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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2020-4957
August 5, 2019

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11333. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11333, as found by the hearing officer, are as follows:[2]

> The Virginia Department of Transportation [the "agency"] employed Grievant as a Transportation Operator II at one of its facilities. He began working for the Agency in 2017. His customary work shift was from 7 a.m. to 3:30 p.m. except when he was called to assist with snow removal. Grievant received an overall rating of Contributor on his 2018 performance evaluation.
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> The Agency has a system to enable it to locate and track the movement of its trucks.
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> On December 10, 2018, Grievant was assigned Truck 18. He went to the Store parking lot. Mr. W was operating a tractor to clear snow from Store's parking lot. Mr. W called the Supervisor at 6:35 a.m. and told Supervisor that an Agency truck was in the Store parking lot preventing Mr. W from pushing snow off the parking lot. Mr. W said that the Agency truck's spreader was running and

[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. 11333 ("Hearing Decision"), July 2, 2019, at 2-3.

throwing salt and sand on the building and in the parking lot. Mr. W told the Supervisor that Mr. W tried to awaken the driver but was unsuccessful.

At 6:37 a.m., the Supervisor called Grievant but Grievant did not answer his phone. At 6:40 a.m., the Supervisor called the Manager and asked the Manager to check on Grievant at the Store while the Manager was on his way to work.

At approximately 6:45 a.m., the Manager arrived at the Store parking lot. The Manager approached Grievant's truck and observed Grievant slumped forward in his seat with his head on the dashboard. The salt/abrasive spreader was running and approximately 400 or 500 pounds of salt was in a pile in the parking lot. The pile was approximately 2.5 feet high and 9 feet wide. The Manager beat on the truck door and yanked on the door handle. The Manager began reaching into his tool box to get a hammer to knock out the window because the Manager thought Grievant might be having a medical emergency. Before the Manager could break the window, Grievant started moving around in the truck and opened the door.

On December 11, 2018, Grievant was assigned Truck 18. H[e] drove the truck to a Lumber Yard. He was tired and had not had a break. He got out of the vehicle and walked around in an attempt to be more alert. He got back into the vehicle and "passed out."

On December 11, 2018 at approximately 7:30 a.m., the Supervisor was reviewing SWAS to determine where Agency's trucks were located. He noticed that Truck 18 had been in the same location for a while. The Supervisor called Grievant at 8:04 AM. Grievant said he was almost back at the Lot. Grievant arrived at the Lot at approximately 8:20 a.m. and then left the Facility.

On December 14, 2018, a Citizen called the area headquarters and spoke with the Manager about a truck at the Lumber Yard that was running and keeping her awake. The Citizen said the truck was running from 6 a.m. to 8 a.m. making her dogs bark and keeping her awake. The Manager contacted another employee to check on the location of Truck 18. The employee confirmed that Grievant's truck was idle from approximately 5:57 a.m. until approximately 7:55 a.m.

Grievant had several health issues including a condition of sleep disturbance. He did not have sleep apnea. He was returned to work full duty on November 26, 2018.

On February 8, 2019, the grievant was issued a Group III Written Notice with removal for sleeping during work hours.[3] The grievant timely grieved the disciplinary action and a hearing was held on June 12, 2019.[4] In a decision dated July 2, 2019, the hearing officer determined that "the Grievant's removal must be upheld" because the agency had "presented

[3] *Id.* at 1.
[4] *See id.*

sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours."[5] The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary action.[6] 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 . . . ."[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 either 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.

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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.

In the hearing decision, the hearing officer assessed the evidence presented by the parties as follows:

> On December 10, 2018, Grievant was operating an Agency truck and supposed to be working. He fell asleep and remained asleep even though Mr. W and the Manager attempted to wake him. On December 11, 2018, Grievant drove his

[5] *Id.* at 4.
[6] *Id.* at 4-5.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.

> truck to the Lumber Yard parking lot and "passed out." Grievant was asleep while he was supposed to be working . . . .
>
> Grievant argued that the District Safety Manager told employees to pull over and nap if they feel tired and unsafe to drive. The District Safety Manager denied saying employees could pull over and [sleep]. The Hearing Officer does not believe Grievant was authorized to sleep during work hours.[14]

Based on this analysis, the hearing officer determined that the agency had "presented sufficient evidence to support the issuance of a Group III Written Notice," and that, "[u]pon the issuance of a Group III Written Notice, an agency may remove an employee."[15] In his request for administrative review, the grievant contends that "[t]here is no clear explanation from [the hearing officer] in his brief recitation of the facts or the decision to explain how he reconciled" conflicting evidence about whether employees in the grievant's work area were allowed to nap if they were fatigued and that agency management condoned this practice.[16]

Having reviewed the hearing record, EDR finds that the hearing officer appears to have considered the grievant's evidence about this issue, but found that it was not credible.[17] At the hearing, for example, the grievant and one of his witnesses testified that the District Safety Manager told employees they could take a nap at work if they were fatigued.[18] They also testified that the Manager and the Supervisor approved of this practice and identified several other employees who had allegedly slept during work hours.[19] The District Safety Manager, on the other hand, testified that she has never told employees they could take a nap, and described a meeting at which she told employee to pull over, walk around, and/or call their supervisor for assistance if they were fatigued during operations.[20] The Supervisor and the Manager stated that they were unaware of any employees sleeping during work hours.[21] To the extent any aspect of the grievant's evidence was not specifically addressed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to particular testimony and/or other evidence does not necessarily constitute a basis for remand. In addition, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. Here, it would appear that the hearing officer did not address all of the grievant's evidence in detail because he did not find it to be credible and/or persuasive on the issue of whether the District Safety Manager, the Supervisor, and/or the Manager told employees they could nap during work hours or approved of that practice.

In summary, there is evidence in the record to support the hearing officer's conclusion that the grievant was asleep during work hours on two consecutive shifts, and that his conduct supported the issuance of a Group III Written Notice.[22] While the grievant may disagree with the

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[14] Hearing Decision at 4.
[15] *Id.*
[16] Request for Administrative Review at 1-2.
[17] *See* Hearing Decision at 4.
[18] Hearing Recording at 2:37:07-2:40:49 (Grievant's Testimony), 3:16:25-3:18:07 (Mr. J's testimony).
[19] *Id.*at 2:43:43-2:45:12 (Grievant's Testimony), 3:18:11-3:20:25 (Mr. J's testimony).
[20] *Id.* at 1:01:45-1:02:52 (District Safety Manager's testimony).
[21] *Id.* at 18:13-18:22, 35:09-35:19 (Supervisor's testimony), 48:49-49:00 (Manager's testimony).
[22] Hearing Decision at 3-4; *see* Agency Ex. 1 at 3-4; Agency Ex. 5 at 3; Agency Ex. 6; Agency Ex. 10 at 22-23.

hearing officer's decision, there is nothing to indicate that his consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. 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. Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the decision on this basis.

Mitigation

In addition, the grievant challenges the hearing officer's decision not to mitigate the Written Notice and/or his termination. More specifically, the grievant contends that other similarly situated agency employees slept during work hours and either were not disciplined or were disciplined less harshly than he.[23] The grievant also disputes the hearing officer's determination that he "failed to understand the significance of his mistake on December 10, 2018 and repeated that behavior on December 11, 2018,"[24] arguing that the hearing officer improperly "dr[ew] conclusions about the state of mind of the Grievant as opposed to the actual facts placed in evidence."[25]

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]."[26] The *Rules for Conducting Grievance Hearings* (the "*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."[27] 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, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[28]

Thus, the issue of mitigation is only reached if the hearing officer 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 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

[23] Request for Administrative Review at 2.
[24] Hearing Decision at 4.
[25] Request for Administrative Review at 2.
[26] Va. Code § 2.2-3005(C)(6).
[27] *Rules for Conducting Grievance Hearings* § VI(A).
[28] *Id.* § VI(B)(1).

discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[29] EDR will review a hearing officer's mitigation determination for abuse of discretion,[30] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[31] In his mitigation analysis, the hearing officer found that the "Grievant presented evidence of other employees who received disciplinary action for sleeping but were not removed from employment."[32] He went on to conclude, however, that "the Agency ha[d] presented aggravating factors that justif[ied] not reducing Grievant's disciplinary action."[33] In particular, the hearing officer noted that "[t]he Grievant was caught sleeping on December 10, 2018 and knew that his behavior was unacceptable," yet he repeated the behavior on the following night, December 11, 2018.[34]

It does not appear from EDR's review of the hearing record that the evidence is sufficient to demonstrate that the agency's treatment of the grievant was different from other employees who may have been similarly situated to him. At the hearing, the grievant argued that two other agency employees received Group III Written Notices for sleeping during work hours, but were not terminated.[35] The grievant and one his witnesses further testified that management was aware that employees slept during work hours and did not discipline employees for it.[36] As the hearing officer noted, however, there was an "aggravating factor" about the grievant's behavior that justified termination rather than a lesser level of punishment; namely, that he was "caught sleeping on December 10, 2018" and then "repeated that behavior on December 11, 2018."[37] EDR has not reviewed evidence to suggest that the two comparator employees who received Group III Written Notices and were not terminated were caught sleeping on two consecutive shifts, nor is there evidence in the record to show that other employees who allegedly slept during work hours did so under circumstances that were similar to those for which the grievant disciplined. In short, there is a factual basis for the hearing officer's conclusion that the comparator employees cited by the grievant were not similarly situated to him, with the result that mitigation was not warranted here.

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[29] 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).

[30] "'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.*

[31] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[32] Hearing Decision at 4.

[33] *Id.*

[34] *Id.*

[35] *See* Agency Ex. 12.

[36] Hearing Recording at 2:43:43-2:45:12 (Grievant's Testimony), 3:18:11-3:20:25 (Mr. J's testimony).

[37] Hearing Decision at 4-5.

Moreover, and although the grievant argues that the hearing officer improperly made "conclusions about [his] state of mind,"[38] the hearing officer's characterization of the grievant's behavior is consistent with the facts, which show that the grievant was asleep during work hours on two consecutive shifts.[39] Whatever the grievant's state of mind, the hearing officer determined that he engaged in the same misconduct—sleeping at work—a second time on December 11, 2018, after the Manager found him asleep on December 10, 2018, and that these facts weighed against mitigation of the disciplinary action and the grievant's termination.

In conclusion, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the actual evidence in the record. Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer, and EDR cannot conclude that the hearing officer's decision not to mitigate constitutes an abuse of discretion here. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[40] In this case, there does not appear to have been sufficient evidence in the record regarding inconsistent discipline of similarly situated comparator employees that the hearing officer may have relied upon to support mitigation. Accordingly, EDR cannot conclude that his mitigation analysis was flawed in this respect and declines to disturb the decision on this basis.

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.[41] 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.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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[38] Request for Administrative Review at 2.
[39] *E.g.*, Agency Ex. 1 at 3-4; Agency Ex. 5 at 3; Agency Ex. 6.
[40] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[41] *Grievance Procedure Manual* § 7.2(d).
[42] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).