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ADMINISTRATIVE REVIEW

In the matter of the Department of Professional and Occupational Regulation
Ruling Number 2020-5014
December 13, 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 Numbers 11394/11395/11396/11397/11398. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Numbers 11394/11395/11396/11397/11398, as found by the hearing officer, are as follows:[2]

> The Department of Professions and Occupations ["agency"] employed Grievant as an IT Director. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Agency hired Grievant in October 2017. She began supervising the Unit which consisted of approximately six employees. Four of the employees were in the Unit when she began working in her position and she hired two additional employees. The existing employees included Employee 4 and Employee 3. Employee 4 was interim unit director prior to Grievant's selection for the position. Grievant also selected a Contingent Worker who served as a Database Administrator but was not an Agency employee.
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> The Former Agency Head told Grievant in October 2017 to "clean up" the Unit. The Former Agency Head felt a great deal of frustration with several Unit employees. For example, when he asked Employee 4 to reconfigure his laptop to

[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 Nos. 11394/11395/11396/11397/11398 ("Hearing Decision"), October 31, 2019, at 2-4 (citations omitted).

better accommodate his needs, Employee 4 said "no, this is the way I do it" even though Employee 4 reported to the Former Agency Head. On another occasion, the Former Agency Head had a problem with his laptop software and took it to Employee 4 and asked Employee 4 to repair the laptop. When the Former Agency Head went to retrieve his laptop, Employee 4 could not find it. Employee 4 had given the laptop to another employee to use. The Former Agency Head described the attitude of several Unit employees as "passive-aggressive." The Former Agency Head told Grievant when she was hired that she had a tough job but he expected she would be able to fix it. He did not tell Grievant she could violate the Standards of Conduct to correct the Unit.

The Former Agency Head spoke often about the problem of bullying and that employees should not have a fear of coming to work.

At Grievant's direction, the Contingent Worker participated in an employee panel interviewing candidates for a position with the Unit. He served as a subject matter expert. He advised the panel whether candidates had correctly answered questions about databases and understood the relationship between an application and a database.

Grievant formed a close working relationship with the Contingent Worker. When Grievant was not at work, the Contingent Worker acted like he was in charge of the Unit. It is not clear whether Grievant was aware of how the Contingent Worker behaved when she was away from the office.

Grievant treated her subordinates differently. Grievant's actions "morphed" the Unit into old employees and new employees.

Grievant told Employee 4 that Employee 3 did not know what she was doing and was not qualified for her job. Employee 3 learned of the comment and was upset by the comment. Employee 3 began looking for other jobs because she did not want to work under Grievant. Grievant sometimes used a demeaning tone when she spoke about Employee 3 in front of [other] employees.

Grievant would "take digs" at Employee 4. When Employee 4 tried to express an opinion, Grievant would "shut him down." When they were discussing projects, Employee 4 would sometimes ask if he could do anything and Grievant quickly said "No".

Grievant denied Employee 3's request to renew a "soft token" so that Employee 3 could telecommute. Grievant denied Employee 3's request for approximately seven months without explaining her reasoning to Employee 3. Grievant allowed other employees to obtain soft tokens and telecommute within a short period of time.

When Grievant met with employees, she would sometimes abruptly stop them from speaking by raising her hand with her palm out in a "stop" gesture. She would stop the employees from speaking while they were in the middle of expressing their ideas. Several employees found this frustrating and believed it occurred too often. When Employee 3 told Grievant her gesture was rude, Grievant replied that she did it to Employee 4 all the time. Employee 2 also found Grievant's "stop" gesture to be rude. Grievant used this gesture regularly from October 2017 to June 2019, according to Employee 2.

Employee 4's step-father passed and Employee 4 was upset. Employee 3 and Grievant were walking towards the break room and Employee 3 said she was worried about Employee 4. Employee 3 told Grievant Employee 4's wife had health issues and his step-father had died. Grievant replied that Employee 4 was upset because Grievant got the Unit Director position and Employee 4 was making himself sick. Employee 3 was offended by Grievant's comment.

When Grievant first joined the Unit, she had a meeting that included Employee 4, Employee 3 and several other employees. Grievant said to Employee 4 "so you are the one who wanted my job". The other employees overheard Grievant's comment. Employee 2 heard Grievant several times "joking" that Employee 4 made himself sick since he did not get Grievant's job.

Employee 3 needed to be absent from work. Employee 3 told Grievant she was going to court to assist her niece. Employee 3 did not expect Grievant to tell anyone else why Employee 3 was absent from work. Grievant later told Ms. S that Employee 3 had left for the day and had a court custody matter going on with Employee 3's sister and niece. Employee 2 also overheard Grievant's comment about Employee 3. Employee 3 was surprised that Grievant had disclosed what Employee 3 considered to be a private matter.

Employee 4, Employee 3, and Employee 2 met with Mr. Q to vent their frustrations with Grievant. Some of the employees were tearful when describing how Grievant had treated them. Mr. Q would hear comments about "I can't do anything right" or everyone is "walking on eggshells" around Grievant.

On one occasion, Grievant suggested Employee 4 might be just a "glorified help desk clerk." Employee 4 was offended by Grievant's comment.

Grievant told Employee 4 that Employee 3 could not do her job. Employee 4 said that Employee 3 could do her job and had been doing it for over a year.

Employee 4 developed an ulcer and had to be hospitalized. During a meeting in November 2018, one employee asked Employee 4 how he was feeling. Employee 4 said he was feeling better and had had an ulcer. Grievant heard Employee 4's comment and then said aloud, "I probably gave him that ulcer."

Grievant was trying to be funny but offended Employee 4 in front of other employees.

On June 10, 2019, the agency issued to the grievant five separate Written Notices: (1) a Group III Written Notice with termination for neglect of duty under DHRM Policy 1.60, *Standards of Conduct*; (2) a Group III Written Notice with termination for violating DHRM Policy 2.35, *Civility in the Workplace*; (3) a Group III Written Notice with termination for violating the agency's Code of Ethics; and (4) two Group II Written Notices with termination for failure to follow a policy promulgated by the Virginia Information Technologies Agency related to procuring and managing contingent IT workers.[3] The grievant timely grieved each separate Written Notice, and a single hearing on the grievances was held on October 11, 2019.[4] In a decision dated October 31, 2019, the hearing officer determined that two of the five Written Notices should be upheld: the Group III Written Notice for violating DHRM Policy 2.35, and a Group II Written Notice alleging that the grievant permitted a contingent IT worker to assist with agency job hiring.[5] Based on these two Written Notices indicating termination, and finding no mitigating circumstances to reduce the disciplinary action, the hearing officer upheld the agency's decision to remove the grievant from employment.[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 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.

Civility in the Workplace

In her request for administrative review, the grievant argues that she treated all of her staff equally and did not undermine team cohesion, staff morale, or employee self-worth. She attributes some employees' perceptions as "resistance to change" and notes that their "frustrations were never presented, discussed or addressed" with the grievant.[10] She asserts that

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[3] *See id.* at 1.
[4] *Id.*
[5] *Id.* at 5-7.
[6] *Id.* at 8.
[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] Request for Administrative Review at 1.

"[n]o jokes were ever made regarding an employee's health condition or well-being" and "no discussions regarding a court custody case were ever made."[11] She denies "using a 'stop' gesture to cut [employees] off in the middle of a statement" and "telling others that Employee 3 could not do her job."[12]

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] 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.

Here, the hearing officer made appropriate factual determinations that the grievant

> violated DHRM Policy 2.35 by undermining team cohesion, staff morale, and employee self-worth. Grievant treated old employees differently from how she treated new employees she hired. Grievant undermined staff morale by discussing Employee 4's private medical matters and Employee 3's private court proceedings. Grievant inappropriately confronted Employee 4 in front of other employees as the one who wanted her job. Grievant mocked the seriousness of Employee 4's medical condition by saying as a joke that she probably caused his ulcer. Grievant undermined Employee 3's self-worth by telling other employees that Employee 3 could not do her job. Grievant frequently undermined the self-worth of employees by using a "stop" gesture to cut them off in the middle of their statements.[17]

On review of the hearing record, EDR finds evidence to support the hearing officer's finding that the grievant's actions occurred as alleged and constituted misconduct under DHRM Policy 2.35. Multiple witnesses testified to their perception that the grievant treated older, "legacy" employees differently from the employees the grievant had hired.[18] Employee 2 testified that the grievant discussed and/or trivialized Employee 4's medical matters with others[19]

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[11] *Id.* at 2.
[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] Hearing Decision at 6.
[18] *See* Hearing Recording at 1:03:55-1:45:55 (Employee 3's testimony); 2:15:30-2:16:30 (Employee 4's testimony).
[19] *Id.* at 1:44:05-1:45:50, 1:48:05-1:48:25 (Employee 2's testimony).

and discussed Employee 3's private court proceedings.[20] Employees 3 and 4 testified that the grievant inappropriately accused Employee 4 of wanting her job, in front of other employees.[21] Employee 4 testified that he was upset when the grievant joked that she probably caused his ulcer.[22] Multiple employees testified that the grievant said to them that Employee 3 could not do her job or otherwise criticized Employee 3.[23] Multiple employees testified that the grievant frequently used a "stop" gesture to cut off individuals trying to speak during group discussions.[24] Multiple employees testified that the grievant's manner toward employees undermined team cohesion, morale, and/or self-worth.[25] 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. Thus, even if the record may also include evidence that could support the grievant's contrary view of the underlying events, EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where, as here, the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer.[26]

EDR also finds no basis to disturb the hearing officer's conclusion that termination of the grievant's employment was consistent with law and policy. In general, the Group III level "is appropriate for offenses that, for example . . . constitute . . . unethical conduct; neglect of duty; [and] disruption of the workplace."[27] As the hearing decision cited, DHRM Policy 2.35 specifies that "[b]ehaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable."[28] Violations of Policy 2.35 may warrant a Group III Written Notice "depending on the nature of the offense."[29] It appears that the agency in this case determined, in its discretion, that the effects of the grievant's conduct – from a supervisory position – were so pervasive as to have caused a sustained disruption to the workplace such that the agency head lost confidence in the grievant to continue in her leadership position.[30] This determination aligned with testimony from multiple witnesses, and the hearing officer appropriately concluded it was consistent with law and policy. While undermining of team cohesion and staff morale may not rise to the level of a Group III offense in every circumstance, EDR cannot say in this case that the hearing officer's conclusion lacked evidentiary support or was otherwise unreasonable.

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[20] *Id.* at 1:43:25-1:44:01 (Employee 2's testimony).
[21] *Id.* at 1:20:25-1:21:00 (Employee 3's testimony); 2:18:20-2:20:00 (Employee 4's testimony).
[22] *Id.* at 2:34:30-2:35:10 (Employee 4's testimony).
[23] *Id.* at 2:21:45-2:23:20 (Employee 4's testimony); 3:32:20-3:33:10, 3:38:00-3:38:30 (Employee 5's testimony).
[24] *Id.* at 1:16:30-1:17-35 (Employee 3's testimony); 1:40:20-1:41:37 (Employee 2's testimony).
[25] *Id.* at 1:03:15-1:05:25 (Employee 3's testimony); 2:15:30-2:18:00 (Employee 4's testimony); 3:23:55-3:25:33, 3:27:05-3:29:17 (Employee 5's testimony).
[26] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[27] DHRM Policy 1.60, *Standards of Conduct*, at 9.
[28] DHRM Policy 2.35, *Civility in the Workplace*, at 2.
[29] DHRM Policy 1.60, *Standards of Conduct*, Attachment A: Examples of Offenses Grouped by Level, at 2.
[30] *See* Hearing Recording at 40:55-42:37 (agency head's testimony).

Violation of VITA Policy

As to the upheld Group II Written Notice for violating the VITA Policy for Procuring and Managing IT Contingent Workers, the grievant contends that any disciplinary action arising from this violation should have been mitigated because the violation was not knowing or willful.[31]

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]."[32] 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 be consistent with law and policy."[33] 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.[34]

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.[35] 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

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[31] Request for Administrative Review at 4. In its response, the agency argues that it appropriately held the grievant responsible for compliance with the relevant policies regardless of her intent to violate them. To the extent that the agency raises independent challenges to the hearing decision and/or the hearing officer's reasoning in its response (received by EDR on November 25, 2019), the agency did not assert those challenges within the 15-calendar-day appeal period following the issuance of the hearing decision and, thus, EDR declines to consider them in this ruling. *See Grievance Procedural Manual* § 7.2(a) ("Requests for administrative review must be in writing and ***received by*** [EDR] within 15 calendar days of the date of the original hearing decision." (Emphasis in original.)).

[32] Va. Code § 2.2-3005(C)(6).

[33] *Rules for Conducting Grievance Hearings* § VI(A).

[34] *Id.* § VI(B).

[35] 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).

charges."[36] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[37] and will reverse the determination only for clear error.

Here, the grievant asserts that she "was not aware" of the VITA policy's prohibition on contingent workers' participation in hiring processes; *i.e.* she lacked actual notice of the rule giving rise to the violation.[38] Although the *Rules* include "lack of notice" as an example of mitigating circumstances,[39] they do not provide that any lack of notice automatically causes the imposed discipline to exceed the limits of reasonableness. Even if the hearing officer finds that an employee lacked notice of the disciplinary consequences of breaking a rule, the hearing officer must still consider all the relevant facts and circumstances to determine whether mitigation is authorized and warranted. EDR has consistently interpreted the notice provision to require actual or constructive notice of the consequences for misconduct only in cases where the severity of the discipline imposed could not have been anticipated by a reasonable employee.[40] Under the *Rules*, "an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee."[41]

The hearing officer in this case found that the grievant directed the Contingent Worker to participate as a subject matter expert advising panelists who were interviewing candidates for a position with the Unit.[42] The VITA policy provides that individuals using contingent workers must "insure" that such workers "do not . . . [p]articipate in any way in processes related to hiring or termination of an employee or Contingent Worker."[43] As the hearing decision expressly noted, failure to follow policy generally warrants disciplinary action at the Group II level.[44] Thus, the hearing officer concluded that a Group II Written Notice for the grievant's violation of the VITA Policy did not exceed the bounds of reasonableness. Even accepting the grievant's contention that her lack of knowing or willful violation could have justified mitigation, EDR cannot say that the hearing officer abused his discretion in deferring to the agency's reasonable decision not to mitigate its disciplinary action.

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

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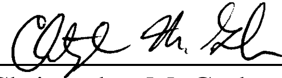
[36] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[37] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion 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.*
[38] Request for Administrative Review at 4.
[39] *Rules for Conducting Grievance Hearings* § VI(B)(2).
[40] *See*, *e.g.*, EDR Ruling No. 2013-3503.
[41] *Rules for Conducting Grievance Hearings* § VI(B)(2) n.26.
[42] Hearing Decision at 3.
[43] *Id.* at 7; Agency Ex. 13, at 10.
[44] Hearing Decision at 5; DHRM Policy 1.60, *Standards of Conduct*, Attachment A: Examples of Offenses Grouped by Level, at 1.

final hearing decision once all timely requests for administrative review have been decided.[45] 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.[46] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[47]



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