EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5021
January 2, 2020

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 11399. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11399, as found by the hearing officer, are as follows:[2]

> The Department of Corrections [the "agency"] employs Grievant as a Specialist at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.
>
> The Former [Probation Officer ("PO")] was responsible for preparing a monthly "Sex Offender 957/958 Budget" that he provided to the Chief. Preparing the budget included receiving reports from providers, adding and updating financial information, and identifying treatment information.
>
> On October 30, 2018, Grievant drafted an email confirming her duties would include:
>
> > SOV- Monthly Report
> > Monthly Report for [Chief] (How many probationers on GPS, DNA needed, SIDS number, Monday left for 957/958)

[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. 11399 ("Hearing Decision"), November 18, 2019, at 2-4 (citations omitted) (emphasis in original).

Maintaining Budget for 957/958

The Former PO stopped working at the Facility on November 30, 2018. He trained Grievant regarding how to prepare the budget prior to leaving. The Former PO met with Grievant and spent approximately two or three hours showing Grievant how to complete the budget. Grievant told the Former PO she understood his training.

Grievant began preparing the monthly budget and would provide copies of the budget to the Chief and Deputy Chief as expected by the Agency. Grievant completed budgets from December 2018 through March 2019. Grievant did not complain that she did not know how to prepare these budgets.

SPO K began working at the Facility on April 20, 2019. He began supervising Grievant. He was to begin completing the budget once he "got up to speed". He had prior experience completing budgets. SPO K asked Grievant for any information she had regarding the budget including what money was used for and what money was left. Grievant said that Ms. M had the information he wanted. SPO K spoke with Ms. M but Ms. M only had limited information. SPO K spoke with the Chief Deputy and indicated he could not obtain the necessary information. The Chief Deputy spoke with the Chief and indicated that SPO K could not get the necessary information for the budget.

On April 22, 2019 at 5:10 p.m., the Chief sent Grievant an email stating:

> Please forward to me the balance remaining on the Sex Offender Treatment/Polygraph Funds by close of business tomorrow, April 23, 2019. Additionally, let me know if there are any changes with being within our two percent range.

On April 23, 2019 at 4:52 p.m., Grievant sent the Chief an email:

> Per our conversation, these are the numbers I retrieved from the Share Drive $2,713.00 (Sex Offender treatment) and $2,990.00 (Sex Offender polygraph), however please confirm with [SPO K] and [Ms. M.] As far as being under the two percent range, please ask [SPO K] and [Ms. M].

On Thursday April 25, 2019 at approximately 11 a.m., Grievant and the Chief met to discuss the Chief's email to Grievant. The meeting ended at approximately 11:30 a.m. At 11:36 a.m., the Chief sent Grievant an email stating:

> Today, we met to discuss the email that I sent you on April 22, 2019 requesting the balance remaining on the Sex Offender Treatment/ Polygraph funds by close of business April 23, 2019.

> Additionally, I requested for you to let me know if we [are] within the two percent range. You provided me with the information that you retrieved from the shared drive, however, you did not inform me if we are within the two percent spending range. I need to know if we are within the two percent range.
>
> **Additionally, I need the projections for the number of polygraphs that were scheduled in March, April, and May as well as the number of clients scheduled for treatment.**
>
> During our meeting, you mentioned several times that [SPO K] is currently doing the budget; however, I made it clear to you that I am requesting the information from you, as [SPO K] has only been at the district for a short time and you have the information. I also made you aware that when I talked with you on Monday April 22, 2019, you went back and forth and debated with me in reference to my request. I informed you that my directives in my email were clear and I expected you to provide me with the information that I requested, as my directives are not debatable. I also informed you that the Healing Environment starts with you.
>
> Please provide me with the information in bold by close of business today, April 25, 2019.
>
> I believe in staff having a voice; however, sharing your voice does not always mean that the outcome will always be what you want. Going forward, you are expected to follow my directives and the directives of supervisors in this district.
>
> On April 29, 2019 at 5 p.m., Grievant sent the Chief an email stating:
>
> > I asked [SPO K] and he stated he does not know if we would be under the 2 percent range but he has a meeting with [Ms. M] tomorrow or Wednesday. For the Sex Offender Treatment budget the numbers are March $2,430, April $2,090, and May the numbers are not updated in the system. For the Sex Offender Polygraphs, the numbers have not been updated in the system for March, April, and May.

On May 10, 2019, the agency issued to the grievant a Group II Written Notice with a 10-workday suspension for failing to follow instructions.[3] Citing the agency's Operating Procedure 135.1, the Written Notice specified that the Chief had asked the grievant to provide information regarding "the remaining balance of the Sex Offender Treatment/Polygraph Funds by close of

[3] *Id.* at 1; Agency Ex. 1.

business 4-23-19" and "any changes within our two percent spending range."[4] The Written Notice explained that grievant failed to provide the information to multiple managers who requested it, expressing that she was not responsible for it.[5] The grievant timely grieved the Written Notice, and a hearing was held on October 28, 2019.[6] In a decision dated November 18, 2019, the hearing officer determined that the Group II Written Notice with suspension was warranted because the grievant had failed to answer questions and provide information requested by the Chief.[7] The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.[8]

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."[9] 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.[10] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant asserts that she was "being targeted due to the fact of my serious medical problem." Further, the grievant contends that she was not "trained to manage a budget." EDR construes these arguments to challenge the hearing officer's findings that the agency's discipline was consistent with law and policy and that no mitigating circumstances existed to warrant reduction of the agency's discipline.

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

[4] Agency Ex. 1, at 1-2.
[5] *Id.* at 2.
[6] Hearing Decision at 1.
[7] *Id.* at 5.
[8] *Id.* at 5-6.
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).

preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[15] 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.

In this case, the hearing officer made appropriate factual determinations that the grievant engaged in the behavior charged on the Written Notice by not providing information that the Chief and other managers had specifically and repeatedly requested:

> The Chief instructed Grievant to inform the Chief whether the Facility's Sex Offender budget would be within the two percent range. Grievant failed to answer the Chief's question and instead referred the Chief to SPO K and Ms. M – neither of whom could answer the question. The Chief also instructed Grievant to provide a projection for the number of polygraphs and clients for March, April, and May 2019. Grievant did not answer the Chief's question.[16]

The hearing officer further concluded that the Chief's instructions were reasonable because the grievant was adequately trained to prepare a budget and had been doing so for some months.[17] Under these circumstances, the hearing officer determined, the grievant "had adequate training to answer the Chief's questions and had access to the necessary information to do so. . . . [T]he Chief had the authority to instruct Grievant to provide the information requested. Grievant was obligated to comply with the Chief's instruction."[18] Failure to do so, the hearing officer concluded, is a Group II offense for which DHRM Policy 1.60, *Standards of Conduct*, permits suspensions for up to 10 workdays.[19]

Upon thorough review of the hearing record, EDR finds evidence to support the hearing officer's conclusion that the grievant was adequately trained to provide the information the Chief requested. At the hearing, the former PO testified that, prior to his retirement, he had trained the grievant to maintain the program budget, including distributing budget information on a monthly basis.[20] He trained the grievant because she was expected to take over his budget duties after he retired.[21] This expectation is reflected in an email the grievant herself sent to the Former PO and Deputy Chief in October 2018.[22] The Chief and Deputy Chief both testified that the grievant had prepared the budget information for their program each month from December 2018 through March 2019.[23] During this period, the grievant, from her performance of the Former PO's budget duties, appeared to understand how to provide budget information.[24]

---

[15] *Grievance Procedure Manual* § 5.8.
[16] Hearing Decision at 5.
[17] *Id.*
[18] *Id.*
[19] *Id.*; *see* DHRM Policy 1.60, *Standards of Conduct*, at 9.
[20] Hearing Recording at 7:24-9:40 (Former PO's testimony).
[21] *Id.* at 9:45-10:33.
[22] Agency Ex. 5.
[23] *Id.* at 40:55-42:40 (Deputy Chief's testimony) and 52:30 (Chief's testimony).
[24] *Id.*at 45:50-46:20 (Deputy Chief's testimony) and 53:00-30, 1:49:25-1:50:22 (Chief's testimony).

The record also supports the hearing officer's determination that evidence was insufficient to establish any affirmative defense based on the grievant's serious medical problem. While disciplinary action taken because of the grievant's disability would have been inconsistent with the federal Americans with Disabilities Act as well as state policy, the grievant did not testify at the hearing or put forth other evidence articulating any affirmative defense related to a serious medical problem that may have been relevant to the misconduct alleged. An agency human resources witness testified that she discussed the possibility of accommodations with the grievant, but the grievant expressed that she was able to perform her job duties without accommodations.[25] The Chief testified that she proceeded with disciplinary action based on guidance from human resources that there was no apparent medical consideration that should influence issuance of the Written Notice.[26] Further, the agency presented legitimate business reasons for the Chief's instructions and resulting discipline for not following them;[27] no evidence before the hearing officer compelled him to find that these reasons were a pretext for discrimination or "targeting" of any kind. Thus, EDR finds no basis to disturb the hearing officer's findings that the agency's disciplinary action was consistent with law and policy.

For similar reasons, EDR cannot conclude that the hearing officer erred in declining to mitigate the agency's disciplinary action. 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]."[28] 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."[29] 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.[30] EDR will review a hearing officer's mitigation determination for abuse of discretion[31] and will reverse the determination only for clear error.

Here, as explained above, the hearing officer appropriately sustained the agency's charge of failure to follow instructions. Thus, he appropriately upheld the agency's conclusion, in its discretion, that this misconduct warranted disciplinary action at the level of a Group II Written Notice with 10-workday suspension.[32] As discussed above, the record supports the hearing

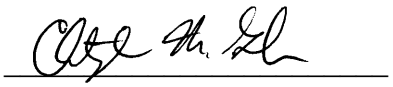
[25] Hearing Recording at 2:05:30-2:08:48 (Witness J's testimony).
[26] *Id.* at 1:41:20-1:44:35 (Chief's testimony).
[27] *Id.* at 1:06:20-1:07:35.
[28] Va. Code § 2.2-3005(C)(6).
[29] *Rules for Conducting Grievance Hearings* § VI(A).
[30] *Id.* § VI(B).
[31] "'Abuse of discretion' is synonymous with 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.*
[32] *See* DHRM Policy 1.60, *Standards of Conduct*, Attachment A, at 1 (listing "[f]ailure to follow a supervisor's instructions" as an example of an offense meriting a Group II Written Notice).

officer's conclusion that the grievant was adequately trained to follow the instructions given and that she failed to put forth sufficient evidence to establish that she was targeted because of a medical issue. Thus, EDR cannot say that the hearing officer erred in finding that the agency's disciplinary action was within the bounds of reasonableness.

Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EDR declines to disturb the decision.

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.[33] 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.[34] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[35]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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