EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health & Developmental Services
Ruling Number 2020-5111
July 9, 2020

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11478. For the reasons set forth below, the matter is remanded for reconsideration and clarification by the hearing officer.

FACTS

The relevant procedural background and facts in Case Number 11478, as set forth by the hearing officer, are as follows:[1]

> . . . [T]his matter was continued generally at the Grievant's request until March, 2020. I instructed the Grievant to notify me when she was ready to proceed to hearing on or after March 1, 2020. Having heard nothing from the Grievant, I sent an email to the parties on March 24, 2020. In that email, inasmuch as the COVID-19 issue had now intensified with a state isolation policy in place, I set forth several alternatives with how to handle this matter. I requested input from the parties as to how they wished to proceed and I inquired of the Grievant as to whether she intended to move forward with this matter as I had not heard from her on or about March 1, 2020, as previously instructed. I instructed the parties to respond on or before April 3, 2020.
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> Having not heard from the Grievant, on April 3, 2020, I sent an email to the parties setting forth that the issues raised by COVID-19 had simply become more serious and more complicated and that I did not see how a hearing in the normal sense could simply take place. After setting forth my reasoning, I directed that this matter be submitted to me in writing. . . .
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> On April 6, 2020, the Agency filed with me an objection to conducting the hearing as I had set forth in my prior email. I responded to the Agency on April 6, 2020, indicating that I saw no alternative to having the hearing that I felt was either

[1] Decision of Hearing Officer, Case No. 11478 ("Hearing Decision"), May 15, 2020, at 3-6 (citations omitted).

safe or secure. That email was copied to the Grievant, also asking her if she would be agreeable to a 90 day continuance in an attempt to satisfy the Agency's objection and in the hope that 90 days subsequent to April 6th, the COVID-19 issue would have relented in some fashion. In that email, I also pointed out to the Grievant that we had sent her a scheduling email on April 3, 2020, by the internet, by regular mail, and that my paralegal had made a phone call indicating to her that these had been sent.

On April 6, 2020, the Grievant acknowledged receipt of the scheduling email of April 3, 2020. The Grievant indicated in her email to me that she was waiting to discuss this matter with counsel.

During the afternoon of April 9, 2020, one day prior to the deadline date for submission of evidence in this matter, my office received a phone call from an attorney indicating that she had been retained by the Grievant and would be representing the Grievant in this matter. I instructed my paralegal to call the attorney and inform her that I would not require her to file all documentary and witness evidence on behalf of her client on April 10, 2020, as I recognized that would impose a near-impossibility upon her. Counsel for Grievant was provided with the name and email address for the Agency Representative and instructed to copy him on all correspondence.

On April 10, 2020, the Agency timely filed its exhibits pursuant to the original scheduling order. On April 13, 2020, I sent to Grievant's counsel the email string that contained the original deadlines and asked her when she would be prepared to comply with the production of documentary evidence, but indicated that evidence would need to be produced no later than Wednesday, April 29, 2020. On April 16, 2020, Grievant's counsel responded and indicated that she would file all necessary documents by April 29, 2020. Pursuant to that email, I established a new scheduling order so that documentary evidence and witness statements would be due on or before April 29, 2020. I extended rebuttal evidence and objections until May 6, 2020, and my ruling on any objections to May 8, 2020. I also indicated, if anyone desired, I would accept closing arguments on or before May 11, 2020.

Sometime after 8:30 p.m., on April 29, 2020, Grievant's counsel filed documents with me. This was approximately 3 ½ hours after the established 5:00 p.m. on that date, and I would note that Grievant's counsel did not copy the Agency Representative. Later that same evening, I forwarded the documents I had been sent by Grievant's counsel to the Agency Representative.

On May 1, 2020, the Agency Representative filed an objection to my accepting the documents filed on behalf of the Grievant, arguing that those documents were not timely filed. . . .

> It was unclear to me if the Agency Representative had copied the Grievant's counsel with his objection to Grievant's evidence. On May 1, 2020, I forwarded that objection to Grievant's counsel. No further objections were filed with me, nor was any rebuttal evidence offered to me on or before May 6, 2020. Grievant's counsel never offered any reason for the late filing of documentary evidence and/or witness statements, nor did she request a continuance for filing. On May 8, 2020, I ruled that Grievant's documentary evidence and witness statements were in fact not timely exchanged consistent with hearing officer's orders, that I hereby excluded the entirety of that evidence. I would note that, subsequent to that ruling, I have heard nothing from Grievant's counsel.
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> . . . .
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> The Grievant submitted a notebook containing Tabs A-N, and a witness affidavit for the Grievant. That notebook was objected to by the Agency, and it was rejected in its entirety inasmuch as it was not timely filed pursuant to specific instructions by the hearing officer.
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> It appears that the issue at hand involved the restitution amount of $3,300.00. It appears that the Grievant was charged with a felony on June 16, 2017. Subsequently, from April of 2018 through October of 2019, this matter worked its way through the Court system of the State of Maryland. It further appears that on September 5, 2018, the Grievant pled guilty before this court and the disposition was Probation for Judgment. Finally, it is documented that restitution was made, and that on October 11, 2019, an Order was entered ending this matter.

Based on this procedural and factual background, the hearing officer issued a decision, dated May 15, 2020, upholding a Group III Written Notice with termination that the agency had issued to the grievant on November 15, 2019.[2] Citing DHRM Policy No. 1.60, *Standards of Conduct*, and its own policy DI506, *Criminal History Checks and Background Verification Requirements*, the agency specifically charged that the grievant had "failed to report . . . the pending charge of Theft from October 2017, her guilty plea and subsequent finding of Probation Before Judgment . . . in September 2018."[3] The hearing officer concluded that the grievant had failed to report the charge, plea, probation, and restitution during the time that she was an employee and, as such, she "did not comply with DI506."[4] Further, the hearing officer concluded that, in apparently consulting counsel on whether to report, the grievant was "seeking a reason to avoid compliance" with her employer's requirements.[5] The hearing officer did not identify any mitigating circumstances.[6]

The grievant now appeals the hearing decision to EDR.

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[2] *See id.* at 1.
[3] *Id.*
[4] *Id.* at 7.
[5] *Id.*
[6] *Id.*

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.

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.

Exclusion of Grievant's Evidence

While procedural determinations are necessarily within the hearing officer's discretion,[14] the hearing officer must exercise that discretion in a manner consistent with the grievance procedure. EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure.[15] EDR will generally disturb a decision within the hearing officer's discretion only if (1) it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule, and (2) the objecting party can show prejudice.[16] In this case, the grievant has demonstrated prejudice in that the hearing officer declined to consider any of her evidence, including her sworn statements, and subsequently ruled in favor of the

[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] 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.
[14] *E.g., Grievance Procedure Manual* § 5.5.
[15] *See* Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).
[16] *Cf.* EDR Ruling No. 2013-3450; EDR Ruling No. 2012-3067.

agency.[17] As such, EDR will assess whether the hearing officer abused his discretion or otherwise violated a grievance procedure rule in deciding the merits solely on the agency's written evidence.

According to the hearing decision, the hearing officer proposed to the parties on April 3, 2020, that they conduct the hearing fully in writing, due to a public health emergency that prevented in-person proceedings for the foreseeable future.[18] Neither the grievant nor the agency initially agreed to this proposal; the following business day, the agency proposed to continue the hearing until live proceedings could be held in person or by teleconference.[19] For her part, the grievant indicated she was seeking counsel on the matter.[20] Later the same week, however, an attorney for the grievant entered her appearance and ultimately agreed to submit written evidence by April 29, 2020.[21] The hearing officer then scheduled an additional week for the submission of rebuttal evidence and another five days for closing arguments.[22] The grievant's counsel submitted her written materials to the hearing officer shortly before 9:00 p.m. on April 29; the hearing officer forwarded these to the agency later on the same date.[23]

Due to the changes to normal practices brought on by the ongoing public health emergency, EDR has expressed that similar adjustments to normal hearing practices to allow for missteps that may occur along the way are reasonable and required in this environment.[24] While EDR has given hearing officers guidance about alternatives to standard in-person hearings, the selected alternative should not prejudice either party or materially impact the result.[25] Here, assuming without deciding that the hearing officer could properly encourage the parties to completely forego live proceedings, it is clear that this determination made pre-hearing procedures much more consequential than they would otherwise be. According to the grievant's counsel, she failed to notice the 5:00 p.m. deadline that appeared at the bottom of the hearing officer's original scheduling instructions.[26] She claims that she subsequently did not receive the agency's objection to the grievant's exhibits or the hearing officer's decision to exclude them because her email system "flagged" the hearing officer's address as external.[27] Had the same events occurred prior to live proceedings, the hearing officer could have explored via argument whether exclusion was appropriate and, in any event, the grievant would still have had the opportunity to question witnesses and present her own testimony for the hearing officer's consideration. But with any method of live hearing abandoned, the result of a four-hour delay in submitting exhibits was that the grievant lost her opportunity even to testify on her own behalf.[28]

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[17] Hearing Decision at 5, 8.
[18] *Id.* at 3-4. According to the hearing decision, this proposal included a submission deadline of 5:00 p.m. for all scheduling dates. *Id.*at 4.
[19] *Id.*; Hearing Officer Ex. A, at 1-2.
[20] Hearing Decision at 4.
[21] *Id.* at 4-5.
[22] *Id.* at 5.
[23] *Id.*; Hearing Officer Ex. A, at 2.
[24] *See* EDR Ruling No. 2020-5108.
[25] *Grievance Procedure Manual* § 5.2.
[26] *See* Grievant's Request for Administrative Review.
[27] *See id.*
[28] The grievant's testimony was reflected in an affidavit among the submissions apparently excluded in their entirety from the evidence to be considered by the hearing officer. Hearing Decision at 4.

Failing to adhere to a hearing officer's scheduling instructions is an issue of noncompliance with the grievance process. However, the reasons why such situations occur are not all equal, and a sufficiently flexible approach is warranted to address them. Here, the grievant's representative appears to have mistaken the established submission deadline as only a date, rather than a date *and time*; the representative also apparently submitted her exhibits only to the hearing officer and not to the agency. While EDR does not excuse this failure to carefully review and comply with the hearing officer's instructions in their entirety, the noncompliance appears to have been relatively minor and quickly cured. Indeed, the agency noted no prejudice or burden it suffered due to receiving the submissions not at 5:00 p.m. but later that night,[29] nor did the hearing officer reference any administrative burden in his decision.

In the absence of any prejudice apparent from the record, the hearing officer's decision amounts to a sanction for the grievant's procedural noncompliance. The *Rules for Conducting Grievance Hearings* provide guidance to hearing officers in ordering sanctions, specifically requiring consideration of the "seriousness of the conduct," including whether "the conduct was in bad faith rather than a simple mistake."[30] Ultimately, "[t]he severity of any order of sanctions must be commensurate with the conduct necessitating the sanction."[31] Here, EDR perceives nothing to suggest that the grievant's representative's four-hour submission delay was more egregious than a mistake. On the other hand, the hearing officer's sanction was severe, resulting in a determination against the grievant without apparently considering any of her evidence. Accordingly, the hearing officer's exclusion of the grievant's evidence in full was not commensurate with the noncompliance, and therefore EDR finds that the hearing officer did not adhere to the grievance procedure in excluding the grievant's evidence. This matter must be remanded for reconsideration to include the grievant's evidence as submitted on April 29, 2020.[32]

Level of Discipline

The hearing officer upheld the agency's discipline at the Group III level, noting that a Group III Written Notice is appropriate for "acts of misconduct of such a severe nature that a first occurrence normally should warrant termination" and "offenses that . . . constitute illegal or unethical conduct . . . or other serious violations of policies, procedures or laws."[33] The hearing officer found that the grievant violated agency policy DI506 because she never "reported either the charge, her serving probation, her guilty plea, or the dismissal of this event subject to restitution

[29] In objecting to admission of the grievant's evidence, the agency relied on the absence of just cause for untimely submission, noting that the proceedings had already been delayed multiple times to accommodate the grievant. Hearing Officer Ex. A, at 3. EDR notes that, in her request for administrative review, the grievant's representative has explained that after she submitted the grievant's exhibits, she was out of the office due to the deaths of multiple family members. *See* Grievant's Request for Administrative Review. She maintains that she believed she was still in email contact but apparently missed some incoming messages during this time.
[30] *Rules for Conducting Grievance Hearings* § III(E).
[31] *Id.*
[32] This ruling does not prevent the hearing officer from considering other evidentiary objections the agency may raise on remand.
[33] Hearing Decision at 6; DHRM Policy 1.60, *Standards of Conduct*, at 9.

and probation."[34] Further, the hearing officer inferred from the grievant's consultation with a lawyer that she violated agency policy knowingly.[35]

Upon reconsideration of the parties' evidence, the hearing officer should clarify the scope of the conduct being upheld as a terminable violation. Agency policy DI506 requires employees to "notify their supervisors of any arrests, charges (to include pending), convictions, and motor vehicle violations . . . within **five workdays** of the event."[36] Here, according to the hearing decision, the grievant was charged on June 16, 2017; pled guilty on September 5, 2018, resulting in a disposition of "probation before judgment"; and had made restitution as of October 11, 2019.[37] However, the grievant's evidence indicates she was hired in June 2018 – after the charge, but before pleading guilty. The hearing decision is ambiguous regarding when the grievant's failure to report developments in the Maryland proceedings became a violation of DI506; the decision implies that the grievant was obliged to report the charge from 2017, but EDR is unable to determine which provision of the policy would have required her to do so, and when.[38]

This clarification is necessary because it goes not only to the misconduct charged but also the severity of the offense. For example, a prolonged and willful failure to report numerous developments in a criminal proceeding, on the one hand, could reasonably be considered a more serious violation than, on the other, a failure to report a plea in good-faith reliance on the advice of a personal attorney about the plea's import. The extent of the misconduct could also be relevant to mitigating and aggravating considerations in determining the reasonableness of the penalty.[39]

Finally, to the extent that the hearing officer inferred knowing or willful intent solely from the grievant's consultation with her attorney, EDR perceives no basis to support such an inference. Many agency policies implicate a variety of legal interests for state employees, for which they may reasonably seek knowledgeable counsel in order to understand their employment rights. Although an employee relies on such counsel at her own risk, doing so does not in itself suggest intentional disregard of policy, nor should it be viewed as an aggravating factor for disciplinary purposes. If anything, acting on the advice of counsel could potentially be considered a mitigating circumstance, if the hearing officer determined that reliance on such advice was relevant to the interests of fairness or other factors informing the reasonableness of the penalty.[40] Here, the grievant's submissions appear to include a letter from the attorney who represented her in the Maryland proceedings explaining that, despite the grievant's guilty plea, the result was not considered a criminal conviction in the state of Maryland. The possibility that agency policy uses the term "conviction" to encompass events that may not be legal convictions could also be a mitigating factor to be considered in deciding whether the penalty of a Group III Written Notice

[34] Hearing Decision at 7; Agency Ex. G, at 4.
[35] Hearing Decision at 7.
[36] Agency Ex. G, at 4 (emphasis in original).
[37] Hearing Decision at 6; *see* Agency Ex. D, at 2-4.
[38] *See* Hearing Decision at 6-7 (including the agency's definition of a "charge" and citing the policy's purpose "for a prospective employee . . . to notify the Agency" of events such as the grievant's charge, probation, guilty plea, and payment of restitution).
[39] It appears that the agency considered the seriousness of the offense as an aggravating circumstance in issuing the Group III Written Notice.
[40] *See Rules for Conducting Grievance Hearings* § VI(B)(2).

with termination was within the bounds of reasonableness. Thus, the hearing decision must be reconsidered as to the significance of the grievant's consultation with her lawyer and the resulting advice.

CONCLUSION

For the reasons set forth above, EDR remands the case to the hearing officer to reconsider this case in light of the grievant's evidence and affidavit as submitted on April 29, 2020. The hearing officer must notify the parties that the record is being re-opened for admission of the grievant's evidence, with sufficient time to receive and consider evidentiary objections by the agency and any response from the grievant. The hearing officer will also have discretion to accept rebuttal evidence and/or other evidence as may be deemed appropriate. After reconsideration of all the evidence in the record at that time, the hearing officer will issue a new decision that replaces the original decision issued on May 15, 2020.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[41] 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.[42] 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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

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