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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2019-4947
July 12, 2019

The Virginia Department of Transportation ("the agency") has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11317. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11317, as found by the hearing officer, are as follows:[2]

> The Virginia Department of Transportation [the "agency"] employs Grievant as a Transportation Operator II at one of its facilities. He has been employed by the Agency for approximately 11 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> On May 22, 2018, the Crew Leader, Mr. H, and Grievant were assigned responsibility for road maintenance along several highways near the Agency's headquarters. The Crew Leader drove the State vehicle. Grievant sat in the front seat of the vehicle. Mr. H sat in the back seat. They performed their work duties on various highways until they came to a sinkhole to the side of a highway.
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> The Crew Leader was the supervisor with respect to the work to be performed on May 22, 2018. He was a Transportation Operator III. He could not hire or terminate employees. He directed where the crew would go and what tasks

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.
[2] Decision of Hearing Officer, Case No. 11317 ("Hearing Decision"), May 29, 2019, at 2-3.

they would perform at each job site. He could assign crew members to work trucks. He could determine when the crew took a lunch break or other breaks. The Agency expected Grievant to follow the instructions of the Crew Leader while working on the crew. Grievant understood he was supposed to follow the instructions of the Crew Leader.

Mr. H's wife worked at a Department of Corrections Facility. At some point, she called and spoke with Mr. H. At approximately 11:20 a.m., Mr. H approached the Crew Leader and Grievant and said there was an emergency and he needed to go to the DOC Facility. He asked the Crew Leader if they could drive to the DOC Facility since they were close to the DOC Facility. The Crew Leader wanted to help Mr. H address an emergency so he decided they would drive to the DOC Facility. Grievant did not state he objected to the Crew Leader's decision.

The three men travelled approximately three or four miles to the DOC Facility. The DOC Facility included meat packing equipment. The trip took between eight and ten minutes. They arrived at approximately 11:30 a.m. They exited the State vehicle. Mr. H met his wife and gave her money. Grievant began eating his lunch but did not finish. He considered the stop to be his lunch break. Mr. H's wife offered to give the three men a tour of a portion of the facility. The three men walked down a hallway, looked at several machines and the food product made by those machines. The tour took approximately 15 minutes. They returned to the State vehicle and drove to the sinkhole area. The men left the sinkhole, went to the DOC Facility, and returned to the sinkhole in approximately 30 to 35 minutes.

The Crew Leader drove the State vehicle to another job site. The trip took approximately 15 minutes. They observed another crew at the job site finishing up work. The Crew Leader, Grievant, and Mr. H remained at the job site for approximately five minutes.

The Crew Leader decided he wanted to take a lunch break. He "spoke up" and said he wanted to go to Burger King because "I like Burger King." He drove the State vehicle to the Burger King. The Crew Leader and Mr. H went inside Burger King. Grievant remained with the State vehicle. He left the State vehicle and went inside a local Grocery Store to use the restroom. Grievant returned to the State vehicle. He waited for the two other men to finish their lunches. He ate the rest of his sandwich that he started eating when he was at the DOC Facility. Once the Crew Leader and Mr. H returned to the State vehicle, they travelled to other job sites and ultimately returned to the headquarters to end their shifts.

The Agency issued the Crew Leader and Mr. H Group I Written Notices.

On August 10, 2018, the agency issued to the grievant a Group I Written Notice of disciplinary action. Citing DHRM Policies 1.60 and 1.25, the Written Notice addressed "abuse of state time."[3] Specifically, the Written Notice charged:

> [Y]our assignment [on May 22, 2018] was to fulfill job orders and resolve complaints (i.e. filling potholes, opening pipes, etc.) . . . . [Y]ou and two other employees were witnessed visiting and taking a tour for 30 minutes or more at the [DOC Facility.] This visit was conducted on work time, outside of your lunch break.
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> Your actions on May 22, 2018 demonstrate a misuse of State time. . . . [R]ather than fulfilling your job responsibilities for the Commonwealth, you took a trip to the [DOC Facility] and took a tour on work time.[4]

The grievant timely grieved the Written Notice, and a hearing was held on May 9, 2019.[5] In a decision dated May 29, 2019, the hearing officer determined that the disciplinary action issued to the grievant "must be reversed" because "the [a]gency ha[d] not shown that Grievant abuse[d] state time . . . ."[6]

The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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 argues that the hearing officer erred in rescinding the Written Notice because the grievant made a "conscious decision" and "willingly chose" to go to the DOC Facility, wrongly calling the visit his lunch break instead of protesting or objecting.[10] More generally, the agency invokes its discretion to determine what conduct by its employees constitutes abuse of state time.[11]

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[3] Agency Ex. 1 at 1.
[4] *Id.*
[5] Hearing Decision at 1.
[6] *Id.* at 5.
[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* Agency Request for Administrative Review at 4-5. To the extent that the agency interprets the hearing decision to include a determination that the grievant took (or believed he took) two authorized lunch breaks on May 22, 2018, EDR finds no such conclusion. On appeal, the agency contends that "a reasonable reading of the facts is

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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 this case, EDR concurs with the agency's position that it must "ensure its employees are using state time and resources in an appropriate manner."[16] Within the bounds of any applicable definitions or other guidance in agency or state policies, the agency has substantial discretion in determining whether an employee has devoted full effort to job responsibilities during work hours and has used state time and resources judiciously, as required by DHRM Policy 1.60. However, in cases involving discipline, the agency also bears the burden to show that the grievant engaged in the behavior charged on the Written Notice,[17] that this behavior constituted misconduct, and that the discipline for such conduct was consistent with law and policy. Because this burden lies with the agency, a hearing officer's rescission of discipline does not necessarily signify that the grievant's conduct was proper as a general proposition.

Here, the hearing officer reasoned that, to support discipline for the misconduct in this case, the agency was required to prove that the grievant was "at fault"; that is, he "took an action that he should not have taken or failed to take an action that he should have taken."[18] Under this

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that the crew took its lunch break, together, when it stopped at the shopping center location after leaving the DOC [F]acility and after visiting another work crew. This was authorized by the crew lead and consistent with how the crew typically took its lunch breaks." *See id.* at 3. EDR agrees that this reading is reasonable, as well as consistent with both the Hearing Decision and the Written Notice, which made no reference to the shopping-center stop as a basis for discipline. Even assuming that the hearing officer erroneously referred to either of the crew's stops as a "lunch break," EDR finds that such phrasing was immaterial to the hearing officer's analysis and, thus, was harmless error, if any at all.

[11] *See* Agency Request for Administrative Review at 6-9.

[12] Va. Code § 2.2-3005.1(C).

[13] *Grievance Procedure Manual* § 5.9.

[14] *Rules for Conducting Grievance Hearings* § VI(B).

[15] *Grievance Procedure Manual* § 5.8.

[16] Agency Request for Administrative Review at 7.

[17] *See Rules for Conducting Grievance Hearings* § VI(B) ("In all circumstances, . . . the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge. . . . Thus, a hearing officer's review is limited to the conduct charged in the Written Notice and Attachments.").

[18] Hearing Decision at 4. On appeal, the agency does not appear to dispute this standard for discipline, although it argues that it must be able to impose discipline that ensures the "judicious use of employee time and employee

standard, at a hearing to determine whether discipline for alleged abuse of state time was warranted, the agency was required to show by a preponderance of the evidence that it reasonably determined that the grievant, through his conduct cited on the Written Notice, was at fault for abusing state time. Ultimately, the question addressed on administrative review is not whether EDR agrees with the hearing officer's decision, but whether facts in the record support that decision.

Here, the hearing officer concluded, based on appropriate factual determinations, that the agency failed to prove that it reasonably determined that the grievant, through his own conduct, abused state time:

> Grievant is not responsible for the poor decisions made by the Crew Leader. Grievant was not responsible for any statements Mr. H made to the Crew Leader. . . . The Crew Leader decided the three men would go to the DOC Facility. Grievant followed the Crew Leader's directive. Grievant was not obligated to protest the Crew Leader's decision. Grievant knew the Crew Leader had the authority to determine where the crew travelled.
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> . . . Grievant did not abuse State time by leaving the sinkhole and travelling to the DOC Facility. . . . The Agency has not established that Grievant was responsible for delaying the departure from the DOC Facility in order to take the tour. . . . With respect to how Grievant used his time [at the DOC Facility], it did not matter whether he took the tour or remained in the State vehicle. In either case, this time was not productive work. The Agency has not shown that Grievant abuse[d] State time by taking a tour of the DOC meat-packing facility.[19]

On review of the hearing record, EDR finds support for the hearing officer's conclusion that, considering all the facts and circumstances, the agency failed to prove that the grievant's behavior put him at fault for failing to use state time judiciously.[20] The Written Notice makes clear that the grievant's job assignments on the day in question were to "fulfill job orders and resolve complaints."[21] As to the manner and means of completing those assignments, multiple agency witnesses testified to the effect that the Crew Leader acted in a supervisory capacity and was responsible for directing the crew's activities during work hours, including deciding that the crew would go first to the sinkhole and then to the DOC Facility.[22] The Crew Leader himself testified that he made the decision to drive the crew from the sinkhole to the DOC Facility, based on his understanding that Mr. H had an emergency need to meet his wife there, and that he likely

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management of their workday while they are on the road doing their jobs." Agency Request for Administrative Review at 8.

[19] Hearing Decision at 4-5.

[20] *Id.* at 4, 5.

[21] Agency Ex. 1 at 1.

[22] Hearing Recording at 19:30-20:15, 1:00:30-1:01:40, 1:44:35-1:45:50 (testimony by the Crew Leader, District Engineer, and Maintenance Operations Manager). For example, the crew was at the sinkhole just prior to their trip to the DOC Facility because the Crew Leader "wanted to look at it," even though they had no work assignments for that location and the Crew Leader's own supervisor testified that the crew "had no business going over there anyway." *Id.* at 15:30-16:05, 1:44:05-1:44:30.

would have simply left the grievant at the sinkhole on the side of the road if the grievant had objected to the trip.[23] These facts support the hearing officer's determination that the grievant's failure to use state time judiciously was not attributable to staying with the Crew Leader and/or his mode of transportation en route to the DOC Facility.

Likewise, the record supports the hearing officer's conclusion that the agency did not demonstrate by a preponderance of the evidence that the grievant "was responsible for delaying the departure from the DOC Facility in order to take the tour."[24] 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. Here, no testimony established that the grievant made any particular contribution to a decision for the group to enter the DOC Facility.[25] Based on the Crew Leader's account, the hearing officer found that "all three men" entered the DOC Facility, with nothing to indicate that the grievant desired, agreed to, or encouraged the tour "despite the wishes of the other two men"[26] – one of whom acted in a supervisory role over him. Accordingly, it was reasonable for the hearing officer to determine that the agency did not carry its burden to prove that the grievant was responsible, through his conduct, for abusing state time during the crew's venture into the DOC Facility.

The hearing officer's conclusions are not undermined by the grievant's failure to protest, object to, or report the crew's visit to the DOC Facility. The hearing officer reasoned as follows:

> [If Grievant] had remained on the side of the road near the sinkhole, he could have been in danger from vehicle traffic. Also, it is not clear what work he could have done while the two other men were away from the sinkhole. . . .
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> The Agency argued that Grievant could have remained with the State vehicle instead of taking the tour. If Grievant had remained with the State vehicle, Grievant most likely would have sat in the State vehicle without doing any productive work. With respect to how Grievant used his time, it did not matter whether he took the tour or remained in the State vehicle. In either case, his time was not productive work.[27]

These findings are material to the issue of whether the grievant was responsible for abuse of state time – the misconduct charged on the Written Notice before the hearing officer.[28] The agency does not appear to dispute the hearing officer's determination that, given the Crew Leader's decisions, the grievant could not feasibly perform his regular authorized job duties during the work time the crew devoted to the DOC Facility trip. Instead, the agency argues that it reasonably attributed responsibility for abuse of state time to the grievant, regardless of his

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[23] *Id.* at 27:50-28:30, 34:15-34:25.
[24] Hearing Decision at 5.
[25] On this issue, the Crew Leader testified only that Mr. H's wife's supervisor at the DOC Facility "okayed us, said it was ok to go in there, so we went into the facility." Hearing Recording at 18:25-18:44.
[26] Hearing Decision at 4-5.
[27] *Id.*
[28] *See* Agency Request for Administrative Review at 3.

ability to use his time productively, based on his failure to protest, speak up against, or in any way report the crew's activities.[29] But the Written Notice did not cite failure to object to or report the trip. Further, even assuming that the grievant was on sufficient notice that his failure to object or report was at issue (which is not apparent from the Written Notice), the agency still bore the burden to prove at the hearing that the grievant's acts or omissions constituted the misconduct it identified on the Written Notice: abuse of state time.[30] While it may have been reasonable for the agency to infer from the grievant's lack of protest that he supported or ratified the use of work time to go to the DOC Facility, the hearing officer was required to consider the evidence *de novo*. Thus, he was not bound to make the same inference the agency did about whether the grievant agreed with the trip, particularly in the absence of corroborating testimony.[31] 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.[32]

Having reviewed the hearing record and considered the totality of the circumstances in this case, EDR cannot find that the hearing officer's conclusion was not based on evidence in the record and the material issues of the case, or that it was otherwise out of compliance with the grievance procedure. Thus, EDR will not substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR 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.[33] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

[29] *Id.* at 4-5 (the grievant "was not an inexperienced worker who could not speak up against something he did not want to do."). Although the agency argues that the hearing officer improperly "ma[de] th[e] argument for [the grievant]" that the grievant did not want to go on the trip or tour, EDR is unable to locate such an argument in the hearing decision. *Id.* at 5. Rather, the hearing officer found that the agency had not demonstrated that the grievant was obligated to protest the Crew Leader's decision in order to avoid abuse of state time, or that he was otherwise responsible for the crew's activities. Hearing Decision at 4, 5.

[30] As the hearing officer noted, the agency "did not charge Grievant for failing to request leave for that day." Hearing Decision at 5, n.5. To the extent that the agency seeks to uphold its discipline on grounds that the grievant failed to report misconduct as required under Policy 1.60, the Written Notice gave no indication that the agency intended to charge the grievant with a failure to make such report, rather than simply with failing to use state time judiciously. *See* Agency Request for Administrative Review at 5; Agency Ex. 1 at 1. While the agency has substantial discretion to decide what constitutes judicious use of work time by its employees, it must nevertheless put the grievant on sufficient notice of his alleged misconduct and, if the matter proceeds to hearing, prove its cited misconduct by a preponderance of the evidence.

[31] The grievant's testimony demonstrated that, at the time of the DOC Facility trip directed by the Crew Leader, he was willing to consider it as his lunch break. *See* Hearing Recording at 1:27:35-1:32:40. However, he did not testify as to whether he personally supported or agreed with the trip or tour as a use of work time.

[32] *See*, *e.g.*, EDR Ruling No. 2019-4938.

[33] *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]

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