Issue: Administrative Review of Hearing Officer's Decision in Case No. 11094, 11095; Ruling Date: December 8, 2017; Ruling No. 2018-4648; 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 2018-4648
December 8, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 11094/11095. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11094/11095, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Home Manager. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Agency had concerns about Grievant's management of staff. Following an investigation, the Agency decided to issue Grievant a Notice of Improvement Needed/Substandard Performance. This Notice required Grievant to attend Supervisor Training Part I on April 6, 2017 and Part II in May or June 2017.
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> Grievant completed Part I of the training. Grievant did not attend Part II of the training on May 8, 2017 because her child was sick. Part II was also scheduled for June 1, 2017. On May 30, 2017, Grievant was reminded to attend the training on June 1, 2017 from noon to 4 p.m. On May 30, 2017, the Supervisor sent Grievant an email stating, "Make sure you attend this training. See you there."
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> Grievant did not report to the training at noon. She appeared at 1:30 p.m. and sought entry into the training class. The HR Director said she could not attend late because she had missed key information.
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> A Support Intensity Scale (SIS) meeting was scheduled for June 13, 2017. During this meeting, an Assessor would ask questions about an individual living at the Facility. An employee knowledgeable of the individual's needs was

[1] Decision of Hearing Officer, Case No. 11094/11095 ("Hearing Decision"), November 7, 2017, at 2-3 (citations omitted).

supposed to attend the meeting to speak on behalf of the individual who otherwise might not be able to speak for him or herself.

On June 8, 2017, the Manager sent an email to residential managers indicating Grievant was to attend a SIS meeting for Individual H on June 13, 2017 at 2 p.m. The Manager informed Grievant that the meeting "could take up to 2 hours and you will need to bring the records." Grievant's regular work shift ended at 5:30 p.m.

On June 13, 2017, Grievant met with the Assessor and Individual H at 2 p.m. She left the meeting. The Assessor complained to Facility managers that no staff were in the meeting. The Manager attempted to locate Grievant. Grievant went to the front desk and spoke with the Manager by telephone at 2:45 p.m. Grievant told the Manager she had to leave to pick up her child at 3 p.m. The Manager told Grievant to stay in the meeting. Grievant did not return to the meeting.

The grievant was issued a Group II Written Notice on June 12, 2017 for failure to follow instructions because she did not report to the June 1 training on time.[2] On August 23, 2017, the grievant was issued a second Group II Written Notice, for failure to follow instructions and/or policy due to her failure to attend the June 13 SIS meeting, and terminated based on her accumulation of disciplinary action.[3] The grievant timely grieved the disciplinary action and a hearing was held on November 3, 2017.[4] In a decision dated November 7, 2017, the hearing officer determined that the agency had presented sufficient evidence to show the grievant had failed to follow instructions with regard to both incidents, and upheld the issuance of both Written Notices and the grievant's termination.[5] 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."[6] 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.[7]

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[2] *Id.* at 1.
[3] Agency Exhibit 4; *see* Hearing Decision at 1. In the hearing decision, the hearing officer appears to have incorrectly noted the date of the misconduct as the date the second Group II Written Notice was issued. *See* Hearing Decision at 1. Such a clerical error has no material impact on the outcome of the case because there is evidence in the record to support the hearing officer's finding that the grievant engaged in the misconduct charged on the Written Notice, as discussed further below.
[4] Hearing Decision at 1.
[5] *Id.* at 3-4.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Hearing Officer's Consideration of the Evidence

In her 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 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 "[g]rievant was instructed to complete Part II of Supervisor's training," and that she "knew the training began at noon on June 1, 2017, but reported to the training room one and a half hours after the training began."[12] With regard to the SIS meeting, the hearing officer found that the "[g]rievant was instructed to attend the SIS meeting for Individual H on June 13, 2017," but "left the meeting" after it had begun.[13] The hearing officer further noted that "[t]he Manager instructed [the grievant] to return to the meeting and she refused."[14] The hearing officer determined the grievant's actions relating to both the training and the SIS meeting constituted a failure to follow instructions, thereby warranting the issuance of two Group II Written Notices.[15]

In support of her position, the grievant argues that the Supervisor did not attend the June 1 training and that she did not register to attend for the training. The grievant further claims she was unable to report to the training on time because she was required to provide coverage in other areas of the facility due to staffing shortages. In addition, the grievant asserts that she was on leave when the initial email directing her to attend the SIS meeting was sent, and that she did not receive adequate instructions about her attendance and role at the meeting. The grievant states she also had to provide coverage due to staffing issues on the day of the SIS meeting, and left the meeting at the Manager's request.

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer's determination that the grievant failed to follow instructions by not attending both the June 1 training and the June 13 SIS meeting, and that her actions were not justified. The

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[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] Hearing Decision at 3.
[13] *Id.* at 4.
[14] *Id.*
[15] *Id.* at 3-4.

grievant received an email from the Supervisor on May 30, directing her to report to the training on June 1.[16] The agency presented evidence that the grievant arrived late to the training and it was not acceptable for her to attend only a portion of the training.[17] While the grievant argued at the hearing that "she was unable to attend to the training on time because her unit was short-staffed and she had to attend to the needs of the individuals in her unit,"[18] the Manager testified it was not acceptable for grievant to miss the training even if she had competing priorities at the facility, and that the grievant should have made arrangements with the Supervisor to ensure staff coverage or report to the training late.[19] The agency also presented evidence that the grievant knew she was expected to be present at the SIS meeting on June 13.[20] Although the grievant initially attended the SIS meeting, she left and did not return to the meeting when instructed to do so by the Manager.[21] Moreover, there is evidence in the record to support the hearing officer's statement that the grievant "should have followed" the Manager's instruction to return to the SIS meeting when she was told to do so.[22]

Though 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.[23] 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

The grievant also appears to challenge the hearing officer's decision not to mitigate the disciplinary action. Under 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]."[24] The *Rules for Conducting Grievance Hearings* (the "*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."[25] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

[16] Agency Exhibit 3 at 6.
[17] Hearing Recording at 39:51-40:38 (testimony of HR Director).
[18] Hearing Decision at 3.
[19] Hearing Recording at 10:21-11:05 (testimony of Manager), 38:24-39:42 (testimony of HR Director).
[20] Agency Exhibit 4 at 18; Hearing Recording at 15:25-18:01 (testimony of Manager).
[21] Hearing Recording at 18:45-21:18 (testimony of Manager).
[22] Hearing Decision at 4; *e.g.*, Hearing Recording at 18:45-21:18 (testimony of Manager).
[23] *See, e.g.*, EDR Ruling No. 2014-3884.
[24] Va. Code § 2.2-3005(C)(6).
[25] *Rules for Conducting Grievance Hearings* § VI(A).

> (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.[26]

Thus, the issue of mitigation is only reached if the hearing officer 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 her judgment on that 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.[27] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[28] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Inconsistent Discipline

In her request for administrative review, the grievant claims that, at another session of the training she was disciplined for failing to attend, "a supervisor was also late and allowed inside with no penalty . . . ." Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[29] At the hearing, the grievant presented a written statement from another employee describing the agency's treatment of other employees who allegedly failed to attend training classes and either were not disciplined or were disciplined less severely than the grievant.[30] While the statement claims that other employees were permitted to arrive late at trainings and/or meetings and were not disciplined for doing so, it does not identify any specific comparator employees or establish how they might have been similarly situated to the grievant. Under these circumstances, there does not appear to have been sufficient evidence in the record regarding inconsistent discipline that the hearing officer may have relied upon to support mitigation. Accordingly, EEDR cannot conclude that his mitigation analysis was flawed in this respect and declines to disturb the decision on this basis.

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[26] *Id.* § VI(B)(1).
[27] 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).
[28] "'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.*
[29] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[30] Grievant's Exhibit 1 at 54.

Delay in Issuance of August 23 Written Notice

The grievant appears to further assert that the hearing officer should have mitigated the disciplinary action because of the delay between June 13, the date on which the misconduct charged on the August 23 Written Notice occurred, and the issuance of the Written Notice itself. Although it cannot be said that a delay in issuing discipline is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. In this case, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.[31] The *Rules* provide that the hearing officer "will not freely substitute [his or her] 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 reasonableness.'"[32] Under the circumstances presented in this case, EEDR cannot conclude that a delay of approximately two months renders the agency's disciplinary action outside the limits of reasonableness. EEDR therefore cannot find that the hearing officer erred by not mitigating the disciplinary action, and declines to disturb hearing officer's decision on this basis.

Production of Documents and Attendance of Witnesses

Finally, the grievant argues that the agency did not provide her with a copy of a video recording that she claims will allegedly show her attending the SIS meeting on time and leaving when she was paged by the Manager, and that she was not notified two of her witnesses were unable to attend the hearing. Pursuant to the *Rules*, a hearing officer may "issue an order for . . . the production of documents" upon request by a party.[33] The *Rules* further state that it is the agency's responsibility to require the attendance of agency employees who, as in this case, are ordered by the hearing officer to attend the hearing as witnesses.[34] In cases where a party fails to produce relevant documents or does not "make available relevant witnesses" who have been ordered to attend, hearing officers have the authority to draw an adverse inference against that party if it is warranted by the circumstances.[35]

Here, the grievant appears to have requested a copy of the video recording (as well as some additional documents) when she submitted her proposed exhibits to the hearing officer. However, EEDR's review of the hearing record indicates that no order was issued for the production of the video recording referenced by the grievant, or for any other documents. It does not appear the grievant brought the matter to the hearing officer's attention either before or during the hearing. Regardless of any procedural issues relating to the grievant's request for the recording, EEDR has reviewed nothing to indicate that admission of the recording would have impacted the outcome of the case such that the grievant suffered any material prejudice. At the hearing, the grievant presented an email she sent to agency management explaining she was present for part of the SIS meeting.[36] This statement would appear to be consistent with her

[31] Hearing Decision at 2-3.
[32] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[33] *Rules for Conducting Grievance Hearings* § III(E).
[34] *Id.* ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").
[35] *Id.* § V(B).
[36] Grievant's Exhibit 1 at 32.

explanation of what the recording would show. 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. Even accepting as true the grievant's written statement and her description of the content of the recording, there is evidence in the record to show that the grievant did not attend the SIS meeting as directed, as discussed more fully above.[37]

In addition, two agency employees (Witness R and Witness E) did not attend the hearing, even though they were ordered to appear as witnesses by the hearing officer. Witness R was unable to appear in person and made arrangements to testify by telephone, but the agency's advocate did not have Witness R's phone number when the grievant attempted to call her to testify.[38] Witness E was not present at the hearing.[39] In response to a query from the hearing officer, the grievant proffered that Witness R and Witness E would have testified that the grievant was present at the SIS meeting for a period of time.[40] The grievant also presented, as part of her exhibits, a statement written by Witness R that is consistent with her description of the witnesses' proffered testimony about the SIS meeting.[41] It appears the hearing officer did not draw an adverse inference based on the nonattendance of Witness R and Witness E, as there is no discussion about it in the hearing decision. It is clear from the hearing record, however, that the hearing officer accepted from the grievant a summary of what their testimony would have been. Even if the hearing officer had determined that an adverse inference was warranted in this case, the purported testimony of Witness R and Witness E, if accepted as true, would appear to have had no effect on the outcome of the case, as their testimony would not have necessarily included any evidence beyond the statement from Witness R that was admitted into the record as part of the grievant's exhibits.

In summary, and considering the totality of the evidence presented by the grievant at the hearing, EEDR has no reason to conclude that the grievant's ability to mount a defense to the charges against her was materially prejudiced as a result of the agency's alleged failure to provide her with the video recording and/or make Witness R and Witness E available to testify. EEDR has thoroughly reviewed the hearing record and finds that there is nothing to show this additional evidence would have an impact on the hearing officer's decision. Accordingly, EEDR declines to disturb the 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.[42] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

[37] *See supra* notes 16-22 and accompanying text.
[38] Hearing Recording at 1:29:07-1:29:12.
[39] *Id.* at 1:12:12-1:12:30, 1:14:02-1:14:06.
[40] *Id.* at 1:29:15-1:30:43.
[41] Grievant's Exhibit 1 at 34.
[42] *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

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