Issue: Administrative Review of Hearing Officer's Decision in Case No. 11146; Ruling Date: June 1, 2017; Ruling No. 11192; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2018-4719
June 1, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11146. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11146, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as an Offender Workforce Development Specialist at Facility 1. He began working for the Agency on August 10, 2015. Grievant received an overall rating of Exceeds Contributor on his most recent annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant reported to the Supervisor. The Supervisor's office was located approximately 300 miles from Facility 1. The Supervisor reported to the Manager. The Manager worked at Headquarters. The Superintendent worked at Facility 1.
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> The Agency used the Time Attendance Leave (TAL) system for employees to report and account for leave requests and approvals. TAL showed employees the amount of accrued leave they had in many categories such as annual leave, personal leave, etc. It did not show any accrued balance for the category of civil work-related leave.
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> Grievant advised the Supervisor that he wanted to obtain employment at another location. The Supervisor told Grievant that the Agency would "cover" his time devoted to interviews. Grievant understood this comment to mean he did not have to report as leave his time taken to interview at Agency facilities.
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> Grievant properly notified the Supervisor in advance of the days he would not be at work.

[1] Decision of Hearing Officer, Case No. 11146 ("Hearing Decision"), May 1, 2018, at 2-5 (citations omitted).

Grievant lived in City 1 which was approximately 64 miles north of Facility 1 where he worked. His wife got a new job in another part of the State so Grievant and his wife wanted to move to City 2. City 2 was approximately 180 miles south of Facility 1 and 216 miles south of City 1.

Grievant moved to City 2 on September 1, 2017.

Grievant began interviewing at other DOC facilities in July 2017. Because of the length of his drive, he was away from Facility 1 for approximately 8 hours each time he had an interview at another DOC facility near City 2.

Grievant spoke with the Supervisor and told the Supervisor Grievant intended to begin interviewing at other DOC facilities. Grievant told the Supervisor that Grievant would have to use a lot of leave because of the lengthy drives to the interviews. The Supervisor told Grievant not to worry about using personal time and that the Agency would get back with him. The Supervisor told Grievant the Agency would "cover" his leave.

Grievant interviewed at DOC Facility H on July 21, 2017.

On July 31, 2017, Grievant spoke with the Superintendent. Grievant told the Superintendent that Grievant was going on his second interview at Facility H and had applied for jobs at several other facilities. The Superintendent expressed concern that Grievant was spending a lot of time away from Facility 1 and said that Grievant, the Supervisor, and the Superintendent should discuss the matter. The Superintendent went on leave for several weeks without first talking to Grievant about being away from Facility 1.

Grievant interviewed at DOC Facility H on July 31, 2017.

Grievant did not report to work as follows:

On July 21, 2017, Grievant drove to Facility H and was interviewed for a position with the DOC. He did not make an entry into TAL to take leave for his absence.

On July 31, 2017, Grievant drove to Facility H and was interviewed for a position with the DOC. He used TAL on July 20, 2017 to request eight hours of annual leave to be absent on July 31, 2017.

On August 2, 2017, Grievant was absent from work. He did not interview for a position with the Agency. He did not request leave in TAL.

On August 8, 2017, Grievant drove to Facility D and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 9, 2017, Grievant drove to Facility D and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 25, 2017, Grievant drove to Facility G and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 28, 2017, Grievant drove to Facility D and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

On August 29, 2017, Grievant drove to Facility De and was interviewed for a position with the DOC. Grievant did not request leave in TAL.

The Superintendent went on sick leave. He returned on September 4, 2017. On September 5, 2017, Grievant told the Superintendent that he would be away from the Facility for additional interviews. Grievant had interviews on September 12, 2017 and September 14, 2017. The Superintendent told Grievant he could take civil and work-related leave for four hours two times per year. Grievant replied that he did not know about that limitation. Grievant believed the Agency would "cover" his leave because that is what the Supervisor told him.

On September 6, 2017, Grievant was absent from work due to illness. He did not record his sick leave in TAL.

On September 12, 2017, Grievant drove to Facility G and was interviewed for a position with the DOC. Grievant did not initially request leave in TAL. On September 20, 2017, Grievant requested five hours of annual leave for September 12, 2017. Grievant's Supervisor approved the request on September 21, 2017.

On September 13, 2017, Grievant sent the Supervisor an email stating, "I was appraised by the Superintendent that I am "technically" only allowed 4-hrs agency time for interview-related events."

On September 14, 2017, Grievant drove to Facility L and was interviewed for a position with the DOC. Grievant did not initially request leave in TAL. On September 20, 2017, Grievant requested five hours of annual leave for September 14, 2017. Grievant's Supervisor approved the request on September 21, 2017.

On September 21, 2017, Grievant drove to Facility L and was interviewed for a position with the DOC. Grievant did not initially request leave in TAL. On September 20, 2017, Grievant requested four hours of annual leave and one hour of Family/Personal leave for September 21, 2017. Grievant's Supervisor approved the request on September 21, 2017.

In Grievant's response to the Agency's notice of its intention to take disciplinary action, Grievant discussed two days in which he was absent from work due to illness. Grievant wrote, "I previously did not account for and, honestly, simply and mistakenly overlooked." Regarding the September 6th absence, Grievant wrote, "I mistakenly forgot to record my absence in TAL when returning to the facility on Thursday, September 7th."

On December 1, 2017, the grievant was issued a Group II Written Notice for failure to comply with policy and a Group III Written Notice for false reporting of leave records.[2] The grievant timely grieved the disciplinary actions and a hearing was held on February 12, 2018.[3] In a decision dated May 1, 2018, the hearing officer determined that the agency had presented sufficient evidence to support the issuance of the Group II Written Notice for failure to follow policy because the grievant did not properly record his leave in TAL.[4] The hearing officer further concluded that the agency had not presented evidence to demonstrate that the grievant falsified leave records, but did find that the grievant had failed to follow the agency's policy to obtain approval for using civil and work-related leave in excess of eight hours.[5] As a result, the hearing officer reduced the Group III Written Notice to a Group II Written Notice.[6] The hearing officer upheld the grievant's termination based on his accumulation of disciplinary action.[7] The grievant now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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."[8] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[9]

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence presented at the hearing, are not supported by the evidence. More specifically, the grievant disputes the hearing officer's decision to reduce the Group III Written Notice to a Group II Written Notice for failing to comply with the agency's policy regarding the use of work-related leave.[10] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] 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.[13] 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.
[3] *Id.*
[4] *Id.* at 5-6.
[5] *Id.* at 6-7.
[6] *Id.* at 6-8.
[7] *Id.* at 8.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] As the grievant has not challenged the hearing officer's conclusions with regard to the Group II Written Notice for failing to properly record leave in TAL, it will not be discussed further in this ruling.
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).

evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[14] 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, EEDR 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 the grievant "was entitled to take eight hours of work-related leave under the Agency's policy," and that "[h]e could exceed that amount by obtaining approval from the Organizational Unit Head."[15] The hearing further determined that the grievant "did not seek permission from the Organizational Unit Head" and that "[h]is Supervisor was not an Organizational Unit Head."[16] While the hearing officer noted that "the Supervisor had only a limited understanding of the Agency's leave policy and his comments served to mislead Grievant," he further stated that the grievant "should have reviewed the policy himself rather than relying on his misinformed Supervisor."[17] As a result, the hearing officer determined that the grievant failed to follow the agency's policy by not obtaining approval from the Organizational Unit Head to use more than eight hours of work-related leave, thereby justifying the issuance of a Group II Written Notice.[18]

In support of his position that the hearing officer erred in upholding the issuance of a Group II Written Notice for the above-described misconduct, the grievant contends that the Manager, whom he alleges was an Organizational Unit Head, approved his use for more than eight hours of work-related leave when asked by the Supervisor. The grievant further argues that he "mistakenly relied solely on the inaccurate direction of [his] supervisor . . . in managing compliance with the policy governing" work-related leave, that he "communicated consistently with [his] supervisor prior to any absences," and that "it was a customary practice to utilize time and to have that time retroactively approved by supervisors."[19]

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer's determination that the grievant failed to follow agency policy by using more than eight hours of work-related without approval from the Organizational Unit Head. The agency's policy on work-related leave clearly states that "[e]mployees shall be allowed time off from work to participate in interviews for state employment opportunities," and that leave for "[p]romotional interviews that exceed[s] eight hours annually may be approved at the discretion of the Organizational Unit Head."[20] At the hearing, the Supervisor testified that he discussed the policy with the grievant, including the provisions that address the amount of time permitted for

[14] *Grievance Procedure Manual* § 5.8.
[15] Hearing Decision at 6.
[16] *Id.*
[17] *Id.* at 7.
[18] *Id.* at 6-8.
[19] In his request for administrative review, the grievant appears to assert that he requested documents from the agency that would allegedly show the Manager approved his use of work-related leave, and that not all responsive documents were provided to him. The hearing officer does not appear to have issued an order for the production of documents in this case, and EEDR has reviewed nothing in the record to show what documents the grievant may have requested from the agency. As a result, EEDR has no basis to find any error in the hearing decision with regard to this issue.
[20] Agency Exhibit 4 at 8-9.

interviews.[21] The grievant testified that he believed the Supervisor and the Manager agreed that his leave for promotional interviews would be covered.[22] The grievant further explained that he did not remember there was a policy for work-related leave, and that he did not record the hours he used for interviews in TAL because the Supervisor told him his leave for that purpose would be covered by the agency.[23] While the evidence appears to show that the Supervisor and the Manager may have discussed the grievant's use of work-related leave,[24] EEDR has not identified any evidence to show that the Manager approved the grievant's use of work-related leave in excess of eight hours, whether retroactively or in advance. Moreover, there appears to be no evidence in the record showing whether the Supervisor or the Manager was an Organizational Unit Head who could have approved the grievant's use of work-related leave in excess of eight hours. Although the hearing officer noted that the "Grievant notified the Supervisor by email or verbally each time [he] expected to be absent from work and did so within a reasonable time period,"[25] this does not override the agency's policy requirement that an Organizational Unit Head must approve work-related leave for promotional interviews that exceeds eight hours.[26]

Although the grievant may disagree with the hearing officer's assessment of the evidence, conclusions as to the credibility of witnesses 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 EEDR 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.[27] Because the hearing officer's findings of facts with regard to these issues are based upon evidence in the record and address the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR declines to disturb the decision on this basis.

Mitigation

In addition, the grievant challenges the hearing officer's decision not to mitigate the agency's disciplinary action. Specifically, he appears to allege that he "mistakenly relied solely on the inaccurate direction of [his] supervisor (and facility superintendent) in managing compliance with the policy governing absences and time submissions related to the agency interviews [he] attended" and that he "communicated consistently with [his] supervisor prior to any absences," and that these factors support mitigation of the Written Notice. 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 [EEDR]."[28] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer

[21] Hearing Recording at 15:45-17:48 (testimony of Supervisor).
[22] *Id.* at 2:01:01-2:01:25 (testimony of grievant).
[23] *Id.* at 2:25:00-2:26:31 (testimony of grievant).
[24] *See* Grievant's Exhibit 16.
[25] Hearing Decision at 7.
[26] *See id.*
[27] *See, e.g.*, EDR Ruling No. 2014-3884.
[28] Va. Code § 2.2-3005(C)(6).

should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[29] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[30]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[31] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[32] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. Furthermore, and especially in cases involving a termination, mitigation should be utilized only in the exceptional circumstance. DHRM Policy 1.60, *Standards of Conduct*, provides that an employee's accumulation of "[a]second active Group II Notice normally should result in termination."[33] It is the extremely rare case that would warrant mitigation with respect to a termination due to formal discipline. However, EEDR also acknowledges that certain circumstances may require this result.[34]

In this instance, the hearing officer found no mitigating circumstances that would support a decision to further reduce the discipline issued by the agency.[35] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best

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[29] *Rules for Conducting Grievance Hearings* § VI(A).
[30] *Id.* § VI(B)(1).
[31] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[32] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*
[33] DHRM Policy 1.60, *Standards of Conduct*, § B(2)(b). Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).
[34] The Merit Systems Protection Board views mitigation as potentially appropriate when an agency has "knowingly and intentionally treat[ed] similarly-situated employees differently." Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (1991) (citations omitted); *see* Berkey v. United States Postal Serv., 38 M.S.P.R. 55, 59 (1988) (citations omitted).
[35] Hearing Decision at 7.

penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[36] Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support further mitigating the discipline issued, EEDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EEDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR 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.[37] 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.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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[36] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[37] *Grievance Procedure Manual* § 7.2(d).
[38] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[39] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).