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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Health
Ruling Number 2025-5774
October 29, 2024

The grievant 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 12158. For the reasons set forth below, EDR remands the matter to the hearing officer for further clarification.

FACTS

The relevant facts in Case Number 12158, as found by the hearing officer, are as follows:[1]

> The Virginia Department of Health employs Grievant as a Human Resource Analyst at one of its locations. She performs various human resource functions for the Agency. Grievant has been employed by the Agency for approximately seven years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant became a notary before joining the Agency. She read and understood the laws regarding being a notary. She was familiar with the Notary Handbook. She kept her certificate of notary in her office. Grievant renewed her notary commission while she was an Agency employee. The Agency paid Grievant's fee to renew her commission that was set to expire on January 31, 2020. Grievant did not routinely notarize documents.
>
> Grievant had a stamp that had showed her name, Commonwealth of Virginia, Notary Public with her number, and "EXPIRES 01/31 _____". To use the stamp, Grievant affixed the stamp to the document and wrote in the year of expiration. Grievant's Notary Commission expired on January 31, 2024.

[1] Decision of Hearing Officer, Case No. 12158 ("Hearing Decision"), Sept. 26, 2024, at 2-4 (footnotes omitted).

The Commonwealth of Virginia does not remind notaries that their commissions are about to expire. Grievant was obligated to remember when her commission expired and to renew it.

The Virginia Department of Social Services requires completion of a Central Registry Release of Information form for certain individuals working with children. The form states:

> The Virginia Child Abuse and Neglect Central Registry is mandated by the Virginia Child Protective Law and contains the names of individuals identified as an abuser or neglector in founded child abuse and/or neglect investigations conducted in the state of Virginia. The findings are made by Child Protective Services staff in local departments of social services and are maintained by the Virginia Department of Social Services. Legal mandates for the Virginia Department of Social Services to provide a Central Registry and a mechanism for conducting searches of the registry are found in § 63.2-1515 of the Code Virginia.

Before November 2022, the individual's signature had to be notarized. After that time, the form was revised to remove the section for notary signature. The new form states:

> THE NOTARY REQUIREMENT HAS BEEN REMOVED AND IS NO LONGER NEEDED.

Ms. S was employed by the Agency. She worked with children as part of a grant with the Department of Social Services. DSS required her to consent annually to a background check. Ms. S was required to submit to DSS a Central Registry Release of Information form with a $10 fee. The Agency typically paid the fee.

Ms. S asked Grievant to notarize a Virginia Department of Social Services Central Registry Release of Information form. Grievant went "online" using a link she had saved, obtained the form, and printed it. Grievant gave the form to Ms. S who signed it in Grievant's presence.

Part III of the retrieved form was entitled "CERTIFICATE OF ACKNOWLEDGEMENT OF INDIVIDUAL" and contained blank spaces to write information including Grievant's signature as "Notary Public Signature." Grievant wrote the county name, Commonwealth of Virginia, and date. Grievant stamped the document with her seal and wrote the year "24" in the blank space in the notary seal stamp. Grievant signed the certificate. Grievant did not recognize that her notary commission had expired a month and 12 days earlier on January 31, 2024 and, thus, she was no longer authorized to notarize documents. Grievant did not receive a fee for notarizing the form for Ms. S.

Grievant gave the form to Ms. S who sent it to DSS.

On April 1, 2024, the document was returned to the Agency with the request for an original signature.

DSS sent the form back to the Agency because DSS staff believed Ms. S had submitted a copy and not a form with an original signature in blue ink.

Business Manager notified HR Manager and District Director of Grievant's error. HR Manager conducted a search of the Commonwealth of Virginia's Notary database. She observed that Grievant's notary commission had an expiration date of January 31, 2024. She also retrieved the Notary Handbook.

On April 11, 2024, HR Manager and Grievant met by video conference. HR Manager told Grievant that Grievant had mistakenly notarized a document after Grievant's commission had expired. Grievant did not believe HR Manager. Grievant got up and went over to obtain her commission certificate. Grievant showed the certificate to the HR Manager as proof that her commission had not expired. The HR Manager asked, "What year are we in?" Grievant reviewed the certificate and realized that she had made a mistake and that her commission had expired. Grievant apologized for making the mistake. The HR Manager believed Grievant's mistake was unintentional.

Grievant asked another notary in the office to assist Ms. S with completing the form.

Once Grievant realized her commission had expired, she contacted the Commonwealth of Virginia to obtain her commission again.

Grievant later learned that the DSS release form did not require notarization.

On May 14, 2024, the agency issued to the grievant a Group III Written Notice with a 15 workday suspension for unsatisfactory performance, failure to follow policy, and falsifying records.[2] The grievant timely grieved the disciplinary action, and a hearing was held on September 5, 2024.[3] In a decision dated September 26, 2024, the hearing officer determined that the grievant had not engaged in falsification, but that the agency had presented sufficient evidence of unsatisfactory performance by the grievant.[4] The hearing officer further found that the grievant's conduct "impacted the Agency's reputation because she engaged in unlawful behavior in the course of her employment."[5] As such, the hearing officer determined that it was appropriate for the agency to have elevated the disciplinary action to a Group II level, but not a Group III as issued.[6] Accordingly, the hearing officer reduced the disciplinary action to a Group II and reduced

[2] Agency Ex. 3; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 5-6.
[5] *Id.* at 5.
[6] *Id.*

the grievant's suspension to the maximum allowed at the Group II level of 10 work days.[7] The grievant 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."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Elevation of offense

The hearing officer found that the agency had met its burden to show that the grievant engaged in unsatisfactory performance, which is typically a Group I offense.[11] Neither the grievant nor the agency appear to challenge this finding on appeal, and EDR has no basis to dispute the hearing officer's determinations in this regard. Nevertheless, properly citing to the portion of the *Standards of Conduct* policy on aggravating factors,[12] the hearing officer determined that it was appropriate to elevate this disciplinary action to a Group II because of the impact on the agency's reputation by the grievant's "unlawful behavior."[13] The grievant disputes this determination on appeal, noting that there was no evidence presented at hearing about how the grievant's conduct impacted the agency's reputation.[14] Based on EDR's review of the record evidence, we are unable to identify evidence in the record that indicates how or whether the agency's reputation was impacted by the grievant's conduct. Indeed, the witnesses presented by the agency appeared to state affirmatively that they were unaware of any such impacts.[15]

An employee's "unlawful behavior" can certainly impact the reputation of an agency. Whether or to what extent the agency's reputation is impacted and whether or to what extent such impacts justify elevation of an offense is necessarily a case-by-case determination that would consider factors such as the nature and severity of the "unlawful behavior," the employee's role and responsibilities, the relevant agency role and responsibilities at issue, and any actual evidence of reputational impacts. There may also be cases in which reputational impacts can be presumed. However, in this case, it is unclear whether the record supports the hearing officer's apparent presumption of reputational impact in the absence of evidence about how the agency itself

[7] *Id.* at 6.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Hearing Decision at 5.
[12] DHRM Policy 1.60, *Standards of Conduct*, at 9.
[13] Hearing Decision at 5.
[14] Request for Administrative Review at 1.
[15] Hearing Recording at 34:14 – 35:00 (testimony of Health District Director); Hearing Recording at 1:08:06 – 1:08:17, 1:11:43 – 1:11:50 (testimony of regional HR business partner).

perceived any reputational impact and the extent thereof. It is also unclear whether such a presumption would be appropriate given the particular facts of the grievant's conduct. As such, EDR is remanding this matter to the hearing officer to clarify the determination that the grievant's "unlawful behavior"[16] impacted the agency's reputation and the record evidence supporting that determination. If, on remand, the hearing officer is not able to identify the reputational impact or record evidence supporting this finding, then it follows that the disciplinary action should be further reduced to a Group I offense without a suspension.

Mitigation

The grievant appears to also argue that the hearing officer erred by not reducing the disciplinary action issued based on mitigating factors. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[17] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[18] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[19]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[20] Where the hearing officer does not sustain all of the agency's charges and finds that

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[16] While not directly addressed on appeal, because evaluation of the reputational impact involves consideration of the nature and severity of the "unlawful behavior," it is a question for clarification on remand as to the exact nature of the "unlawful behavior" and the hearing officer's evaluation of that conduct. In its rebuttal, the agency cites to portions of the Virginia Notary Act as to "official misconduct" and impersonating a notary. *See* Agency Rebuttal at 3. The hearing officer should clarify how the grievant has engaged in "unlawful behavior." For example, to the extent that the hearing officer is finding that the grievant impersonated a notary, we would presume that such a finding would address whether the grievant's conduct has been "willful," as prescribed by the Code. *See* Va. Code § 47.1-29. If the hearing officer finds that the grievant has engaged in "official misconduct" under the Act, we would commit the hearing officer's attention to Va. Code § 47.1-24 to consider whether "official misconduct" is a determination within the purview of the Secretary of the Commonwealth.

[17] Va. Code § 2.2-3005(C)(6).

[18] *Rules for Conducting Grievance Hearings* § VI(A).

[19] *Id.* at § VI(B)(1).

[20] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate 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 that a lesser penalty be imposed on fewer charges."[21] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[22] and will reverse the determination only for clear error.

In assessing mitigating factors, a hearing officer "will not freely substitute [their] 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] EDR has found no specific evidence of mitigating factors presented in the record that were not adequately addressed in the decision or that would support a different result than contemplated in this ruling. Thus, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. Accordingly, we decline to disturb the decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer to clarify the findings that the Written Notice can be elevated to the Group II level, as addressed 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).[24] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[25]

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.[26] 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.[27]

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[21] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[22] "An abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").
[23] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).
[24] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[25] *See Grievance Procedure Manual* § 7.2.
[26] *Id.* § 7.2(d).
[27] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28]

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[28] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).