Issue: Administrative Review of Hearing Officer's Decision in Case No. 10741; Ruling Date: March 17, 2016; Ruling No. 2016-4311; Agency: Department of Behavioral Health and Developmental Services; Outcome: Remanded to AHO.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2016-4311
March 17, 2016

The Department of Behavioral Health and Developmental Services (the "agency") 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 10741. For the reasons set forth in this ruling, EDR remands the case to the hearing officer to the extent described below.

FACTS

The grievant was employed by the agency as a Compliance/Safety Officer III.[1] On November 3, 2015, the grievant was issued a Group III Written Notice with termination for falsifying records based on his submission of a "leave slip and time Clock Adjustment form" that contained inaccurate information.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on February 4, 2015.[4] The relevant facts in this case, as found by the hearing officer, are as follows[5]:

> The Agency provided me with a notebook containing eight tabs, and entered into evidence, during the course of the hearing, DHRM Policy 4.57. That Policy was placed in the front of the Agency's notebook. That notebook was accepted in its entirety as Agency Exhibit 1, without objection.
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> The Grievant provided me with a notebook containing nine tabs (A-I), and entered into evidence, during the course of the hearing, various medical records and documentation from the Reed Group. That additional evidence was placed in the Grievant's notebook at Tab J. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.
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> I heard from four witnesses in this matter, three of whom were joint witnesses and the fourth was the Grievant. In addition to the Grievant, I heard

[1] *See* Agency Exhibit 1, Tab 1 at 1.
[2] *Id.* at Tab 2.
[3] *Id.* at Tab 1.
[4] *See* Decision of Hearing Officer, Case No. 10741 ("Hearing Decision"), February 11, 2016, at 1.
[5] *Id.* at 3-6 (citations omitted).

from the Grievant's immediate supervisor, ("IS"). I also heard from the person to whom IS reported, ("AA"), and I heard from ("HM"), a Human Resource Manager for the Agency.

On or about September 24, 2015, the Grievant received from HM a letter which stated the following:

> Your position has been identified for abolishment, effective October 25, 2015, due to the "rightsizing" of [Agency] as we move toward closure and you will be placed on Leave Without Pay - Layoff effective October 25, 2015...

Accordingly, as of 12:01 a.m., October 25, 2015, the Grievant's position was abolished. The Grievant's last day of work was Friday, October 23, 2015. On October 23, 2015, the Grievant executed an [Agency] Checkout Form ("Checkout Form"), wherein he returned certain Agency items to the Agency and he either signed forms or had information presented to him. [6] The Checkout Form indicated that the date of separation was October 24, 2015. It does not state whether that means at the beginning of October 24, 2015, or at midnight of October 24, 2015.

The testimony presented before me by all four witnesses was that the Grievant clocked out of work at approximately 2:32 p.m., on October 23, 2015, and that everyone recognized that was the Grievant's last day of employment with the Agency. There was some testimony as to an accounting reason for why the letter of September 24, 2015, indicated that the abolishment would be effective October 25, 2015.

During the course of the day of October 23, 2015, the Grievant presented to AA a Leave Request and Call Out Form. All witnesses before me testified that there was no falsification contained in this form. The form indicated that the Grievant was requesting two hours of leave time commencing at 2:30 on October 23, 2015. The Grievant testified that he was turning in this form in order to commence an application for short-term disability. The Grievant originally presented this form to AA who indicated to the Grievant that he did not know how to process this form and the Grievant was advised to see IS. IS apparently looked at this form, found it correct, and signed it. This all took place on October 23, 2015, the date the Written Notice, in Section I, states is the "Offense Date." In Section II of the Written Notice, the verbiage used is, "on or around October 23, 2015." I was given no definition, legal or otherwise of "around."

The Grievant, having completed the checkout process with the Agency, left the Agency pursuant to the abolishment of the position the Grievant occupied.

[6] Agency Exhibit 1, Tab 5, Page 17

This was not a position created solely for the Grievant. It was a generic position and the Grievant was the current occupant.

The uncontradicted testimony from the Grievant was that sometime during the late afternoon or evening of October 23, 2015, he spoke to a representative of the Reed Group, the third party administrator of the short-term disability policy of the Agency. He testified that he was told by this representative that, in order to qualify for such disability, he needed to have taken at least one full day of leave. Accordingly, sometime during the day of October 24, 2015, the Grievant deposited under the office door of AA an envelope containing the documents found at Agency Exhibit 1, Tab 6, Pages 1, 3 and 7. One of these documents was a New Leave Request. It indicated that the Grievant was on sick leave for the entirety of October 23, 2015. This clearly was not factually accurate. The second document was a Time Clock Adjustment Form. This form states as follows:

> ...No work performed 8:00AM to 2:30PM (time clock not correct). Sick leave/disability applies full day...

While the statement that the time clock was not correct is a factually inaccurate statement, the statement regarding "no work performed" may in fact be reasonably accurate as the evidence before me is that most of the employees whose jobs had been abolished due to rightsizing performed little or no work on their last day of employment. Their day was consumed with parties, lunch and the final act of signing out with the Agency for the last time.

The envelope containing these documents was not found by AA until he reported to work on October 26, 2015. This was after the Grievant had been terminated pursuant to the abolishment of his position. He took these documents to HM and she, in conjunction with others, determined that there had been a falsification which warranted termination. However, when I questioned HM as to what she would have done had the Grievant come to her personally on the morning of October 26, 2015, with these documents, she quite clearly and honestly stated that she would have told him that he could not do that and would have returned the documents to him and the matter would have ended there. Of course, the Grievant, no longer being an employee of the Agency, had no standing to take the documents to HM.

. . . .

On November 3, 2015, when the Group III Written Notice was issued, the Grievant was not employed by the Agency. Not only was he not employed as of October 23, 2015, but the position he had worked had been abolished as of midnight on October 24, 2015. I find the issuance of this Group III Written Notice to be null and void. An "effective termination" date of November 3, 2015, implies that the Agency felt the Grievant was still employed as of November 3, 2015.

> To the extent that the Agency or DHRM should find otherwise, I find that the Agency is bound by the testimony of HM when she testified that, had the Grievant been able to present the documents to her personally, she would have said he could not do that, returned the documents to him, and the matter would have ended. There is no difference in AA giving HM the documents or the Grievant giving the documents to her. There is no justification for the disparity of result.
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> Finally, Policy 1.60 defines a Group III offense as those that "severely impact agency operations." I find it difficult to envision how any piece of this matter severely impacted the operation of this Agency.

In a decision dated February 11, 2016, the hearing officer determined that the agency had not presented sufficient evidence to justify the issuance of a Group III Written Notice, directed the agency to "rescind the Written Notice and all records regarding termination and return to the Grievant all benefits he was entitled to" when his layoff was effective.[7] 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."[8] 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 either party; the sole remedy is that the hearing officer correct the noncompliance.[9]

Inconsistency with Agency Policy

In its request for administrative review, the agency asserts that the hearing officer's decision is inconsistent with state policy. Specifically, the agency argues that: (1) the Group III Written Notice was not "null and void"[10] as a result of the grievant's layoff because an employee who is in layoff status "[has] not been fully separated from the state" until his layoff benefits have expired; (2) the issuance of the disciplinary action was appropriate because the grievant engaged in the charged misconduct before he entered layoff status; and (3) in reaching a decision, the hearing officer exceeded the scope of his authority in concluding that that falsification of records, which is defined as a Group III offense in DHRM Policy 1.60, *Standards of Conduct*, did not "severely impact[] the operation of [the] Agency . . . ."[11]

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[7] *Id.* at 6.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Hearing Decision at 6.
[11] *Id.*

The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] The agency has requested such a review. Accordingly, the agency's policy claims will not be discussed in this ruling.

Hearing Officer's Questioning of Witnesses

The agency appears to argue that the hearing officer "was doing his best to find an avenue of defense for the Grievant" and thus was biased against the agency. Specifically, the agency claims that the hearing officer improperly questioned one of the agency's witnesses, HM, and "made his decision based on what [HM] may have done under a set of facts and circumstances that are not present here." EDR's *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "the hearing officer may question the witnesses."[13] The *Rules* further caution, however, that the "tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side."[14]

Having reviewed the hearing record, EDR finds that the hearing officer's questions of HM were relevant and reasonable. Indeed, it appears that the hearing officer questioned HM for approximately thirteen minutes, not "approximately an hour," or a majority thereof, as suggested by the agency, and that he did so in an attempt to clarify the facts of the case and the reason the agency determined the disciplinary action was warranted.[15] Both parties had the opportunity to further question HM about the matters raised by the hearing officer, and the agency's advocate chose to do so.[16] Likewise, EDR finds no error in the hearing officer's presentation of hypothetical questions to HM as a method of exploring the agency's reasoning in support of its position. EDR has identified nothing in the hearing officer's conduct at the hearing that was inconsistent with the *Rules* or showed bias in favor of the grievant. The agency's request for relief with respect to this issue is denied.

Hearing Officer's Consideration of Evidence

The agency further alleges that some parts of the hearing officer's decision are inconsistent with the evidence in the record. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[18] 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.[19] Thus, in

[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] *Rules for Conducting Grievance Hearings* § IV(C).
[14] *Id.*
[15] *See* Hearing Recording at 2:29:25-2:42:17 (testimony of HM).
[16] *See id*. at 2:42:20-2:42:58 (testimony of HM).
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.
[19] *Rules for Conducting Grievance Hearings* § VI(B).

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.[20] 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.

Alternative Decision Regarding HM's Testimony

The hearing officer's decision appears to rest primarily on a determination that the Written Notice was "null and void" due to the grievant's employment status at the time it was issued on November 3, 2015, i.e., that he "was not employed by the Agency" on that date.[21] However, the hearing officer also made an alternative finding that, if "the Agency or DHRM" should disagree with his conclusion regarding the validity of the Written Notice, then "the Agency is bound by the testimony of HM" that, "had the Grievant been able to present the documents to her personally, she would have said he could not do that, returned the documents to him, and the matter would have ended."[22] The hearing officer determined that "[t]here is no difference in AA giving HM the documents or the grievant giving the documents to [HM]," and thus there was "no justification for the disparity of result" between these two possible outcomes.[23] While the hearing officer's findings regarding whether the Written Notice was "null and void" at its issuance may involve mixed questions of fact and policy, the final resolution of those issues in this case is an interpretation of policy, which is the proper purview of the DHRM policy review referenced above.

However, in the event the DHRM policy review overrules the hearing officer's findings regarding the issuance of the Written Notice or otherwise remands the case, the hearing officer's alternative finding regarding the testimony of HM may apply. For that reason, EDR's review of the agency's claims about that issue is warranted at this time. The agency argues that the hearing officer's finding in relation to HM's testimony is not consistent with the *Rules* because he was "required to base [his] determination[] on the evidence presented at the hearing" and not "upon supposition and speculation about other possible events that may have occurred . . . ." The agency further asserts that the hearing officer reached a decision by relying "on inappropriate speculation about what may have happened under a different set of facts . . . ."

Hearing officers are tasked with reviewing the evidence presented by the parties and deciding whether the agency has proved, by a preponderance of the evidence, that the grievant engaged in the behavior described in the Written Notice, that the behavior constituted misconduct, and that the discipline imposed by the agency is consistent with law and policy.[24] While it would not necessarily be improper for a hearing officer to consider and make a decision

[20] *Grievance Procedure Manual* § 5.8.
[21] Hearing Decision at 6.
[22] *Id.*
[23] *Id.*
[24] *Rules for Conducting Grievance Hearings* § VI(B)(1).

based, in part, upon witness testimony about a similar hypothetical situation, EDR has reviewed the hearing record and finds that the basis on which the hearing officer's alternative conclusion would rescind the Written Notice is unclear. The hearing officer appears to have found that the two documents submitted by the grievant on October 24 contained factually inaccurate information.[25] The hearing decision does not, however, include any discussion of whether that behavior constituted misconduct. For example, the hearing officer did not define the elements necessary to support a charge of falsification, whether there is evidence that could demonstrate those elements, such as, for example, an intent to falsify, or a conclusion as to whether the grievant's actions justified a charge of falsification. While this discussion may not have been necessary due to the decision that the discipline was "null and void" because the grievant had been laid off before the discipline was issued, if the DHRM policy review determines that such an action was permissible, the hearing officer must provide additional clarification of his assessment of the evidence and factual findings regarding the grievant's actions and whether they constituted falsification or other misconduct.

Furthermore, it is unclear on what basis the hearing officer determined the agency was "bound by the testimony of HM" that the grievant would not have been disciplined if he had "present[ed] the documents to her personally . . . ."[26] To the extent the hearing officer's alternative finding was a determination that the evidence in the record established a basis on which to mitigate the discipline, EDR finds that mitigating on the basis of disparate disciplinary treatment is not warranted in this case because there is no record evidence of any other agency employee being treated differently than the grievant. However, HM's testimony could potentially be relevant to the question of whether the charged behavior constituted misconduct, in addition to being considered as a mitigating factor generally. Depending on the hearing officer's analysis as to the underlying elements of the charge of falsification, there may be no need to address whether this testimony would support mitigation.

Other Factual Issues

In addition, the agency asserts that parts of the hearing decision "are inconsistent with the evidence" and/or "inconsistent with other findings" in the decision. Specifically, the agency argues that the hearing officer "erroneously stated" the grievant was "no longer employed by the agency" as of 2:30 p.m. on October 23.[27] The hearing officer appears to have found the evidence relating to the grievant's employment status between October 23 and 26 to be unclear. For example, the evidence in the record shows that "as of 12:01 a.m., October 25, 2015, the Grievant's position was abolished."[28] However, the hearing officer further noted the Checkout Form completed by the grievant October 23 "indicated that the date of separation was October 24, 2015," though it did not specify the time at which the grievant's separation was effective.[29]

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[25] Hearing Decision at 4.
[26] *Id.* at 6; *see* Hearing Recording at 1:56:59-1:57:30, 2:39:30-2:40:54 (testimony of HM).
[27] Hearing Decision at 5-6.
[28] *Id.* at 3; *see, e.g.*, Agency Exhibit 1, Tab 5, at 1; Hearing Recording at 34:03-34:49 (testimony of AA).
[29] Hearing Decision at 3; *see* Agency Exhibit 1, Tab 5, at 17.

EDR has not, however, identified any evidence to show that the grievant's employment status changed when he left work on October 23. For that reason, it appears the hearing officer erred in concluding that the grievant's employment with the agency ended on October 23. As with the hearing officer's findings with regard to the testimony of HM, this particular piece of evidence does not impact the conclusion that the Group III Written Notice was "null and void" at its issuance, as discussed more fully above.[30] If, however, the DHRM policy review concludes that the hearing officer's decision is not consistent with policy, the specific dates on which the grievant's layoff took effect and his employment status may have changed become more significant in determining whether the agency presented sufficient evidence to support the issuance of the discipline. For that reason, the hearing officer is directed to provide clarification of his findings with regard to the grievant's employment status on October 23 if the decision is remanded by the DHRM policy review.

The agency disputes the hearing officer's finding that the grievant no longer had "standing" to take documentation personally to HM after October 23.[31] The agency argues that the grievant's layoff status "would not have prevented him from presenting benefits paperwork personally and requesting guidance from HM." EDR is unclear what weight this determination had on the hearing officer's analysis of the case, so perhaps it will be elucidated if a remand becomes necessary. However, in response to questioning about whether HM would have spoken to the grievant about the documentation at issue, HM testified that the grievant would not have been "available" to her directly due to his layoff,[32] which could tend to support the hearing officer's conclusion that "the Grievant . . . had no standing to take the documents to HM,"[33] if the agency also felt that access to the grievant was not "available" for the agency either.

Finally, the agency claims that the hearing officer erred in stating that "it [is] difficult to envision how any piece of this matter severely impacted the operation of this Agency"[34] and that he improperly required the agency to "prove the falsification severely impacted agency operations," thus "adding a new element of proof." Whether agencies must present evidence to demonstrate that Group III offenses "severely impact agency operations"[35] in order to justify their issuance at a grievance hearing or whether Group III offenses are, by nature of their classification, presumed to have a severe impact on agency operations, is a matter that can be addressed by the DHRM policy review. While there is some evidence in the record relating to the impact of the grievant's actions on the agency's operations,[36] it is unclear what impact this evidence had on the hearing officer's analysis. Having reviewed the hearing decision and record, EDR is unable to identify whether, in what way, and to what extent the hearing officer based his decision on any such evidence. Accordingly, if the hearing decision is remanded by the DHRM policy review, the hearing officer must provide additional discussion of his conclusions

[30] Hearing Decision at 6.
[31] *Id.* at 5.
[32] Hearing Recording at 2:42:24-2:42:56 (testimony of HM).
[33] Hearing Decision at 5.
[34] *Id.* at 6.
[35] DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[36] *See* Hearing Recording at 2:35:57-2:39:12 (testimony of HM).

regarding the impact of the grievant's actions on agency operations and the manner in which that evidence impacts his analysis of the disciplinary action.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, if remanded by the DHRM policy review, the case must also be remanded for revision of the original hearing decision consistent with the requirements of the grievance procedure as stated in this ruling. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).[37] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.[38] 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.[39] 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.[40] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[41]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[37] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[38] *See Grievance Procedure Manual* § 7.2.
[39] *Grievance Procedure Manual* § 7.2(d).
[40] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[41] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).