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ADMINISTRATIVE REVIEW

In the matter of the Department of Correction
Ruling Number 2025-5778
November 4, 2024

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 12098. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 12098, as found by the hearing officer, are as follows:[1]

> Grievant had been an employee of the Department for six (6) years. Grievant was a good employee. Grievant was stationed and lived near Grievant's "home facility." Grievant was loaned out to a distant facility. Grievant received additional compensation for working at a distant facility. While in the vicinity of the "loaned facility," Grievant was stopped for speeding. Grievant was in a state vehicle. The record showed she was doing 79-mph in a 55-mph zone. The speed was reduced by the officer who ticketed her to 64-mph. Grievant recognized she was speeding and did not appear at the court hearing. Rather, Grievant accepted the fine which Grievant paid. Grievant did make a timely report to her superior that Grievant had gotten a speeding ticket while in a state vehicle.

On December 18, 2023, the agency issued to the grievant a Group I Written Notice for conviction of a moving traffic violation in a state vehicle.[2] The grievant timely grieved this disciplinary action, and a hearing was held on August 22, 2024.[3] In a decision dated October 9, 2024, the hearing officer found that the agency met its burden of proof in showing that the grievant engaged in the alleged behavior, that the behavior constituted misconduct, and that the agency's discipline was consistent with law and policy.[4] The hearing officer further concluded that no

[1] Decision of Hearing Officer, Case No. 12098 ("Hearing Decision"), Oct. 9, 2024, at 2 (footnotes omitted).
[2] Agency Ex. 1; Hearing Decision at 1, 3.
[3] *See* Hearing Decision at 1.
[4] *Id*. at 3-4.

mitigating circumstances existed to further reduce the agency's disciplinary action.[5] Accordingly, the hearing officer upheld the Written Notice.[6] The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[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 the request for administrative review, the grievant challenges the hearing decision on grounds that the hearing officer did not properly consider evidence presented in mitigation of the disciplinary action. 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]."[10] 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."[11] 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.[12]

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

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[5] *Id.* at 4-5.
[6] *Id.* at 5.
[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).
[10] Va. Code § 2.2-3005(C)(6).
[11] *Rules for Conducting Grievance Hearings* § VI(A).
[12] *Id.* at § VI(B)(1).
[13] 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.

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."[14] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[15] 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.'"[16] The grievant argues that the hearing officer did not properly consider evidence about the vehicle driven by the grievant not being properly maintained. The hearing officer addressed this evidence in the decision, finding that the grievant "failed to prove a nexus that a specific defect in the vehicle was the cause of Grievant going over the speed limit."[17] Indeed, the grievant admits in the request for administrative review that "there is no direct link indicating the maintenance failures would definitively affect the speedometer." While the grievant notes that such an effect "is possible," EDR cannot find that the grievant has presented evidence that was not adequately addressed in the decision or that would support a different result than contemplated in the hearing officer's decision.

The second mitigating factor cited by the grievant was the alleged disparity in discipline between the grievant and another agency employee who was alleged to have been inattentive, sleeping, or "nodding" off at work and received no disciplinary action.[18] Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees."[19] As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[20] Analogous precedent from the Merit Systems Protection Board ("MSPB") on this issue provides that a grievant must show that the agency improperly considered the "consistency of the penalty with

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).

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

[15] "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.").

[16] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).

[17] Hearing Decision at 4.

[18] *See* Hearing Decision at 4.

[19] *Rules for Conducting Grievance Hearings* § VI(B)(2).

[20] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

those imposed upon other employees for the same or similar offenses."[21] Once such an inference is presented, the MSPB precedent holds that the burden shifts to the agency to prove a legitimate explanation for the disparate treatment.[22] Similarly, the *Rules* provide that while it is the burden of the grievant to "raise and establish mitigating circumstances," the agency bears the burden of demonstrating "aggravating circumstances that might negate any mitigating circumstances."[23] Therefore, in making a determination of whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately.[24]

The hearing officer addressed the grievant's evidence, finding that there was "no evidence presented that [the other employee] was actually sleeping."[25] The hearing officer further noted that the employee had a medical condition and voluntarily left employment at the agency.[26] In short, the hearing officer determined that the matter was not similar to the circumstances giving rise to the grievant's misconduct.[27] EDR concurs with the hearing officer's analysis. The types of misconduct at issue are not the same or similar and would not provide proper support for a hearing officer to determine that the Group I Written Notice exceeded the limits of reasonableness. 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 declines to disturb the hearing officer's decision in this matter. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[28] 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.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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[21] *E.g.*, Singh v. U.S. Postal Serv., 2022 M.S.P.B. 15, at 6, 13-15 (2022) (overruling the "more flexible approach" EDR has cited in the past from *Lewis v. Dep't of Veterans Affairs*, 113 M.S.P.R. 657 (2010), and instead going back to a more rigid analysis that requires the relevant offenses to be of the same or similar kind).
[22] *E.g.*, *Singh*, 2022 M.S.P.B. at 7; *Lewis*, 113 M.S.P.R. at 665.
[23] *Rules for Conducting Grievance Hearings* § VI(B)(2); *see also Grievance Procedure Manual* § 5.8.
[24] *See, e.g.*, EDR Ruling No. 2024-5672.
[25] Hearing Decision at 4.
[26] *Id.*
[27] *Id.*
[28] *Grievance Procedure Manual* § 7.2(d).
[29] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[30] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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