Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 11014; Ruling Date: October 17, 2017; Ruling No. 2018-4620; Agency: Department of Social Services; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2018-4620
October 17, 2017

The Department of Social Services (the "agency") 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 reconsidered decision in Case Number 11014. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTUAL BACKGROUND

The substantive and procedural facts of this case are set forth in EEDR's first administrative review in this matter, EEDR Ruling Number 2018-4588, and are incorporated herein by reference. In summary, this case concerns the agency's issuance of two Group II Written Notices on March 16 and March 30, 2017, for failure to follow instructions and unsatisfactory performance, and the grievant's termination upon the issuance of the second Written Notice due to her accumulation of disciplinary action.[1] Both Written Notices were issued while the grievant was on a three-month re-evaluation plan, after she received an overall rating of "Below Contributor" for the 2015-16 performance cycle.[2]

In the original hearing decision, the hearing officer concluded that the agency had not followed state policy by issuing disciplinary action to the grievant to address matters relating to her work performance that were also part of the re-evaluation plan.[3] EEDR received requests for administrative review from both parties to the grievance. In EEDR Ruling Number 2018-4588, this Office found that the decision was not consistent with state policy on the basis that, under policy, it is permissible for an agency to discipline an employee while she is subject to a re-evaluation plan, and remanded the case to the hearing officer for reconsideration.

The hearing officer issued a reconsidered decision on September 5, 2017, finding that the agency could "issue a Written Notice for continuing poor performance," but not multiple Written Notices, and rescinded the second Group II Written Notice.[4] The hearing officer further concluded that the agency had not presented sufficient evidence to show that the first Written

[1] Decision of Hearing Officer, Case No. 11014 ("Hearing Decision"), July 5, 2017, at 1, 3-4; *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").
[2] Hearing Decision at 5.
[3] *Id.* at 5-8.
[4] Reconsidered Decision of Hearing Office on Remand, Case No. 11014 ("Reconsidered Decision"), September 5, 2017, at 6-9, 11.

Notice constituted a Group II offense and reduced it to a Group I Written Notice for unsatisfactory performance.[5] In addition, the hearing officer determined that "the Agency's act of imposing early termination under the Policy 1.60 disciplinary process to interrupt the Policy 1.40 re-evaluation plan was a retaliatory action," although its underlying "assessment of poor performance appear[ed] based on the Grievant's actual conduct and behavior," and was not retaliatory in nature.[6] The agency now appeals the reconsidered 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."[7] 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.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Inconsistency with State Policy

In the reconsidered decision, the hearing officer assessed the question of "whether the Agency may issue written notice discipline, with early termination, for the same performance issues for which it committed to the 3-month re-evaluation plan" and found that the agency had "prematurely and improperly ended the re-evaluation plan by issuing two Group II Written Notices and an early termination . . . ."[10] To support this conclusion, the hearing officer construed the DHRM policy interpretation provided by the agency to support the principle that a single Written Notice may be issued for "continuing poor performance," but that multiple Written Notices may not be issued. The hearing officer further explained the rationale for his decision as follows:

> The Agency elected to address the Grievant's poor work performance under Policy 1.40, and explicitly placed the Grievant under a 3-month re-evaluation plan, after which the Agency could have exercised options, including termination for the Grievant's lack of sufficient improvement. Additionally, the Agency, under Policy 1.60, opted to issue two consecutive Group II Written Notices and termination for the Grievant's lack of improvement before the end of the 3-month re-evaluation period. Of particular importance, the written notices were based on the re-evaluation plan, as readdressed by management and noted within the re-evaluation plan that had not run its course.[11]

---

[5] *Id.* at 7-9, 11.
[6] *Id.* at 9-10.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Reconsidered Decision at 6.
[11] *Id.* at 7.

Finally, the hearing officer noted that, while "Policy 1.40 does not insulate the employee from discipline, including termination," the disciplinary actions at issue in this case were "based specifically on the re-evaluation plan itself, as readdressed by management during the re-evaluation process, using the re-evaluation plan itself as its tool for documenting the lack of improvement."[12]

Having reviewed the hearing record and considered the submissions of the parties, EEDR finds that the reconsidered decision does not comply with state policy. An agency is not constrained to issue only a single Written Notice to an employee who is subject to a re-evaluation plan, but may instead issue discipline that is appropriate and warranted under the circumstances to address any and all instances of misconduct that may occur during the re-evaluation plan, potentially including termination via Written Notice(s). The issuance of multiple Written Notices in such a situation is, therefore, permissible under policy. Similarly, an agency does not "elect" to manage an employee's performance under either Policy 1.40 or Policy 1.60. Both policies may be applied as appropriate and necessary to address unsatisfactory performance or other misconduct, and the terms of both policies are applicable to employees who have been placed on a re-evaluation plan. In finding otherwise and rescinding the second Group II Written Notice on that basis, the hearing officer did not properly apply state policy.[13] Accordingly, the matter must be remanded to the hearing officer.

Retaliation

The agency further asserts that the hearing officer erred by finding that "the Agency improperly retaliated against th[e] Grievant by its disciplinary process imposed to end prematurely the re-evaluation period with termination."[14] It appears that the hearing officer's finding of retaliation is solely based on his determination that the agency's alleged "premature" termination through the disciplinary process was a violation of policy.[15] As addressed above, the hearing officer's determinations relating to the disciplinary process that occurred in this case are inconsistent with state policy. Consequently, his finding that the agency's disciplinary process was retaliatory in this case is unsupported and must be reversed on remand.

Hearing Officer's Consideration of the Evidence

In the remainder of its request for administrative review, the agency essentially argues 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 consistent with the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to

---

[12] *Id.*

[13] The DHRM policy interpretation plainly states that Policy 1.40 "permits the issuance of multiple . . . Written Notices under the Standards of Conduct policy for continuing deficiencies in performance." The hearing officer misconstrued an example provided in the policy interpretation to support his conclusion that the agency could issue a single Written Notice to the grievant for during the re-evaluation period. *See* Reconsidered Decision at 7. In other words, the hearing officer did not properly apply the policy interpretation or the policy language itself to the facts of this case.

[14] Reconsidered Decision at 10.

[15] Indeed, the hearing officer also determined that the evidence was insufficient to show that the agency's "evaluation of [her] performance was motivated by improper factors," and its assessment of her work performance was instead "based on the Grievant's actual conduct and behavior . . . ." Reconsidered Decision at 10.

[16] Va. Code § 2.2-3005.1(C).

determine the grievance based "on the material issues and the grounds in the record for those findings."[17] 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.[18] 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.[19] 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.

The agency argues that the hearing officer erred by concluding the first Written Notice constituted a Group I offense for unsatisfactory performance, rather than a failure to follow instructions justifying the issuance of the Group II Written Notice. Having reviewed the reconsidered decision, EEDR finds that the hearing officer determined the misconduct, as charged in both Written Notices, was supported by the evidence in the record. In the reconsidered decision, the hearing officer stated that "[t]he supervisor testified consistently with the allegations of continued poor work performance referenced in the Written Notices, and his testimony credibly establishes the Grievant's pattern of poor work performance."[20] However, the hearing officer reduced the disciplinary action to a Group I Written Notice on the basis that "the supervisor's instructions were to improve work performance," and thus the offense was not properly characterized as a failure to follow instructions, but rather as unsatisfactory work performance.[21]

EEDR's *Rules for Conducting Grievance Hearings* provides that, if the hearing officer determines the employee engaged in the behavior described in the Written Notice, the behavior constituted misconduct, and the disciplinary action is consistent with law and policy, then the discipline must be upheld, absent mitigating circumstances.[22] Although the Written Notices charged the grievant with both failure to follow instructions and unsatisfactory work performance, there is nothing under policy that requires an agency to issue a Group I Written Notice for misconduct that could be appropriately addressed as a Group II offense. Here, the agency elected to charge and discipline the grievant's misconduct as a failure to follow instructions. While the agency could have chosen to address the grievant's misconduct with a less severe level of discipline, a hearing officer "is not a 'super-personnel officer'" and "should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy" if the agency has established that the discipline was warranted and appropriate under the circumstances.[23]

---

[17] *Grievance Procedure Manual* § 5.9.
[18] *Rules for Conducting Grievance Hearings* § VI(B).
[19] *Grievance Procedure Manual* § 5.8.
[20] Reconsidered Decision at 7.
[21] *Id.*
[22] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[23] *Id.* § VI(A).

The hearing officer has also stated in the reconsidered decision that "the supervisor's instructions [could not] be separated from the unsatisfactory work performance that is referenced explicitly in each Written Notice" and found that "the supervisor's instructions were to improve work performance."[24] EEDR has not identified evidence in the record to support such a determination. While the re-evaluation plan set out general performance expectations for the grievant, the agency presented evidence that she was also given additional directives by her supervisor, none of which appear to be addressed in the remand decision. For example, the grievant and her supervisor met multiple times to discuss her progress in completing the tasks assigned to her under the re-evaluation plan.[25] During those meetings, the supervisor noted continuing deficiencies in the grievant's performance and gave her additional instructions to complete outstanding tasks.[26] Those directives were connected to the re-evaluation plan in that they were related to the tasks assigned to the grievant, but constituted more than instructions to simply improve her work performance. Instructions of this nature would properly be considered separate from the agency's general expectation that the grievant should perform the job responsibilities assigned to her, and the grievant's failure to comply with those instructions would be appropriately deemed a failure to follow instructions sufficient to constitute a Group II offense.

The determination as to whether a Written Notice was issued at the appropriate level is a mixed question of fact and policy. The remand decision contains limited factual analysis and/or findings in relation to the allegations contained in the Written Notices. However, the hearing officer did find that the agency had established the grievant engaged in the misconduct charged on the Written Notices.[27] As to the policy portion of this question, and assessing the conduct alleged on the Written Notices as stated therein, EEDR finds that both the Written Notices permissibly describe conduct that would support disciplinary action at the Group II level under the *Standards of Conduct* policy. While an employee's unsatisfactory work performance would ordinarily be considered a Group I offense, the nonperformance of assigned tasks, or refusal to perform assigned tasks, could rise to the level of a Group II offense for failure to follow instructions, depending on the facts and circumstances. In this case, the Written Notices describe that the grievant's actions amounted to more than unsatisfactory work performance. As discussed above, the grievant was instructed by her supervisor to complete certain assigned tasks.[28] The agency further presented evidence that the grievant told her supervisor a particular work task "is all I can and will do" and indicated that she would not perform other duties assigned to her in the re-evaluation plan.[29] There is also evidence showing that the grievant was directed to complete daily and monthly reports and consistently did not do so.[30] Accordingly, EEDR finds that the hearing officer erred by reducing the first Written Notice to a Group I offense and rescinding the second Written Notice. The decision must be remanded, and the hearing officer is directed to uphold both Group II Written Notices for failure to follow instructions, as well as grievant's termination due to her accumulation of disciplinary action.

---

[24] Reconsidered Decision at 7.
[25] *See* Agency Exhibit 8.
[26] *E.g., id.* at 2, 6, 9-11, 13-14.
[27] Reconsidered Decision at 7.
[28] *See supra* notes 25-26 and accompanying text.
[29] Agency Exhibit 8 at 10; Hearing Recording at 1:13:33-1:16:13 (testimony of supervisor).
[30] *See, e.g.*, Agency Exhibit 8; Hearing Recording at 1:01:27-1:03:23, 1:03:40-1:04:12, 1:04:14-1:05:56 (testimony of supervisor).

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for revisions consistent with this ruling. Once the hearing officer issues his second reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original or first reconsidered decision).[31] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[32]

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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

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