Issue: Administrative Review of Hearing Officer's Decision in Case No. 10667; Ruling Date: November 10, 2015; Ruling No. 2016-4256; Agency: Virginia Employment Commission; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the Virginia Employment Commission
Ruling Number 2016-4256
November 10, 2015

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management administratively review the hearing officer's decision in Case Number 10667. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10667, as found by the hearing officer, are as follows:[1]

> The Virginia Employment Commission employs Grievant as a Workforce Services Representative. Grievant's work hours were from 8 a.m. until 5 p.m. with an hour lunch break. She has been employed by the Commonwealth for approximately 27 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant and other staff in her Office must report to work by 8 a.m. in order to participate in a staff meeting during which Office duties are discussed and the Supervisor makes any work duty changes. The Supervisor repeatedly instructed staff including Grievant to report to work by 8 a.m. She sent emails reminding staff of the importance of reporting to work by 8 a.m. The Supervisor advised staff that they could take their lunch hour between 11 a.m. and 2 p.m. as long as someone remained in the office when other employees were at lunch.
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> The Supervisor measured whether employees were late to work using a wall clock and her cell phone. The time on her cell phone was set through her carrier and she believed it to be accurate. She ensured that the clock on the wall was accurate.
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> Grievant worked in two office locations. The Agency only considered Grievant's attendance at Location W.
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> On December 19, 2013, Grievant was three minutes late to work.
> On January 31, 2014, Grievant was late to work.

[1] Decision of Hearing Officer, Case No. 10667 ("Hearing Decision"), October 7, 2015, at 2-4.

On February 3, 2014, Grievant was 15 minutes late to work.
On March 7, 2014, Grievant was five minutes late to work due to traffic delay.
On April 7, 2014, Grievant was five minutes late to work.
On April 10, 2014, Grievant was one hour late.
On April 28, 2014 Grievant was five minutes late.
On May 12, 2014, Grievant was 15 minutes late.
On May 21, 2014, Grievant was 2 hours late.
On May 22, 2014, Grievant was 15 minutes late.
On May 30, 2014, Grievant was five minutes late.
ON June 2, 2014, Grievant did not report to work.
On June 9, 2014, Grievant was ten minutes late because of "stomach issues."
On June 18, 2014, Grievant was five minutes late.
On July 9, 2014, Grievant was five minutes late because she overslept.
On July 30, 2014, Grievant was ten minutes late.
On August 6, 2014, Grievant was 20 minutes late.
On August 11, 2014, Grievant was five minutes late.
On August 18, 2014, Grievant was 30 minutes late.
On September 10, 2014, Grievant was ten minutes late.
On October 22, 2014, Grievant was ten minutes late.
On October 24, 2014, Grievant arrived as the staff meeting began.
On October 29, 2014, Grievant arrived as the staff meeting began.
On November 7, 2014, Grievant was 30 minutes late because she did not sleep well.
On November 12, 2014, Grievant arrived as the staff meeting began.
On November 19, 2014, Grievant was late to work.
On November 21, 2014, Grievant was late to work because she was not feeling well.
On December 1, 2014, Grievant was late to work.
On December 2, 2014, Grievant was three hours late to work because of "stomach problems."
On December 10, 2014, Grievant was five minutes late to work due to traffic delay.
On December 15, 2014, Grievant was late to work due to "neck problems."
On December 29, 2014, Grievant was three minutes late to work because she was stopped in traffic.
On January 5, 2015, Grievant was ten minutes late due to traffic delay.
On February 3, 2015, Grievant was ten minutes late to work due to "car trouble."
On February 11, 2015, Grievant arrived as the staff meeting was starting.
On February 23, 2015, Grievant was 20 minutes late because of "transportation issues."
On March 2, 2015, Grievant arrived as the staff meeting was starting.
On March 3, 2015, Grievant was late to work because she overslept.
On March 4, 2015, Grievant arrived as the staff meeting was starting.
On March 9, 2015, Grievant was four minutes late due to "traffic tie ups."

> On March 24, 2015, Grievant was two and a half hours late because she was not feeling well.
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> No evidence was presented showing that Grievant requested protection under the Family Medical Leave Act or placed the Agency on notice of a possible claim under the FMLA.

On or about April 2, 2015, the grievant was issued a Group I Written Notice for excessive tardiness.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on September 22, 2015.[4] In a decision datedOctober 7, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant "demonstrated a pattern of tardiness sufficient to justify the issuance of a Group I Written Notice" and upheld the disciplinary action.[5] The grievant 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."[6] 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.[7]

Fairly read, the grievant's request for administrative review alleges that the hearing officer erred in not mitigating the agency's disciplinary action. Specifically, she argues that she "submitted 2 and a half typed pages of experiences that [she] deemed to be racially insensitive" at the hearing, but "only a very few of the occurrences were addressed during the grievance process or hearing." In effect, the grievant argues that the hearing officer failed to consider all of the evidence in the record relating to her argument that the disciplinary action was discriminatory and/or retaliatory in nature.

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 [EDR]."[8] 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."[9] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

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[2] Agency Exhibit 1 at 1-2.
[3] Agency Exhibit 2 at 1-3.
[4] *See* Hearing Decision at 1.
[5] *See id.* at 4-6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3005(C)(6).
[9] *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.[10]

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.[11] EDR will review a hearing officer's mitigation determination for abuse of discretion,[12] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In the hearing decision, the hearing officer assessed the evidence and found that "[t]ardiness and poor attendance are Group I offenses," that the grievant "was informed that she was to report to work by 8 a.m.[,] and that the Agency strictly monitored her arrival time."[13] As a result, the hearing officer determined that the agency had presented evidence sufficient to show that the "Grievant demonstrated a pattern of excessive tardiness based on the standard for attendance set by the Agency and of which she had notice."[14] In his mitigation analysis, the hearing officer addressed the grievant's allegations that "the Agency discriminated against her because of her race[,] that the Agency created a hostile work environment based on her race" and that "the Agency only took action against her after the complained" to agency management.[15] The hearing officer discussed several examples cited by the grievant in support of this assertion, concluded that "[n]o credible evidence was presented" to support the grievant's claims of discrimination and retaliation, and declined to mitigate the disciplinary action on those bases.[16]

The grievant had "the burden to raise and establish mitigating circumstances that justif[ied] altering the disciplinary action" and presented evidence to support her claim that the

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[10] *Id*. § VI(B)(1).
[11] 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).
[12] "'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.*
[13] Hearing Decision at 4.
[14] *Id.* at 5.
[15] *Id.* at 6.
[16] *Id.*

disciplinary action was tainted by a discriminatory and/or retaliatory motive at the hearing.[17] For example, the grievant presented evidence to suggest that she and another employee were singled out to perform certain tasks because of their race.[18] The grievant's supervisor testified that she made fun of the grievant's attire when the grievant and other members of the office wore black and white clothing, but explained that she did not make those comments because of the grievant's race and that other employees made fun of each other regardless of their race.[19] The hearing officer found that the grievant had not presented evidence to show these actions were discriminatory.[20]

At the hearing, the grievant also argued at the hearing that the agency decided to issue the Written Notice after she discussed her concerns about discrimination with agency management.[21] The evidence in the record indicates that the grievant notified her office's Regional Director of alleged discrimination between March 6 and March 11, 2015.[22] On March 18, the grievant's supervisor submitted information about the grievant's excessive tardiness to the agency's human resource office.[23] The grievant appears to argue that the temporal proximity of these two actions supports an inference that the disciplinary action was retaliatory. The hearing officer considered this argument and found that there was "[n]o credible evidence to show that the Agency retaliated against her for complaining" to agency management.[24]

The hearing record contains further evidence relating to the grievant's assertion that there were "racial divides" and other discriminatory "preferential treatment" in her office.[25] In her request for administrative review, the grievant asserts that the hearing officer's mitigation analysis was flawed because these documents were not addressed in the hearing decision. While the grievant is correct that the hearing officer did not explicitly discuss all of the evidence in the record that could have supported her claim of discrimination, there is no requirement under the grievance procedure that a hearing officer specifically discuss every piece of evidence in the hearing record. Thus, mere silence as to some of the evidence does not necessarily constitute a basis for remand in this case. Further, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties. In the absence of witness testimony or other evidence to corroborate the allegedly discriminatory actions cited in the documents or to demonstrate how the documents supported her claim that the Written Notice was discriminatory in nature, it would appear that the hearing officer did not discuss that evidence in the hearing decision because he determined that it was not credible and/or persuasive.

Having reviewed the hearing record, EDR finds that there is evidence to support the hearing officer's decision. The evidence presented by the grievant to support her claims of discrimination and retaliation was circumstantial in nature, in that there was no direct evidence to show that the Written Notice was issued either because of her race or because she complained to

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[17] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[18] *E.g.*, Hearing Recording at 1:20:03-1:21:18 (testimony of Witness B); Agency Exhibit 2 at 29-30.
[19] Hearing Recording at 1:36:28-1:38:21 (testimony of supervisor); Grievant's Exhibit 5 at 6.
[20] Hearing Decision at 6.
[21] Hearing Recording at 1:53:06-1:54:04.
[22] Agency Exhibit 2 at 23-24.
[23] *Id.* at 52.
[24] Hearing Decision at 6.
[25] Agency Exhibit 2 at 29-30.

agency management about preferential treatment and racial divides in her office. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. Based on EDR's review of the hearing record, there is nothing to indicate that the hearing officer's analysis was in any way unreasonable or not based on the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR cannot conclude that the hearing officer's decision constitutes an abuse of discretion in this case. Accordingly, EDR will not disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.[26] 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.[27] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[28]

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