Issue: Administrative Review of Hearing Officer's Decision in Case No. 10245; Ruling Date: September 28, 2018; Ruling No. 2019-4778; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health and Developmental Services
Ruling Number 2019-4778
September 28, 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 11245. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11245, as found by the hearing officer, are as follows:[1]

1. The Grievant was employed by the Agency as a Human Services Care Specialist at a secure facility (the "Facility").

2. On Sunday, May 20, 2018, the Grievant was in Building 39 of the Facility, a maximum security forensic unit, long-term treatment area, housing dangerous patients who present a severe safety risk to staff and other patients. Accordingly, staff must be extremely vigilant while monitoring the patients for antecedents or triggers which could portend a safety risk.

3. The Grievant was sitting near a table at which 2 patients were playing chess and/or checkers during the 10:00 a.m. to 11:30 a.m. activity period.

4. A recreational therapist found the Grievant for lengthy periods of time to be less than alert, with her eyes closed.

5. The Grievant is a former supervisor.

6. The Grievant's lack of alertness presented a safety risk to the Facility.

7. The Grievant admitted to her supervisor that she was in an activity on Sunday, May 20, 2018 with her eyes closed and patients present.

[1] Decision of Hearing Officer, Case No. 11245 ("Hearing Decision"), August 21, 2018, at 2-3 (citations omitted). The original hearing decision issued by the hearing officer appears to reference an incorrect case number in the caption. The proper case number will be remedied for the published version of the decision.

8. On May 23, 2018, the Grievant signed the due process memorandum provided to her by her supervisor. This informed the Grievant of management's intent to issue the Grievant a correction action in the form of a Group III Written Notice with Termination for the Grievant's lack of alertness and offered the Grievant an opportunity to respond to her supervisor by the end of her shift on May 25, 2018.

9. The Grievant timely submitted a written response to her supervisor. In the Written Statement, the Grievant stated:

> I was bored, but mostly I was nauseated and dizzy caused by my medication. I was reluctant to share my personal information, but now I have no other choice. With my condition, affecting my work life, tasks have become a little challenging while in this period of adjustment. On May 20, 2018, I had taken my medication later than usual which caused a little nauseated, however, I still was alert within group. With the constant side effects that comes along with my medication, such as sluggishness, dizziness and nausea I now understand my client's perspective with being non-compliant with my medication side effects. With fighting nausea and dizziness I pushed myself to come to work due to my occurrences.

10. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

On June 4, 2018, the grievant was issued a Group III Written Notice with termination for being less than alert during work hours.[2] The grievant timely grieved the disciplinary action and a hearing was held on August 15, 2018.[3] In a decision dated August 21, 2018, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant was not alert during work hours and upheld the Group III Written Notice and her termination.[4] 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."[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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[2] Agency Exhibit 1 at 1.
[3] Hearing Decision at 1.
[4] *Id.* at 3-9.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with State Policy

In her request for administrative review, the grievant appears to assert that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy. Upon review of the grievant's submission, EEDR is unable to find any argument, not otherwise addressed herein, that raises any way in which state policy was not followed by the hearing officer. Accordingly, EEDR finds no basis to conclude that the hearing decision is inconsistent with policy.

Hearing Officer's Consideration of the Evidence

In addition, the grievant appears to assert that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[9] 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.[10] 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.[11] 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 concluded that the grievant had engaged in the charged misconduct,[12] that the agency's "alertness policy [was] important to the proper functioning, safety and security" of the facility,[13] and that the agency "appropriately determined that the Grievant's violations of its alertness policy constituted a Group III Offense subject to termination."[14] In support of her position, the grievant contends that "[d]ocumentation from physician and witnesses written testimonies [sic] along with the policies and procedures of the state" support her position that the disciplinary action should have been rescinded.

EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant was less than alert while working. For

[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] *See* Hearing Decision at 5.
[13] *Id.* at 7.
[14] *Id.*at 5.

example, one of the agency's witnesses testified in detail that she observed the grievant with her eyes closed for an extended period of time and that the grievant was not sufficiently alert to effectively monitor the patients for whom she was responsible.[15] While there is some witness testimony that the grievant was alert and had her eyes open during the time period in question,[16] the grievant herself told agency management that she had her eyes closed, although she denied that she was asleep or less than alert.[17] 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.[18]

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case 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. Accordingly, EEDR declines to disturb the decision on this basis.

Mitigation

Finally, the grievant appears to argue that the disciplinary action should have been mitigated based on her length of employment with the agency. 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]."[19] 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."[20] 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.[21]

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[15] Hearing Recording at Track 1, 17:58-19:11, 24:24-25:00 (testimony Witness M); *see* Agency Exhibit 1 at 6.
[16] *E.g.*, *id.* at Track 2, 3:30-3:37 (testimony of Witness E), 7:01-7:39 (testimony of Witness G).
[17] Agency Exhibit 1 at 4.
[18] *See, e.g.*, EDR Ruling No. 2014-3884.
[19] Va. Code § 2.2-3005(C)(6).
[20] *Rules for Conducting Grievance Hearings* § VI(A).
[21] *Id.* § VI(B)(1).

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.[22] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[23] 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 should have been considered as a mitigating factor is unpersuasive. While it cannot be said that length of service is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[24] The weight of an employee's length of service 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 length of service and otherwise satisfactory performance become. In this case, the grievant's length of employment is not so extraordinary that it justifies mitigation of the agency's decision to issue a Group III Written Notice for conduct that was determined by the hearing officer to be terminable due to its severity. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the evidence in the record. Accordingly, 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.[25] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

[22] 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).
[23] "'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.*
[24] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[25] *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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