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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Health
Ruling Number 2020-4982
October 1, 2019

The grievant 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 11336. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11336, as found by the hearing officer, are as follows:[2]

> The Virginia Department of Health [the "agency"] employs Grievant as a Human Resources Analyst I at one of its facilities. She serves as a Human Resource Manager at one of the Agency's Local Health Departments.
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> The Human Resource Technician I ("HR Technician") reported to Grievant. The HR Technician began working for the Agency on August 29, 2016. She was a full time city employee and a part-time State employee. . . . Her leave was governed by City policies. . . .
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> In February 2018, the HR Technician told Grievant she was diagnosed with PTSD. The HR Technician told Grievant that the HR Technician had general anxiety disorder and PTSD. The HR Technician told Grievant the HR Technician needed to "destress" by "closing my door, looking out the window, and not being bombarded." Grievant told the HR Technician to do whatever she needed to "get yourself together."

[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. 11336 ("Hearing Decision"), August 28, 2019, at 2-10 (citations omitted).

The HR Technician requested approval to telecommute. On March 20, 2018, Grievant granted the HR Technician's request.

Grievant allowed the HR Technician to use "flex time" to adjust her schedule if she came in late. In an email dated May 21, 2018, Grievant told the HR Technician "you will always be allowed to flex when asked." On June 7, 2018, the HR Technician came to work late because "my doctor contacted me this morning to inform me that my appointment time changed." Grievant granted the HR Technician's leave requests.

The HR Technician liked to keep the door to her office closed in order to reduce her stress level. Grievant asked the HR Technician why she kept her door closed and the HR Technician said that doing so kept her environment safe and calm. . . .

The HR Technician worked 35 hours per week for the City and five hours per week for the State. The HR Technician asked Grievant if the HR Technician could eliminate her five hours of State time and only work 35 hours per week. The HR Technician wanted an earlier start time for her shift in order to attend medical appointments in the afternoon. She wanted to attend weekly appointments with her therapist that began between 4:00 p.m. and 4:15 p.m. The HR Technician wanted to change her work schedule to begin at 8 a.m. and end at 3:30 p.m. with a 30 minute lunch period. The HR Technician, however, did not tell Grievant why she wanted to begin her shift earlier. In other words, The HR Technician did not tell Grievant the HR Technician wanted to change her shift to allow her to attend medical appointments.

On June 8, 2018, The HR Technician sent Grievant an email:

> I would like to ask that effective Monday, June 11, I revert to the adjusted schedule of 8:30 a.m. to 4 p.m., Monday to Friday with a 30 minute lunch break that we agreed upon 10/26/2016. On the days where CIPPS entry is required I would like to begin work at 7:30 a.m. I fully understand that you allowed me to begin working at 7:30 as a privilege and completely understand your right to deny my request. Should any request to begin at 7:30 a.m. be denied, I'd like to accept a reduction of 30 minutes in Wage time reporting and request an 8 a.m. start time when CIPPS is required keeping the same end time of 4 p.m.

On June 11, 2018, Grievant sent the HR Technician an email:

> Exception for today's schedule adjustment to 8:30 a.m. to 4 p.m. was granted on Friday because of business needs (the scheduled on-boarding of [name]), but not as a change to your new work schedule.

I mentioned to you that future on-boarding can be scheduled to begin at 9:30 a.m. The need to start on-boarding at 9 a.m. is no longer a hard requirement since the longest on-boarding has been taking about 1.5 hours instead of the previous 2 – 2.5 hours because you no longer have to go into details regarding VDH benefits as we emailed the candidates all of the materials ahead of time and VDH Benefits Administrator also provides monthly webinar.

And, as explained previously, I have more need of your support until at least 4:30 p.m. daily and almost all of our staff (including supervisor/manager's) are working until 4:30 p.m. (some work later) thus they can also use your support instead of coming to me directly or having to return the next day to find you (when I'm too busy to assist them). Although we briefly changed your schedule to end at 4 p.m. shortly after you started working to test it out (from 10/2016 to 12/02/2016), your scheduled end time has always been at 4:30 p.m. before and after that timeframe.

Much consideration also went into approving your request to reduce work schedule about 20 hours/month while the Administration Division is working on requesting to make your position full-time (i.e. being flexible and considerate of your current request is potentially creating a challenge for us to meet our goal). It was agreed that this reduction would be temporary as my hope in goal is to convert the HR Tech I position into full-time status by the following fiscal year. I believe we've been both understanding and flexible, but based solely on the fact that you simply want to work less hours at this point in time, I can't comprehend or justify the need to negotiate yet another 30-minute reduction here and there.

Your new schedule shall remain as previously stated, which is 9 a.m. to 4:30 p.m. However, I will revisit the subject after three months' time to see how the schedule is working for you and [Local Health Department]. We will see whether changes should/could be made then, might be for more or less hours or different start/end time. . . .

On June 26, 2018, the HR Technician sent Grievant an email:

Earlier this year, mid-February I believe, I informed you of my medical situation. Following the diagnosis received I have been attending regular appointments with a clinician. I am in need of and would like to submit the required paperwork to request FMLA. Upon reviewing my leave balance, scheduled appointments, and the City policies, I've noticed that I will not have enough leave to cover my appointments and possible absences. This is disheartening as

> I've requested an adjusted schedule and neither of my proposed schedules work for you because you could not comprehend or justify my need. When you find a time that's convenience for you, I'd like to know my options regarding taking leave without pay now versus later. No matter the solution, I will incur a hardship that will result in unpaid leave but would like to minimize the adverse effect of my finances.

The HR Technician contacted the City HR staff and obtained the necessary FMLA paperwork. The HR Technician submitted that paperwork to Grievant. . . .

On July 13, 2018, the HR Technician filed an internal EEO complaint with the Agency Office of Human Resources. The HR Technician claimed that Grievant discriminated against her based on her disability and subjected her to a hostile work environment. The EEO & ER Division Director began an investigation. . . .

On July 16, 2018, the HR Technician sent Grievant an email indicating she was not feeling well and would be leaving the office. The HR Technician also wrote, "I'm also requesting that we reschedule our first PIP meeting to a later date." The HR Technician did not explain why she wanted a later date for their meeting. Grievant replied, "I will reschedule the PIP meeting."

On July 16, 2018 at 2:15 p.m., Grievant attempted to reschedule the PIP meeting for July 17, 2017 at 3 p.m. due to the HR Technician's early departure on July 16, 2018. Grievant sent the HR Technician a calendar invitation to the meeting. On July 17, 2018 at 9:23 a.m., the HR Technician sent Grievant an email, "I do not feel well and would like to reach out to you later on a better time to meet."

On July 17, 2018, . . . Grievant wanted to know why the HR Technician had canceled their first PIP meeting. Grievant went to the HR Technician's office and knocked on the closed door. Grievant opened the door and attempted to close the door to speak privately with the HR Technician. The HR Technician asked that the door remain open and Grievant left the door open as she spoke with the HR Technician from the doorway. The HR Technician returned to the seat behind her desk. Grievant told the HR Technician that Grievant was concerned about the HR Technician's behavior. Grievant said she hoped they could meet before the end of the week because the PIP required that they meet every week.

Grievant left the HR Technician's office and spoke with her supervisor, the Manager, and two City Human Resource employees. Grievant was concerned that the HR Technician was not being productive and was rude to Grievant when they met. Grievant obtained permission from a city manager to send the HR Technician home for the day. . . .

> The Agency's EEO Director trained human resource staff that "there were no magic words" necessary for an employee to use to trigger the Agency's obligation to begin guiding an employee regarding the ADA, Rehabilitation Act, or State disability policies. If an employee mentioned having a medical condition, the employee's supervisor was expected to "press pause" and seek guidance regarding how to address the employee's possible disability.
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> After learning of the HR Technician's PTSD diagnosis in February 2018, Grievant did not provide the HR Technician with any information or guidance regarding the applicability of the Americans with Disabilities Act and the opportunity for reasonable accommodation for her disability. Grievant did not contact the Agency's Human Resource Office or the City's Human Resource Office for guidance to ensure the Agency was in compliance with the requirements of the ADA. The HR Technician was aware of the provisions of the ADA but did not know the ADA applied to her since she was not a State employee.

On November 29, 2018, the agency issued to the grievant a Group II Written Notice of disciplinary action for engaging in workplace harassment and discrimination against an employee on the basis of her disability; creating a hostile work environment; and engaging in bullying behavior toward others in the workplace.[3] The grievant timely grieved the Written Notice, and a hearing was held on July 15, 2019.[4] In a decision dated August 28, 2019, the hearing officer determined that the grievant's misconduct cited in the Written Notice was supported only to the extent that she failed to follow the agency's policies for compliance with the Americans with Disabilities Act. The hearing officer concluded that this misconduct amounted to "unsatisfactory work performance" that warranted, at most, a Group I Written Notice.[5] Accordingly, he reduced the disciplinary action to a Group I Written Notice and found no mitigating circumstances warranting further reduction of the discipline.[6]

The grievant 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

[3] Agency Ex. 1.
[4] Hearing Decision at 1.
[5] *Id.* at 10-13.
[6] *Id.* at 13.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant argues that the hearing officer erred in not mitigating the grievant's Group I Written Notice. In its initial disciplinary action, the agency considered as mitigating circumstances the grievant's past job performance, lack of past disciplinary action or policy violations, and due process response.[10] The agency also noted that, due to her supervisory role, the grievant was charged with abiding by all agency policies to the highest degree.[11] Based on all the circumstances, the agency concluded that, although the conduct charged to the grievant warranted a Group III Written Notice, mitigation to the Group II level was appropriate.[12] On appeal, the grievant contends that the hearing officer erred in failing to apply the mitigating circumstances cited initially by the agency and should have accordingly mitigated the supported discipline – a Group I Written Notice – to counseling, *i.e.* the agency's standard discipline for a first-time "unsatisfactory work performance" offense.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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.

Mitigation

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 [EDR]."[17] The *Rules for Conducting Grievance Hearings* ("*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

[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] *See* Agency Ex. 1; Grievant's Request for Administrative Review at Ex. A.
[11] *Id.*
[12] *Id.*
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] Va. Code § 2.2-3005(C)(6).

be consistent with law and policy."[18] More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[19]

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is high.[20] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, he or she "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[21] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[22] and will reverse the determination only for clear error.

In this case, the hearing officer concluded that no mitigating factors existed such that further reduction was required *in light of the mitigation standard applicable at the hearing stage*. While the hearing decision did not expressly cite the grievant's past job performance and lack of disciplinary record in his mitigation analysis, a hearing officer's mere silence as to particular facts or 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 facts presented. Finally, even if the hearing officer had failed to consider the grievant's past job performance and lack of disciplinary record, EDR finds no basis in the record to conclude that such error would have altered his mitigation analysis.

Here, it would appear that the hearing officer did not cite the relevant mitigating circumstances because he did not conclude that they might cause the discipline upheld to "exceed[] the bounds of reasonableness," such that a lower level of discipline would be the "maximum reasonable level sustainable under law and policy." EDR finds that facts in the record support this conclusion. In addition to the mitigating circumstances cited on the Written Notice in this case,

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[18] *Rules for Conducting Grievance Hearings* § VI(A).
[19] *Id.* § VI(B)(1).
[20] The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve 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). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." Batten v. U.S. Postal Serv., 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).
[21] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[22] "'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.*

the agency noted that it held the grievant to a high standard because of her supervisory role.[23] DHRM Policy 1.60, *Standards of Conduct*, gives agencies discretion to issue a Group I Written Notice to an employee for unsatisfactory work performance.[24] Therefore, the Group I Written Notice did not exceed the maximum reasonable level sustainable under law and policy. While the grievant may disagree that her conduct and its surrounding circumstances merited a Group I Written Notice, EDR cannot say that the hearing officer abused his discretion in finding that her past performance and lack of disciplinary record were not mitigating circumstances such that a Group I Written Notice would exceed the bounds of reasonableness.

Absent evidence that the agency might have imposed lesser discipline under the circumstances, EDR finds no basis to disturb the hearing officer's decision to uphold disciplinary action against the grievant at the level of a Group I Written Notice.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration 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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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[23] *See* Agency Ex. 1.
[24] DHRM Policy 1.60. *Standards of Conduct*, Attach. A (stating that "[t]ypically, counseling is appropriate" to address a first instance of unsatisfactory work performance, "although an agency has the discretion to issue a Group I Written Notice").
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).