Issue: Administrative Review of Hearing Officer's Decision in Case No. 10939; Ruling Date: May 5, 2017; Ruling No. 2017-4527; Agency: Department of Social Services; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2017-4527
May 5, 2017

The Department of Social Services (the "agency") 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 10939. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and explanation.

FACTS

The relevant facts in Case Number 10939, as found by the hearing officer, are as follows[2]:

> The Department of Social Services employed Grievant as a Media Relations Specialist. She had been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant was on military leave from April 5, 2016 until September 30, 2016. Grievant returned to work on October 4, 2016.
>
> > On October 6, 2016, the Supervisor sent Grievant an email assigning her to "Repurposing "Real Stories" on public site as editorial pitches to local publications throughout the Commonwealth: Due October 27, 2016.
>
> The Supervisor described what action to take and how Grievant should complete the task. Grievant replied on October 6, 2016 to the Supervisor's email by saying she would review the assignment and let the Supervisor know by October 7, 2016 if Grievant had any questions.

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[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] Decision of Hearing Officer, Case No. 10939 ("Hearing Decision"), March 7, 2017, at 2-6 (citations omitted).

Grievant was working on October 24, 2016 but told the Supervisor she had a medical appointment at noon that day.

Grievant met with a Licensed Professional Counselor regarding mental health issues. The Provider provided her with a letter stating:

> To Whom It May Concern:
>
> My name is [Provider] and I am a Licensed Professional Counselor. I have been providing individual psychotherapy for [Grievant] beginning October 24, 2016.
>
> During our initial assessment it became clear to me that [Grievant] would greatly benefit from some time away from work. The current level of stress in her life is threatening to exacerbate her medical conditions.
>
> I would recommend two weeks of leave for [Grievant] during which time she can work on reducing stress and developing health coping skills.

On Monday October 24, 2016 at 4:03 p.m., Grievant sent the Supervisor an email stating:

> My doctor has taken me out of work for the next two days (Tuesday and Wednesday). I will submit my leave in TAL, just wanted to let you know what was going on.

On Monday October 24, 2016 at 4:52 p.m., the Supervisor replied:

> Ok, thanks for letting me know. Please scan/email your doctor's note to me please. Thank you.

On October 24, 2016 at 3:59 p.m., Grievant sent the Benefits Manager an email regarding "Short-Term Disability Claim" stating:

> My doctor has taken me out of work effective immediately until November 11th. I called VRS to file my claim and they informed me that I am still showing up in the system as terminated. Could you please advise me on what I need to do to be updated in the system?

On October 25, 2016 at 8:28 a.m., Grievant sent the Agency's Benefits Manager an email stating:

> Please see attached letter from my doctor. I know that I have to notify [Supervisor] of my leave but I would like to keep the nature

> of my leave private if at all possible. Please let me know what else you need from me.

On October 25, 2016 at 2:25 p.m., the Benefits Manager sent Grievant an email stating:

> [Grievant] – under a separate e-mail where we will copy [Supervisor], I will have [HR Analyst] send you the VSDP information. All medical information is confidential. You do not need to provide medicals to us – just to the [Third Party Administrator].

On October 25, 2016 at 2:43 p.m., the HR Analyst sent Grievant an email regarding initiating a short-term disability claim. He sent the Supervisor a copy of his email to Grievant.

On October 25, 2016 at 4:02 p.m. Grievant sent the Supervisor an email stating:

> I was waiting to hear back from HR before notifying you of my extended absence. My doctor has taken me out of work for a couple of weeks. I anticipate being out until Monday [November 7th]. I will provide you with additional information as I get it.

On October 25, 2016, the Supervisor sent Grievant a text stating:

> I emailed you as well but thought I would send a text in case you were signing off of email for a while. Seeing as though you're not returning until after the launch of national adoption month, please send me what you have so far for the feature story deliverable due this week. Obviously you're not required to do any work while you are out but I just need what you've been able to accomplish to date. Thanks.

On October 25, 2016, Grievant sent the Supervisor a text stating:

> I had still planned to send you my project that's due on the 27th, wasn't going to just drop the ball on it. I'm still putting it together and will send Thursday.

On October 26, 2016 at 10:16 a.m., the Supervisor sent Grievant an email stating:

> Short-term disability means that you are unable to engage in work activity. We cannot allow you to continue to work on this project as you suggested yesterday. Please send me whatever work that has been completed on the feature stories project immediately.

> Also, please provide an update on what has been done to date on the Media Engagement Strategy deliverable due next week.
>
> This is all that will be required of you before you are released to return to work. Thank you?
>
> The Supervisor sent Grievant a text stating:
>
> Please check your email. Your STD prohibits you from continuing work activity. Just send me what you have now.

On October 26, 2016 at 12:05 p.m., Grievant sent the Supervisor a text stating:

> Ok, I understand that. Along with following my doctor's orders, to give you what I have now will require some time spent compiling it. I will need until tomorrow to get you what I have.
>
> The Supervisor replied:
>
> But I am not asking you to compile anything. Just send me what you have in whatever form it's in now. Email, word, draft, etc. I don't need you to spend any more time compiling.
>
> Grievant responded:
>
> In order [to] provide you with what I have, in any format that's electronic, it will have to be compiled as I mentioned before. All of my notes are handwritten and not presentable. I do not feel comfortable providing you with anything that's incomplete or not easy to understand, even if it's drafts.

On October 27, 2015 at 12:35 p.m., Grievant sent the Supervisor an email stating:

> Having connectivity issues with my work computer so I'm sending from my personal e-mail. Just in case you don't receive it, I acknowledge receipt of the NOI. E-mails are sitting in my outbox.
>
> Attached is what I have so far regarding the adoption project. There are five pitch letter[s]. Portsmouth and Roanoke pitch letters contain a family form the area featured in it. There is an attachment that specifies which outlets I have identified to send the two stories to. The generic pitch letter is for all other media outlets. The Fredericksburg and Washington pitch letters are personalized to two reporters who have reported on foster care/adoption issues before.

> There is a media list attached that is color coded with the outlets for Portsmouth (yellow) and the outlets for Roanoke (green).
>
> To date I have done research and identified content to be included in the plan for each element of the strategy.
>
> Because Grievant sent the email from her personal email account and with large attachments, Grievant's email went to the Supervisor's SPAM electronic mail folder instead of to the Supervisor's electronic inbox. The Supervisor did not realize she had received Grievant's email. In December 2016, the Supervisor discovered that VITA had "quarantined" Grievant's email and attachment for 14 days and then removed it from the Supervisor's computer.

On November 1, 2016, the grievant was issued two Group II Written Notices for failure to follow instructions and terminated from employment with the agency based on her accumulation of disciplinary action.[3] The first Written Notice states that the grievant did not "provide a doctor's note" in response to her supervisor's request,[4] and the second Written Notice states that the grievant did not comply with her supervisor's directive to provide the project work product while she was out of work.[5] The grievant timely grieved the disciplinary actions[6] and a hearing was held on February 15, 2017.[7] In a decision dated March 7, 2017, the hearing officer concluded that the agency had presented sufficient evidence to justify the issuance of the second Group II Written Notice, but found that the agency's decision to issue the first Group II Written Notice (relating to the instruction to provide a doctor's note) was not supported by the evidence in the record.[8] As a result, the hearing officer rescinded the first Group II Written Notice, ordered the grievant reinstated to her former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.[9] The agency now appeals the hearing 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."[10] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[11]

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[3] *See* DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[4] Agency Exhibit 1.
[5] Agency Exhibit 2.
[6] Agency Exhibit 3; *see* Hearing Decision at 1.
[7] *See* Hearing Decision at 1.
[8] *Id.* at 6-8.
[9] *Id.* at 8-9.
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).

Fairly read, the agency's request for administrative review contends that the hearing officer's decision is inconsistent with the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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.

In the hearing decision, the hearing officer assessed the evidence and determined that "[t]he Provider's note sufficiently discloses Grievant's medical condition such that Grievant was justified in refusing to submit the note to the Supervisor."[16] The hearing officer further determined that the "Grievant submitted the Provider's note to the Agency's Benefits Manager" and "understood the Benefit Manager's reply email to be saying Grievant was not obligated to provide medical information to the Agency including the Supervisor."[17] Based on this evidence, he concluded that her actions were adequate to "inform[] the Agency of her reason for being absent from work" and "notif[y] the Supervisor that she would be absent from work."[18] The agency disputes these conclusions, argues that the grievant was instructed by her supervisor to provide a doctor's note authorizing her absence, that she was required to comply with that instruction, and that she did not do so.

Having reviewed the evidence in the record, EDR is unable to determine whether the hearing officer considered and addressed whether the grievant complied with the valid instruction to submit a doctor's note directly to the supervisor. The hearing officer determined that the grievant was justified in not providing the doctor's note she had, but that does not address the question of whether the grievant adequately complied with her supervisor's instruction in this instance. For example, the grievant could have obtained a different note from her medical provider that did not contain specific medical information about her diagnosis.[19] Because EDR cannot find that the hearing officer has squarely addressed whether the grievant

[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.
[16] Hearing Decision at 7.
[17] *Id.*
[18] *Id.*
[19] *See* Hearing Recording at 27:48-28:30 (testimony of VSDP Policy Analyst), 3:05:17-3:05:35 (testimony of Employee Relations Coordinator).

complied with the supervisor's instruction, the matter must be remanded for clarification on this point.[20]

It may be that the hearing officer did not specifically address this issue because he did not find that the record evidence was sufficient to demonstrate the grievant had failed to follow her supervisor's instruction. Indeed, the record evidence could be viewed as mixed on this point. For instance, the supervisor's instruction contained no deadline by when the grievant was to submit the doctor's note.[21] There was no additional communication from the supervisor indicating that the request for the note was immediate or that the grievant had violated the supervisor's expectations until the grievant was provided notice of due process in advance of issuance of the disciplinary action, which occurred only a few days following the original instruction.[22] The grievant was still on leave at this time[23] and some evidence might indicate that, in the grievant's experience, employees had been permitted to submit a medical note following return to work from leave.[24]

On the other hand, the grievant does not appear to have responded directly to her supervisor's email requesting a doctor's note,[25] nor did she provide the agency with any medical documentation other than the Provider's note that she emailed to the Benefits Manager.[26] In addition, the Benefits Manager testified that she was unaware of the supervisor's instruction to the grievant during their correspondence,[27] and the grievant's email communications with the Benefits Manager do not state that the supervisor had asked the grievant for a doctor's note.[28] Another witness testified that a manager may request a reasonable medical note that authorizes the employee's absence when an employee is out of work, and that an employee cannot substitute communication with human resources about a medical absence for communication with her supervisor.[29]

Based on the foregoing, EDR cannot determine whether and to what extent the hearing officer considered all of the evidence surrounding the grievant's actions in response to her supervisor's instruction. Upon consideration of the record evidence, some relevant points of which are noted above, the hearing officer may find that the grievant's behavior, while not necessarily violating a supervisor's instruction, may have been unsatisfactory in certain respects, such as, for example, lack of communication with the supervisor about the instruction, which

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[20] It may be that the grievant has complied with the requirements of policy to submit justification supporting the need for leave, but EDR is unable to determine whether the hearing officer has assessed the grievant's alleged failure to follow the supervisor's instruction itself.
[21] Agency Exhibit 5 at 1.
[22] *See* Agency Exhibit 1 at 4-6; Agency Exhibit 5; Agency Exhibit 6 at 7-10.
[23] *See* Hearing Recording at 4:24:03-4:26:08 (testimony of grievant).
[24] *Id.* at 3:46:38-3:46:45 (testimony of grievant); *see also id.* at 34:41-34:57 (testimony of VSDP Policy Analyst),
[25] *See* Agency Exhibit 5 at 1, 4-5. Some points that have been raised in this matter and EDR is unclear if they have been considered include that if the grievant did not want to provide the medical note she had in her possession, she could have communicated with the supervisor that she needed additional time to procure a suitable note from her medical provider. The grievant could also have communicated to the supervisor that she had submitted her medical note to the Benefits Manager instead. Additional communication from the grievant about her concerns and actions could have shown that the grievant was attempting to comply with the supervisor's instruction. However, it is not clear from the record that the grievant made any direct response to the supervisor's request at all.
[26] *See* Agency Exhibit 1 at 1-2.
[27] Hearing Recording at 2:34:21-2:34:48 (testimony of Benefits Manager).
[28] Agency Exhibit 5 at 2-3.
[29] Hearing Recording at 14:28-14:52, 17:09-17:18 (testimony of VSDP Policy Analyst).

might lead to a finding of misconduct at some lower level. Accordingly, the hearing decision must be remanded to the hearing officer for further consideration and explanation of the evidence in the record relating to these issues.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration of the evidence in the record to the extent discussed above. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).[30] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.[31]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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[30] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[31] *See Grievance Procedure Manual* § 7.2.
[32] *Id.* § 7.2(d).
[33] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[34] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).