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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Behavioral Health and Developmental Services
Ruling Number 2023-5531
March 29, 2023

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 11883. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11883, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Psychiatric Technician III at one of its locations. Grievant had prior active disciplinary action. She received a Group II Written Notice on December 31, 2020 for leaving the workplace without permission.
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> On March 20, 2022, Grievant was working at the Facility on the Floor where approximately 10 patients were located. The RNCA was in the Nursing Station. Tech W was also working. The Unit was in quarantine at the time. This meant that employees entering the Floor were required to wear personal protective equipment including masks and gowns.
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> The RNCA was taking her lunch break in the Nursing Station. Tech W was not in the Nursing Station. Grievant's Son called the telephone in the Nursing Station and asked to speak to Grievant. The RNCA told the Son to call back in 15 minutes since no one was able to relieve Grievant.
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> When Grievant came into the Nursing Station, the RNCA told Grievant that her son called 10 minutes ago and to call him back.

[1] Decision of Hearing Officer, Case No. 11883 ("Hearing Decision"), February 21, 2023, at 2-3.

> Grievant was concerned that anytime her Son called it would be because of an emergency and she wanted to be notified of the call so she could speak to him without delay. Grievant wanted the RNCA to stop her lunch break, put on her PPE, and enter the Floor to relieve Grievant so Grievant could take the telephone call. The RNCA could not have relieved Grievant because it would have been necessary for another Nurse to come to the Nursing Station to relieve the RNCA.
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> Grievant was standing a few feet away from the RNCA. Grievant raised her voice and began berating the RNCA for failing to notify Grievant immediately when her Son called. Grievant asked, "Why did you not come and get me!" The RNCA said she was on her lunch break. The RNCA did not raise her voice to Grievant. The RNCA apologized several times, but Grievant continued to berate the RNCA. Grievant continued to argue with the RNCA for at least ten minutes.
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> Tech W was at the medication cart near the Nursing Station. She was within ten feet of Grievant and the RNCA. Tech W heard the conversation and felt it was disturbing. Tech W did not intervene. She was surprised the conversation lasted for so long.
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> The RNCA notified the Agency that she was no longer comfortable working with Grievant and asked to be moved to another Ward or Building.

The agency issued to the grievant a Group II Written Notice on April 20, 2022 for lack of civility in the workplace.[2] The grievant timely grieved the disciplinary action, and a hearing was held on January 30, 2023.[3] In a decision dated February 21, 2023, the hearing officer determined that the agency had presented sufficient evidence to support a Group I Written Notice on grounds that the grievant's behavior was disruptive to the workplace, but that there was insufficient evidence to raise the disciplinary action to a Group II Written Notice.[4] The hearing officer also concluded that no mitigating circumstances existed to remove the disciplinary action entirely.[5] The grievant now appeals the 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 . . . ."[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 either 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.

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[2] Hearing Decision at 1; Agency Exs. at 4.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 3-4.
[5] *Id.* at 4.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of Evidence

The grievant challenges the factual determinations made by the hearing officer – in particular, the credibility of the agency's witness testimony regarding the incident in question. 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 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.

The grievant primarily argues that the hearing officer's determinations are based on insufficient evidence because the credibility of the RNCA was compromised by her inconsistent statements regarding the incident. This claim rests on the fact that in the RNCA's initial statement, she claimed the grievant cursed at her during the altercation, but she then later confirmed during a meeting with the grievant and other agency employees that she did not curse, only that the grievant's delivery was "loud, disrespectful, and embarrassing."[13] Further, the hearing officer in his decision ultimately decided that due in part to these inconsistent statements by the RNCA, the evidence only supported the disciplinary action at a Group I level.[14] The grievant argues that the hearing officer confirmed the RNCA's statements being inconsistent, and, therefore, her credibility was "forfeited" and cannot be corroborated. However, the one witness at the incident other than the grievant and the RNCA, Tech W, provided a memo that supported the RNCA's statements regarding the grievant's behavior, and supported this memo during her testimony at the hearing.[15]

While the grievant testified that she did not engage in disrespectful or abusive behavior against the RNCA,[16] the grievant provided no witnesses or evidence of the altercation other than her own account of what happened. The grievant contests the credibility of the RNCA as a witness, but there is evidence in the record to support the hearing officer's determinations of credibility, including direct testimony from Tech W who witnessed the incident firsthand.[17] Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts

[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).
[13] *See* Agency Exs. at 9; Grievant Exs. at 11.
[14] Hearing Decision at 3-4.
[15] Agency Exs. at 8; *see also* Hearing Recording at 30:00-31:00 (Tech W's testimony).
[16] Hearing Decision at 1:04:00-1:05:00 (Grievant's testimony).
[17] Tech W testified that she was in the room adjacent to the grievant and the RNCA when she heard the altercation take place. *See* Hearing Recording at 33:20-34:20; Agency Exs. at 8.

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. EDR cannot find that the hearing officer abused his discretion by assessing the issues in this case based on his conclusions in this regard.

The grievant also argues in her appeal that "it is dubious if the behavior [she] exhibited warrants disciplinary action at all," since Tech W and the RNCA did not originally intend to report or feel obligated to report the grievant's behavior. The grievant argues that the lack of reporting diminishes the legitimacy of the claim that her behavior was a form of insubordination or wrongdoing in the workplace. However, it appears that the agency's HR department decided to pursue the disciplinary action based on input from the grievant's management.[18] The record indicates that the hearing officer had the opportunity to consider these factors as he made his determinations. 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.[19] Accordingly, EDR declines to disturb the hearing decision on these grounds.

Mitigation

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]."[20] 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."[21] 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.[22]

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

[18] Agency Exs. at 10.
[19] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[20] Va. Code § 2.2-3005(C)(6).
[21] *Rules for Conducting Grievance Hearings* § VI(A).
[22] *Id.* § VI(B).

high.[23] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[24] and will reverse the determination only for clear error.

The hearing officer found that there were no mitigating factors to justify further reduction of the disciplinary action.[25] The grievant, on appeal, argues that both the agency and the hearing officer failed to consider "how the interaction made [her] feel as a longstanding state employee." The grievant is referring to the basis of the incident itself; the reason for her frustration was because her son called her at work to try to get a hold of her, and it is the grievant's belief that her son would only call for an emergency.[26] Given this understanding, she believes she was justified to be upset about the fact that the RNCA not only did not immediately forward the call to the grievant, but forgot to mention the call to the grievant until the grievant found her during her lunch break. The grievant appears to be frustrated by the agency's lack of consideration or discussion of this context throughout their meetings or the grievance process, and instead focusing solely on how her behavior went against agency policy and was disrespectful to the RNCA.

While the grievant's frustration is understandable, we cannot find that the hearing officer erred in determining that the stated reason for her behavior was not a justification to cancel out an agency policy violation. As the hearing officer found, the behavior exhibited characteristics warranting a Group I Written Notice under the applicable *Civility in the Workplace* Policy.[27] Agency exhibits also reflect that the RNCA asked the son over the phone if he could call back at a later time, and when she did not receive any feedback as to the urgency of the call, she assumed that it was not an emergency.[28] 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

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[23] 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).

[24] "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.").

[25] Hearing Decision at 4.

[26] Grievant Exs. at 6.

[27] Agency Exs. at 25 ("Harassment, Bullying, Workplace Violence: . . . Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.") The hearing officer in his decision states that "[d]isruptive behavior is a Group I offense," and such behavior would be considered to fall under Policy 2.35's prohibited behavior.

[28] Agency Exs. at 20-21.

reasonableness.'"[29] EDR has found no specific evidence of mitigating factors presented in the record that were not adequately addressed in the decision or that would support a different result. 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. 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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[29] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).