Issue: Reconsidered Administrative Review of Hearing Officer's Decision in Case No. 11242; Ruling Date: November 16, 2018; Ruling No. 2019-4798; Agency: Department of Veterans Services; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

RECONSIDERED ADMINISTRATIVE REVIEW

In the matter of the Department of Veterans Services
Ruling Number 2019-4798
November 16, 2018

The Department of Veterans 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 decision in Case Number 11242. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts in Case Number 11242, as found by the hearing officer, are as follows:[1]

> The grievant is employed by the agency as a Service Representative. Her Supervisor is the Regional Director for the agency. In the first part of January 2018, the grievant was not at work, being on short term disability. On January 17 she sent a text message to the Supervisor apprising him that she would need to leave work early on the following day for a medical appointment. That text was the first indication that the Supervisor had that the grievant was returning to work.
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> The Supervisor was relatively new to the position. His immediate predecessor in the office had a process by which employees could request leave informally and then enter the request into the Time Attendance Leave (TAL) system at the end of the month in which the leave was taken. TAL is the computer record keeping system utilized by the agency and others in the Commonwealth for the request and approval of leave by employees. On January 18 the grievant had no accumulated leave that she could take, having not yet worked a full day upon her return from short term disability status. The Supervisor explained to the grievant that he required all requests for leave to be entered in TAL prior to being taken and that approval would need to be reflected in that system. He gave the grievant a verbal counseling for her failure to follow his policy.
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> The grievant entered a request in TAL on February 28 to take leave on March 14, 15, and 16. The Supervisor denied the request due to mandatory training for his employees being previously scheduled during that time frame. The grievant sent the Supervisor a text message on March 14 apprising him that she was unable to work and attend the training due to the illness of her children. He

[1] Decision of Hearing Officer, Case No. 11242 ("Hearing Decision"), Sept. 19, 2018, at 3-4.

> approved leave for that day. The grievant did not work either March 14, 15, or 16. On March 15 the Supervisor directed her to provide to him appropriate documentation reflecting the illness of the children and to arrange for make-up training. He gave her an additional verbal counseling via text message on March 15. She has failed to provide any supporting documentation regarding the claimed illness. It is unclear if the leave for March 15 and 16 would have been approved had the documentation been timely provided.
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> On March 9 the grievant had submitted by e-mail to the Supervisor notice that she needed to be away from work on March 19 for a dental appointment. She did not submit a formal request for leave through TAL. The Supervisor contacted the grievant on March 19 and was told that she was on her way to the dental appointment. This was during her normal work hours. On March 22 he told the grievant that she would receive a written disciplinary action for the March 19 unauthorized absence. On April 9, he again engaged in verbal counseling with the grievant. He issued her a Group I Written Notice on April 12, 2018. The offense dates shown in the written notice are March 14, 15, 16, and 19. The document cites the grievant for unauthorized absences and failure to follow instructions.

The grievant timely grieved the Group I Written Notice and a hearing was held on September 6, 2018.[2] In a decision dated September 19, 2018, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the conduct charged on the Written Notice, i.e., that she took leave without requesting and/or receiving approval from the Supervisor in advance of her absence, and that the grievant's behavior constituted misconduct at the level of a Group I offense.[3] However, the hearing officer further determined that the grievant had been counseled by the Supervisor for taking leave without approval on the dates listed on the Written Notice before the discipline was issued, and that DHRM Policy 1.60, *Standards of Conduct*, does not permit an agency to both counsel an employee and issue formal disciplinary action for the same event.[4] As a result, the hearing officer rescinded the Group I Written Notice.[5] The agency appealed the hearing decision to EEDR. This Office issued a ruling on November 13, 2018, remanding the decision to the hearing officer for revisions. On November 14, 2018, the grievant requested that EEDR reconsider its decision due to an alleged factual error in the ruling with regard to the evidence in the record. This reconsidered ruling will address the grievant's assertion and replace the original ruling.

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

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[2] *See id.* at 2.
[3] *Id.* at 4-6.
[4] *Id.* at 6-8.
[5] *Id.* at 8.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

In this case, the hearing officer found that the grievant had engaged in the behavior charged on the Written Notice and that her behavior constituted misconduct warranting some level of corrective or disciplinary action.[9] The hearing officer rescinded the Written Notice on the basis that the DHRM Policy 1.60, *Standards of Conduct*, does not permit an agency to "impose counseling and a disciplinary action for the same events (as opposed to merely the same type of misconduct) . . . ."[10] In its request for administrative review, the agency argues that the hearing officer improperly applied DHRM Policy 1.60, *Standards of Conduct*, in determining that an agency may not counsel and issue formal disciplinary action to an employee for the same event. The agency further contends that the grievant's misconduct in this case was "sufficiently egregious" to warrant both counseling and a Group I Written Notice.

DHRM Policy 1.60, *Standards of Conduct*, describes the Commonwealth's system of progressive discipline for managing employee performance. The policy defines "corrective action" as "[a]ny intervening informal or formal counseling action taken by management to address employment problems," and "disciplinary action" as "[a] formal action taken in response to unacceptable performance or misconduct."[11] Counseling is a form of corrective action that may be either informal (verbal) or formal (written).[12] Disciplinary action is generally issued in the form of a Written Notice.[13] Depending on the nature and severity of the misconduct, a Written Notice may be issued at the level of a Group I, II, or III offense and be accompanied by varying levels of additional action, including suspension without pay, demotion or transfer either with or without a disciplinary salary action, or termination.[14]

As the hearing officer noted, the *Standards of Conduct* does not expressly state whether an agency may both counsel an employee and issue disciplinary action to her for the same event.[15] The *Standards of Conduct* also does not explicitly prohibit an agency from doing so. EEDR need not address this general proposition, however, for the reasons described below.

EEDR has thoroughly reviewed the hearing record and finds that the decision does not comply with state policy. The grievant's misconduct in this case, as charged on the Written Notice and found by the hearing officer, demonstrated a pattern of behavior that justified counseling to ensure she had notice of the Supervisor's expectations regarding use of leave, as well as disciplinary action to address her continued failure to request and obtain approval before using leave. The Written Notice lists four offense dates on which the grievant used leave without first obtaining the Supervisor's approval: March 14, 15, 16, and 19.[16] The hearing officer found

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Hearing Decision at 6-8.
[10] *Id.* at 8.
[11] DHRM Policy 1.60, *Standards of Conduct*.
[12] *Id.* § B(1).
[13] *Id.* § B(2).
[14] *See id.*
[15] *See* Hearing Decision at 6-8.
[16] Agency Exhibit 1.

that the Supervisor "engaged in verbal counseling with the grievant" on April 9, and that this counseling addressed her conduct on March 19.[17]

At the hearing, the Supervisor testified that he verbally counseled the grievant about her absences on March 14, 15, and 16.[18] EEDR has not, however, identified evidence in the record to support a conclusion that the grievant was counseled about her conduct on March 19. While an attachment to the Written Notice states that the grievant was verbally counseled on April 9 about attendance issues, the attachment does not identify the subject of the counseling or specify the matters about which the grievant was counseled on that date. [19] Indeed, the only other reference in the hearing file to an April 9 counseling is a document labeled "withdrawn" that is not numbered as one of the agency's exhibits. No witnesses testified about counseling that occurred on April 9 or the "withdrawn" document. Moreover, the "withdrawn" document appears to discuss an incident that is entirely separate from grievant's conduct on March 19.[20] In the absence of witness testimony or other record evidence to demonstrate that the Supervisor counseled the grievant about her failure to obtain approval before using leave on March 19, EEDR finds that the hearing officer erred by making a factual determination otherwise and rescinding the Written Notice on that basis.

For these reasons, EEDR finds that the agency's issuance of the Written Notice to address the grievant's use of leave without approval is consistent with DHRM Policy 1.60, *Standards of Conduct*. Accordingly, the matter must be remanded to the hearing officer, and the Group I Written Notice must be upheld as the proper application of policy in this case.

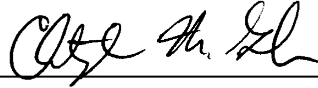
CONCLUSION AND APPEAL RIGHTS

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 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).[21] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[22]

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.[23] 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

[17] Hearing Decision at 4, 8.
[18] *E.g.*, Hearing Recording at 27:00-, 29:41-30:53 (testimony of Supervisor).
[19] *See* Agency Exhibit 1.
[20] To the extent the hearing officer relied upon the "withdrawn" document in reaching his decision, EEDR finds that the document was not part of the record and does not support a conclusion that the Supervisor counseled the grievant about her conduct on March 19.
[21] *See*, *e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[22] *See Grievance Procedure Manual* § 7.2.
[23] *Id.* § 7.2(d).

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



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