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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5794
December 30, 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 11947. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11947, as found by the hearing officer, are as follows:[1]

> Prior to his termination, Grievant had been a Corrections Officer at the Facility. Grievant had been employed by the Agency for more than three years. No evidence of prior disciplinary action was introduced during the hearing. Prior to the events associated with this disciplinary action, the evidence suggested that Grievant's performance had been satisfactory to the Agency.
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> Inmate X is an inmate who was incarcerated at the Facility during December of 2022. Witness X is the mother of Inmate X.
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> In December 2022, Witness X met Grievant in the parking lot of the Hardware Store. Witness X testified that the purpose of the meeting was for Witness X to deliver a package to Grievant. Witness X had been instructed to deliver the package to Grievant by Inmate X and according to Witness X, Inmate X had been involved, at least in part, in arranging the meeting. Witness X described the package she delivered to Grievant as a box that contained shoes and what appeared to be little pieces of paper.
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> Grievant had not reported having a prior existing relationship with Witness X to the Agency. Grievant did not report his meeting with Witness X to the Agency.

[1] Decision of Hearing Officer, Case No. 11947 ("Hearing Decision"), Nov. 13, 2024, at 2-3.

On February 10, 2023, the grievant was issued a Group III Written Notice with termination for fraternizing with the family member of an inmate.[2] The grievant timely grieved the disciplinary action, and a hearing was held on September 19, 2024.[3] In a decision dated November 13, 2024, the hearing officer determined that the disciplinary action issued to the grievant must be upheld because the grievant engaged in prohibited fraternization under agency policies.[4] The hearing officer further found that no mitigating circumstances existed to reduce the disciplinary action.[5]

The grievant now appeals the hearing 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."[6] 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.[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 his request for administrative review, the grievant argues that the hearing officer discounted evidence that, in its totality, would have discredited the agency's case against the grievant as driven by improper motives. He also contends that the hearing officer "did not consider evidence in mitigation of the offense." It appears the grievant also claims that the agency failed to provide due process prior to issuing discipline.

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

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[2] *See id.* at 1; Agency Exs. at 1-4.
[3] *See* Hearing Decision at 1. It appears that the scheduling of a hearing in this matter was delayed based on both parties' requests to continue until after the resolution of potentially related criminal charges. During the lengthy pendency of the case, the hearing officer originally appointed by EDR became unavailable, and EDR assigned the matter to a new hearing officer.
[4] *Id.* at 6-7.
[5] *Id.* at 7.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[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).

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 on 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.

Agency's Burden of Proof

The Written Notice in this matter charged that the grievant had contact with the mother of an inmate at the facility where he worked, in what appeared on video to be a pre-arranged meeting in a commercial parking lot.[13] The agency charged that this action constituted fraternization under its policies, a terminable offense.

In support, the agency called Witness X, the mother of an inmate at the facility where the grievant worked. The hearing officer found that Witness X "credibly testified that she met Grievant in the parking lot . . . and that she delivered a package to Grievant as Inmate X had instructed her to do and consistent with arrangements made by Inmate X."[14] The hearing officer noted that the grievant did not present conflicting testimony to refute the facts offered by Witness X.[15]

The grievant presents several reasons why he believes the hearing officer should not have credited the testimony of Witness X. Primarily, he appears to argue that Witness X testified at the hearing because "she is facing criminal charges" with respect to her involvement in the underlying events.[16] He also notes that Witness X "reported multiple accounts of her involvement in potential wrongdoing."[17] However, the hearing officer found that Witness X "did not appear to be uncertain in her testimony as to her recollection that it was Grievant that she met in the [store] parking lot and that it was Grievant to whom she delivered the package as instructed by her son, Inmate X."[18] Moreover, the grievant "had the opportunity to cross-exam[ine] Witness X and did not elicit testimony calling into question her identification of Grievant as the individual with whom she met . . . ."[19] The grievant's appeal does not cite any specific evidence in the record not already considered by the hearing officer that would tend to suggest that Witness X may not testify truthfully under oath.

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[12] *Grievance Procedure Manual* § 5.8.
[13] Agency Exs. at 1-4.
[14] Hearing Decision at 4; *see* Hearing Recording at 1:16:11-1:33:01 (Witness X's testimony).
[15] Hearing Decision at 5-6. The grievant characterizes the hearing officer's analysis as "penaliz[ing]" him for not testifying. Request for Administrative Review at 3. However, EDR interprets the decision simply to explain that there was testimonial evidence that the grievant met Witness X in the parking lot, and no conflicting testimony (*i.e.*, from the grievant) that he did not meet Witness X. Where the hearing testimony in evidence does not raise a dispute of fact, EDR would not characterize a finding consistent with the testimony to constitute a "penalty" on any party.
[16] Request for Administrative Review at 4.
[17] *Id.* at 3.
[18] Hearing Decision at 4.
[19] *Id.*

The grievant further appears to argue that Witness X's credibility was undermined by flaws in the agency's investigation of the grievant's conduct. The hearing officer specifically agreed with the grievant's argument that the agency's evidence with respect to its investigation did not establish its burden of proof.[20] However, she did not find that any investigative flaws necessarily called into doubt the firsthand hearing testimony by Witness X as to what she recalled about interacting with the grievant. We identify nothing in the record that would have required her to make such a connection. The grievant disputes the hearing officer's analysis, essentially arguing that the agency had an improper motive that should taint the credibility of Witness X. That the hearing officer was not ultimately persuaded by the grievant's arguments does not, without more, indicate that she failed to consider the grievant's evidence in determining that Witness X's testimony about meeting the grievant was 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.[21]

Mitigation/Due Process

The grievant further contends that the hearing officer failed to consider evidence in mitigation. His claim appears to relate, at least in part, to his allegations that the agency failed to satisfy his due process rights.[22] The grievant claims that his facility warden "falsified the date on the [due process] document" given to him. The grievant appears to argue that this date discrepancy violated the Virginia Correctional Officers' Procedural Guarantee Act, as well as the grievant's constitutional rights under *Garrity v. New Jersey*.[23] Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[24] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[25] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

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[20] *Id.* at 5 ("The unwillingness or inability of [two investigators] to testify as to the details of the Agency's investigation made it difficult for this Hearing Officer to rely on the Agency's investigative materials in determining the facts of this case."); *see, e.g.*, EDR Ruling No. 2024-5594.
[21] *See, e.g.*, EDR Ruling No. 2020-4976.
[22] Request for Administrative Review at 1, 4.
[23] 385 U.S. 493 (1967). The grievant's request for administrative review offers only general assertions regarding the statutory and/or constitutional due-process rights claimed to be violated. As such, our review focuses on whether the grievant participated in the grievance hearing process with reasonable notice of the allegations against him and a fair opportunity to be heard in response. To the extent the grievant seeks to pursue these and/or additional due-process claims, they may be presented to the applicable circuit court as questions of law.
[24] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[25] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[26] The pre-disciplinary notice and opportunity to be heard need not be elaborate, nor resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[27]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[28] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[29]

Here, it appears that the grievant, represented by a lay advocate of his choosing, participated in a hearing before an impartial decision-maker, where he had the opportunity to present evidence relevant to the agency's accusations against him and to question all witnesses called. Based upon the full post-disciplinary due process provided to the grievant, EDR agrees with many courts that any lack of pre-disciplinary due process can be cured by the extensive post-disciplinary due process.[30] Because it appears that the grievant participated in a full and fair hearing with the opportunity to present evidence and to question the adverse witnesses presented by the agency to carry its burden of proof, EDR will not disturb the hearing decision based on any alleged pre-disciplinary due process deficiencies.

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[26] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

> [p]rior to the issuance of Written Notices, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, at 11.

[27] *Loudermill*, 470 U.S. at 545-46.

[28] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[29] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[30] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).

Finally, the grievant contends that the evidence proved that the agency's disciplinary action was undertaken for an improper motive, supporting mitigation of the 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]."[31] 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."[32] 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.[33]

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.[34] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, they "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[35] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[36] and will reverse the determination only for clear error.

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[31] Va. Code § 2.2-3005(C)(6).
[32] *Rules for Conducting Grievance Hearings* § VI(A).
[33] *Id.* at § VI(B)(1).
[34] 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).
[35] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[36] "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.").

In light of this standard, we find no basis to disturb the hearing officer's conclusion that "no mitigating circumstances exist to reduce the disciplinary action."[37] Even if we were to accept the grievant's argument that the agency's investigative staff had improper motives, such motives do not necessarily make termination unreasonable where the hearing officer has found that the evidence supports the grievant's conduct as a terminable offense under its policy. In other words, an agency is not required to excuse an employee's terminable misconduct merely because the investigation of such misconduct is flawed – again assuming, as was the case here, that the agency proved such misconduct by a preponderance of the record evidence at the hearing. Here, the hearing officer accepted as reasonable the agency's position that its employees are prohibited from fraternization as defined by agency policy and that engaging in such misconduct normally results in termination. The grievant has not presented a basis for EDR to disturb that finding.

CONCLUSION AND APPEAL RIGHTS

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.[38] 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.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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[37] Hearing Decision at 7.
[38] *Grievance Procedure Manual* § 7.2(d).
[39] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[40] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).