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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5019
December 23, 2019

The Department of Corrections (the "agency") 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 11400. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11400, as found by the hearing officer, are as follows:[2]

> The [Agency] employs Grievant as a Corrections Officer at one of its facilities. Grievant began working for the Agency in 2007. His work performance was otherwise satisfactory to the Agency.
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> Grievant's Conditions of Employment For All Employees stated:
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> Employees may be temporarily assigned to other institutions in the State should the need arise for their services at another state agency.
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> The Agency experienced a staff shortage at Facility A. Agency managers decided to assign staff from Grievant's Facility to Facility A to work one week shifts. Grievant's Facility maintained a "draft list" from which Facility managers selected employees to be assigned to work at Facility A. Employees were placed at the top of the draft list on a rotating basis.

[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. 11400 ("Hearing Decision"), November 13, 2019, at 2-3 (citations omitted).

Grievant's father had a quarterly Cardiac pacemaker appointment at a Hospital. His appointment was scheduled for March 7, 2019. Grievant planned to take his father to the Hospital as was his practice. Grievant was not scheduled to work on March 7, 2019.

While at the Facility, the Lieutenant called Grievant on the telephone. Grievant was also at the Facility. The Lieutenant told Grievant that his name was at the top of the draft list and that he had to go to Facility A for the week of March 4, 2019 through March 10, 2019. Grievant told the Lieutenant he could not go to Facility A. The Lieutenant spoke with his supervisor and after that conversation, the Lieutenant asked Grievant to write an email explaining why he could not go to Facility A.

On February 24, 2019, Grievant wrote an email to the Warden:

> Sorry to bother you in this matter but I have tried to explain to my supervisors that I am not able to go to [Facility A] to work for a week. I am presently occupied with my DRs appointments which are many, my wife's appointments which are many …. I am the only person who can take my father to his appointment at [Hospital]. His assisted living [name] will only take him locally. He has fallen several times this year and has broken several bones. *** As you can hopefully see I have far too many things going on at home and therefore can't and won't go to [Facility A] if they persist in trying to threaten me with a group. I will gladly work over when I can but locally and help out any way I can but there is far too much going on in my life to add the stress of going out of town for a long period of time. I will gladly meet with whomever this concerns. Thank you.

Grievant did not report to work at Facility A for the week of March 4, 2019 through March 10, 2019.

On April 5, 2019, the agency issued to the grievant a Group II Written Notice of disciplinary action.[3] Citing the agency's Operating Procedure 135.1 and the Conditions of Employment for All Employees at the grievant's facility, the Written Notice specified that the grievant "did not work at [Facility A] . . . as instructed" even though the Conditions of Employment provided that he "may be temporarily assigned to other institutions in the State should the need arise . . . ."[4] The grievant timely grieved the Written Notice, and a hearing was held on October 24, 2019.[5] In a decision dated November 13, 2019, the hearing officer determined that the Written Notice must be rescinded because the agency "was not authorized to

[3] *Id.* at 1; Agency Ex. 1, at 1-2.
[4] Agency Ex. 1, at 1-2.
[5] *See* Hearing Decision at 1.

take disciplinary action against Grievant after Grievant exercised his right to Family Medical Leave."[6]

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."[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.

In its request for administrative review, the agency argues that it presented evidence that the grievant was not protected by the federal Family and Medical Leave Act ("FMLA") because he "had not worked 1250 hours in the preceding 12 month period."[10] The agency argues that, where an employee does not meet a qualifying requirement for the FMLA, it "eliminates [him] from those protections afforded under the FMLA until the requirements are met."[11] According to the agency, the hearing decision was erroneously grounded in FMLA rights and failed to properly address whether the grievant's behavior constituted misconduct warranting disciplinary action.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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

[6] *Id.* at 5.
[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 2-3.
[11] *Id.* at 3.
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

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.

DHRM Policy 4.20, *Family and Medical Leave* provides "guidance regarding the interaction of the FMLA and the Commonwealth's other Human Resource policies" for state employees.[16] According to the FMLA and Policy 4.20, eligible employees are entitled to "up to 12 weeks of unpaid family leave per leave year because of their own serious health condition or the serious health condition of an eligible family member . . . ."[17]

While the FMLA and Policy 4.20 establish certain requirements and responsibilities for employees who seek to use the leave entitlement, they also articulate employer responsibilities that do not necessarily depend on an employee's eligibility. The FMLA distinguishes between "employees" and "eligible employees." An "employee" is "any individual employed by an employer," or, as applicable to the state employee in this case, "any individual employed by a State, political subdivision of a State, or an interstate governmental agency . . . ."[18] An "eligible employee" means an "employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested . . .; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period."[19] Under the FMLA's implementing regulations:

> when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. . . . Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period.[20]

On the other hand, "[i]f, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required."[21]

In his decision, the hearing officer concluded that the grievant

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[16] DHRM Policy 4.20, *Family and Medical Leave*, at 1.
[17] *Id.*; *see* U.S.C. § 2612(a)(1). A serious health condition includes "[a]ny period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visit to a health care provider at least twice a year, and may involve occasional episodes of incapacity." DHRM Policy 4.20, *Family and Medical Leave*, at 10.
[18] 29 U.S.C. § 2611(3) (citing 29 U.S.C. §§ 203(e)(1), (e)(2)((C)); *see* 29 C.F.R. § 825.102.
[19] *Id.* at § 2611(2)(A); *see* 29 C.F.R. § 825.102; *see also* DHRM Policy 4.20, at 2 (stating that, to be eligible for FMLA leave, an employee must "have been employed by the Commonwealth for a total of at least 12 months in the past seven years and have worked for at least 1,250 hours in the previous 12-month period . . . .").
[20] 29 C.F.R. § 825.300(b)(1); *see also* DHRM Policy 4.20, at 2 ("Eligibility determinations are made as of the date that the family and medical leave is to begin.").
[21] 29 C.F.R. § 825.300(b)(3).

> provided the Agency with adequate notice of his need for Family Medical Leave on March 7, 2019. It appears that Grievant's father had a serious health condition. Grievant notified the Agency that he needed to transport his father to a hospital for a cardiac care appointment relating to a pacemaker. . . . Covered Family Medical Leave includes transporting a parent to medical appointments to address a serious health condition. It was not necessary for Grievant to use the words "Family Medical Leave" in order for his request to be considered a request for Family Medical Leave. It was not necessary for Grievant to submit "FMLA paperwork" to notify the Agency of his request for leave. The Agency failed to make further review of Grievant's request to challenge the substance of his request.
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> By expecting Grievant to report to Facility A, the Agency, in essence, denied Grievant's request for Family Medical Leave without a basis to do so.

This reasoning amounts to a finding that the agency failed to meet its burden to prove that its disciplinary action was consistent with law and policy as it relates to Family and Medical Leave. Upon careful review, EDR concludes that the hearing officer's finding in this respect is based on evidence in the record, or lack thereof. On February 24, 2019, upon being assigned to work at Facility A during the following week, the grievant emailed the Warden:

> . . . I am not able to go to [Facility A] to work for a week. I am presently occupied with my DRs appointments which are many. [M]y wife's appointments which are many (when her rheumatoid arthritis flares up or her lupus she needs me to take her. I am the only one who can take my father to his appointments at the VA . . . . He has fallen several times this year and has broken several bones.[22]

The hearing officer appropriately determined that this email was sufficient to put the agency on notice that the grievant may have been requesting leave for FMLA-qualifying reasons. The email referenced serious medical conditions (arthritis, lupus, broken bones) and related medical appointments for the grievant's wife and father.[23] Ordinarily, such notice triggers the agency's obligation to "notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances."[24]

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[22] Agency Ex. 1, at 3.

[23] It appears that the grievant's primary concern was a March 7 hospital appointment related to a fourth serious health condition (his father's cardiac care). *See* Hearing Decision at 2-3. In any event, neither the agency's request for administrative review nor the record as a whole appears to dispute that the agency was on notice that the grievant wished to be absent for reasons that could potentially qualify for Family and Medical Leave.

[24] 29 C.F.R. § 825.300(b)(1). Contrary to the agency's contention, an employee's ineligibility for requested FMLA leave does not, in itself, negate the employer's obligation to make that eligibility determination and timely notify the employee accordingly. *See* U.S. Dep't of Labor, *Field Operations Handbook*, ch. 39g00(b)(1), Aug. 10, 2016 ("When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within 5 business days, absent extenuating circumstances. The notice must state whether the employee is eligible for FMLA leave, and *if not*, at least one reason why the employee is not eligible." (emphasis added)).

In a grievance hearing challenging formal discipline, the agency bears the burden to prove that its discipline is consistent with legal and policy standards that are reasonably implicated by the agency's own allegations.[25] Because the agency's discipline in this case was grounded in the grievant's refusal to work at Facility A in order to care for a family member with a serious health condition, the agency had the burden to produce evidence that its discipline was consistent with the FMLA and Policy 4.20. In the absence of other evidence on that issue, the hearing officer asked the Warden why Family and Medical Leave did not excuse the grievant from his assignment to Facility A. The Warden responded:

> We know when we start working for this agency, we know the nature of it, and we know what the requirements are. So, whether it's, you know, unfortunately, we have elderly parents, we have children to take care of, we have other family members to take care of, and we understand that we have to make accommodations for that when we're called away to work. As an administrator, it's impossible for me to decide who has a reason that's good enough why they can't go. Because everybody has something going on in their family; everybody has responsibilities outside of work that they have to take care of. . . . So, I did not pick and choose which excuses were good excuses and which weren't. I didn't even open that up for consideration.[26]

This testimony supports the hearing officer's finding that the agency "failed to make further review of Grievant's request to challenge the substance of his request."[27]

The agency contends that it produced witness testimony to the effect that "the Grievant was not under the protections of the FMLA at the time he [was] instructed to report to Facility A and . . . was not eligible under the requirements of the FMLA as the Grievant had not worked 1250 hours in the preceding 12-month period."[28] However, after a thorough review of the hearing recording, EDR is unable to identify agency witness testimony to establish these conclusions. The agency elicited generalized testimony from a human resources representative that the grievant had, at some point prior to February 24, 2019, "inquire[d] about family medical

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[25] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(1). Here, the notice of potentially FMLA-qualifying circumstances was evident in an attachment to the agency's Written Notice. *See, e.g.*, Agency Ex. 1, at 3. While an agency bears no burden to disprove law and policy arguments raised by a grievant's affirmative defenses, in this case the agency's own evidence put Family and Medical Leave at issue.

[26] Hearing Recording at 59:25-1:01:22 (Warden's testimony).

[27] Hearing Decision at 5.

[28] Request for Administrative Review at 2-3. With its Request for Administrative Review, the agency has attached what appear to be the grievant's timesheets and other documentation of his total hours worked for the 12 months preceding February 24, 2019. Pursuant to the *Rules for Conducting Grievance Hearings*, "[t]he evidentiary record is generally closed at the conclusion of the hearing, unless the hearing officer has allowed for a period after the hearing for the receipt of additional evidence. . . . After the hearing officer closes the evidentiary record, additional evidence generally may not be admitted." *Rules for Conducting Grievance Hearings* § IV(G). The *Rules* provide a "narrow exception" for newly discovered evidence that "was in existence at the time of the hearing, but was not known (or discovered) by the party until after the hearing officer closed the evidentiary record." *Id.* Because it does not appear either that the hearing officer held the record open following the hearing or that the agency is presenting its post-hearing documents as newly discovered evidence, EDR finds no basis to consider these documents on administrative review.

leave" but that it was "not implemented" for reasons that the witness did not explain.[29] The grievant himself testified that he did not request Family and Medical Leave for his father's appointment "because I was told that I had to have 1,250 hours in a year, and due to the three surgeries I'd had the year before, I didn't have 1,250 hours."[30] This testimony from the grievant does not establish whether, how, or when the agency determined that the grievant would be ineligible as of March 7, 2019, or whether and when his eligibility might have changed based on his hours worked. In light of the warden's testimony to the effect that it was not his practice to consider potentially FMLA-qualifying circumstances, the hearing officer concluded that the evidence did not establish that the agency's disciplinary action was consistent with its obligation to determine the grievant's eligibility "as of the date that the family and medical leave is to begin."[31] EDR cannot say that this conclusion was an abuse of the hearing officer's discretion or was otherwise unreasonable. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and 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.[32]

Nothing in this ruling, or in the hearing decision, should be read to suggest that the agency in fact failed to meet its obligations under the FMLA or Policy 4.20. The hearing officer did not, and could not, make findings on that issue. Although he determined that the grievant put the agency on notice of a potentially FMLA-qualifying circumstance, the hearing officer lacked sufficient factual information to analyze the grievant's eligibility for FMLA leave or, indeed, whether the agency had properly determined that the grievant was *not* eligible for such leave as of March 7, 2019 and properly notified him of that fact. Thus, the hearing officer merely determined that the agency failed to meet the third prong of its burden to prove by a preponderance of the evidence that its disciplinary action against the grievant was consistent with law and policy. Because the hearing officer could not find that the necessary FMLA prerequisites preceded the agency's disciplinary action, his decision appropriately did not address whether the grievant's behavior constituted misconduct under the circumstances.[33]

Accordingly, EDR declines to disturb the decision on this basis.

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 final hearing decision once all timely requests for administrative review have been decided.[34] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

[29] Hearing Recording at 11:20-11:53 (Witness W's testimony).
[30] *Id.* at 1:04:25-1:05:01 (Grievant's testimony).
[31] DHRM Policy 4.20, *Family and Medical Leave*, at 2.
[32] *See, e.g.*, EDR Ruling No. 2020-7976; EDR Ruling No. 2014-3884.
[33] *See Rules for Conducting Grievance Hearings* at § VI(B)(1) ("If the agency does not prevail as to any of the elements [of proof for disciplinary actions], the disciplinary action should not be upheld.").
[34] *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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