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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2020-5133
July 28, 2020

The grievant 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 11492/11510. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts in Case Number 11492/1150, as found by the hearing officer, are as follows:¹

The Virginia Department of Transportation [the “agency”] employed Grievant as an Assistant District Engineer at one of its facilities. He began working in the position in December 2016. He is a Professional Engineer. No evidence of prior active disciplinary action was presented during the hearing.

In June 2019, Central Office staff conducted a quality assurance review of the Program at the District where Grievant worked. The review identified several problems with the type of inspections performed, the frequency of those inspections, and the qualifications of staff completing the inspections. Item 3 regarded the failure to perform and/or document mechanical or electrical equipment inspections. Item 4 regarded failure to address comments. Grievant’s Unit was given responsibility to develop a corrective action plan to address the items of concern identified in the quality assurance review.

¹ Decision of Hearing Officer, Case No. 11492/11510 (“Hearing Decision”), June 30, 2020, at 2-4 (internal citations omitted).

The Supervisor made Grievant responsible for developing corrective actions plans relating to Items 3 and 4. The Supervisor met with Grievant several times to discuss the assignment.

On June 16, 2019, the Supervisor instructed Grievant to complete the action plans by July 8, 2019. Grievant did not comply with that instruction. Since Grievant did not submit the action plans by July 8, 2019, the Supervisor instructed Grievant to complete the action plans by July 16, 2019. Grievant did not submit the action plans by the second deadline. While the Supervisor was on vacation, the Acting District Engineer instructed Grievant to complete the action plans by August 20, 2019. Grievant did not meet that deadline. He submitted unsatisfactory actions plans on August 26, 2019. Grievant was asked to complete updated action plans but did not do so.

Grievant received an annual performance evaluation for the period October 25, 2018 to October 24, 2019. Grievant received an overall rating of Below Contributor. He acknowledged receipt of the annual evaluation on November 26, 2019.

On July 25, 2019, the Agency offered to have Grievant accept a demotion to an Engineer Senior position and report to an Assistant District Engineer. Grievant would have remained in the same payband. Grievant declined the demotion. That position was later filled and was not available to Grievant at the time of his removal.

On December 10, 2019, Grievant and the Supervisor met to discuss the re-evaluation process. Grievant received the re-evaluation plan and the Supervisor discussed the Agency's performance expectations for Grievant during the re-evaluation period.

During the re-evaluation period, the Supervisor scheduled weekly meetings with Grievant to discuss and review his assigned tasks and overall work performance. The Supervisor provided several written progress notes. In the progress reports, the Supervisor identified several performance issues:

1. Failure to adequately complete most of the re-evaluation plan tasks and the action plans related to the movable bridge program management as well as some of the tasks associated with inspection and budget/business management.
2. Continued issue of late paid invoices due to lack of oversight, which almost impacted the district's prompt payment act requirements in December 2019.
3. Rehired staff argumentation without obtaining necessary approval for alternate bridge sources and hence impacted the bridge section's budget.
4. Missed five mandatory re-evaluation weekly meetings without acceptable excuses. The dates were December 19, 2019, January 10, 2020, January 23, 2020, and February 13, 2020.

Grievant was notified by a letter dated February 25, 2020 that his performance during the re-evaluation period was Below Contributor. Grievant was placed on paid administrative leave until March 9, 2020 and given until March 2, 2020 to provide his response to the Agency's evaluation.

Agency managers reviewed the Agency's available positions and Grievant's skills and concluded that there were no other suitable positions for Grievant to fill. The Agency decided to separate Grievant from employment.

On January 8, 2020, Grievant filed a complaint with the DHRM Office of Equal Employment Services alleging discrimination based on veteran status.

On October 15, 2019, the grievant was issued a Group I Written Notice for unsatisfactory work performance because he failed to adequately complete the corrective action plans.² On March 9, 2020, following a three-month re-evaluation period, the agency removed the grievant from employment due to unsatisfactory work performance.³ The grievant timely grieved both actions, and a hearing was held to address these matters on May 12, 2020.⁴ On June 30, 2020, the hearing officer issued a decision upholding the Group I Written Notice and the grievant's removal for unsatisfactory work performance.⁵ The grievant has now requested administrative review of the hearing officer's decision.

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 The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ 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 essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁹ and to determine the grievance based "on

² Hearing Decision at 1; *see* Agency Exh. 1.

³ *Id.* at 1; *see* Agency Exh. 12, at 168-170 (termination letter).

⁴ The hearing was held remotely due to the ongoing pandemic. Hearing Decision at 1.

⁵ *See id.* at 7.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

the material issues and grounds in the record for those findings.”¹⁰ Further, in cases involving discipline, the hearing officer reviews the evidence *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.¹¹ 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.¹² 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.

First, the grievant alleges that the agency’s motivation for the issuance of the Written Notice and for his removal was discriminatory in nature. An agency witness denied these allegations at the hearing,¹³ and the hearing officer noted in the decision that “the grievant did not testify [or] . . . present any credible evidence to prove this argument.”¹⁴ Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Thus, there is nothing in the record that indicates the hearing officer’s findings regarding the discrimination allegations are an abuse of discretion or without basis in the record.¹⁵

The grievant further contends that the agency did not prove by a preponderance of the evidence that its actions were warranted and appropriate given the circumstances of his case. In support of this assertion, he argues that his supervisor was not in an appropriate position to initially evaluate his performance or re-evaluate his performance following the three-month re-evaluation period because 60% of the grievant’s duties were performed in districts outside of the supervisor’s management jurisdiction.¹⁶ Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where, as here, 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. In the hearing decision, the hearing officer found that the testimony of the grievant’s supervisor and other agency witnesses was credible and held that the agency had “presented sufficient evidence to support the issuance of a

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Recording 3:31:00-3:33:00 (assistant division administrator’s testimony).

¹⁴ Hearing Decision at 6.

¹⁵ The grievant also includes in his appeal an allegation that his request to have a witness present during meetings with his supervisor was a request for reasonable accommodation under the Americans with Disabilities Act. As stated above, the grievant did not present evidence to support a discrimination claim at hearing. The grievant has also not described the basis for his request for reasonable accommodation in his appeal. The hearing officer addressed this point in the decision, finding that the grievant had not presented a basis to support his request for a witness during the meetings. Hearing Decision at 6-7. EDR has no basis to disturb the hearing decision as to this issue.

¹⁶ The grievant also contends that he was denied access to agency property and networks while on administrative leave. He argues that his inability to access agency property and networks was in violation of DHRM policy and due process requirements. The only evidence in the record relevant to this argument shows that the grievant was notified that he would have limited access to the agency’s facilities and property while on paid administrative leave, which is a standard agency practice. *See* Agency Exh. 12, at 36. As a result, EDR finds no error in the hearing decision with respect to these issues that justifies remanding the case to the hearing officer.

Group I Written Notice . . . [and that the a]gency’s decision to remove Grievant following a three month re-evaluation must be upheld.”¹⁷

EDR has reviewed the hearing record and cannot find that the hearing officer’s determinations regarding the Group I Written Notice or the grievant’s removal following an unsatisfactory three-month re-evaluation are without basis in the record. For instance, the grievant’s supervisor testified that he issued the Group I Written Notice because the grievant failed to deliver a satisfactory corrective action plans on time despite two extensions of the deadline.¹⁸ The grievant’s supervisor explained that the grievant’s action plan was not sufficient because it did not match the format the grievant was expected to follow and did not include a detailed timeline for completing the work.¹⁹ Further, an agency witness stated that he believed the grievant’s supervisor appropriately re-evaluated the grievant as a “Below Contributor” following the three-month re-evaluation period.²⁰ This witness testified that several issues with the grievant’s performance continued throughout the three-month re-evaluation period despite the grievant being advised of the Agency’s expectations during that time.²¹ These issues included late payments, not responding to requests for information in a timely manner, and failure to adhere to instructions to stop staff augmentation.²²

Although the grievant may disagree with the agency’s assessment of his performance, 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.²³ Because the hearing officer’s findings in this instance 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, we decline to disturb the decision on this basis.

Mitigation

The grievant also appears to argue that the Group I Written Notice should have been mitigated because he was seeking assistance for personal trauma while participating in the performance improvement plan before he received the Written Notice. 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 the Department of Human Resource Management”²⁴ 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.”²⁵ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

¹⁷ Hearing Decision at 4, 7.

¹⁸ Hearing Recording at 53:00-55:05 (supervisor’s testimony); *see* Agency Exh. 1, at 4-6 (due process memorandum).

¹⁹ *Id.*

²⁰ Hearing Recording at 3:35:00- 3:37:00 (assistant division administrator’s testimony).

²¹ *Id.*; *see* Agency Exh. 12, at 31-32 (re-evaluation rating letter).

²² *Id.*; *see* Hearing Decision at 6-7.

²³ *See, e.g.*, EDR Ruling No. 2014-3884.

²⁴ Va. Code § 2.2-3005(C)(6).

²⁵ *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.²⁶

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.²⁷ EDR will review a hearing officer's mitigation determination for abuse of discretion,²⁸ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable. The hearing officer noted that the grievant "did not present evidence showing the disciplinary action should be reversed" and that "no mitigating circumstances exist[ed] to reduce the disciplinary action."²⁹ EDR finds no basis to conclude that hearing officer's decision not to mitigate on this basis was contrary to the evidence in the record or constitutes an abuse of discretion. Accordingly, EDR will not disturb the hearing officer's mitigation decision on this basis.³⁰

CONCLUSION AND APPEAL RIGHTS

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.³¹ Within 30 calendar days of a final hearing decision, either party may appeal the

²⁶ *Id.* § VI(B)(1).

²⁷ 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).

²⁸ "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.*

²⁹ Hearing Decision at 4-5.

³⁰ To the extent this ruling does not address any specific argument raised in the grievant's request for administrative review, EDR has thoroughly reviewed the hearing record and found no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

³¹ *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.³² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³³

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³² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³³ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).