Issue: Administrative Review of Hearing Officer's Decision in Case No. 11248; Ruling Date: November 29, 2018; Ruling No. 2019-4804, 2019-4805; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.

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 Numbers 2019-4804, 2019-4805
November 29, 2018

Both the grievant and the Department of Behavioral Health and Developmental Services (the "agency") have 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 11248. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11248, as found by the hearing officer, are as follows:[1]

> The Virginia Department of Behavioral Health and Developmental Services employs Grievant as a Policy Review Specialist. She has been employed by the Agency for approximately four years. No evidence of prior active disciplinary action was introduced during the hearing.
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> On July 1, 2016, Grievant received a counseling memorandum from Dr. B advising her:
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> > Pursuant to the Department of Human Resources Management Policy 1.60, Standards of Conduct, employees are to contribute to the success of the agency's mission by demonstrating respect for the agency and towards agency coworkers, supervisors, and managers. *** Please ensure that you maintain professionalism, are respectful to your coworkers and supervisors, and apply appropriate discretion within the workplace.
>
> Grievant reported to the Supervisor, Ms. M, who reported to Dr. B. Dr. B left the Agency in January 2018.
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> On August 17, 2017, Dr. B walked out of Ms. T's office to walk to the conference room near Ms. T's office. Ms. T had complimented Dr. B on her clothing outfit. Grievant overheard Ms. T complimenting Dr. B. Ms. T was

[1] Decision of Hearing Officer, Case No. 11248 ("Hearing Decision"), Oct. 17, 2018, at 2-3 (citations omitted).

> standing at the door of her office while Grievant was at the door of her office a few feet away. Grievant looked at Ms. T and began kissing the back of her hand. Grievant said to Ms. T, "Keep kissing." Ms. T asked Grievant what she meant by her gesture and comment. Grievant responded, "Why don't you just go in there and kiss her on the cheek?" Ms. T went into her office. Ms. T felt that Grievant's comment was inappropriate and unprofessional. Grievant's behavior upset Ms. T. Ms. T complained to Dr. B about Grievant's behavior.
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> On November 17, 2017, the Supervisor called Grievant and several other employees into a meeting. The Supervisor was loud, belligerent, and threatening to employees as she accused management of never being satisfied with her work. The Supervisor said someone was undermining her authority by communicating with management. She cursed as she spoke and said d—k, s—t, and a—hole as she yelled at the employees. Ms. T was also in the meeting and testified that it appeared the Supervisor was having a "break down" or "melt down". The Supervisor transferred to another Unit within the Agency in December 2017.

On September 5, 2017, the grievant was issued a Group II Written Notice for failure to follow instructions.[2] The grievant timely grieved the disciplinary action and, in a decision dated October 17, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show that, based on her August 17, 2017 interaction with Ms. T, the grievant failed to follow Dr. B's instruction to be respectful and professional toward other employees.[3] The hearing officer further determined, however, that the agency had not disciplined the grievant consistently with other similarly situated employees because the Supervisor did not receive a Written Notice for the incident that occurred in November 2017, but was only counseled about her conduct.[4] As a result, the hearing officer mitigated the discipline to a Group I Written Notice.[5] Both the grievant and the agency now seek administrative review from 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]

Grievant's Arguments Regarding the Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant argues that the hearing officer's findings of fact, based on the weight and credibility he accorded to testimony presented at the hearing, are not supported by the evidence in the record. Hearing officers are authorized to make

[2] *Id.* at 1.
[3] *Id.* at 1, 3-4.
[4] *Id.* at 5.
[5] *Id.*
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

"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 found that, "[on July 1, 2016, Grievant was instructed to be respectful and professional towards other employees," and that the "Grievant was unprofessional and disrespectful towards Ms. T" on August 17, 2017 when she "kissed her hand and suggested Ms. T kiss Dr. B."[12] The hearing officer determined that the "Grievant's actions were inappropriate in the Agency's workplace and caused Ms. T to feel demeaned and offended," and that the evidence was sufficient to demonstrate that the grievant failed to follow Dr. B's July 1, 2016 instruction.[13] In support of her position, the grievant argues that (1) the testimony of the agency's witnesses was untruthful, (2) the hearing officer "errored [sic] in focusing on the demeanor of the witnesses as a fact-finding criterion" instead of basing his decision "solely on the facts of material witness testimony," and (3) the hearing officer "did not reference testimony . . . that support [sic] the grievant's position" and "only documented [evidence] that was adversarial to the grievant's position."

EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant failed to follow Dr. B's instruction regarding expectations for the grievant's workplace behavior. At the hearing, for example, the agency presented evidence to show that the grievant had been counseled about her workplace behavior on multiple occasions in 2016.[14] Ms. T testified about the August 17, 2017 incident, and provided a description of events that is consistent with the hearing officer's findings of fact.[15][16] Although the grievant may disagree with the hearing officer's assessment of the witnesses' credibility, conclusions as to these matters 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

[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.*
[14] *See* Agency Exhibit C.
[15] *See* Hearing Decision at 3.
[16] *Id.* at 2; *see* Hearing Recording at 56:20-1:02:07 (testimony of Ms. T); Agency Exhibit D.

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.[17]

Furthermore, the grievant has not identified specific examples of any "adverse demeanor, actions, and words" that are not discussed in the hearing decision and would have allegedly supported her arguments based on the evidence presented at the hearing. There is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties at a hearing. Thus, mere silence as any specific piece of evidence does not necessarily constitute a basis for remand. As stated above, it is squarely within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented. In this case, it would appear the hearing officer did not discuss the demeanor and/or credibility of all the witnesses who testified because he did not find it to be relevant and/or persuasive with regard to the issues presented in this case.

In summary, and 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 will not disturb the hearing decision on the bases cited by the grievant.

Grievant's Claim Regarding the Agency's Party Representative

In addition, the grievant asserts that the hearing officer erred by permitting the agency's party representative to attend and testify at the hearing, despite the grievant's "professional concerns" about the party representative selected by the agency. At the hearing, the grievant objected to the party representative's participation in the hearing because the party representative also appeared on the agency's list of potential witnesses, and the hearing officer overruled the grievant's objection.[18] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "[t]he agency may select an individual to serve in its capacity as a party. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify."[19] EEDR has reviewed nothing in the record to indicate either that the agency's party representative acted improperly or that the hearing officer erred in overruling the grievant's objection. As a result, EEDR has no basis to conclude that the grievant experienced any material prejudice due to the agency's choice of party representative, and declines to disturb the decision on this basis.

[17] *See, e.g.*, EDR Ruling No. 2014-3884.
[18] Hearing Recording at 20:11-21:02.
[19] *Rules for Conducting Grievance Hearings* § IV(A).

Other Issues Raised by the Grievant

The grievant also submitted a supplement to her request for administrative review, in which she alleges that she did not receive adequate due process and offers newly discovered evidence for EEDR's consideration. The *Grievance Procedure Manual* provides that "[r]equests for administrative review must be in writing and ***received by*** EEDR within 15 calendar days of the date of the original hearing decision.[20] EEDR has typically permitted an appealing party to submit additional briefing material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the fifteen calendar days can be considered by EEDR on administrative review. The grievant presented no argument about due process or newly discovered evidence in her original, timely request for administrative review, and EEDR received the grievant's supplemental briefing after the fifteen calendar-day deadline for administrative review of the hearing decision had expired. Accordingly, EEDR finds that the grievant's claims regarding due process and newly discovered evidence are untimely, and they will not be considered in this ruling.

Parties' Arguments Regarding Mitigation

In their requests for administrative review, both parties challenge the hearing officer's decision to mitigate the disciplinary action to a Group I Written Notice. The grievant argues that the discipline should have been rescinded entirely because "[n]o disciplinary action was implemented against the Supervisor" after the November 2017 incident. The agency contends that the grievant and the Supervisor were not similarly situated and, thus, the hearing officer erred by mitigating the Group II Written Notice.

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]."[21] 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."[22] 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.[23]

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.

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[20] *Grievance Procedure Manual* § 7.2(a).
[21] Va. Code § 2.2-3005(C)(6).
[22] *Rules for Conducting Grievance Hearings* § VI(A).
[23] *Id.* § VI(B)(1).

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.[24] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[25] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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.[26] In the decision, the hearing officer found that the Supervisor "cursed, yelled, and displayed anger towards Agency employees" in a November 2017 meeting and that "[t]he Supervisor's behavior was more offensive and disruptive to other Agency employees than was Grievant's behavior."[27] The hearing officer stated that the Supervisor "should have received at least a Group II Written Notice" for this instance of misconduct," but that the agency appeared to have taken no "disciplinary action against the Supervisor, thereby treating Grievant and the Supervisor differently without a reasonable explanation."[28] Based on this analysis, the hearing officer determined that the discipline issued to the grievant should be mitigated to a Group I Written Notice.[29]

Regardless of the specific charge or offense code listed on the Written Notice, the evidence in the record shows that the grievant and the Supervisor engaged in similar underlying conduct: inappropriate and/or disruptive workplace behavior.[30] However, the agency presented evidence at the hearing to show that management's practice for addressing this type of misconduct would typically consist of counseling initially, to be followed by formal disciplinary action (i.e., a Written Notice) if the conduct persists or is not otherwise corrected.[31] Significantly, EEDR has not identified record evidence to demonstrate that the Supervisor had been counseled about unprofessional behavior before the November 2017 incident. On the other hand, there is ample evidence to show that the grievant was counseled multiple times about her workplace behavior, as well as the agency's expectations for professional conduct, before the incident with Ms. T occurred.[32] Under these circumstances, EEDR finds that the evidence in the record is not

[24] 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).
[25] "'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.*
[26] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[27] Hearing Decision at 5.
[28] *Id.*
[29] *Id.*
[30] *E.g.*, Agency Exhibits A, D; Grievant's Exhibit 1 at 39.
[31] *See* Hearing Recording at 3:00:43-3:02:47, 3:07:08-3:07:50, 3:10:36-3:11:05 (testimony of Witness P), 3:26:05-3:32:51 (testimony of Witness D).
[32] *See* Agency Exhibit C.

sufficient to support a conclusion that the grievant and the Supervisor were similarly situated such that mitigation of the disciplinary action was warranted.

Based on this analysis, EEDR finds that the mitigating factors cited by the hearing officer do not place the agency's decision to issue a Group II Written Notice outside the "tolerable limits of reasonableness" in this case.[33] As a result, EEDR concludes that the hearing officer abused his discretion in mitigating the disciplinary action. The hearing officer has not adhered to the requirements of the grievance procedure and the *Rules* in his mitigation analysis. Accordingly, the hearing decision must be remanded for reversal of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the hearing decision 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 reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[34] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[35]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[36] 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.[37] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[38]

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

[33] Hearing Decision at 5.
[34] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056. In order to avoid unnecessary confusion, challenges to the hearing officer's interpretation of policy related to the Group II Written Notice in his reconsidered decision will be considered new matters, even if such challenges could have been raised with respect to the initial decision as well.
[35] *See Grievance Procedure Manual* § 7.2.
[36] *Grievance Procedure Manual* § 7.2(d).
[37] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[38] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).