Issue: Administrative Review of Hearing Officer's Decision in Case No. 10883; Ruling Date: December 21, 2016; Ruling No. 2017-4457; Agency: University of Virginia Medical Center; Outcome: Remanded to AHO.

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

ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2017-4457
December 21, 2016

The University of Virginia Medical Center ("the agency") 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 10883. For the reasons set forth below, the matter is remanded to the hearing officer.

FACTS

The relevant facts in Case Number 10883, as found by the hearing officer, are as follows:[1]

> The University of Virginia Medical Center employs Grievant as a Medical Assistant. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant wanted to take a vacation from June 10, 2016 through June 17, 2016. On December 28, 2015, she received approval for paid time off but the approval was contingent on Grievant having sufficient leave balances to cover the vacation period.
>
> Towards the end of May 2016, the Supervisor realized Grievant did not have sufficient leave balances to apply to Grievant's requested vacation. The Supervisor met with Grievant to discuss the leave balance deficit. At the conclusion of the meeting, the Supervisor told Grievant that she would "get back" with Grievant. Grievant assumed this meant the Supervisor would speak with Grievant in person.
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> On June 8, 2016 at 4:44 p.m., the Supervisor sent Grievant an email advising Grievant:
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> > You will not have enough PTO time saved up to take this entire time off and will be 18.82 hours short of the 40 hours needed to take this required time. You have been placed back on the schedule to work on Wednesday 6/15/2016 from 1400-1700, as well as Thursday and Friday 6/16/16-6/17/16 from 0830-1700. ***

[1] Decision of Hearing Officer, Case No. 10883 ("Hearing Decision"), November 23, 2016, at 2-3 (citation omitted).

> If you have any questions or concerns, please see me tomorrow afternoon. Let me know if there is anything I can do to help you.
>
> Grievant worked on June 9, 2016 but did not read the email. She was busy providing services to patients.
>
> Grievant received a telephone call from a coworker informing her that she had to report to work on June 15, 2016. Grievant became angry because the Supervisor had not called her as she had expected.
>
> On June 10, 2016, the Supervisor was meeting with a new employee in her office. Grievant called the Supervisor. The Supervisor answered the telephone call because she routinely received emergency calls and other calls. Grievant spoke with a disrespectful tone. Grievant spoke loudly. The Supervisor said "I don't need to be talked to like this." The Supervisor had to hold the telephone approximately six inches away from her ear because of Grievant's loud voice. Grievant began yelling questions at the Supervisor about the upcoming weekly work schedule. At one point, the Supervisor attempted to answer one of Grievant's questions but Grievant abruptly and rudely responded "I'm not done talking." Grievant continued with her aggressive, accusatory, and derogatory manner throughout the call. Grievant called the Supervisor "cowardly" and "sneaky". Grievant accused the Supervisor of trying to "undermine her". The Supervisor told Grievant that the telephone conversation needed to end because Grievant's behavior was inappropriate. The Supervisor told Grievant, "when you get back next week we will continue our conversation as to if this will be handled as an occurrence or not." Grievant hung up on the Supervisor before the Supervisor finished her entire sentence.

On June 29, 2016, the grievant was issued a Step Two Formal Performance Improvement Counseling ("disciplinary action") for her conduct during the June 10 phone call.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on November 22, 2016.[4] In a decision dated November 23, 2016, the hearing officer determined that the grievant's conduct was protected activity under the Code of Virginia and, accordingly, ordered the disciplinary action rescinded.[5] The agency 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

[2] Agency Exhibit 1.
[3] Agency Exhibit 2.
[4] *See* Hearing Decision at 1.
[5] *Id.* at 4.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[7]

The hearing officer correctly states that under Section 2.2-3000 of the Code of Virginia, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management."[8] Further, EDR has interpreted this statutory language to provide that engaging in such conduct is protected activity for purposes of a claim of retaliation.[9]

As EDR has held, however, this protection is not without exception.[10] For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise unreasonable under the circumstances.[11] The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.

In finding that the grievant's behavior on the phone call was protected, the hearing officer stated, "[i]t is not unusual for an employee with a strong opinion about his or her treatment by an employer and who is angry to express that opinion in a loud voice with intensity."[12] While that may be true, the protections afforded in Section 2.2-3000 of the Code of Virginia should not extend to expressions that are incompatible with the relevant standards of workplace decorum, such as, in most circumstances, yelling at a supervisor.[13] For example, while it may be understandable for an employee to express him/herself "with intensity" in certain situations, the limited protections provided by statute should not give employees license to be demeaning, verbally abusive or derogatory, or otherwise adopt a demeanor that would violate workplace expectations in the given circumstances, especially once advised by a supervisor that the employee's demeanor is unacceptable.[14]

In this case, the hearing officer found that the grievant adopted a "disrespectful tone," called the supervisor "cowardly" and "sneaky," displayed an "aggressive, accusatory, and derogatory manner," "abruptly and rudely" interrupted the supervisor, and hung up on the

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Hearing Decision at 3-4.
[9] *E.g.*, EDR Ruling No. 2009-2128; EDR Ruling Nos. 2008-1964, 2008-1970.
[10] EDR Ruling No. 2009-2128.
[11] *Cf.* Equal Employment Opportunity Commission Enforcement Guidance on Retaliation and Related Issues § II(A)(2)(b), http://www.eeoc.gov/policy/docs/retal.html (stating that protected acts under Title VII must be "reasonable" for the anti-retaliation provisions to apply).
[12] Hearing Decision at 4.
[13] It is notable that during the hearing in addressing the agency's advocate regarding the protections of Section 2.2-3000, the hearing officer used an employee who "scream[s]" or "yell[s]" as an example of conduct that would not be protected. Hearing Recording at 50:16 – 50:53. In such circumstances, while protection may not be provided by Section 2.2-3000 for an employee to yell at a supervisor, the specific facts of the interaction may provide excuse for such behavior so that it should not be disciplined under policy. For example, it might be considered understandable for an employee to raise his/her voice when confronted by a supervisor who has already adopted that tone or demeanor him/herself.
[14] The applicable workplace expectations of demeanor must be necessarily equally applicable to all members of the workplace, including management and non-management employees, and will be assessed by a hearing officer in nearly every case to the extent such evidence exists in the record.

supervisor at the end of the call.[15] However, the hearing officer's analysis of whether the grievant's behavior exceeded any protections afforded by the statute were focused on whether the grievant engaged in threats.[16] As stated in this ruling, the analysis must consider more than just whether an employee engaged in threats, but whether the conduct was reasonable under the circumstances. Yet, the hearing officer has already determined the grievant's conduct violated agency policy.[17] Thus, in this instance, it is unclear whether Section 2.2-3000 should properly provide protection to the manner of the grievant's conduct during the June 10 phone call.[18] The hearing officer is directed to reconsider his decision in accordance with this ruling.[19]

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR remands this matter to the hearing officer. Both parties will have the opportunity to request administrative review of the hearing officer's remand decision on any other *new* matter raised in the remand decision (i.e., any matters not previously part of the original decision).[20] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[21]

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.[22] Within thirty 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.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24]

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[15] Hearing Decision at 3.
[16] *Id.* at 4.
[17] *Id.*
[18] The grievant's behavior is protected to raise workplace concerns; the manner in which she raised those concerns might not be protected. However, even if her behavior was not protected in this instance, the question of whether the grievant received disciplinary action at the appropriate level has not been addressed by the hearing officer.
[19] This ruling does not determine whether the disciplinary action was otherwise appropriate under the relevant fact, policy, and/or mitigation analyses. This ruling only addresses whether Section 2.2-3000 of the Code of Virginia serves as a basis to find the grievant's behavior was protected by law.
[20] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[21] *See Grievance Procedure Manual* § 7.2(a).
[22] *Id.* § 7.2(d).
[23] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[24] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).