Issue: Administrative Review of Hearing Officer's Decision in Case No. 10315; Ruling Date: June 11, 2014; Ruling No. 2014-3888; Agency: Virginia Department of Health; Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA
Department of Human Resources Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Health
Ruling Number 2014-3888
June 11, 2014

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10315. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10315 are as follows:[1]

> The Grievant was employed by the Agency as a Nutritionist Assistant and has worked for the Agency for approximately eight and one half years. The Grievant's job duties included working a window to check in clients of the Agency. The Agency has two Nutritionist Assistants that work the same hours and work next to each other staffing the windows. On August 7, 2013, the Grievant and the other Nutritionist Assistant engaged in an argument at their windows. A line of clients had formed and the Grievant requested the assistance of her co-worker. She refused to assist because she was engaged in other duties and complained that the Grievant's frequent late arrival for work kept her from her duties. The Grievant verbally abused her co-worker about her age, her personal relationship and accused her of excessive drinking. This occurred in front of Agency clients. The argument was heard by staff and another employee of the Agency came to the window to assist clients. Both of the Nutritionist Assistants were disciplined for disrupting the work place, each receiving a Written Group II Notice and a five day suspension. The Grievant has this active Group II Written Notice in her personnel file.
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> The Grievant's Supervisor took her current position approximately three years ago. When she took the position she encountered numerous problems with staff performance. One of the major issues was the failure of the staff to follow policy in regard to absenteeism, tardiness and unauthorized leave. In order to correct this problem the Grievant's Supervisor held staff meetings, handed out

[1] Decision of Hearing Officer, Case No. 10315 ("Hearing Decision"), April 29, 2014, at 1-2 (citations omitted).

written copies of Agency policy and made her expectations regarding time and attendance clear to the staff. The Supervisor began taking leave time for tardiness to correct the problem.

The Grievant was frequently late to work and, at times, took long lunches and left early. The Grievant was advised with the rest of the staff that this was a violation of policy and that staff was expected to be at work on time and ready to serve the Agency clients from the moment the office opened. The staff, including the Grievant, was notified by email that leave would have to be taken for late arrivals. A staff meeting was held on June 27, 2013, advising the Grievant and the rest of the staff that they must arrive on time in the morning and from lunch. The Grievant continued to arrive late to work and the Supervisor began to document her arrival times. On August 6, 2013, the Grievant was counseled by her Supervisor again about being late. The Grievant continued to arrive late for work and not return from lunch in a timely manner. On September 25, 2013, the Grievant was issued a Group II Written Notice with employment termination for accumulated written notices because of her failure to follow instructions and/or policy and poor attendance.

In June 2013, the Grievant gave the Agency a "progress note" from her doctor. The Grievant and Agency personnel discussed options under the Americans with Disabilities Act, the Family Medical Leave Act and Agency disability programs. The Grievant did not provide any further medical documentation and did not complete any applications for relief under the above mentioned program.

On August 8, 2013, the Grievant filed a complaint with the Agency about her co-worker in regard to the August 7, 2013 incident.

On September 25, 2013, the grievant was issued a Group II Written Notice with termination based on the accumulation of discipline.[2] She initiated a grievance, and on April 29, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.[3] The grievant has requested an administrative review by EDR of the hearing officer's decision.

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

[2] Agency Exhibit 4. As the grievant notes in her request for administrative review, the hearing officer incorrectly identified the date on which the Written Notice was issued as September 28, 2013, rather than September 25, 2013. This typographical error does not appear to have any substantive effect on the hearing officer's findings and therefore will not be addressed further in this ruling.

[3] Hearing Decision at 1,4.

matters related to … procedural compliance with the grievance procedure."[4] 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 action be correctly taken.[5]

Conduct of Agency Counsel

In her request for administrative review by EDR, the grievant asserts that the agency's counsel engaged in "witness tampering" with respect to Witness Z. The grievant does not specify or explain the basis of this allegation, however, and no basis for this claim is discernible from EDR's review of the hearing record. As Witness Z did not testify at hearing, it appears likely that the grievant's objection to the agency counsel's conduct relates in some way to Witness Z's non-appearance or failure to testify, although this is unclear.

A review of the hearing file indicates the grievant did not specifically identify Witness Z as a witness she intended to call as hearing. However, the agency listed Witness Z as a potential witness at hearing and the hearing officer issued an order for the Witness's appearance. Although it is unclear from the hearing record why the agency apparently elected not to call Witness Z to testify or Witness Z otherwise failed to appear, there is no evidence in the hearing record that the agency's counsel engaged in any inappropriate conduct with respect to Witness Z. Moreover, even if EDR were to assume for the sake of argument that the agency's counsel in some way improperly caused Witness Z not to appear or to testify, Witness Z was no longer employed by the agency at the time of the hearing and therefore the hearing officer would have had no basis to draw an adverse inference against the agency for her failure to testify.[6] For these reasons, the hearing decision will not be disturbed on this basis.

Inconsistency with State and Agency Policy

The grievant's request for administrative review further asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested and received such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Findings of Fact

The grievant also challenges a number of the hearing officer's factual findings. 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 grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to

[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] *See Rules for Conducting Grievance Hearings* § V(B).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.

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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Based on a review of the record, there is sufficient evidence to support the hearing officer's factual findings in this case. In reaching his decision that the grievant had failed to comply with directives regarding tardiness and attendance, the hearing officer considered documentary and testimonial evidence that the grievant was "frequently late to work and, at times, took long lunches and left early," that she was advised that this conduct was not in accordance with policy and managerial expectations, and that her actions were not excused or protected under policy.[12] Although the grievant disputes these findings, there is sufficient record evidence to support the hearing officer's decision.[13] That parties disagree regarding the evidence does not in itself constitute a basis for overturning the hearing officer's decision. The test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer's findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

Consideration of Prior Written Notice

The grievant also asserts that the hearing officer erred by considering testimony and evidence relating to a prior Group II Written Notice, issued on September 3, 2013. In his decision, the hearing officer explained that at hearing, both parties "indicated to the hearing officer that both notices had been grieved and were [the] subject of the hearing."[14] As a result of this representation, the hearing officer admitted evidence relating to both the September 3, 2013 and the September 25, 2013 Written Notices.[15] The hearing officer subsequently determined that, pursuant to EDR Ruling No. 2014-3795, only the grievance related to the September 25,

[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 2-4.
[13] *See, e.g.*, Agency Exhibits 4, 13-18; *see also, e.g.*, Hearing Recording at 3:53:51-3:54:37 (testimony by co-worker regarding clarity of expectations and the grievant's tardiness); 4:04:28-4:04:56 (testimony by co-worker regarding the grievant's continued tardiness).
[14] Hearing Decision at 1.
[15] *See* Hearing Recording at 2:21:31-2:23:01.

2013 Written Notice had been qualified for hearing; and his "Decision and Order" was related solely to that Written Notice.[16]

EDR's review does not support the grievant's claim that the hearing officer erred in his consideration of evidence. Although the hearing officer described the altercation giving rise to the September 3, 2013 Written Notice in his decision,[17] his consideration of that event appears to be limited to its relationship to the grievant's attendance issues[18] and her argument that the agency retaliated against her for her "whistleblow[ing]" complaints about the altercation.[19] Further, we note that the grievant agreed at hearing to admit witness testimony related to the September 3, 2013 Written Notice and advised the hearing officer that she was challenging the issuance of that Written Notice.[20] Accordingly, the hearing decision will not be remanded on this basis.

Mitigation

Fairly read, the grievant's request for administrative review also challenges 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 [EDR]."[21] The *Rules for Conducting Grievance Hearings (*"*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."[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,
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> 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]

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[16] Hearing Decision at 1, 5.
[17] *Id.* at 2.
[18] *Id.* at 3-4.
[19] *Id.* The grievant also asserts that the hearing officer erred in finding she was not a "whistle blower." This argument is without basis. In his decision, the hearing officer noted that the grievant had shown that she had engaged in protected activity, but concluded that she had not shown that this protected activity was causally related to the disciplinary action against her. *Id.* at 4. With respect to the grievant's claim that she was not allowed to introduce evidence regarding her protected activity, she has not produced evidence to show that any relevant evidence was excluded or that the hearing officer otherwise erred with respect to this claim.
[20] *See* Hearing Recording at 2:21:31-2:23:01.
[21] Va. Code § 2.2-3005(C)(6).
[22] *Rules for Conducting Grievance Hearings* § VI(A).
[23] *Id.* § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

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 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.[24] EDR 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.

The grievant argues in her request for administrative review that the hearing officer should have mitigated the disciplinary action because she was not treated consistently with other employees. In his decision, the hearing officer concluded that the evidence established that employees were treated equally with respect to the attendance policy.[26] The grievant challenges this finding, noting in particular that a co-worker testified that other employees were allowed to return from lunch late. However, a review of the hearing recording indicates that on further questioning, the co-worker was unsure whether those employees were required to take leave for any tardiness.[27] Further, the co-worker did not testify regarding the frequency of any tardiness by those employees during the applicable time period or whether they had previously obtained permission from their supervisor to return late.[28] Although the grievant might disagree as to whether she was treated consistently or singled out, in light of the record evidence, we cannot find that the hearing officer abused his discretion by not mitigating the grievant's disciplinary action. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

CONCLUSION AND APPEAL RIGHTS

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.[29] 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

[24] *E.g., id.*
[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] Hearing Decision at 4.
[27] Hearing Recording at 3:45:38-3:47:26.
[28] *Id.*
[29] *Grievance Procedure Manual* § 7.2(d).

arose.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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