Issue: Administrative Review of Hearing Officer's Decision in Case No. 11043; Ruling Date: August 30, 2017; Ruling No. 2018-4609; 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 2018-4609
August 30, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Virginia Department of Human Resource Management administratively review the hearing officer's decision in Case Number 11043. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11043, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Safety Service Treatment Technician at one of its facilities. Grievant had good attendance. No evidence of prior active disciplinary action was introduced during the hearing.
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> On April 22, 2017, Grievant was responsible for checking the status of two patients. She had a Patient Monitoring Sheet on a clipboard on a table in the room where she was working.
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> To complete a fifteen minute check, Grievant was obligated to observe a patient and determine his condition. Grievant was then expected to write her observation on a Patient Monitoring Sheet.
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> On April 22, 2017, Grievant wrote on the Patient Monitoring Sheet that she completed a fifteen minute checks every fifteen minutes from 7:30 a.m. until 6:15 p.m. (except for during her lunch break). Grievant did not perform fifteen minute checks for Mr. C at 7:45 a.m., 8:15 a.m., 9 a.m., 9:30 a.m., 9:45 a.m., 3:30 p.m., 3:45 p.m., 5:30 p.m., 5:45 p.m., 6 p.m., 6:15 p.m.

On May 16, 2017, the grievant was issued a Group II Written Notice for failure to follow policy as the result of "a conversation with a nurse during which Grievant was rude and disrespectful."[2] On May 19, 2017, the grievant was issued a second Group II Written Notice for

[1] Decision of Hearing Officer, Case No. 11043 ("Hearing Decision"), August 15, 2017, at 2.
[2] *Id.*at 1.

failure to follow policy because she did not complete fifteen minute patient checks and a Group III Written Notice with termination for client neglect.[3] The grievant timely grieved the disciplinary actions and a hearing was held on August 14, 2017.[4] In a decision dated August 15, 2017, the hearing officer concluded that the agency had not presented sufficient evidence to show the grievant was rude and disrespectful to a nurse and rescinded the first Group II Written Notice.[5] The hearing officer further determined that the second Group II Written Notice must be rescinded because "the policy and underlying events" presented by the agency also "form[ed] the basis for issuance of the Group III Written Notice," such that the agency "ha[d] issued two written notices to address the same behavior."[6] The hearing officer did, however, find that the agency had presented sufficient evidence to show that the grievant's conduct constituted neglect of a patient and upheld the issuance of the Group III Written Notice and the grievant's termination.[7] 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."[8] 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.[9]

Mitigation

Fairly read, the grievant alleges in her request for administrative review that the hearing officer erred in not mitigating the Group III Written Notice and/or her termination.[10] Specifically, the grievant claims that: (1) the agency did not apply disciplinary action to her consistent with other similarly situated employees because Ms. L was given an opportunity to resign in lieu of receiving disciplinary action for client neglect, (2) her prior work performance was satisfactory, and (3) she was ill and asked to leave work on the day the incident occurred. 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]."[11] 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."[12] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[3] *Id.*
[4] *See id.*
[5] *Id.*at 3.
[6] *Id.*
[7] *Id.*
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Although the grievant asserts that "the hearing decision is in fact inconsistent with state and agency policy," her arguments appear to relate to the issue of mitigation and will be addressed as such in this ruling.
[11] Va. Code § 2.2-3005(C)(6).
[12] *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.[13]

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.[14] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[15] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Inconsistent Discipline

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.[16] Upon conducting a review of the hearing record, it does not appear that the evidence in the record is sufficient to support a conclusion that the agency's treatment of the grievant was different from other employees who may have been similarly situated to her.

In the hearing decision, the hearing officer assessed the evidence and found that the grievant had not been treated differently from Ms. L, a similarly situated employee.[17] The hearing officer stated that "Ms. L failed to perform fifteen minute checks" and was told "she should resign so that she would not be disciplined," while the "grievant was not afforded a similar option . . . ."[18] However, the hearing officer ultimately found that "this inconsistency [was] not a mitigating circumstance" because it was "not clear that Agency managers were aware of this action and intended to treat Ms. L differently from Grievant."[19] The grievant disagrees

[13] *Id.* § VI(B)(1).
[14] 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).
[15] "'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.*
[16] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).
[17] Hearing Decision at 4.
[18] *Id.*
[19] *Id.*

with the hearing officer's assessment of the evidence regarding Ms. L and appears to argue that the hearing officer should have mitigated the disciplinary action.

EEDR has thoroughly reviewed the hearing record and, while the grievant may disagree with the hearing officer's mitigation decision, there is nothing to indicate that the hearing officer's decision not to mitigate on this basis was contrary to the evidence in the record or constitutes an abuse of discretion. Based on EEDR's review of the record, it appears that the evidence presented at the hearing was sufficient to support the hearing officer's decision not to mitigate the discipline and that his determination was otherwise not arbitrary or capricious. Accordingly, EEDR will not disturb the hearing officer's mitigation decision on this basis.

Prior Satisfactory Work Performance

Similarly, the grievant's claim that her otherwise satisfactory performance should have been considered as a mitigating factor is unpersuasive. While it cannot be said that prior satisfactory work performance 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.[20] The weight of an employee's past work performance 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 that otherwise satisfactory performance becomes. In this case, the grievant's prior satisfactory performance is not so extraordinary that it would clearly justify 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 that basis.

Evidence Relating to the Grievant's Medical Condition

Finally, the grievant argues that she "asked to leave" work because she felt ill and her "request was denied" due to a staff shortage at the facility, even though "there were [sic] enough staffing to relieve [her]." In the hearing decision, the hearing officer considered the evidence presented by the grievant about her medical condition, found that she "conducted some of the fifteen minutes checks on April 22, 2017," and stated that he "[did] not believe that Grievant was so sick she could not have completed the other checks."[21] Having conducted a review of the hearing record, there is no basis for EEDR to conclude that the hearing officer's consideration of the evidence about the grievant's medical condition was in error or constituted an abuse of discretion in this case. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EEDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion in this case. Accordingly, EEDR declines to the hearing decision on this basis.

[20] *See* EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[21] Hearing Decision at 4; *see, e.g.*, Hearing Recording at 1:05:47-1:07:02 (testimony of grievant).

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.[22] 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.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24]

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

[22] *Grievance Procedure Manual* § 7.2(d).
[23] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[24] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).