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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5161
October 9, 2020

The Department of Behavioral Health and Developmental Services (the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11553. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11553, as found by the hearing officer, are as follows:[1]

> The facility [where the agency employs grievant] consists of, among other buildings, residential homes for clients of the agency and administration building(s). The Agency has designated Building 1 as the administration building.
>
> . . . .
>
> The Agency promoted Grievant . . . on December 10, 2018, to the position of Direct Support Professional II in the Agency's residential department. . . .
>
> As an employee in the Agency's residential department, Grievant could routinely be required to work eight (8) to sixteen (16) hours per shift.
>
> On February 10, 2020, the Agency essentially promoted Grievant again as she was hired as a Direct Support Professional II in the Agency's day department. . . . [I]n this assignment, Grievant primarily worked a day shift.
>
> . . . [W]orking in the assignment of Day Support Professional in Home #2 exposes an employee to working longer than an 8-hour shift or day shift.

[1] Amended Decision of Hearing Officer, Case No. 11553 ("Hearing Decision"), September 8, 2020, at 2-6 (paragraph enumeration and citations omitted). The hearing decision under review in this ruling is an amended version of an original decision, which was issued on September 2, 2020. *See id.*at 1.

The evidence, to include Grievant's work history, shows she is a good worker and has no disciplinary history with the Agency.

Grievant's Need for Family Medical Leave Act (FMLA) Leave

On June 14, 2019, Hospital admitted Grievant's minor child, a teenage son, for multiple reasons. A medical report from Hospital indicates those reasons included his

- making suicidal threats;
- running away behavior; and
- physically attacking family members.

The son's medical record noting his date of birth indicates he was a minor on April 22, 2020, and remains one.

On June 21, 2019, Grievant informed the Agency that she needed leave to care for her son. The Agency then determined and notified Grievant that she was eligible for Family Medical Leave Act (FMLA) leave; that is, the Agency approved Grievant's FMLA leave request.

In addition, the Agency informed Grievant that she was required to use her available leave (sick, vacation, or other leave) during her FMLA absence.

To support her FMLA status Grievant provided the Agency with a completed certification form. . . .

Particularly, Grievant certified that the care she would be providing for her son included "counseling, physiological therapy sessions[. M]ental health outings and events. Emotional support." The certification indicates Grievant signed and dated her certification on June 22, 2019.

In the physician's section of the certification, the health care provider notes in pertinent part that the child was hospitalized on June 14, 2019. As previously referenced a June 14, 2019 medical note regarding the child substantiates the doctor's reporting.

In addition, on this certification, the health care provider noted that the child would need treatment visits at least twice a year for his condition. Furthermore, she commented that the child was referred for individual and family therapy. Moreover, the health care provider described other relevant medical facts related to the child's condition by noting the child "will need therapy sessions once or twice a week but also the patient (child) needs increased supervision and support."

The health care provider also remarked that the child would require follow up treatments. Consistent with earlier statements, she estimated that upon release from the hospital the child would require therapy sessions twice a week. Additionally, the health care provider stated that the parent will need to be home to supervise and support the patient.

The Hearing Officer finds that the health care provider's recommendation of therapy as frequent as twice a week indicates the child had/has a serious health condition.

In her certification, the health care provider estimated the child would need intermittent care from July 1, 2019, to July 1, 2020. . . .

Grievant remained eligible for FMLA-qualifying leave on April 22, 2020.

The April 22, 2020 Incident

On April 22, 2020, the Agency was operating under an emergency due to COVID-19. Specifically, in Home #2 of the Agency, some residents and staff had tested positive for the [virus]. Consequently, this home did not have enough staff to operate because some staff had called in sick. In addition, some residents of the home had been quarantined due to their having contracted the virus. To address the emergency situation, the Agency determined that to meet its staffing needs in Home #2, it required additional staff to work in Home #2. Management determined this would necessitate moving staff from other departments or locations of the Agency to Home #2.

An assignment of direct support professional (DSP) in Home #2 constituted an assignment in the residential department of the Agency. As such, a DSP assigned to Home #2 could be required to work up to 16 hours. In effect, this was more than an 8-hour day shift.

. . . Grievant had been hired as a day support worker as of February 2020. She was working in that assignment on April 22, 2020. Then shortly before noon on April 22, 2020, Supervisor reassigned Grievant to work in Home #2. Supervisor selected Grievant, along with another employee, because Grievant had recent experience working in the home. This modification in Grievant's assignment would likely require her to work 8- to 16-hour shift(s), rather than her normal day shift.

. . . [S]uch a change would adversely affect Grievant's ability to care for her child as her time at work would not be limited to the day shift. And Grievant would be unavailable to care for her son after normal day business hours as she was accustomed to doing while assigned to the day department.

Shortly before lunch time, Supervisor approached Grievant and informed her of the reassignment. The parties dispute whether Supervisor specifically instructed Grievant to report to a scheduler to determine her hours in Home #2 or to report directly to Home #2. However, the evidence establishes that Grievant's assignment to work in Home #2 was effective immediately on April 22, 2020. Further, her supervisor gave Grievant virtually little notice of this reassignment.

Grievant objected to the assignment.

Supervisor's Version of Events on April 22 and 23, 2020

. . . . [A]fter the notification to Grievant, she objected and informed Supervisor that she had a son with a compromised immune system. Supervisor informed Grievant that personal protective equipment (PPE) would be made available for the employees. Further, he informed Grievant that after an employee works his or her shift, the Agency would pay for the employee to stay in a hotel room in an effort to avoid contaminating the employee's other household members. Then Grievant informed Supervisor that she did not have to work in Home #2 because of FMLA status. The Supervisor then responded that she had to have a legitimate reason to employ FMLA leave. Grievant responded saying she did not have to let Supervisor know the reason for the FMLA leave. Next, Supervisor again instructed Grievant to report so she could be scheduled for the reassignment.

Supervisor stated that Grievant then went to HR and met with staff there. Supervisor stated that once the meetings concluded, he observed Grievant in the administration building and asked her if she had reported to the scheduler for her assignment in Home #2. Grievant informed him that HR informed her she did not have to report. Supervisor then stated he directed Grievant to report for scheduling as he had not been advised that she had been exempt from working in the home.

According to his testimony, Grievant then walked off the job without notifying him. Supervisor contends that Grievant also failed to report to work as scheduled on April 23, 2020, and did not contact him until about 3:01 p.m. on April 23, 2020, to inform him she would not be in on that day and the next.

HR Generalist's Version

. . . . HR Generalist testified she was present for a meeting with Grievant and HR Director. It was during the meeting with HR staff and Grievant on April 22, 2020, that Grievant requested FMLA leave starting April 23, 2020 for a two-week continuous period to care for her son.

By HR Generalist['s] testimony, the HR Director informed Grievant during the meeting that she did not believe a two-week continuous period of leave was approved FMLA as Grievant's FMLA leave for her son was intermittent. Then

according to HR Generalist, the director stated she would review the FMLA certification form previously submitted by Grievant. Even though the Agency had in its possession this form, the director did not retrieve it for review during the meeting.

Also, at one point during HR Generalist['s] testimony, she testified that Grievant did not request FMLA leave for April 22, 2020, then at another time during her testimony, HR Generalist stated that she did not recall Grievant asking for FMLA leave for April 22, 2020.

Moreover, by her testimony HR Generalist could not recall if HR Director stated during the meeting that Grievant had the right to use FMLA leave.

Grievant's Version of What Occurred on April 22, 2020

By her testimony and written statement Grievant notes that upon being told of the reassignment, she objected to her supervisor and requested an alternative assignment. Supervisor informed Grievant there was none and her day support assignments were suspended.

Grievant acknowledged Supervisor informed her that PPE was available and that the Agency would pay for an employee to stay in a hotel room after working an 8-16 hour shift in the home where residents/staff had tested positive for COVID-19. Grievant informed Supervisor again that accepting the assignment would prevent her from being available to safely provide the medical care for her son. She states that after that conversation she and Supervisor agreed she needed to talk to HR regarding her concerns.

Grievant then states she met with HR Director and HR Generalist around 12:15 p.m. and shared with them her concerns regarding her son's medical needs and using her FMLA leave. She also testified or indicated concerns with the amount of notice given regarding the reassignment. Grievant stated she was told that if she went out on FMLA leave it was her right. Further, she testified and stated that HR Director also told her that all she needed if she worked in Home #2 was her PPE and she could go home. To this response, Grievant expressed confusion and concern regarding how she could provide for her son's care at home and also avoid contaminating him with the virus.

By her testimony and statement, Grievant noted that around 12:30 p.m. she also spoke to the [Facility] Director about her concerns. She informed [Facility] Director that Grievant was the mother of three children and one needed her support because of his mental health needs. She testified that [Facility] Director responded also that Grievant had a right to use FMLA leave.

Grievant also testified/stated that after meeting with HR, about 12:50 p.m. she spoke to Supervisor again as she was leaving the administration building. During that conversation she again requested an alternative assignment and for Supervisor to allow her to continue to work in day support. Supervisor responded "no" to her request**.** Grievant then stated that she informed Supervisor she needed to use FMLA leave to provide medical care for her child. She then asked for her leave balance to which Supervisor stated he would get. Grievant then stated she asked him to text it to her. Grievant testified that she and Supervisor walked back into the building where she clocked out at about 1:05 p.m.

Further Grievant testified that on April 23, 2020, she sent her supervisor a text inquiring about her leave that she had asked about the day before. This text indicates Grievant informed Supervisor/HR she would be taking FMLA leave to care for her son.

. . . .

Grievant returned to work on April 27, 2020, and informed her supervisor she had made arrangements for child care.

She also submitted a leave slip requesting FMLA leave for April 22, 23, and 24, 2020. Supervisor approved FMLA leave retroactively for those days and hours.
. . .

On or about August 11, 2020, the Agency instructed staff that had worked in Home #2 to not enter the administration building as a precaution to avoid cross contamination.

According to the [facility] director, when Grievant met with her on April 22, 2020, Grievant mentioned FMLA and the need to care for her son.

On or about March 19, 2020, the Agency communicated with its employees and informed them of the availability of Public Health Emergency Leave (PHEL) due to the COVID-19 crisis. Further, the Agency indicated it would be flexible with employees who were custodial parents and needed to make alternative child care arrangement. Specifically, in pertinent part the communication stated the following:

> …There are also options available for an employee who needs time to secure alternative child care. Approvals will be made on a case by case basis. Please speak with your Supervisor if these situations apply to you. They will work with HR to determine what options may be available to you. 3/20/20 PHEL for child care is for anyone that is the custodial parent and/or guardian.

On May 15, 2020, the agency issued to the grievant a Group III Written Notice of disciplinary action with suspension for failure to report without notice and failure to follow instructions.[2] The Written Notice specified that the grievant failed to follow her Supervisor's instructions to arrange scheduling for a new immediate assignment to Home #2, instead clocking out of work without authorization.[3] The following day, the Written Notice alleged, the grievant "failed to report to work, without prior authorization from her supervisor that she would not work that day."[4] The grievant timely grieved the Written Notice, and a hearing was held on August 13, 2020.[5] In a decision dated September 8, 2020, the hearing officer determined that the Written Notice must be rescinded because the grievant "was eligible for intermittent leave for her son. . . . Further, she provided noticed to multiple persons in management as soon as practicable that she was taking such leave."[6]

The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR 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, EDR does not award a decision in favor of a 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 EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency maintains that the grievant was absent from work without obtaining necessary approvals required by agency and DHRM policies.[10] Challenging the hearing officer's finding that disciplinary action was not consistent with the grievant's Family Medical Leave rights, the agency contends that the grievant's existing FMLA certification was for regular, predictable medical appointments, and that the grievant had "no exigent requirement" to leave work on April 22, 2020.[11] The agency further disputes whether the grievant's child was immune-compromised or otherwise at heightened risk for COVID-19 complications, such that the grievant was unable to safely care for him and work her assigned duties in Home #2.[12]

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[2] *See id.* at 1.
[3] Agency Ex. 1, at 1.
[4] *Id.*
[5] Hearing Decision at 1.
[6] *Id.* at 13.
[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] *See* Request for Administrative Review at 1-2.
[11] *Id.* at 3.
[12] *Id.*

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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 on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In her decision, the hearing officer determined that the agency did not meet its burden to prove that the grievant's behavior on April 22 and 23 was misconduct.[17] The hearing officer found that around midday on April 22, the agency reassigned the grievant to work in a COVID-19-positive environment, effective immediately.[18] The hearing officer further found that

> [b]y working in Home #2 where positive COVID-19 cases existed, Grievant would put herself at extra risk of contracting COVID-19 and infecting her son. The evidence clearly demonstrates this extra risk as staff in the administration building . . . instructed those like Grievant who had worked in homes designated as "COVID-19 positive" to refrain from entering the administration building to avoid cross-contamination.[19]

Moreover, the hearing officer found that the grievant made her Supervisor, human resources staff, and the facility director aware that the immediate reassignment conflicted with her child-care responsibilities, which included caring for her child's mental-health needs after her normal shift and not infecting him with the virus.[20] The hearing officer noted that the agency had advised employees of the possibility of using Public Health Emergency Leave to "secure alternative child care" due to circumstances related to the COVID-19 public health emergency.[21] In such circumstances, the agency advised employees that their supervisors would "work with HR to determine what options may be available to you."[22] Finally, the hearing officer found that the grievant received approval from the agency to use leave related to the need to care for her son from April 22 to 24, 2020:

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[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] *See* Hearing Decision at 11-13.
[18] *Id.* at 11.
[19] *Id.*
[20] *Id.* at 11-12.
[21] *Id.*
[22] *Id.* at 12; Grievant's Ex. 21, at 15.

> [T]he agency's claim that Grievant failed to [obtain] prior approval for her leave is refuted. Grievant was eligible for intermittent leave for her son. She requested such. Further, she provided notice to multiple persons in management as soon as practicable that she was taking such leave.[23]

Evidence in the record supports these conclusions. The grievant and her Supervisor both testified that, after he informed her of her reassignment, she went to discuss her options with human resources staff and the facility director.[24] The grievant testified that both the HR Director and the facility director told her she had the right to use leave to care for her son.[25] Both the grievant and her Supervisor testified that, following these discussions, the grievant informed her Supervisor that she had been told she had the right to take leave rather than report to Home #2 as he instructed, and that she planned to do so.[26]

Based on this evidence, the hearing officer concluded that the agency did not prove that the grievant failed to follow instructions/report to work when she left early on April 22 and continued to be absent on April 23.[27] While the agency maintains that the Supervisor's version of events is the most accurate, 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 EDR 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.[28] Because the evidence supports the hearing officer's findings that the grievant communicated she would take leave rather than work in Home #2, and that the agency's responses as to her rights, options, and permissions were unclear at best, EDR perceives no error in the hearing officer's determination that the agency did not prove the misconduct alleged.

The agency disagrees, arguing that the hearing decision essentially "nullifies" state and agency policies requiring employees to attend work unless they receive approval to be absent.[29] In addition to DHRM Policy 4.30, *Leave Policies – General Provisions*, the agency cites its own Instruction 4040 for the grievant's facility, which makes it "the responsibility of the employee to ensure the supervisor receives" a request for leave.[30] Instruction 4040 further authorizes supervisors to "approve or deny the request based on (1) the reason for the request, and (2) the effect the early departure would have on the rest of the workforce, overtime costs, and facility operations."[31] However, while these provisions may ostensibly set forth a straightforward

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[23] *Id.* at 13.
[24] Hearing Recording Pt. I at 27:55-28:30 (Supervisor's testimony); *id.* Pt. IV at 17:20-18:40 (Grievant's testimony).
[25] *Id.* Pt. IV at 19:00-20:40 (Grievant's testimony).
[26] *Id.* at 20:40-21:28 (Grievant's testimony); *id.* Pt. I at 28:30-29:00 (Supervisor's testimony).
[27] Hearing Decision at 13.
[28] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[29] Request for Administrative Review at 1, 2.
[30] Agency Ex. 9, at 7.
[31] *Id.* at 10-11.

attendance system, the hearing decision identified several factors that complicated the application of the cited policies to the grievant's situation on April 22.

First, the hearing officer noted that the grievant was given "virtually no notice" of a new mandatory assignment that raised an immediate and significant conflict with her personal caregiving responsibilities; she immediately made her Supervisor aware of this conflict.[32] Second, the grievant had legitimate questions as to whether these personal responsibilities made her eligible for leave that was not wholly subject to her Supervisor's approval.[33] Third, the grievant believed that her facility's management essentially answered those questions in the affirmative, and she conveyed as much to her Supervisor when she asked him again for an alternate assignment.[34] Fourth, after learning of the grievant's discussions with other facility management, her Supervisor reiterated that she should not return to her previous work assignment.[35] Fifth, after her leave of absence from April 22-24, the grievant returned to work having apparently arranged for alternative caregiving and reported for assignments in Home #2.[36] Considering the totality of these circumstances, the hearing officer concluded that the agency had not proven its charges that the grievant failed to follow instructions to report to a new assignment or that she was absent without authorization. EDR cannot find that this conclusion nullified any policy or otherwise presents a basis for remand.

Finally, the agency contends that the hearing officer's conclusions with respect to the grievant's FMLA rights are not supported by the record. The agency suggests that the grievant's certification for intermittent FMLA leave covered only scheduled medical appointments related to her child's mental health, not any circumstance the grievant described to agency personnel on April 22, 2020.[37] However, the evidence supports the hearing officer's findings that the grievant had an active FMLA certification for intermittent leave to care for her child's serious mental health condition, including by providing direct supervision.[38] Further, the agency does not appear to dispute the hearing officer's finding that the grievant's reassignment to Home #2 had the potential to alter her work schedule substantially.[39] As the hearing officer found, the evidence indicated that such a substantial shift in the grievant's work hours could implicate personal caregiving responsibilities for which she had received FMLA certification.[40] Indeed, as the hearing officer noted, the agency retroactively designated the grievant's absences as Family Medical Leave.[41]

Moreover, even if we assume that the record suggests ambiguity as to whether the FMLA protected the grievant's right to leave early on April 22, EDR concludes that any error by the

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[32] Hearing Decision at 11.
[33] *See id.* at 11-12. Although employees are generally required to give reasonable notice for all absences, leave benefits under DHRM Policy 4.20, *Family Medical Leave*, or DHRM Policy 4.52, *Public Health Emergency Leave*, are not necessarily contingent on a supervisor's discretionary approval.
[34] Hearing Decision at 12-13.
[35] *Id.* at 11.
[36] *Id.* at 8; Agency Ex. 3, at 9.
[37] Request for Administrative Review at 3.
[38] Hearing Decision at 4; Agency Ex. 8, at 7.
[39] Hearing Decision at 3, 5, 11.
[40] *Id.* at 11.
[41] *Id.* at 8, 13; Agency Ex. 1, at 7.

hearing officer on that question would not change the hearing decision outcome, based on the analysis above. Ultimately, the agency had the burden to prove that the grievant failed to follow directions and to report to work.[42] The hearing officer found that the agency did not carry this burden, based not only on how the grievant's new assignment implicated her Family Medical Leave rights but more broadly on the totality of the circumstances – wherein the grievant's work assignment changed immediately and substantially, she communicated to multiple agency managers that the new assignment was not compatible with her caregiving needs, such needs might trigger certain non-discretionary leave benefits, and management arguably recognized her right to use such leave. Therefore, even assuming that the hearing officer's analysis as to FMLA interference was in error, EDR declines to disturb the decision.

CONCLUSION AND APPEAL RIGHTS

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.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]

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[42] *Rules for Conducting Grievance Hearings* §§ IV(C), VI(B)(1).
[43] *Grievance Procedure Manual* § 7.2(d).
[44] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[45] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).