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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5888
May 29, 2025

The Department of Corrections (the "agency") has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12250. For the reasons set forth below, EDR remands the matter to the hearing officer for further consideration.

FACTS

The relevant facts in Case Number 12250, as found by the hearing officer, are incorporated by reference.[1] On December 9, 2024, during a search of the grievant's vehicle, a note believed to have been written by an inmate was discovered in the bottom of the center console.[2] The hearing officer has found that it was "more likely than not that Grievant placed the note in her center console."[3] On February 20, 2025, the agency issued to the grievant a Group III Written Notice with termination for violation of the agency's Operating Procedure 135.2 because the note was "inappropriate to have in her possession" and the grievant had failed to report the behavior of the inmate.[4] The grievant timely grieved the disciplinary action, and a hearing was held on April 21, 2025.[5] In a decision dated April 22, 2025, the hearing officer appears to have determined that the agency had presented no evidence that the grievant engaged in fraternization with the inmate, but that the grievant had violated the reporting requirements of Operating Procedure 135.2.[6] However, the hearing officer states that the agency offered no evidence as to how or whether the grievant's conduct severely impacted the agency's operations or why termination was the automatic result without consideration of certain cited agency policy language.[7] Thus, while the hearing officer upheld the Group III Written Notice, the hearing officer mitigated the termination down to a 30-

[1] Decision of Hearing Officer, Case No. 12250 ("Hearing Decision"), Apr. 22, 2025, at 2-5.
[2] *Id.* at 3.
[3] *Id.* at 4.
[4] Agency Exs. at 1-3; *see* Hearing Decision at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 3-5.
[7] *Id.* at 5.

day suspension.[8] Accordingly, the hearing officer ordered the grievant reinstated with back benefits and, presumably, back pay less the 30-day suspension.[9] The agency now appeals the decision to EDR.

DISCUSSION

By statute, EDR has 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."[10] 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.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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

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[8] *Id.* at 5-6.
[9] *Id*. If the hearing officer had intended to order reinstatement without back pay, the hearing officer should clarify the matter on remand.
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[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 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).

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.

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.[19] 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.'"[20] Given that the hearing officer upheld the disciplinary action as a Group III, it is not clear that the mitigation standard has been met here based on the grounds cited in the decision.

However, EDR observes that the grounds cited by the hearing officer for mitigating the grievant's termination (essentially, the lack of evidence about the severity of the misconduct and any impact on the agency's operations)[21] appears to be more relevant to the question of what level of discipline (e.g., Group II or Group III) the grievant's behavior should be categorized at. The agency argues that evidence about "the degree to which the misconduct disrupted Agency operations" is not part of the agency's burden of proof.[22] However, the agency does have the burden to demonstrate that a disciplinary action is consistent with policy.[23] Therefore, the agency must present evidence demonstrating that a Written Notice is properly categorized at the appropriate level under state and agency policy. EDR's review of the record in this regard finds somewhat conflicting evidence.

The hearing officer records in the decision that the warden "testified that fraternization is always a Group III Offense with termination."[24] However, as stated above, it does not appear that the grievant was found to have engaged in fraternization, but rather a failure to report the letter.[25] EDR is unable to locate evidence in the record as to whether the agency "always" treats a failure

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[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] *E.g.*, EDR Ruling No. 2023-5458.
[20] *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22; *e.g.* EDR Ruling No. 2014-3777.
[21] *See* Hearing Decision at 5.
[22] Administrative Review Request at 5-6.
[23] *E.g., Rules for Conducting Grievance Hearings* § VI(B)(1).
[24] Hearing Decision at 3.
[25] *Id.* at 3-5.

to report as a Group III Offense with termination. As a basic principle, a failure to follow a written policy can be categorized as a Group II offense under DHRM Policy 1.60, *Standards of Conduct*.[26] Elevating such a Group II offense to a Group III would require evidence of aggravating factors or, for example, other unique impact[27] in the absence of applicable policy language. Thus, the hearing officer's consideration of the severity of the offense and any impact on agency operations would appear to be a relevant and important consideration to the resolution of this case.

The agency's standards of conduct policy (Operating Procedure 135.1) also offers potentially conflicting evidence in this regard. On the one hand, the policy lists violations of Operating Procedure 135.2 (where the failure-to-report provision resides) as a Group III offense.[28] However, Attachment 2 to the same policy suggests that violations of Operating Procedure 135.2 "may, depending on the nature of the offense, constitute a Group I, II, or III offense."[29] DOC Operating Procedure 135.2 certainly identifies some types of misconduct that are properly categorized as Group III offenses. For example, the policy provides language on sexual misconduct and fraternization. However, even with fraternization, the policy states that fraternization should normally be treated as a Group III offense "unless surrounding circumstances and mitigating factors are present that warrant a reduction in the disciplinary action."[30] Furthermore, Operating Procedure 135.2 identifies other types of misconduct that do not so clearly fall within the normal parameters of a Group III offense, such as abuse of employment status, vigilance, professional appearance, and courtesy and respect. To find that such types of misconduct were Group III offenses would necessarily involve consideration of the particular circumstances of the misconduct and any impact on agency operations. Failure to report would appear to be in a similar type of category.

The hearing officer's decision does not contain a discussion as to why the Written Notice was upheld as a Group III offense.[31] On remand, based on the discussion above, the hearing officer must consider whether the disciplinary action at issue is properly categorized as a Group II or a Group III offense. If the hearing officer upholds the Written Notice as a Group III, then the mitigating factors cited do not support a determination that termination exceeds the limits of reasonableness for a Group III offense, for which termination is a presumptively reasonable outcome. However, if the hearing officer finds that the record evidence supports upholding the Written Notice only at the Group II level, then requisite findings as to the maximum level of suspension should be made.[32] EDR would also point out that the agency has stated on appeal that "uncontested facts" were presented at hearing as to the impact on agency operations.[33] The hearing officer must consider such evidence on remand in the resulting analysis, as well.

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[26] *E.g.*, DHRM Policy 1.60, *Standards of Conduct*, at 11.
[27] *Id.* at 10, 13; *see also id.*, Attach. A (Examples of Offenses Grouped by Level).
[28] Agency Exs. at 56.
[29] DOC Op. Proc. 135.1, *Standards of Conduct*, Attach. 1 (Examples of Offenses Grouped by Level).
[30] Agency Exs. at 34.
[31] *See* Hearing Decision at 4-6.
[32] Assuming termination does not occur, state policy permits suspension for a maximum of 10 workdays in conjunction with a Group II Written Notice, and up to 30 days in conjunction with a Group III Written Notice. DHRM Policy 1.60, *Standards of Conduct*, at 12-13.
[33] Administrative Review Request at 6.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer to further consider and clarify his findings as described above.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[34] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[35]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued their remanded decision.[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]

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[34] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[35] *See Grievance Procedure Manual* § 7.2(c).
[36] *Id.* § 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).