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

SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Wildlife Resources
Ruling Numbers 2025-5772, 2025-5775
November 20, 2024

The Department of Wildlife Resources (the "agency") and the grievant have requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's reconsidered decision in Case Number 12071. For the reasons set forth below, EDR declines to disturb the reconsidered decision.

FACTS

The relevant facts in Case Number 12071, as found by the hearing officer, were recited in EDR's first administrative review ruling and are incorporated herein by reference.[1] In a decision dated April 29, 2024, the hearing officer determined that the agency had not proven that any of the nine Group III Written Notices issued to the grievant were warranted and appropriate, and as such they must be rescinded.[2] Following the agency's request for an administrative review, EDR upheld the hearing officer's findings as to Written Notices 2, 3, and 6 but remanded the decision for reconsideration of the hearing officer's rescission of Written Notices 1, 4, 5, 7, 8, and 9.[3] Upon reconsideration, the hearing officer again concluded that Written Notices 1, 4, 5, 7, and 8 were not supported by the evidence and must be rescinded.[4] Written Notice 9 was reduced from a Group III level to Group I.[5]

Both parties now seek administrative review of the reconsidered 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."[6] If the hearing officer's exercise of

[1] EDR Ruling No. 2024-5710, at 1-8.
[2] *See* Decision of Hearing Officer ("Hearing Decision"), Case No. 12071, Apr. 29, 2024, at 21-23.
[3] EDR Ruling No. 2024-5710, at 24.
[4] *See* Reconsideration Decision of Hearing Officer ("Reconsidered Decision"), Case No. 12071, Sept. 30, 2024, at 18.
[5] *Id.*
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for review, the agency challenges the hearing officer's reconsidered findings on each of the six Written Notices within the scope of appeal. The agency contends that the hearing officer inappropriately discounted testimony from its female witnesses – both complainants and managers – in again rescinding or reducing each written notice. As to Written Notice 9, the agency also argues that a sustained violation of DHRM Policy 2.35, *Civility in the Workplace*, would appropriately merit discipline at the Group II level, not Group I as upheld in the reconsidered decision. The agency further argues that the grievant's position as a supervisor was an aggravating factor, supporting elevation of discipline to Group III with termination.

The grievant has also sought administrative review of the hearing officer's findings as to Written Notice 9. The grievant generally contends that the hearing officer should have maintained the findings articulated in his original decision as to the misconduct alleged in Written Notice 9. The grievant further argues that, under equitable principles, the agency should be estopped from pursuing discipline for conduct that the agency had previously disregarded or otherwise deemed not serious enough to rise to the level of misconduct.

Hearing Officer's Consideration of Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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.

---

[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[12] *Grievance Procedure Manual* § 5.8(2).

Written Notice 1

In our administrative review, we remanded Written Notice 1 for reconsideration of the evidence as to conduct that allegedly occurred prior to 2023. In his reconsidered decision, the hearing officer concluded that relevant testimony from Complainant M and the grievant as to the grievant's pre-2023 statements was "in equipoise, at best"[13] as to whether the grievant made statements that would have violated DHRM Policy 2.35, *Civility in the Workplace*.

The agency contends that the hearing officer's consideration appears to be tainted by his renewed finding that the grievant's supervisor and other agency management "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."[14] However, we do not read the hearing officer's analysis of Written Notice 1 to rely upon any such erroneous interpretation. As instructed, the hearing officer re-assessed whether the grievant engaged in the conduct charged – that is, whether the grievant made prohibited statements within the scope of the charges on the written notice. The hearing officer appears to have found both witnesses with personal knowledge of the allegations – Complainant M and the grievant – equally credible. 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. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.[15]

Because the hearing officer found that the agency did not carry its burden of proof as to the first element, no analysis was necessary as to additional elements – that is, whether the alleged behavior was misconduct and whether the discipline was reasonable and consistent with law and policy. Accordingly, we find no basis to disturb the reconsidered decision as to Written Notice 1.

Written Notice 4

In our administrative review, we remanded Written Notice 4 for reconsideration of whether the grievant failed to meet his job expectations under the agency's "Guidelines for Addressing Possession of Unpermitted Captive or Tame Wildlife," in connection with a report of a captive raccoon. We noted that the evidence was unclear as to whether primary responsibility for timely confiscation under the Guidelines rested with the grievant or instead with the responding law enforcement officer. On remand, the hearing officer found that the agency's evidence did not

[13] Reconsidered Decision at 11. 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. *Id.* at 4.
[14] *See id.* at 10.
[15] *See*, *e.g.*, EDR Ruling No. 2020-4976.

conclusively resolve this ambiguity in favor of a conclusion that responsibility for further action lay with the grievant.[16] We find no error in the hearing officer's analysis.

The agency argues that the hearing officer failed to consider the full scope of the misconduct alleged in Written Notice 4, namely his general inaction in responding to a potential public safety issue and failure to "handle[] the situation himself or reach[] out to someone else to work with the officer."[17] Pointing to the testimony of its Deputy Director as to the agency's expectations in this scenario, the agency contends that the hearing officer "simply ignored" her testimony consistent with his discounting of all the agency's female witnesses.[18]

On remand, the hearing officer found that the agency's evidence, including the Deputy Director's testimony, did not "make clear how and what the expectations were when the location of the animal in question was unknown."[19] Although the Deputy Director testified that, as a regional manager, the grievant was responsible for ensuring the Guidelines were followed and therefore should have worked with the officer to "develop a confiscation plan" for the raccoon or assigned someone else to do so,[20] we find no error in the hearing officer's finding that the evidence did not show when any such requirement was triggered, given what little information the grievant or any agency staff appeared to know. Moreover, evidence in the record suggests that law enforcement staff had protocols to ensure public safety without the involvement of the grievant or his staff.[21] Ultimately, the record reflects sufficient ambiguity about what the grievant was required to do and when such that the hearing officer was not required to accept the Deputy Director's testimony as solely determinative of the relevant questions. Accordingly, we will not disturb the reconsidered decision as to Written Notice 4.

Written Notice 5

In our administrative review, we remanded Written Notice 5 for additional consideration of whether the grievant "requested access to a firearm to potentially euthanize" a domestic pig and/or otherwise failed to perform his managerial responsibilities with respect to a request for assistance with the pig. On remand, the hearing officer found that "[n]o action or order to dispatch the pig ever happened," and "consideration of potential use of euthanasia drugs or a firearm amounts to no more than the deliberative process of preparedness."[22] The hearing officer further reasoned that no evidence established the pig as definitely "domestic" such that any subsequent acts by the grievant would have constituted misconduct.[23] We find no basis to disturb the hearing officer's analysis.

[16] Reconsidered Decision at 11-12.
[17] Agency's Request for Administrative Review at 3.
[18] *Id.*
[19] Reconsidered Decision at 12.
[20] Hearing Recording Pt. I at 2:19:00-2:21:05.
[21] *See* Joint Exhibits at 205.
[22] Reconsidered Decision at 12.
[23] *Id.*

The agency contends that, as with Written Notice 4, the hearing officer disregarded the testimony of the agency's Deputy Director as to acceptable behavior for its regional managers. Specifically, the agency points to the Deputy Director's testimony that it was "untenable" for the grievant even to pass along the request for assistance to his subordinate.[24] However, even assuming that the hearing officer should have given substantial weight to this testimony, Written Notice 5 does not cite misconduct in how the grievant notified his subordinate of the request for euthanasia assistance. Instead, the Written Notice, issued at the Group III level, charges that the grievant "attempted the dispatch of a domestic pig," "directed his subordinate to dispatch the animal using immobilization drugs," and then "requested access to a firearm to dispatch the animal via other means."[25] The hearing officer determined that the evidence did not show that the grievant engaged in this conduct. We have no basis to disturb this conclusion.

Written Notices 7 and 8

In our administrative review, we found the hearing officer's express findings of fact as to Written Notices 7 and 8 to be largely supported by the evidence. However, we remanded both written notices for reconsideration to include a specific incident involving a paintball gun that appeared to be a significant aspect of the charged misconduct in both written notices but was not addressed in the original decision. We also instructed that other incidents alleged to have occurred prior to 2023 were properly within the scope of the written notices and therefore should be included in the hearing officer's analysis.

As to the paintball gun incident, which involved the grievant's criticism of multiple female subordinates for lending a paintball gun to a citizen to use for wildlife control, the hearing officer concluded: "I do not find the evidence supports the assertion that this action by the Grievant is anything more than his exercise of his discretionary supervisory authority."[26] The agency disagrees, citing testimony from the subordinate employees as to why they believed their action with the paintball gun was justified. However, legitimate and reasonable disagreement with a supervisor's criticism does not necessarily suggest that the criticism is misconduct under DHRM Policy 2.35. The agency also points out that the grievant issued counseling memoranda to subordinates stating that Complainant M's approval of the paintball gun loan "did not align with [regional] leadership" – thereby criticizing Complainant M to subordinates.[27] Although managers should be cautious not to undermine intermediate supervisors, some situations may call for clarification and transparency when employees have received different messages from different levels of management – as apparently occurred in this situation. The hearing officer found that the agency failed to prove that the grievant's approach to balancing these interests constituted misconduct. We perceive no basis to disturb this conclusion.

As to allegations of conduct occurring prior to 2023, the hearing officer concluded that, although the grievant's subordinates clearly did not like his supervision, the agency failed to prove

[24] Agency's Request for Administrative Review at 4.
[25] Joint Exs. at 9.
[26] Reconsidered Decision at 13.
[27] Agency's Request for Administrative Review at 5.

that his supervision style rose to the level of misconduct. The hearing officer did not find that the grievant's questioning of Complainant M's work and projects exceeded his managerial discretion and rose to the level of misconduct.[28] He further found that "the evidence indicates Complainant P's strong professional differences with the Grievant and dissatisfaction with certain aspects of the Grievant's supervision" – but not that the grievant's conduct rose to the level of misconduct.[29] Based on the hearing officer's factual findings supported by record evidence, we find no basis to disturb this conclusion as to the Written Notices as issued.

Written Notice 9

In our administrative review, we remanded Written Notice 9 for reconsideration of the charge related to the grievant's reference to his subordinate employee as "Barbie," as well as clarification regarding the paintball-gun incident referenced above and allegations prior to 2023. In his reconsidered decision, the hearing officer found that "a reasonable person may find the behavior of jokingly making the Barbie comment and the finger gesture is prohibited behavior under Policy 2.35," but "the Group III level offense is too severe for a first offense and when considering the overall context."[30] The hearing officer upheld the discipline at the Group I level as the maximum reasonable discipline under the circumstances.

The agency strongly disagrees, arguing that calling a female subordinate "Barbie" – especially in front of other female subordinates – falls under "the most serious type of violation of the civility code for the Commonwealth" in large part because it denigrates individuals based on membership in a protected class.[31] In support of its contention, the agency also cites the grievant's written feedback to Complainant D that her actions were "passive aggressive" and that she needed to "temper [her] passion."[32] The agency also argues that showing a middle finger to a direct report should justify a Group III offense because it is "obscene and extremely offensive to a reasonable person."[33] Finally, the agency maintains that policy violations are generally disciplined at the Group II level and that "[i]f the reconsidered decision stands as it is written, the rules regarding civility in the state workplace will simply be unenforceable."[34]

We agree with the agency's position that gender-derogatory "jokes" and profane gestures are generally unacceptable under DHRM Policy 2.35. That said, the reconsidered decision identifies multiple reasons for finding the discipline at the Group III level to be unwarranted under the circumstances. The hearing officer noted that the agency "issued counseling to . . . the Grievant's direct supervisor with obviously greater management authority and responsibility than the Grievant. . . . [The supervisor] had greater supervisory responsibilities, yet, compared to the

[28] Reconsidered Decision at 13.
[29] *Id.* at 14-15.
[30] *Id.* at 17.
[31] Agency's Request for Administrative Review at 6-7.
[32] *Id.* at 7.
[33] *Id.*
[34] *Id.* at 8.

Grievant, he received about the lightest level of discipline."[35] The hearing officer reasoned that this decision did not appear to be consistent with the agency's stated rationale that the supervisors involved in the allegations at issue here should be held to higher standards than their subordinates.[36] The hearing officer also noted that Complainant D frequently "cussed out" the grievant, providing relevant context for the grievant's own profanity.[37] Accordingly, we do not read the hearing decision to signify that the sustained allegations are acceptable conduct, or that they could not be disciplined at a more severe level under other circumstances. Here, the hearing officer appropriately considered contextual evidence to determine the severity of the misconduct in this particular case. We cannot find that his determinations lack a basis in the record.

In addition, we do not agree with the agency's assessment that the hearing officer's reconsidered decision means that DHRM Policy 2.35 is unenforceable. The agency in this matter was in the difficult position of attempting to prove allegations of mostly verbal misconduct that had apparently gone unaddressed for some years. In some cases, the only evidence offered to the hearing officer about these incidents was witness testimony. The fact that the hearing officer did not find certain testimony by the agency's female witnesses *more* credible than the grievant's as to statements made years ago does not necessarily suggest a view that "women are not to be believed," as the agency suggests.[38] Rather, it illustrates one of the difficulties that may occur when management fails to address complaints timely. On appeal, the agency's overall claim appears to be that its management addressed the situation as soon as possible when it learned of the misconduct – ultimately concluding that the grievant's behavior merited nine Group III Written Notices with termination. However, the hearing officer previously found that the grievant's supervisor was made aware of complaints about the grievant in "early 2021."[39] The agency's investigation report also indicates that two complainants met with the grievant's supervisor in 2022 and advised him of continuing problems they were having with the grievant's communication.[40] The report states that the supervisor declined to accept documentation the complainants brought to support their claims, but he admitted he was aware of problems and had been unable to address them.[41] To the extent that the agency argues that the hearing officer failed to appreciate the severity of the grievant's pattern of conduct, both written decisions clearly articulate how this claim is belied by the agency's approach to the grievant's supervisor, who was responsible for overseeing the grievant's conduct during this time and addressing complaints appropriately.[42] Like all DHRM policies, Policy 2.35 is most effectively enforced by the members of agency management who directly oversee those in violation.

Finally, the hearing officer's reduction of discipline to the Group I level does not appear to be inconsistent with his discretion or with state policy. Although Group II discipline is generally

[35] Reconsidered Decision at 10.
[36] *Id.* at 18.
[37] *Id.* at 16-17; *see* Hearing Recording Pt. II at 2:56:30-3:00:00 (grievant's testimony).
[38] *See* Agency's Request for Administrative Review at 1.
[39] Hearing Decision at 12.
[40] Joint Exs. at 170.
[41] *Id.* at 170-172.
[42] Allowing prohibited conduct to continue and failure to respond to prohibited conduct are both expressly defined as violations of Policy 2.35. DHRM Policy 2.35, *Civility in the Workplace*, at 5.

appropriate for failure to follow written policies or instructions, violations of DHRM Policy 2.35 may be disciplined at any level, depending on the circumstances.[43] Moreover, to the grievant's arguments on appeal, we find no basis in law or policy to suggest that the hearing officer may have erred in sustaining formal disciplinary action for misconduct proven by a preponderance of the evidence.[44]

Based on the foregoing, we decline to disturb the hearing officer's conclusions with respect to Written Notice 9.

CONCLUSION AND APPEAL RIGHTS

The hearing officer is the finder of fact for grievance hearings. That EDR may have weighed differently the testimony of the multiple female witnesses in this case and/or reached another result is not a basis for remand. As we have consistently held, EDR cannot substitute its judgment for that of the hearing officer with respect to factual findings. Accordingly, and for the reasons set forth above, EDR declines to disturb the hearing officer's decision.

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.[45] 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.[46] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[47]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[43] *See Policy Guide – Civility in the Workplace: Policy 2.35 Prohibited Conduct/Behaviors* ("Disciplinary actions to address prohibited behaviors may be taken on a progressive basis or actions may be taken upon the first occurrence, depending upon the nature and seriousness of the conduct. The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited.").
[44] The grievant's cross-appeal appears to reference both a "mistake of law" and "a core legal issue." While the grievant cites to no provision of law violated or mistakenly applied, EDR would note that the parties have the opportunity to argue that the final hearing decision is contradictory to law in an appeal to the applicable circuit court. Va. Code § 2.2-3006(B). To the extent the grievant is arguing that the agency should be "estopped," EDR cannot find the doctrine of estoppel applicable. *See, e.g.*, Falls v. Va. State Bar, 240 Va. 416, 418, 397 S.E.2d 671, 672 (1990).
[45] *Grievance Procedure Manual* § 7.2(d).
[46] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[47] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).