Issue: Administrative Review of Hearing Officer's Remand Decision Issued on March 30, 2018; Ruling No. 2018-4808; Agency: Department of Corrections; Outcome: AHO's Remand 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 2018-4808
May 8, 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 on remand in Case Number 11140. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The hearing officer's findings of fact in his January 19, 2018 decision in Case Number 11140, as recounted in EEDR's first administrative review in this case, EEDR Ruling Number 2018-4678, are hereby incorporated by reference.[1] In EEDR Ruling Number 2018-4678, this Office found that the hearing decision was not consistent with state policy because the hearing officer had not properly applied the relevant provisions of DHRM Policy 4.57, *Virginia Sickness and Disability Program*, and remanded the case to the hearing officer for reconsideration.[2] The hearing officer issued a reconsideration decision on March 30, 2018.[3] In the reconsideration decision, the hearing officer upheld the issuance of the Group III Written Notice and the grievant's termination as directed in EEDR Ruling Number 2018-4678.[4] The grievant now appeals the reconsideration 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."[5] 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.[6]

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[1] *See* Decision of Hearing Officer, Case No. 11140 ("Hearing Decision"), January 19, 2018.
[2] *Id.*
[3] *See* Reconsideration of Decision of Hearing Officer, Case No. 11140, March 30, 2018, at 1.
[4] *Id.*
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant appears to argue that the hearing officer's findings of fact, based on the weight and credibility he accorded to the testimony presented at the hearing, are not supported by the evidence. In support of her position, the grievant contends that she "complied with workplace protocol and procedures by notifying [her] employer of [her] absence," that her "health issues limited [her] ability to communicate" while she was out of work, and that she "should not have received any disciplinary actions for [using] FMLA leave . . . ."

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[8] 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.[9] 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.[10] 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.

EEDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and finds that there is evidence in the record to support the issuance of the Written Notice and ultimate outcome of the case reflected in the hearing officer's reconsideration decision. At the hearing, for example, the agency presented evidence that the grievant was directed to submit medical documentation by October 5, 2017, and that she did not comply with that instruction.[11] The hearing officer further stated that the grievant "did not testify and could not establish the date she may have attempted to fax notes to the Agency," and that "[t]he Agency did not receive [her] medical excuses until she submitted them as part of the hearing process."[12] As stated in EEDR Ruling Number 2018-4678, "it was appropriate [under state policy] for the agency to consider the grievant absent from work without authorization for any period during which her short-term disability claim had not been approved by the TPA" because she did not provide medical documentation verifying her need for leave as directed.[13] Furthermore, while Ms. B testified at the hearing that she mailed FMLA paperwork to the grievant, there is no evidence in the record to suggest that the grievant requested or received approval for FMLA leave.[14] In short, there is evidence showing that the grievant engaged in the

[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] *Grievance Procedure Manual* § 5.8.
[11] Hearing Recording at 8:05-8:33 (testimony of Ms. H); Agency Exhibit 5; *see* Hearing Decision at 3.
[12] *Id.*
[13] EEDR Ruling No. 2018-4678; *see* DHRM Policy 4.57, *Virginia Sickness and Disability Program*.
[14] Hearing Recording at 23:51-24:24 (testimony of Ms. B); *see* Hearing Decision at 2-3 ("Ms. B later sent Grievant 'FMLA paperwork.'").

behavior charged in the Written Notice, that her behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. Accordingly, EEDR declines to disturb the decision on this basis.

Mitigation

In addition, the grievant appears to argue that the disciplinary action should have been mitigated based on her length of employment and prior satisfactory work performance. 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]."[15] 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 should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[16] 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.[17]

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.[18] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[19] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's claim that her length of employment and otherwise satisfactory performance should have been considered as a mitigating factor is unpersuasive. While it cannot

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[15] Va. Code § 2.2-3005(C)(6).
[16] *Rules for Conducting Grievance Hearings* § VI(A).
[17] *Id.* § VI(B)(1).
[18] 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).
[19] "'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.*

be said that length of service or prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[20] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that otherwise satisfactory performance becomes. In this case, the grievant's length of employment and prior satisfactory performance are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group III Written Notice.

While the hearing officer did not address the issue of mitigation in the reconsideration decision, mitigation was addressed in the original decision. The hearing officer had the opportunity to address mitigating factors again on remand and apparently chose not to do so. A natural conclusion from the lack of consideration of mitigating factors is that the hearing officer did not find the evidence persuasive. Nevertheless, based upon a review of the hearing record, EEDR can find nothing to indicate that any additional consideration of mitigating factors by the hearing officer would alter the outcome in any way. Accordingly, EEDR will not remand the matter to the hearing officer for further consideration of mitigating factors.

Newly-Discovered Evidence

Finally, the grievant has offered evidence for EEDR's consideration on administrative review that is not part of the hearing record. This evidence consists of phone records that the grievant alleges show she had contact with the agency while she was absent from work. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[21] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[22] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[23]

In this case, the grievant has provided no information to support a contention that the additional information she has offered should be considered newly discovered evidence under

[20] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[21] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[22] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[23] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

this standard. The grievant has presented nothing to indicate that she was unable to obtain this evidence prior to the hearing. Indeed, many of the phone records offered by the grievant are dated before the hearing took place, and thus appear to have been in her possession prior to the hearing. The grievant had the ability to offer all relevant evidence and call all necessary witnesses at the hearing. It was the grievant's decision as to what evidence she should present. While the grievant may now realize she could have provided additional evidence to support her contention that she contacted the agency while she was out of work, this is not a basis on which EEDR may remand the decision. Accordingly, there is no basis for EEDR to re-open or remand the hearing for consideration of this additional evidence on this issue.

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.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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