corrections Sergeant, an important supervisory position within the facility.

2. The Grievant was required to strictly adhere to all applicable Agency policies and procedures.

3. As Corrections Sergeant, amongst other duties, Grievant was responsible for supervising and controlling numerous subordinates, including both Agency employees and inmates assigned to the Restorative Housing Unit ("RHU") of the facility.

4. The RHU houses inmates who must be safeguarded by Correctional Officers ("C/Os") with especial vigilance, having been removed from the general population because of problematic issues such as being on suicide watch, facing disciplinary charges, etc.

5. 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 his subordinates.

[1] Decision of Hearing Officer, Case No. 12225 ("Hearing Decision"), Apr. 14, 2025, at 4-6 (internal citations omitted).

6. The Grievant performed an important vital function for the Facility as essentially the officer in charge of RHU, with significant and substantial training invested in the Grievant by the Agency in all aspects of his employment.

7. The Facility reasonably and of necessity relied on the Grievant to fulfill all his duties and responsibilities.

8. The Facility is a high security level institution and the Grievant's role in maintaining the safety and security of inmates, staff and the public is paramount, particularly when the Grievant was assigned to the RHU.

9. Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards Grievant's supervisory duties pertaining to the RHU.

10. On October 9, 2024, Grievant went to retrieve contraband from Inmate A, and in the process committed serious violations of the Agency's policies and protocols.

11. Grievant went into Grievant's RHU cell alone – policy mandates at least two C/Os enter a cell in RHU unless there is an immediate danger to inmate safety. During the hearing, the Grievant admitted that he should have called for another C/O.

12. Grievant verbally abused and threatened Inmate A and another inmate, Inmate B.

13. Grievant admits calling Inmate A a "faggot ass bitch" and in any event all the Grievant's verbal comments of a sexual nature to the inmates, including demeaning references to gender, obscene language, etc., within the meaning of sexual harassment as defined in Operating Procedure 038.3 (PREA), are captured the body camera footage of the incident.

14. For example, the Grievant says on camera, "Shut your bitch ass up" and threatens, "throw you to the wolves."

15. However, the Agency presented no credible evidence of Grievant using excessive force, as argued by his attorney. Inmate A's account is not in the least credible, and the body camera footage is inconclusive.

16. 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.

17. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

18. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

19. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

On December 5, 2024, the agency issued to the grievant a Group III Written Notice with termination, citing unsatisfactory performance, failure to follow instructions and/or policy, and obscene or abusive language.[2] The grievant timely grieved this disciplinary action, and a hearing was held on March 24, 2025.[3] In a decision dated April 14, 2025, the hearing officer determined that, while the agency did not meet its burden of proof regarding the use of excessive force charged in the Written Notice, it nonetheless presented sufficient evidence to support its disciplinary action based on the other charged offenses.[4] The hearing officer further found that no mitigating circumstances existed to reduce the agency's disciplinary action.[5] 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."[6] 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.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant asserts that, while the hearing officer identified each of the mitigating factors proffered by the grievant, he did not adequately consider them in his mitigation analysis. Most notably, the grievant asserts that the hearing officer did not adequately consider (1) the demands of the grievant's work environment, (2) the racial slurs and threats of Inmate A towards the grievant, (3) the bad behavior of the inmates, (4) the long hours

[2] Agency Exs. at 1-2; Hearing Decision at 2.
[3] *See* Hearing Decision at 2.
[4] *Id*. at 8-10, 14.
[5] *Id.* at 10-11, 14.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

worked by the grievant, (5) the facility's staffing shortage, and (6) the stressful work.[9] The grievant further argues that the hearing officer failed to acknowledge that "Inmate A had pushed [the grievant] to the limit with a barrage of racial epithets and vulgar insults."[10] Procedurally, the grievant asserts that due process requires hearing officers to act independently of agency decisions, and that the hearing officer's contention of not being able to act as a "super-personnel officer" and substitute his judgment for that of the agency contradicts this due process requirement.[11]

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in at least some of the behavior charged in the Group III Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy.[12] Indeed, the grievant has not asserted any contention with regard to the hearing officer's findings, and thus has not presented any basis in his appeal on which EDR could find that remand is warranted with respect to those findings. Therefore, the remainder of this administrative review will address the grievant's arguments regarding mitigation and the proper standard of review by a hearing officer regarding mitigating factors.

Mitigation

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]."[13] 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."[14] 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.[15]

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

[9] Request for Administrative Review at 3.
[10] *Id.*
[11] *Id.* at 4-5.
[12] *See, e.g.*, Agency Exs. at 1, 3-5, 7-10; Hearing Recording Pt. 1 at 20:15-25:05, 26:20-27:45 (Investigator testimony); Pt. 2 at 8:10-17:50, 30:20-31:00, 41:40-45:20, 1:15:20-1:15:55 (Assistant Warden testimony); Pt. 3 at 4:00-11:45, 24:30-26:45 (Warden testimony).
[13] Va. Code § 2.2-3005(C)(6).
[14] *Rules for Conducting Grievance Hearings* § VI(A).
[15] *Id.* at § VI(B)(1).
[16] 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

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."[17] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[18] and will reverse the determination only for clear error.

In his decision, the hearing officer noted that the agency "did consider mitigating factors, including the Grievant's past good service to the Agency."[19] He further found that "[w]hile the Grievant might not have specified for the hearing officer's analysis all of the mitigating factors below, the hearing officer considered a number of factors including . . .

1. the demands of the Grievant's work environment;
2. the Grievant's tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's past favorable performance evaluation history;
5. the racial slurs and threats of Inmate A to Grievant;
6. his very hard work for the Facility;
7. the Grievant's excellent evaluations;
8. the bad behavior of the Inmates;
9. the long hours worked by the Grievant;
10. the shortage of staff at the Facility; and
11. the stressful work.[20]

The hearing officer further found that, despite the mentioned mitigating factors, "the Grievant held an important supervisory position where management of necessity relied on him to attend work and to perform his duties in strict conformity with Agency policies . . . ." and that the hearing

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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).

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

[18] "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.").

[19] Hearing Decision at 10.

[20] *Id.* at 10-11.

officer "would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding."[21]

Especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, termination is an inherently reasonable outcome.[22] Moreover, 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.'"[23] Although the grievant is correct in pointing out that the hearing decision did not include specific findings as to how the listed mitigating circumstances were considered, we cannot find that this omission is a basis for remand. EDR interprets the hearing officer's decision as essentially finding that the mitigating factors considered did not meet the grievant's burden to show that the disciplinary action and termination exceeded the limits of reasonableness.[24] Having reviewed the evidence in the record regarding the grievant's arguments as to mitigating factors, EDR perceives no error in the hearing officer's reasoning or his conclusion that mitigation was not warranted. Thus, we cannot say that the hearing officer abused his discretion in finding that the Group III with removal was within the bounds of reasonableness. Accordingly, we decline to disturb the decision on these grounds.

Hearing Officer's Standard of Review

As a final matter, the grievant appears to challenge the impact of EDR's longstanding practice that a hearing officer is not a "super-personnel officer,"[25] arguing that the hearing officer "essentially acknowledged that he felt restricted from exercising his independent judgment with respect to evaluati[ng] mitigating evidence."[26] The grievant asserts that "[a] hearing officer cannot exercise independent judgment if he is constrained from adequately and impartially reviewing the agency's discipline decision or if he fears being challenged as a 'super personnel officer' for acknowledging that the disciplined meted was 'so harsh, unconscionably disproportionate to the offense that it amounts to an abuse of discretion.'"[27]

The full quotation from the case cited by the grievant states the following: "deference is given to the agency's judgment unless the penalty exceeds the range of permissible punishment specified by statute or regulation, or unless the penalty is 'so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.'"[28] This language is similar to and representative of EDR's mitigation standard, which involves a degree of deference granted to agency management unless, for example, the disciplinary action at issue exceeds the

[21] *Id*. at 11.
[22] *E.g.*, EDR Ruling No. 2023-5458.
[23] *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22; *e.g.* EDR Ruling No. 2014-3777.
[24] Hearing Decision at 10-12.
[25] *Rules for Conducting Grievance Hearings* § VI(A).
[26] Request for Administrative Review at 4.
[27] *Id.* at 4-5 (quoting Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987)).
[28] *Parker*, 819 F.2d at 1116.

limits of reasonableness.[29] Where a hearing officer's factual findings support a determination that the disciplinary action does indeed exceed the limits of reasonableness, mitigation may be the appropriate outcome by a hearing officer. As stated above, however, we do not interpret the hearing officer's analysis as expressing restraint from being able to make the necessary finding sought by the grievant to mitigate the disciplinary action in this case, but rather applying the correct standard to determine that mitigation was not appropriate. While the mitigation standard is a high bar, hearing officers have authority to make and have made findings that meet this standard when supported by the facts.[30] Based on the hearing officer's assessment, the facts did not meet that standard in this case and EDR concurs with this conclusion.

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.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[29] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[30] It is also worth noting that hearing officers have also been given the authority to review the facts of a case *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. *Rules for Conducting Grievance Hearings* § VI(B). 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. *Grievance Procedure Manual* § 5.8. 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.
[31] *Grievance Procedure Manual* § 7.2(d).
[32] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[33] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).