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 Wildlife Resources
Ruling Number 2024-5710
August 22, 2024

The Department of Wildlife Resources (the "agency") 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 12071. For the reasons set forth below, EDR remands the hearing decision for reconsideration.

FACTS

The relevant facts in Case Number 12071, as found by the hearing officer, are as follows:[1]

> The Agency employed the Grievant as a regional wildlife manager, since June 25, 2019, without other active disciplinary actions.
>
> On April 12, 2023, the agency provided workplace conduct training by an outside consultant. On or about July 24, 2023, the Agency engaged the same outside consultant as investigator to conduct a workplace investigation following complaints from two female employees (Complainant D and Complainant P), alleging in writing that their supervisor, the Grievant, engaged in unprofessional and immature behaviors. The investigator issued her report of findings on November 8, 2024. The investigator found that the Grievant has demonstrated extremely poor leadership of his female subordinate employees and treated them disparately. The investigator concluded that the Grievant had behaved unprofessionally and immaturely and had engaged in multiple acts of misconduct in violation of DHRM Policy 1.60 and DHRM Policy 2.35.
>
> . . . .
>
> The investigator's report concluded that the Grievant should be disciplined for conduct spanning over four years violating Policies 1.60 and 2.35, either with one Group III written notice for the totality of the conduct or multiple written

[1] Decision of Hearing Officer, Case No. 12071 ("Hearing Decision"), Apr. 29, 2024, at 10, 12-21 (citations and footnotes omitted).

notices for each act. The Agency accepted the investigator's report and issued nine written notices to the grievant, each one elevated to Group III with termination because the Grievant was a supervisor.

The investigator's report also concluded that the Grievant's direct supervisor, the Director of Wildlife Division (DWD), also should be counseled or disciplined for his failure to act. He had a duty to respond to the complaints by Complainant P and Complainant D in a responsible manner, and he failed to do so. Agency management issued counseling to DWD, the Grievant's direct supervisor with obviously greater management authority and responsibility than the Grievant. This level of discipline for DWD certainly was an act of restrained, progressive discipline. DWD had greater supervisory responsibilities, yet, compared to the Grievant, he received about the lightest level of discipline. If DWD failed the complainant subordinates, he and agency management also failed their responsibilities to the Grievant by failing to place him on notice that his conduct was subject to discipline under Policies 1.60 and 2.35.

The Grievant himself perceived management issues with his subordinate employees, the complainants in these written notices, and the Grievant sought assistance from his supervisor, DWD. According to the investigation, DWD considered these personnel problems between the Grievant and his subordinates as personality conflicts, not violations of Policy 2.35, and responded and guided the Grievant, accordingly. In the context of the written notices based on Policy 2.35, Agency management for over four years failed to put the Grievant on any notice of its ex post facto interpretation of conduct as a violation of Policy 2.35.

The Agency's deputy director testified that she was aware of complaints about the grievant in early 2021, before she was promoted to deputy director in April 2021. As the Grievant was not in her chain of command at the time, she referred the matter to her peer, DWD, who was the Grievant's direct supervisor.

When Complainant P and Complainant D made their complaints in July 2023, the human resources (HR) director engaged the outside investigator and placed the Grievant on administrative leave. Once the outside investigator's report, dated November 8, 2023, was received, the deputy director and HR director held the due process meeting with the Grievant. The decision was made that the Grievant's conduct was intolerable and justified termination. The deputy director testified that no mitigating circumstances were considered. The deputy director testified that if an employee was joking inappropriately with a colleague, counseling would be justified. In this case, the record establishes at least some of the Grievant's alleged offenses were joking behavior.

The HR director testified that mitigating circumstances were considered, but there were no circumstances compelling enough to mitigate the nine Group III written notices. The HR director conceded that a few of the written notices would have been lower-level offenses, but supervisors are held to a higher standard. The HR director testified that the agency has not previously issued discipline more

severe than Group I for pronoun misuse. The HR director testified that she viewed the consultant's April 12, 2023, training as "eye opening" to the agency staff, meaning a heightened sense to perceived incivility. She wished these complaints were raised earlier. However, the HR director met with DWD several times in the past regarding communication issues between the Grievant and the two complainants. The HR director testified that secretly recording a conversation, as the two complainants did, is not ideal behavior and could be considered uncivil conduct. As a rule, progressive discipline is the policy.

. . . .

Written Notice No. 1.[2]

. . . . Complainant M testified to hearing [an] alleged disparaging remark. . . . The Grievant credibly denied making the remark . . . . [T]he evidence is in equipoise, at best. The Agency has the burden of showing convincing information beyond equipoise that the Grievant committed the alleged misconduct. I find the Agency has not proved this alleged misconduct. . . .

Written Notice No. 2.[3]

. . . . As revealed during the hearing, the meeting at issue was March 30, 2022 . . . and the Grievant produced medical documentation regarding his medical emergency during that time frame. The Grievant was experiencing severe gastrointestinal pain and discomfort, and he participated in the meeting by telephone instead of in person. There is no evidence that this Grievant was not permitted to work flexibly, or from home, and join a meeting by telephone and, thus, committed misconduct by doing so. . . . [N]o testimony established such misconduct. . . .

Written Notice No. 3.

This written notice alleges the Grievant failed to show up on time for a scheduled meeting on June 6, 2023. The Grievant's credible testimony established that he did attend the meeting but was delayed by equipment problems at the office when making or printing copies of exhibits for the meeting. . . .

[2] Written Notice 1 charged that the grievant "repeatedly [made] disparaging remarks about his supervisor . . . to his subordinates and peers," including a remark that his supervisor "didn't have the balls" to turn in a bad evaluation of the grievant's performance. Hearing Decision at 4; Agency Exs. at 1.

[3] Written Notice 2 charged that the grievant "failed to show up in person for a meeting scheduled with [City] . . . and provided a false explanation for the absence." Hearing Decision at 5; Agency Exs. at 3.

Written Notice No. 4.

The alleged misconduct is failing to address a report of a raccoon being held captive in Botetourt County on June 16, 2023, within the policy mandated 10 calendar days. The evidence showed, however, that there is no "policy mandated 10 calendar days" upon which to base a misconduct charge. The Agency has written "guidance" that states such matters "should" be addressed within 10 calendar days. The evidence showed that the report of the captive raccoon was picked up by an officer from a social media post, without specifics regarding location, etc. The Grievant testified that he asked the reporting officer to investigate further to identify the location for the Agency to address the matter. This need for further investigation is unrebutted and corroborated by written emails. Without such particulars, the suggested response time could not be commenced or implemented. The Grievant testified that the timing of this report also came at an unusually busy time for his unit. . . .

Written Notice No. 5.

The alleged misconduct is the Grievant's attempted dispatch of a domestic pig, contrary to Agency policy and applicable licensures that allow authorized staff to use immobilization drugs on wildlife only. This pig was in the custody of animal control, and the Grievant received a request for the Agency to handle the dispatch of the animal. The grievant assigned the matter to his subordinate employee, Complainant D, who investigated and determined that the pig was a domestic animal and outside the authority of the Agency. Complainant D perceived some improper intent by being involved in the Agency's response to this outside request. The Grievant testified that animal control may possess domestic or feral animals. Complainant D testified that the applicable court order specifically concluded the pig was domestic, but such an order was not produced as evidence. However, no hearing testimony credibly established that the Grievant violated any policy by having his subordinate employee investigate the matter or that he tried to circumvent Agency authority and policy. . . .

Written Notice No. 6.

This written notice charged a violation of Policy 2.35 over the time span between the Grievant's hire date, June 25, 2019, and July 20, 2023, when he undermined team cohesion and staff morale by repeatedly ignoring [Complainant S]'s request to stop using the noun "ma'am" when speaking to her as it made her feel uncomfortable. . . .

The Grievant credibly testified that another, non-testifying, staff member objected to being addressed as "ma'am" and, as corroborated in the investigator's report, she "went off" on the Grievant over his use of the noun. This staff member

admitted to the investigator that she had a "short fuse" and thoroughly explained to him in a "tense voice" that he was continuing to use the term. The staff member recognized that the Grievant was using the term out of respect and tried to comply with the colleague's request.

Complainant S was not the Grievant's subordinate employee, she was at peer level. She resented the Grievant questioning aspects of established programs she was involved in, such as that described by Complainant M in written notice No. 7. Complainant S testified that her tenure at the Agency has had some rough patches, with her experiencing bullying, sexism and sexual harassment (predating the Grievant's hire). She did not like the use of "ma'am" and believed the Grievant did not try to stop using it. When asked how long the Grievant continued, Complainant S said she just stopped hearing it. She also admitted, however, to her own repeated stumbles over use of the non-binary pronoun "they" with a co-worker. The Grievant credibly testified that he did not refuse to change his use of "ma'am," but the habit of using "sir" and "ma'am" was well ingrained in him. The Grievant freely admitted to the experience with this other staff member's requests, the Grievant did not remember Complainant S's specific concerns to him but he denied that he intentionally refused to stop using "ma'am." To the contrary, he tried. I find the Grievant's denial of refusing to stop credible, as it is consistent and corroborated. . . .

I do not find that the use of "ma'am" is inherently uncivil. . . . The testifying deputy director and HR director, both women, testified they did not find use of "ma'am" to be inherently offensive. . . .

Written Notice No. 7.

This written notice charged a violation of Policy 2.35 over the time span between the Grievant's hire date, June 25, 2019, and July 20, 2023, when he undermined team cohesion and staff morale by discounting Complainant M's professional abilities. The Grievant was charged with being openly and unnecessarily critical of Complainant M, to include engaging in behaviors that are deemed immature and unprofessional, which caused an offensive and objectionable work environment. The Grievant allegedly demonstrated his disdain for Complainant M in her professional role when he referred to her as a "glorified technician". The Grievant allegedly participated in behavior which created unnecessary barriers for Complainant M to perform her job duties as a Deer/Turkey/Bear Biologist. . . .

. . . . This complainant did not like the Grievant's supervision, and the large aspect of her complaint was the Grievant's questioning the complainant's assistant about the complainant's projects. . . .

The Grievant credibly testified that, as a new employee and supervisor, he was trying to learn the workings and projects of his Agency unit. . . . The Grievant credibly testified that the only reference he made to "glorified technician" was his supportive expression in a meeting that management should not treat the biologists as glorified technicians. . . .

Written Notice No. 8.

. . . . The written notice charged that the Grievant made the statement that Complainant P "didn't have 'field sense'" and that she didn't do anything he told her to do. The Grievant is alleged to have stated that Complainant P would "fight him every step of the way". Complainant P was also allegedly subjected to immature and demeaning behaviors exhibited by the Grievant, such as repeatedly calling a coworker "grandpa" and "wolf whistle" at a female coworker. . . .

The evidence on the "field sense" comment was explained by the Grievant as his view that the staff needed to demonstrate field sense to communicate and identify effectively with the constituents of the Agency's function—whether urban or rural. I find the Grievant's testimony credible that he used the phrase "field sense" in the context of recognizing it was a trait that served the Agency's function—not directed against or demeaning any particular staff member. Appearing for the Grievant, the agency's land and access manager testified that he spoke with the Grievant about the importance of staff having field sense, and that he (the land and access manager), after many years of experience, is still gaining field sense.

Complainant P talked to DWD, the Grievant's direct supervisor, multiple times, as early as December 2019, about her complaints with the Grievant. Complainant P secretly recorded some of her conversations with the Grievant, and she presented one to the investigator that was transcribed. This phone conversation concerned the meeting subject to written notice No. 2, above. Complainant P also took issue with her performance review, and she successfully negotiated with the Grievant changes to aspects she considered unfair.

Complainant P described the Grievant's whistling as a "wolf whistle" at another female employee, causing Complainant P to feel uncomfortable. Complainant P never inquired of the female object of the alleged wolf whistling. That female employee testified for the Grievant, and she testified to a good working relationship with the Grievant. She testified that the Grievant whistled a tune from a movie she liked, and it was all done for fun. She testified that the Grievant did not "wolf whistle" at her and she displayed outrage and offense during her cross-examination at Complainant P's insulting implication that she engaged in such behavior.

As for the "grandpa" nickname for a male colleague, that employee did not testify. Like the female colleague for the whistling incident, Complainant P never inquired of the male employee about the Grievant's use of the nickname.

The Grievant credibly testified that he did not "wolf whistle" to anybody, as corroborated by the alleged object of the whistling. The Grievant's use of "grandpa" with his colleague grew out of conversations they had about the colleague's grandson. There is no evidence that the whistling or grandpa nickname was demeaning, derogatory, or offensive to those involved. . . . I find the evidence does not preponderate in showing the charged conduct offensive or inappropriate. . . .

Written Notice No. 9.

. . . . The written notice charged the Grievant with making the statement that Complainant D "didn't have 'field sense'" and her male coworker related better to hunters. The Grievant also allegedly referred to Complainant D as "Barbie", stated to Complainant D "I guess you have the body type to move a bear trap", and that she didn't need a raise because her husband was an engineer. On another occasion the Grievant allegedly raised and showed his middle finger to Complainant D when she mentioned to him that she was taking vacation.

Complainant D testified that the "Barbie" comment was made a couple of times in 2020 or 2021, when she was arranging her hair, and Complainant D let the Grievant know the comment was unwelcome. The Grievant did not repeat the "Barbie" joke. Complainant D admitted that the comment was made in a joking manner. Complainant D also conceded that the singular use of the finger gesture was also made in a joking manner.

As for Complainant D's request for a raise, the Grievant credibly denied the comment about her husband, stating he was unaware at the time that she was married. Complainant D was unaware of whether the pay raise request was submitted. The investigator's report, however, notes that the Grievant made the pay raise request for Complainant D and was advised by HR that Complainant D was already at the top of the pay range for her position.

Complainant D secretly recorded some of her conversations with the Grievant, but she did not present those recorded conversations to the Agency or investigator. She also admitted she was known to curse occasionally at work and has not been disciplined for it. The grievant testified that Complainant D "cussed him out repeatedly." Complainant D also took issue with her performance review, and she successfully negotiated with the Grievant changes to aspects she considered unfair.

> As addressed in No. 8, above, the evidence on the "field sense" comment was explained by the Grievant as his view that the staff needed to demonstrate field sense to communicate and identify effectively with the constituents of the Agency's function—whether urban or rural. I find the Grievant's testimony credible that he used the phrase "field sense" in the context of recognizing it was a trait that served the Agency's function—not demeaning any particular staff member. . . . There was no testimony from Complainant D regarding the "body type" allegation of the written notice. . . .

On December 12, 2023, the agency issued to the grievant a total of nine Group III Written Notices, each indicating termination.[4] The grievant timely grieved the termination of his employment, and a hearing was held on April 2 and 3, 2024.[5] In a decision dated April 29, 2024, the hearing officer determined that the agency had not proven that any of the nine Written Notices were warranted and appropriate, and as such they must be rescinded.[6] The agency has requested that EDR administratively review the hearing officer's decision.

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 its request, the agency challenges the hearing officer's consideration of the evidence regarding the conduct charged in each of the nine Written Notices. The agency argues that the hearing officer failed to properly weigh material evidence regarding whether the grievant engaged in misconduct, and/or failed to make findings on the material issues raised by the disciplinary charges. The agency also challenges the hearing officer's interpretation of DHRM Policy 2.35 as applied to the written notices invoking that policy. Moreover, the agency objects to the hearing officer's apparent conclusions that the agency's disciplinary actions were arbitrary and capricious to an extent that negated deference to managerial discretion. Finally, the agency argues that the hearing officer exhibited bias against it, both in his conduct of the hearing and in his consideration of the evidence.

---

[4] Hearing Decision at 1; Agency Exs. at 1-18.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 22-24.
[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).

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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 upon 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.

Hearing Officer Bias

In its request for administrative review, the agency contends that "the hearing officer in this matter was prejudiced in favor of the grievant prior to hearing the testimonial evidence."[14] In support of this claim, the agency asserts that the hearing officer (1) discounted testimony from agency witnesses "across the board" on disputed issues of material fact; (2) suggested that the grievant appeal an adverse ruling to EDR "on the spot," and (3) otherwise injected himself inappropriately into the parties' respective case presentations.[15]

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.[16]

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 . . . ."[17] Grounds for recusal include situations in

---

[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[13] *Grievance Procedure Manual* § 5.8(2).
[14] Request for Administrative Review at 1.
[15] *Id.* at 1, n.1.
[16] *Rules for Conducting Grievance Hearings* § II.
[17] *Id.* § III(G) (alteration in original) (internal quotation marks and citation omitted).

which the hearing officer "has a personal bias or prejudice concerning a party or a party's advocate."[18]

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.[19] 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.'"[20] 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.[21] The party moving for recusal of a judge or hearing officer has the burden of proving the judge's bias or prejudice.[22]

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. As examples of alleged bias, the agency points to instances where the hearing officer prompted the grievant's counsel to rephrase a question to a witness to overcome an objection.[23] However, such guidance from hearing officers is a common resolution to address objections without unduly restricting testimony, and nothing in the record suggests that the hearing officer may have exceeded his discretion in this regard.

The agency also points to an instance when, as the grievant's counsel was examining the grievant about the Written Notices in numeric order, the hearing officer asked if counsel had inadvertently skipped over Written Notice 5 (which counsel confirmed he had).[24] We do not agree that this interjection could reasonably be seen as an indication of bias. The hearing officer, as well as all the hearing participants, had the difficult task in this matter of distinguishing between nine separate written notices, some of which addressed overlapping or similar allegations and testimony. The hearing officer was well within his discretion to clarify which Written Notice was the subject of testimony, and to encourage grievant's counsel to continue addressing the Written Notices in numeric order. Nothing about the hearing officer's brief interjection suggests that it served as improper assistance to the grievant in the presentation of his case.

The agency also objects to the hearing officer's resolution of a dispute that arose at the outset of the proceedings, where the hearing officer denied a request for the grievant's spouse to attend the hearing as an observer but then paused the proceedings to offer the grievant an

---

[18] *Id.*
[19] 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.
[20] 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.").
[21] EDR Ruling No. 2012-3176.
[22] *See Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.
[23] Request for Administrative Review at 1, n.1.
[24] *Id.*

opportunity to immediately appeal his ruling to EDR.[25] We affirm that granting such *ad hoc* appeal opportunities on the record is unusual and generally not encouraged. However, under the circumstances, the hearing officer's suggestion to contact EDR was not improper as a matter of the grievance procedure. The hearing officer acknowledged reasonable uncertainty about EDR precedent on the subject of spousal attendance at grievance hearings, and it appeared that excluding the grievant's spouse in this matter could impose some prejudice on the grievant that could be difficult, if not impossible, to rectify if the hearing officer's ruling was in error.[26] Therefore, although we discourage hearing officers and parties from pursuing "on the spot" appeals during hearings, the hearing officer's choice to offer the opportunity here was understandable, and we cannot find that it demonstrated bias under the circumstances present here.

Finally, the agency argues that the hearing officer's consideration of the evidence exhibited bias, in that his decision suggests that he resolved most conflicting testimony in the grievant's favor.[27] 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. We agree that certain material issues are not sufficiently addressed in the hearing decision, and those omissions relate, by and large, to the agency's evidence. We address those matters with particularity below. However, notwithstanding our conclusion that certain material issues require further consideration, it would generally have been within the hearing officer's discretion to find the grievant's testimony credible, including to the extent it conflicted with the agency's witness testimony. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that we will not substitute our 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.[28]

Accordingly, EDR finds no evidence of hearing officer bias or prejudice that may have denied either party a fair and impartial hearing or decision. We will not disturb the decision on these grounds.

Interpretation of DHRM Policy 2.35

The agency's request also generally challenges the hearing officer's interpretation and application of DHRM Policy 2.35, *Civility in the Workplace* – both in the context of the written notices invoking that policy, and as a general matter. In particular, the agency objects to the hearing officer's finding that the agency "adopted a new and enhanced emphasis and interpretation of Policy 2.35 . . . in April 2023," and that, based on this "new" interpretation, "applying Policy 2.35

[25] *Id.*
[26] The grievant requested his spouse's assistance in navigating the copious documentary evidence presented in the case, essentially as a co-advocate. The hearing officer's denial of this request would have been adverse not only to the grievant, but also to his spouse, a non-party who had apparently arranged to spend her day at the proceedings.
[27] Request for Administrative Review at 1.
[28] *See, e.g.*, EDR Ruling No. 2020-4976.

in a lookback manner constitutes an improper *ex post facto* policy implementation."[29] This finding appears to have influenced the hearing officer's analysis as to Written Notices 1, 6, 7, 8, and 9.[30]

DHRM has the sole authority to interpret state personnel policies and make a final determination on whether a hearing decision comports with such policies.[31] To the extent that the hearing officer's analysis relies on a finding that DHRM Policy 2.35 encompassed new or different conduct after April 2023 based on training apparently received by agency employees, we cannot agree. In general, an employee is presumed to have notice of written standards that have "been distributed or made available to the employee."[32] Policy 2.35's articulation of prohibited conduct has been effective since January 1, 2019, and publicly available online since that date.[33] The policy also requires agencies to specifically train their employees as to its requirements, which it appears the agency did as part of the grievant's onboarding.[34]

Thus, since 2019, state policy has explicitly prohibited harassment, bullying behaviors, and threatening or violent behaviors in the workplace, as well as behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety.[35] DHRM's associated policy guidance further clarifies that workplace conduct is prohibited if it would be considered "demeaning, intimidating, or insensitive" by an objective "reasonable person."[36] The definitions of such offenses have not changed since January 1, 2019, although their application may vary based on the "context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and [other] specific circumstances" involved.[37] Accordingly, we do not find the hearing officer's determination that the agency implemented an improper *ex post facto* policy interpretation to be supported by the record evidence.

Furthermore, we find nothing in state policy or other applicable authority that creates a limitations period on agency management's ability to address misconduct of which it becomes aware. Although DHRM Policy 1.60, *Standards of Conduct*, requires agencies to administer corrective and disciplinary actions "through an objective process initiated as promptly as feasible,"[38] this requirement is not intended to foreclose agencies' ability to address allegations of misconduct that may eventually be uncovered or learned of after a period of time. Similarly, with respect to violations of Policy 2.35, the policy's instruction that misconduct "should" be reported "as soon as possible after the incident occurs"[39] should not be read as a barrier to reporting, nor

---

[29] Hearing Decision at 14.
[30] *Id*. at 14, 16-21.
[31] Va. Code § 2.2-1201(14); *id.* § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[32] *Rules for Conducting Grievance Hearings* § VI(B)(2), n.25.
[33] As of July 1, 2020, DHRM published minor revisions to Policy 2.35 to reflect amendments to the Virginia Human Rights Act that modified the scope of protected classes under the Act. *See* Va. Code § 2.2-3901. These minor revisions bear no apparent relevance to the issues raised in this grievance.
[34] *See* Agency Exs. 334-341.
[35] DHRM Policy 2.35, *Civility in the Workplace*, at 3.
[36] DHRM Policy Guide, "Policy 2.35 Prohibited Conduct/Behaviors," at 1.
[37] *Id.*
[38] DHRM Policy 1.60, *Standards of Conduct*, at 3.
[39] DHRM Policy 2.35, *Civility in the Workplace*, at 3.

would this provision be grounds for an agency to ignore a complaint solely on grounds that it was not made timely. Although delays in reporting and enforcement can impair agencies' ability to manage its workforce efficiently,[40] management must nevertheless investigate reports of misconduct under Policy 2.35 and address sustained allegations appropriately under Policy 1.60. Therefore, to the extent the hearing officer declined to consider conduct that may have occurred prior to April 2023 as an effective limitations period, doing so would not be consistent with policy in this case.

These principles guide EDR's analysis of the written notices in this case that cite specific violations of DHRM Policy 2.35.

Written Notice 1

In Written Notice 1, the agency charged the grievant with "repeatedly making disparaging remarks about his supervisor . . . to his subordinates and peers."[41] The remarks cited included that the supervisor "didn't know what he was doing" and "didn't have the balls" to turn in a bad evaluation of the grievant's performance.[42] Acknowledging conflicting witness testimony about the latter remark, the hearing officer found that the grievant "credibly denied making the remark," and as such, the evidence was, at best, "in equipoise."[43] The hearing officer further reasoned that the remark – if made as long ago as 2019, when the witness was supervised by the grievant – "is stale and moot for current discipline" because the agency applied an "ex post facto" interpretation of DHRM Policy 2.35, such that agency employees were not on adequate notice of the policy's requirements prior to 2023.[44]

The hearing officer's characterization of witness testimony on the subject of the grievant's alleged remarks is consistent with the record. In response to the agency's allegations that the grievant said his supervisor "didn't have the balls," the grievant testified that he did not think anything he had said about his supervisor "could be misconstrued with such vulgarity."[45] However, Complainant D testified that, in a conversation with the grievant, the grievant commented "that his supervisor had no balls and wasn't willing to do anything about [the grievant's] behavior."[46] Complainant M testified that she frequently heard the grievant say that his supervisor "didn't have a backbone" or a spine.[47] Weighing the totality of this testimony, the hearing officer declined to find that the agency established the alleged misconduct by a preponderance of the evidence.

---

[40] For example, delays may prevent the collection of relevant evidence or create the appearance of an improper motive. Such problems can impair an agency's ability to satisfy its burden of proof in disciplinary cases, but are not necessarily fatal to a showing that discipline was warranted and appropriate under the circumstances, even if delayed.
[41] Agency Exs. at 1.
[42] *Id.*
[43] Hearing Decision at 13.
[44] *Id.* at 13-14.
[45] Hearing Recording 2 at 1:56:40-1:57:08 (Grievant's testimony).
[46] Hearing Recording 1 at 4:51:00-4:51:21 (Complainant D's testimony).
[47] *Id.* at 3:49:48-3:50:16 (Complainant M's testimony).

However, the hearing officer's conclusion appears to be based, at least in part, on a finding that the misconduct charged "is stale and moot for current discipline" if it occurred in 2019.[48] As stated above, EDR does not find that this basis alone is sufficient to ignore consideration of and make factual determinations regarding the misconduct charged. Written Notice 1 charges that the grievant made statements to the effect that his then-supervisor was incompetent and "didn't have the balls" to manage the grievant's performance effectively. Such statements, if they occurred, would likely constitute violations of Policy 2.35 in almost any state workplace context – even if the grievant made such statements in 2019. Similar statements using less crass wording could still constitute violations of Policy 2.35 to the extent that an objective reasonable person would view them as denigrating or disrespectful to the supervisor. Because the hearing officer appears to discount allegations from the agency witness based primarily on their timing, we must remand Written Notice 1 for reconsideration of the elements of proof. That is, the hearing officer must determine whether the grievant engaged in the misconduct as charged, whether in 2019 or later.[49] If a preponderance of the evidence shows that the grievant did engage in this misconduct, the hearing officer would need to assess "the maximum reasonable level" of discipline sustainable under law and policy.[50]

Written Notice 2

In Written Notice 2, the agency charged the grievant with "fail[ing] to show up in person for a meeting scheduled with [City] . . . and provided a false explanation for the absence" to the agency's investigator.[51] The Written Notice noted that the grievant's subordinate had to call him directly from the meeting to "inquire as to his whereabouts," and only then did the grievant participate in the in-person meeting by phone.[52] The hearing officer found that, on the day of the meeting at issue, the grievant did not attend the meeting in person because he "was experiencing severe gastrointestinal pain and discomfort," and the agency failed to establish that the grievant's conduct in that condition constituted misconduct, or that he provided false information about it to the investigator.[53]

---

[48] Hearing Decision at 13.

[49] We note that the hearing officer found the grievant's testimony credible as to at least some of the allegations in Written Notice 1, and nothing herein should be read to doubt or second-guess the hearing officer's findings in that respect. 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.

[50] *Rules for Conducting Grievance Hearings* § VI(B)(1) ("When 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 . . . .").

[51] Agency Exs. at 3.

[52] *Id.*

[53] Hearing Decision at 14-15. In its appeal, the agency argues that it "should be entitled to at least some degree of deference in its decision making based upon results of an independent investigation." Request for Administrative Review at 3. We agree that an agency's reliance on a third-party investigation may be relevant to some material issues in a disciplinary grievance hearing – such as whether the agency had an improper motive, or the basis on which credibility determinations were made at the agency level. On the other hand, an agency's reliance on its third-party investigation, in itself, would not typically be sufficient to carry the burden of proof at a grievance hearing.

Evidence in the record supports the hearing officer's findings regarding the grievant's "severe" medical reason not to appear at the meeting in person.[54] The grievant testified that he experienced "abdominal pains" that made him "mind-numbingly blind" with pain at the time of the meeting.[55] The grievant testified that it was this "excruciating pain" that led him to call in remotely to the meeting.[56] Evidence also supports the finding that the grievant did ultimately participate in the meeting remotely and would have been permitted to work flexible hours rather than take sick leave to cover any absence due to his medical situation.[57] The hearing officer found that the agency failed to establish the quantity of any time not actually worked, and we find no basis to disturb that conclusion.

Nevertheless, the agency argues that the grievant still committed misconduct by failing to notify his direct reports that he would not be attending the meeting. However, it is not clear what policy the grievant would have violated by failing to explain his brief absence to his subordinates – and certainly not when failing to do so prior to the meeting, when the hearing officer found he was in medical distress. Although the grievant should perhaps have avoided giving his subordinates the impression that he simply "forgot" about the meeting, we cannot say that the hearing officer erred by declining to recognize that lapse as misconduct. It was within the hearing officer's discretion to conclude that the grievant's behavior as to the City meeting was explained by "severe gastrointestinal pain and discomfort,"[58] rather than being inconsiderate to his subordinates as the agency alleges.[59] Accordingly, EDR declines to disturb the hearing decision as to Written Notice 2.

Written Notice 3

In Written Notice 3, the agency charged the grievant with "fail[ing] to show up on time for a scheduled meeting . . . to discuss the Hound Abatement pilot project, and provided a false explanation for the tardiness" to the agency investigator.[60] The hearing officer found that the grievant was only "momentarily delayed" by "equipment problems at the office when making or printing copies of exhibits for the meeting," and the agency failed to establish that the grievant intentionally provided a false explanation for the incident to the investigator.[61]

Evidence in the record supports the hearing officer's findings. In the grievant's testimony, the grievant stated that he was not late to the meeting in question.[62] He described technological difficulties he encountered prior to the meeting, namely a need to re-establish connection with the office printer from his computer.[63] The grievant testified that he apologized to those waiting on

[54] *See* Hearing Recording 2 at 1:59:36-2:07:45 (Grievant's testimony); *see also* Agency Exs. at 240-243.
[55] Hearing Recording 2 at 1:59:36-2:03:18 (Grievant's testimony).
[56] *Id.*
[57] *See id.* at 2:02:40-2:05:47; *see also* Agency Exs. at 222-223.
[58] Hearing Decision at 15.
[59] *See* Request for Administrative Review at 5.
[60] Agency Exs. at 5.
[61] Hearing Decision at 15.
[62] Hearing Recording 2 at 3:40:40 (Grievant's testimony).
[63] *Id.* at 2:10:03.

him for the delay and asked for a grace period to reconnect his computer.[64] In reference to his "false" account of the meeting's scheduling, the grievant testified that he was overwhelmed at work by having to perform both his own duties as regional manager as well as the duties of an unfilled biologist position, which caused his confusion regarding the meeting date.[65] The grievant testified that he did not intend to mislead the investigator by his confusion.[66]

In its appeal, the agency points to the grievant's status as a regional manager as an "aggravating circumstance" for the grievant's unsatisfactory performance, arguing that the evidence, including witness testimony, showed the grievant was a disorganized supervisor who failed to adequately prepare for the meeting in advance.[67] However, because we do not disturb the hearing officer's conclusion that no misconduct was proven, we will not disturb the hearing decision on any other basis such as aggravating factors as argued.

Written Notice 4

In Written Notice 4, the agency charged the grievant with "fail[ing] to address a report of a raccoon being held captive . . . within the policy mandated 10 calendar days."[68] The Written Notice asserted that, rather than address the situation, the grievant simply told the responding law enforcement officer to wait until his subordinate returned from her vacation, which delayed the agency's response.[69] However, the hearing officer found that the grievant followed up on the report to gather more information, and that the agency failed to establish any policy or other imperative for him to take further action with respect to the issue.[70]

Upon consideration of the hearing officer's analysis, we must remand Written Notice 4 for further consideration. The hearing officer acknowledged the agency's "Guidelines for Addressing Possession of Unpermitted Captive or Tame Wildlife," which instructs that raccoons are in the category of wildlife where an "Expedited Response [is] Required," and the "time between receipt of the initial report of [an] illegal, wild animal and confiscation should be fewer than ten calendar days."[71] It is not clear from the decision why the hearing officer declined to recognize these Guidelines as setting performance expectations for the grievant. While the hearing officer noted that the instruction was stated in conditional terms (*e.g.*, "should"), we cannot agree that this wording by itself suggests reasonable uncertainty about the agency's expectations in the scenario of a captive raccoon report.

To the extent the hearing officer finds the grievant fulfilled his job expectations in light of the Guidelines, the decision on remand should cite record evidence to support such a finding. As

[64] *Id.* at 2:11:02.
[65] *Id.* at 2:12:08-2:13:20.
[66] *Id.* at 2:13:20-2:13:45.
[67] Request for Administrative Review at 6.
[68] Agency Exs. at 7.
[69] *Id.*
[70] Hearing Decision at 15-16.
[71] Agency Exs. at 115.

an example, the hearing decision is unclear as to whether primary responsibility for timely confiscation rested with the grievant, based on the evidence, or instead with the responding law enforcement officer. The record contains conflicting evidence on this point, which is not resolved by the hearing decision. Should the hearing officer find upon reconsideration that some level of disciplinary action is supported by a preponderance of the evidence as to the captive-racoon report, the hearing officer should make corresponding findings as to the appropriate level of discipline, if any, sustainable under law and policy.[72]

Written Notice 5

In Written Notice 5, the agency charged the grievant with "attempt[ing to] dispatch . . . a domestic pig," contrary to agency policy and other applicable regulations limiting the agency's oversight to wild animals.[73] The Written Notice asserted that the grievant "directed his subordinate to dispatch the animal using immobilization drugs" and then "requested access to a firearm to dispatch the animal via other means," even though the animal was "clearly . . . identified as a domestic pig" rather than wildlife.[74] However, the hearing officer found that the grievant properly "assigned the matter to his subordinate employee," and "no hearing testimony credibly established that the Grievant violated any policy" by doing so.[75]

Evidence in the record is consistent with the hearing officer's conclusion that the grievant's direction to his subordinate, as reflected in emails, was not to "dispatch a pig" but rather to respond to a request for assistance.[76] However, in light of the totality of allegations charged by Written Notice 5, we cannot find that the hearing decision contains sufficient findings as to the material issues to adequately review the hearing officer's conclusion that the Written Notice should be rescinded. The disciplinary document contains a specific allegation that the grievant requested access to an agency firearm to potentially euthanize the animal, despite apparently being on notice that the animal was domestic and not under the agency's jurisdiction. Emails between the grievant and his subordinate suggest that there was reason to believe the pig was not "wildlife" as of November 10, 2022.[77] And yet the record contains a text exchange dated November 17, which appears to show the grievant stating to his subordinate: "We are not shooting the pig."[78]

---

[72] *Rules for Conducting Grievance Hearings* § VI(B)(1) ("When 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 . . . .").
[73] Agency Exs. at 9.
[74] *Id.*
[75] Hearing Decision at 16.
[76] *See* Agency Exs. at 170-172.
[77] *Id.* at 171.
[78] *Id.* at 172. The subordinate testified that the grievant called her on November 16 to request access to her work safe to obtain a firearm to dispatch the pig, but then informed her the following day that they would not be doing so after all. Hearing Recording 1 at 4:53:45-4:56:35 (Complainant D's testimony). The grievant denied doing so. Nothing herein is intended to assess the significance or weight of these texts or underlying testimony, a duty that is reserved to the hearing officer. Rather, the text exchange illustrates that the agency offered both testimonial and documentary evidence in support of its allegation that the grievant attempted to dispatch a domestic pig with an agency firearm.

Although the hearing officer concluded that "no hearing testimony credibly established" a policy violation in reference to this issue, this conclusion does not offer clear findings on the issue of whether the grievant pursued the possibility of shooting a domestic pig with an agency firearm – an act which the agency argues was demonstrated in part by the text exchange. Given that Written Notice 5 explicitly articulated the firearm allegation as part of the charges, and the agency presented various evidence relevant to this allegation, we conclude that it was a material issue that does not appear to be squarely addressed in the hearing decision. Therefore, Written Notice 5 is remanded for reconsideration specifically as to whether the grievant "requested access to a firearm to dispatch the animal" despite having reason to be aware that the animal was not considered "wildlife."

Moreover, the agency argues on appeal that Written Notice 5 encompassed a charge that the grievant's approach to the euthanasia request was not consistent with his managerial responsibilities.[79] We agree that this charge is encompassed in Written Notice 5, which specifically asserts that the grievant, as a manager, bore "responsibility to ensure that he and his subordinates are following policies and guidance" of the agency and failed to do so.[80] In general, agencies are entitled to expect their managerial employees to demonstrate leadership skills and good judgment. Failure to meet these expectations could constitute unsatisfactory performance, even in the absence of specific policy instructions. As the agency points out, it also presented witness testimony to the effect that deferring responsibility for the euthanasia decision to his subordinate, particularly in discussions with external entities, was not consistent with his performance expectations as a manager. Accordingly, when reconsidering Written Notice 5, the hearing officer should make findings as to whether the agency proved by a preponderance of the evidence that the grievant's handling of the euthanasia request constituted unsatisfactory performance in light of his managerial responsibilities.

Written Notice 6

In Written Notice 6, the agency charged the grievant with "repeatedly ignoring [a coworker]'s request to stop using the noun 'ma'am' when speaking to her" because doing so would "crush his individuality."[81] The hearing officer found that the grievant

> credibly testified that he did not refuse to change his use of 'ma'am,' but the habit of using 'sir' and 'ma'am' was well ingrained in him. The Grievant . . . did not remember Complainant S's specific concerns to him but he denied that he intentionally refused to stop using 'ma'am.' To the contrary, he tried. I find the Grievant's denial of refusing to stop credible, as it is consistent and corroborated.[82]

Upon a thorough review of the record, EDR concludes that the hearing officer's determinations are sufficiently supported by the grievant's testimony that no remand is warranted as to Written

[79] Request for Administrative Review at 7.
[80] Agency Exs. at 9.
[81] *Id.* at 11.
[82] Hearing Decision at 17.

Notice 6. Specifically, the grievant explained that he used the phrase "crush his individuality" to Complainant S when he approached her for her perspective on why a different female employee had a negative response to the grievant calling her "ma'am."[83] He further testified that, based on Complainant S's response on the subject, his takeaway was:

> Moving forward, working with [the other employee], I would absolutely not . . . ever use "ma'am" when engaging her. And I had a very good understanding as to why [that employee] was sensitive to that issue . . . .
>
> [Complainant S] shared with me . . . some very personal things that had happened to her inside the agency that was unconscionable. . . . If [Complainant S] had ever come to me and asked me not to say "ma'am" to her, out of respect for a wonderful biologist, a wonderful manager, I would have stopped. . . .[84]

However, the grievant testified that he did not take away from the conversation that Complainant S herself did not want to be called "ma'am."[85]

The agency argues that the hearing officer misapprehended the nature of the offense by focusing on the word "ma'am," rather than "the grievant's pattern of calling this employee (as with others) by a name that wasn't their given name after having been asked to stop."[86] Based on EDR's review of the record, the agency made the nature of the offense clear – that is, the grievant was essentially charged with disregarding, or not taking seriously, multiple coworkers' requests in this regard. We agree that the hearing officer's analysis could have addressed this charge with more nuance. For example, in discounting the weight of Complainant S's testimony on this topic, the hearing officer noted that she testified about "her own repeated stumbles over use of the non-binary pronoun 'they' with a co-worker."[87] However, EDR's review of this testimony indicates that Complainant S clearly raised these "stumbles," and her own corrective approach to them, to illustrate the *contrast* to how she perceived the grievant's approach – that is, appearing to prioritize his own preferences over those of the people he was addressing.[88] Although the hearing officer was not required to credit this illustration, the hearing decision's inclusion of this point is not clearly relevant to the substantive misconduct of Written Notice 6: that the grievant failed to give due consideration to others' preferred names and titles.

Nevertheless, the determinative issue is whether the grievant had a pattern of disregarding Complainant S's – and other women's – preferences in this regard to an extent that could violate DHRM Policy 2.35 and rise to the level of Group III discipline. In assessing this issue, the hearing officer clearly considered Complainant S's testimony that she would tell the grievant not to call her ma'am "for a long time, and he didn't stop," but she did not recall a specific instance and

---

[83] Hearing Recording 1 at 2:39:10-2:40:20 (Grievant's testimony).
[84] *Id.* at 2:40:30-2:42:25.
[85] *Id.* at 2:42:25-2:43:00.
[86] Request for Administrative Review at 8.
[87] Hearing Decision at 17.
[88] Hearing Recording 1 at 6:11:00-6:14:35 (Complainant S's testimony).

eventually just "tune[d] this stuff out."[89] It appears the hearing officer instead credited the grievant's testimony that he did not recall Complainant S making this request, and did try to respect the wishes of the other coworker who had been upset. Because weighing the respective witnesses' testimony on this issue was ultimately within the hearing officer's discretion, we will not disturb the hearing decision as to Written Notice 6.

Written Notice 7

In Written Notice 7, the agency charged the grievant with being "openly and unnecessarily critical of [Complainant M]," such as by "refer[ing] to her as a 'glorified technician.'"[90] The hearing officer found "nothing inherently uncivil about asking questions of any employee . . . about Agency functions," and that the grievant made the "glorified technician" comment in the context of saying that employees such as Complainant M should *not* be treated as such.[91]

Evidence in the record supports the hearing officer's findings as to the "glorified technician" comment. The grievant testified that he never referred to any staff member as a glorified technician.[92] Rather, the grievant used this phrase in a conversation with leadership to advocate for the agency to stop treating their biologists as glorified technicians because the job of a biologist is to "do science," not to respond to animal nuisance calls.[93]

However, we conclude that the hearing decision must nevertheless be remanded as to Written Notice 7. As the agency points out in its appeal, the hearing officer's analysis does not address evidence surrounding the grievant's reaction to his subordinates' use of a paintball gun to control a wild bear – an incident that the agency's case addressed in detail as a pivotal aspect of the "open and unnecessary criticism" alleged in the Written Notice.[94] As relevant to Written Notice 7, Complainant M testified that she believed the paintball gun incident occurred because of the grievant's critical attitude toward her, rather than because of any policy consideration.[95] Complainant M testified that loaning out paintball guns was permitted under the bear guidelines for aversive conditions and that it was an action she had performed in her role before.[96] Complainant M testified that the grievant "immediately questioned" her authority when she gave out the paintball gun, which also challenged her abilities and competencies.[97] With Complainant M's testimony focusing primarily on this paintball gun incident, we agree that it was a material issue of fact to be determined within the scope of Written Notice 7.

In addition, we note that much of the hearing officer's analysis of Written Notice 7 is premised on the "vague and very unspecific timeframe" stated by the Written Notice and the

[89] *Id.* at 6:16:10-6:17:20.
[90] Agency Exs. at 13.
[91] Hearing Decision at 18.
[92] Hearing Recording 2 at 2:45:20 (Grievant's testimony).
[93] *Id.* at 2:45:20-2:48:19.
[94] Request for Administrative Review at 9.
[95] Hearing Recording 1 at 3:58:35 (Complainant M's testimony).
[96] *Id.* at 3:56:45-3:58:30.
[97] *Id.* at 3:37:02-3:40:12.

proximity of the Written Notice to the April 2023 Civility in the Workplace training.[98] As addressed above, nothing in state policy or other applicable authority creates a limitations period on agency management's ability to address misconduct of which it becomes aware. To the extent that the hearing officer's determinations excluded alleged misconduct solely on the basis that they occurred before April 2023, they must be reconsidered.

In summary, upon remand, the hearing officer must make additional findings to determine whether the grievant's actions – including those related to the paintball gun incident and any others occurring prior to April 2023 – would support formal disciplinary action for open and unnecessary criticism of Complainant M, as charged in Written Notice 7.

Written Notice 8

In Written Notice 8, the agency charged the grievant with being "openly and unnecessarily critical of [Complainant P]," such as by stating that Complainant P "didn't have 'field sense' and . . . didn't do anything he told her to do."[99] The Written Notice also asserted that Complainant P was "subjected to immature and demeaning behaviors exhibited by the [grievant], such as repeatedly calling [their] coworker 'grandpa'" and making a "wolf whistle" sound at another female coworker.[100] The hearing officer concluded that the grievant did not denigrate Complainant P's "field sense," nor did he "wolf whistle" at another coworker.[101] While the grievant did whistle and did call another employee "grandpa," the hearing officer concluded that there was no evidence that these acts were "demeaning, derogatory, or offensive to those involved" or by a "reasonable person" standard.[102]

Evidence in the record supports the hearing officer's findings as to the use of the "field sense" comment. The grievant testified that his use of that phrase was never meant to call out a specific individual but rather was a reference to the need to bridge the "relationship gap" between the rural communities and urban communities served by the agency.[103] The grievant testified that he used the phrase "field sense" to suggest that a knowledge of both communities is necessary to bridge the information gap required to relate better to their constituents.[104] As for the "wolf whistle," the female employee in question testified that the whistle was completely innocuous and was not perceived by her as offensive.[105] Rather than being a sexually suggestive "wolf whistle," the grievant testified that the whistle was actually a reference to a song in a movie, an inside joke between the female employee and the grievant.[106] Although it appears there was mixed testimony as to the grievant's alleged "grandpa" nickname for another employee, we find no basis to disturb

[98] Hearing Decision at 18.
[99] Agency Exs. at 15.
[100] *Id.*
[101] Hearing Decision at 19.
[102] *Id.*
[103] Hearing Recording 2 at 2:49:45-2:51:58 (Grievant's testimony).
[104] *Id.*
[105] Hearing Recording 1 at 7:36:30-7:39:39.
[106] Hearing Recording 2 at 4:04:47-4:09:02 (Grievant's testimony).

the hearing officer's conclusion that this behavior as a policy violation as to Complainant P was not sufficiently proven by a preponderance of the evidence.[107]

While we conclude that the hearing officer's findings are largely supported by the evidence in the record, we nevertheless remand Written Notice 8 for reconsideration. In its appeal, the agency argues that, as with Written Notice 7, the hearing officer failed to consider substantial evidence surrounding the paintball gun incident – here as it pertained to Complainant P.[108] We remand for reconsideration of Written Notice 8 that includes findings on that material aspect of the allegations that the grievant was "openly and unnecessarily critical" of Complainant P. In addition, the hearing officer's analysis appears again to be premised on the "vague and very unspecific timeframe" of the alleged actions.[109] However, as addressed above, there is nothing in state policy or other applicable authority that creates a limitations period on agency management's ability to address misconduct of which it becomes aware. As above, we perceive no basis to exclude any material allegations from the analysis based solely on their timing. Accordingly, Written Notice 8 is remanded on these grounds.

Written Notice 9

In Written Notice 9, the agency charged the grievant with making "disparaging remarks to and about [Complainant D] professionally and personally," being "openly and unnecessarily critical" of her, and "engaging in behaviors that are deemed immature and unprofessional."[110] The Written Notice asserted that the grievant said Complainant D lacked "field sense" and didn't relate as well to hunters as male employees did, called her "Barbie" and commented on her "body type," stated "that she didn't need a raise because her husband was an engineer," and "raised and showed his middle finger" to her.[111]

The hearing officer found that the evidence was insufficient to establish that the grievant denigrated Complainant D's "field sense," declined to support a salary increase for her based on her marital circumstances, or that the grievant made comments about her "body type."[112] The hearing officer determined that the grievant did perhaps call Complaint D "Barbie" in a joking manner but did not repeat it once Complainant D let the grievant know it was unwelcome.[113] The hearing officer concluded that the "Barbie" comment, under the circumstances, was in the category of a "petty slight" that did not rise to the level of violating DHRM Policy 2.35.[114] Upon our thorough review of the record, evidence therein – or lack thereof – supports the hearing officer's conclusions regarding the grievant's acts as charged in Written Notice 9, in part for reasons that have already been addressed as to other complainants.

---

[107] *See* Hearing Recording 1 at 3:49:00.
[108] Request for Administrative Review at 11.
[109] Hearing Decision at 18.
[110] Agency Exs. at 17.
[111] *Id.*
[112] Hearing Decision at 20.
[113] *Id.*
[114] *Id.* at 20-21.

Nevertheless, we remand Written Notice 9 for further consideration, in part based on the hearing officer's analysis of the grievant referring to Complainant D, his subordinate employee, as "Barbie." The hearing officer concluded that although the evidence suggested the grievant did call Complainant D "Barbie," and perhaps more than once, he found that Complainant D "understood it to be a joke, albeit inept," and the grievant "ultimately took the hint and did not repeat it."[115] Based on this reasoning, the hearing officer declined to "find that every perceived petty slight, annoyance, and isolated incident (unless shown to be extremely serious) constitutes a violation of Policy 2.35."[116] EDR disagrees with the hearing officer's interpretation of Policy 2.35 – both as to the nature of conduct it encompasses and as to agencies' responsibility and discretion to address such conduct. A demeaning comment about one's coworker in the workplace – even if the comment is "isolated" and not "extremely serious" – is clearly within the scope of misconduct under Policy 2.35. This is true regardless of whether the commenter intends the demeaning comment as a "joke," and regardless of whether the commenter is eventually made to realize that the demeaning comment is not appropriate.

To be sure, agencies have substantial discretion to address such complex workplace situations with various corrective options to include formal discipline, with due consideration to the specific context and circumstances. An agency may well conclude that formal discipline in a particular situation would not support goals of disciplinary consistency, accountability, team cohesion, or overall operations. However, whenever misconduct has occurred, the same considerations could also support some level of formal discipline, whether or not the conduct or its consequences are proven to be "extremely serious." In disciplinary grievance hearings, an agency may prove that its disciplinary judgment was within its discretion by satisfying the burden of proof articulated in the *Rules for Conducting Grievance Hearings*, absent any successful affirmative defenses.[117] These principles apply to misconduct under Policy 2.35 as well. To the extent the hearing officer's analysis declined to recognize the agency's discretion in its disciplinary judgments, we remand for reconsideration in light of agencies' "exclusive right to manage the affairs and operations of state government,"[118] provided they satisfy their evidentiary burden of proof for disciplinary matters.

In sum, Written Notice 9 is remanded for reconsideration in light of the interpretation of DHRM Policy 2.35 offered here and application to the grievant's conduct of calling his female coworker "Barbie," as it appears that the hearing officer fully rescinded discipline even when misconduct may have been sustained.[119] Upon reconsideration of Written Notice 9, for the reasons articulated above, the hearing officer should also consider all material allegations, including those occurring prior to April 2023, as well as any findings related to the paintball gun incident as it pertained to Complainant D, as with Written Notices 7 and 8.

---

[115] *Id.* at 20.
[116] *Id.* at 20-21.
[117] *See Rules for Conducting Grievance Hearings* § VI(B)(1).
[118] Va. Code § 2.2-3004(B).
[119] *Rules for Conducting Grievance Hearings* § VI(B)(1) ("When 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 . . . .").

Levels of Disciplinary Action

The hearing officer described the agency's decision to issue nine separate Group III Written Notices for varying levels of offenses as being arbitrary and capricious.[120] As each matter is considered on remand in light of the issues addressed above, if the hearing officer finds that record evidence does not support misconduct at the Group III level, the hearing officer will be required to determine whether the agency has presented evidence to support discipline at any lower level as to each Written Notice. Considering and dismissing, out of hand, the entirety of the agency's admittedly unusual approach of issuing nine separate Group III Written Notices would not be a proper assessment of the disciplinary issues under the *Rules for Conducting Grievance Hearings* in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands the hearing decision for reconsideration of the hearing officer's rescission of Written Notices 1, 4, 5, 7, 8, and 9, as articulated herein. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[121]

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.[122] 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.[123] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[124]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[120] Hearing Decision at 21.
[121] *See Grievance Procedure Manual* § 7.2.
[122] *Grievance Procedure Manual* § 7.2(d).
[123] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[124] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).