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## **ADMINISTRATIVE REVIEW**

In the matter of the Department of Behavioral Health and Developmental Services

Ruling Number 2026-5934

August 19, 2025

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 12301. For the reasons set forth below, EDR remands the matter to the hearing officer for further proceedings.

### **PROCEDURAL HISTORY AND FACTS**

The relevant facts in Case Number 12301, as found by the hearing officer, are incorporated here by reference.<sup>1</sup> On May 21, 2025, the agency issued to the grievant a Group III Written Notice with termination because the grievant placed notes on a co-worker's vehicle stating "Don't start your car," "I know where you live," and "I will kill you!"<sup>2</sup> The grievant timely grieved the disciplinary action,<sup>3</sup> and the hearing officer was appointed on June 16, 2025.<sup>4</sup>

The hearing officer conducted a teleconference with the agency's advocate and the grievant on June 16.<sup>5</sup> The hearing was scheduled for July 1 and a deadline was set to exchange exhibits by June 26.<sup>6</sup> On June 17, the grievant's advocate notified the hearing officer that he would be assisting the grievant.<sup>7</sup> The grievant's advocate submitted a request for documentation on June 18. At the same time, the grievant's advocate notified the hearing officer that he was on vacation and due to return on June 28. The hearing officer issued an order on June 19 for the agency to produce the requested documentation.<sup>8</sup> Among the documents the grievant appears to have requested was a facility public safety report allegedly about another workplace violence incident that occurred in

<sup>1</sup> Decision of Hearing Officer, Case No. 12301 ("Hearing Decision"), July 12, 2025, at 2-9.

<sup>2</sup> Agency Exs. at 3 (page citations are to the agency's handwritten page numbers on the exhibits); *see* Hearing Decision at 1.

<sup>3</sup> *See* Hearing Decision at 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

September 2023.<sup>9</sup> On June 24, the agency notified the grievant's advocate that the requested documents were available to be picked up at the agency facility.<sup>10</sup> As he was still traveling, the grievant's advocate submitted a request to the hearing officer on June 24 asking if it would be acceptable to identify his proposed exhibits by number, as he planned to submit all documents requested from the agency but was unable to exchange the documents themselves as the agency had only produced them in paper form (rather than by scanning and emailing the documents) and he was still out of town. The grievant's advocate states the hearing officer responded to this request with an email that said "see scheduling orders."<sup>11</sup> The following day (June 25), while the grievant's advocate was still out of town, and one day before the exhibit exchange date, the grievant's advocate notified the hearing officer and agency that he would not be submitting exhibits and would instead be relying on witness testimony.<sup>12</sup>

A hearing was held on July 1, 2025.<sup>13</sup> In a decision dated July 12, 2025, the hearing officer upheld the Group III Written Notice as issued as well as the grievant's termination of employment.<sup>14</sup> 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."<sup>15</sup> 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.<sup>16</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>17</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Based on the information available, EDR observes that the hearing officer should have provided additional leeway for the grievant's advocate to submit documentary evidence in this matter, especially after having been made aware of circumstances outside his control and the short timeframe in which the exchange date and hearing were scheduled. While the grievant's advocate did state that he decided not to submit evidence in advance of the hearing, that was only after reaching out to the hearing officer and receiving no guidance or flexibility. Additionally, the grievant appears to have been seeking to offer those documents requested from the agency and ordered by the hearing officer to be produced such that there should have been no surprise or prejudice to the agency even if the exhibits were not formally exchanged prior to the hearing and only presented at the hearing. However, the grievant has also given EDR no understanding of what

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<sup>9</sup> See Request for Administrative Review at 2.

<sup>10</sup> When the grievant's advocate later obtained the documents produced by the agency, the report regarding the 2023 incident was not apparently included. See Request for Administrative Review at 2.

<sup>11</sup> Request for Administrative Review at 1.

<sup>12</sup> Hearing Decision at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 12-13.

<sup>15</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>16</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>17</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

information might be contained in any of these exhibits that would have any impact on the outcome of the hearing, with one exception (the September 2023 workplace violence incident), which will be discussed further below.

The documents at issue appear to include the grievant's personnel record, his training record, and his performance evaluations. If there is any information included in such records that would have been material to any disputed fact in this case, the grievant has not identified it. The grievant also sought documentation about the particular incident for which he was disciplined and the relevant policies involved. Other than a written statement/report by the victim, if it exists, the grievant's advocate has not identified any other documentation that was not produced with respect to those requests. Even if a statement from the victim exists, we cannot find that this information would have any impact on the outcome of this case. Based on EDR's review of the hearing record, the pertinent facts of the incident do not appear to be in dispute. Consequently, there is no indication that the victim's report of the incident would be any different than evidence already in the record. Further, given the nature of the facts of this case, the victim's opinion of the grievant's conduct would appear to have limited materiality to the outcome of this case. Accordingly, even though the grievant should have been given a better opportunity to submit this documentary evidence, because EDR has been provided with no indication that any of this evidence would have had an impact on the outcome of this case, we cannot find that this is any more than harmless error based on the information available. The matter of the alleged 2023 workplace violence incident is a different question.<sup>18</sup>

The Code of Virginia provides that a hearing officer's duties include “[r]eceiv[ing] and consider[ing] evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR].”<sup>19</sup> Section VI(B)(2) of the *Rules for Conducting Grievance Hearings* provides that mitigating circumstances may include “whether the discipline is consistent with the agency's treatment of other similarly situated employees.”<sup>20</sup> As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.<sup>21</sup> 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 those imposed upon other employees for the same or similar offenses.”<sup>22</sup> 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.<sup>23</sup> 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.”<sup>24</sup> Therefore, in making a determination whether inconsistent treatment supports mitigation, a hearing

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<sup>18</sup> If the grievant's advocate sought to present any other documentary exhibits other than those identified in this ruling, that has not been conveyed to EDR. Consequently, we find no basis to consider any further documentary exhibits other than what is addressed in this ruling.

<sup>19</sup> Va. Code § 2.2-3005(C); *see also* *Grievance Procedure Manual* § 5.7.

<sup>20</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>21</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>22</sup> 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).

<sup>23</sup> E.g., *Singh*, 2022 M.S.P.B. at 7; *Lewis*, 113 M.S.P.R. at 665.

<sup>24</sup> *Rules for Conducting Grievance Hearings* § VI(B)(2).

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.<sup>25</sup>

The grievant requested and the hearing officer ordered production of an agency report apparently about the alleged September 2023 workplace violence incident. While it appears that the agency did not produce this report, even in a redacted form, EDR is unable to identify any portion of the hearing record in which the hearing officer addressed the agency's noncompliance with the order. Nevertheless, the grievant's advocate attempted to provide evidence about the 2023 incident through the testimony of witnesses at the hearing. The hearing officer appears to have allowed the grievant's advocate to ask the grievant certain questions about his knowledge of the incident, but stopped the grievant from going into any details.<sup>26</sup> The hearing officer then found fault with the grievant's failure to lay a foundation about this incident.<sup>27</sup> The hearing officer also prevented the grievant from offering the testimony of witnesses with direct knowledge about the 2023 incident.<sup>28</sup>

Based on EDR's review of the record, the hearing officer did not provide an adequate opportunity for the grievant to lay the foundation apparently sought by the hearing officer, even if such a foundation is required, or to otherwise present evidence about the 2023 incident. The hearing officer should have addressed the agency's noncompliance with her order to produce documents in some way, even if it was to take up the agency's objections. As such, EDR is remanding this matter to the hearing officer for further proceedings. EDR directs the hearing officer to order the agency to make available the requested report of the 2023 incident so that it can be admitted into the record and considered in this matter.<sup>29</sup> EDR also directs the hearing officer to reopen the hearing record and hold a reconvened hearing for the admission of this documentary evidence and the testimony of witnesses about the 2023 incident. The agency should also be provided an opportunity to present rebuttal evidence. The hearing officer must then issue a reconsidered decision taking into account and addressing the additional evidence admitted into the record.

To the extent the agency appears to argue that the 2023 matter is unrelated to the incident for which the grievant is disciplined, that objection is not persuasive here. While limited information is available at this stage, it would appear that the grievant's advocate has identified another workplace violence incident for which no one was allegedly disciplined (though this is still unclear) and is trying to present evidence of inconsistent disciplinary practices as a form of mitigation.<sup>30</sup> Evidence about what happened in that particular incident and the agency's handling

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<sup>25</sup> See, e.g., EDR Ruling No. 2024-5672.

<sup>26</sup> Hearing Recording at 1:16:30-1:19:50, 1:23:10-1:36:52, 1:38:01-1:38:20.

<sup>27</sup> *Id.* at 1:49:10-1:54:00.

<sup>28</sup> *Id.*; see also Request for Administrative Review at 2.

<sup>29</sup> The report should be produced in a redacted form, for instance to preserve the privacy of the individuals not personally involved in the grievance. The agency would be required to produce enough details about the incident for a proper evaluation by the hearing officer to the question of mitigation. See EDR Ruling No. 2023-5500 at 3-4.

<sup>30</sup> Request for Administrative Review at 1.

of the matter are issues that are relevant to the grievant's mitigation arguments.<sup>31</sup> We would additionally note that just because documents or information relate to employees other than the grievant does not prevent consideration of that evidence in a grievance proceeding. For example, the Code of Virginia specifically contemplates the production of such documentation, stating that “[d]ocuments pertaining to nonparties that are relevant to the grievance *shall be produced* in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.”<sup>32</sup>

At hearing, the hearing officer also appeared to take issue with the grievant's attempt to present evidence about the 2023 incident due to the agency advocate's apparent lack of awareness of that matter.<sup>33</sup> Again, we do not find that objection persuasive.<sup>34</sup> This would be the type of issue for which the agency's opportunity to present rebuttal evidence could be used. If the agency's advocate did not have information or an appropriate witness available at the hearing to rebut evidence about the 2023 incident, including, for example, to present an explanation for any arguably inconsistent disciplinary practices, the agency could be provided leeway to locate such evidence or witnesses on the day of hearing. If appropriate, the hearing officer could also leave the record open for rebuttal evidence to be presented after the hearing in written form or in a reconvened hearing for that limited purpose (as long as the grievant is also provided an opportunity to cross-examine any witnesses presented). In short, there were options available that would have allowed for the proper admission of the evidence while allowing the agency an opportunity for rebuttal. We are unable to find that preventing the grievant from presenting evidence about the 2023 incident was harmless error based on the information available.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer to re-open the record for further proceedings as described 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).<sup>35</sup> Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.<sup>36</sup>

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<sup>31</sup> In determining whether the misconduct of other employees is similar to that of a grievant, EDR has further stated that “[t]he key is that the misconduct be of the same character.” EDR Ruling No. 2010-2376 n.19. Inasmuch as both the conduct for which the grievant was disciplined and the 2023 incident appear to involve allegations of workplace violence, this standard would appear to be met here. Whether evidence about the 2023 incident results in a determination that there has been inconsistent discipline is a different question and for the consideration of the hearing officer on remand.

<sup>32</sup> Va. Code § 2.2-3003(E) (emphasis added).

<sup>33</sup> Hearing Recording at 1:49:10-1:54:00.

<sup>34</sup> EDR also observes that the grievant appears to have requested the agency's report of the 2023 incident and put on his witness list an individual directly involved in the incident and the agency's investigator into the incident, all in advance of the hearing. Thus, EDR is unsure how questions about the matter could be characterized as a surprise to the agency.

<sup>35</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>36</sup> See *Grievance Procedure Manual* § 7.2(c).

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.<sup>37</sup> 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.<sup>38</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>39</sup>

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<sup>37</sup> *Id.* § 7.2(d).

<sup>38</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

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