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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5073
April 16, 2020

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11427. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11427, as found by the hearing officer, are as follows:[2]

> The Department of Corrections [the "agency"] employed Grievant as a Personnel Assistant at one of its facilities.
>
> Grievant's schedule included a one-half hour lunch break. She could begin her lunch break anytime between 11:30 a.m. and 1:30 p.m. Grievant was allowed to make personal telephone calls during her lunch break.
>
> Most of Grievant's duties involved processing payroll documents and completing human resource paperwork. Approximately ten percent of her time was to be devoted to making telephone calls.
>
> Grievant had tax records returned because the employee was no longer at the address reflected in the Agency's records. Grievant was supposed to determine if a new address existed and if so, resend the document. If she could not find a new address, then Grievant was supposed to file the form in the

[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. 11427 ("Hearing Decision"), March 10, 2020, at 2-4 (internal citations omitted).

employee's file. Grievant had not filed numerous employee tax documents that were returned to the Agency in 2016.

The HRO found numerous documents unfiled by Grievant. The documents were dated from 2018 and 2017. The documents included tax forms and direct deposit forms.

The HRO testified that on December 18, 2018, she met with Grievant and told Grievant she had to file documents within two weeks of receipt.

In April 2019, Grievant went on leave. The HRO reviewed the items in Grievant's office and determined that Grievant had not filed all of the required documents. The HRO observed several payroll checks that were received on March 29, 2019. Grievant had not contacted the employees to ask them to come to the office to pick up their checks. The HRO contacted the employees and arranged for them to receive their checks.

In October 2018, the HRO observed that Grievant was on the phone "all the time". She met with the Warden who told her to review telephone call logs. The HRO told Grievant she should only be making a minimum of personal calls since the phone was supposed to be for business use.

In February 2019, Grievant attended a staff meeting during which the HRO told staff that the telephones should be used for State business only and employees could occasionally make outside calls.

In January 2019, Grievant and the Lieutenant began a romantic relationship. The relationship ended in the beginning of April 2019.

On April 16, 2019, Grievant sent the Lieutenant an email from her personal email account:

> People treat animals better than u have treated me at least they will feed them. You are unbelievable and pathetic and I don't want you. You can take that pasta salad and you know what you can do with it. I hate I loved you and I should have listened to the people that said you were crazy and not worth my time. Karma!

In April 2019, the Lieutenant told the HRO "that woman is crazy." He was referring to Grievant. He told the HRO that Grievant was stalking him.

On May 13, 2019, the Lieutenant sent the HRO an email:

> This statement is in regards to harassing statements and unprofessional demeanor that has been displayed by [Grievant].

> Since the demise of a relationship with [Grievant] she has made numerous degrading statements towards me and [Ms. T]. These messages were sent through text, Facebook messenger, face book news feed, work email and personal email. The messages sent to my personal phone were very direct and vulgar in nature. *** [Grievant] also has used her personal email account to send me an inappropriate email through my DOC email address. Also during this duration, she has been to my residence to confront me due to rumors she heard in regards to [Ms. T] and myself. Fortunately, I wasn't home. She stated to me that she was HR and she was going to get me one way or another. [Grievant] also made inappropriate statements and sent very degrading messages regarding [Ms. T]. She stated again that she [is] HR, I know where [Ms. T] lives, I'll get you both. Supporting documents have been attached to this report.

The Lieutenant testified that "emotions were high" but he did not feel threatened by Grievant's statements.

In July 2019, the Lieutenant ended his relationship with Ms. T and resumed his relationship with Grievant.

On August 19, 2019, the agency issued to the grievant three Written Notices: a Group II for failure to follow a supervisor's instructions; a Group II with suspension for unauthorized use of state property or records; and a Group III with termination for violating DHRM Policy 2.35, *Civility in the Workplace*.[3] The grievant timely grieved these disciplinary actions, and a hearing was held on January 24, 2020.[4] In a decision dated March 10, 2020, the hearing officer determined that the Group II Written Notice for failure to follow instructions must be reduced to the Group I level[5] and that the other Group II Written Notice for unauthorized use of state property must be reversed.[6] However, the hearing officer upheld termination of the grievant's employment based on the Group III Written Notice, finding that the grievant threatened to use her position of power within the agency to threaten a coworker, a violation of Policy 2.35.[7] The hearing officer also found no mitigating circumstances meriting reduction of the disciplinary action.[8]

The grievant now appeals the hearing decision to EDR.

[3] Hearing Decision at 1.
[4] *Id.*
[5] *Id.* at 4-5.
[6] *Id.* at 5-6.
[7] *Id.* at 6-7.
[8] *Id.* at 7.

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."[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.

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 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 her request for administrative review, the grievant does not appear to challenge the hearing officer's conclusions regarding whether she engaged in misconduct under DHRM Policy 2.35. Instead, she claims that, during the disciplinary process, the agency failed to keep her grievance process confidential, failed to hold a due process meeting with her, and went forward with disciplinary action as a form of retaliation for her participation in the grievance process.[16] EDR interprets these claims as arguments that the hearing officer failed to consider these allegations as mitigating factors.[17]

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[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).
[15] *Grievance Procedure Manual* § 5.8.
[16] *See generally* Request for Administrative Review.
[17] To the extent that the request for administrative review presents these claims as issues that should have been independently determined by the hearing officer, EDR disagrees. By statute, only certain management actions may be resolved at a grievance hearing. Among those that automatically qualify for hearing are formal disciplinary actions like those at issue in this matter. *See Grievance Procedure Manual* § 4.1(a) Alleged misapplications or unfair applications of policy do not automatically qualify for hearing. *Id.* § 4.1(b). Thus, the issues automatically qualified for hearing in this case, and the relief available under the grievance procedure, related solely to whether the agency's disciplinary actions were warranted and appropriate under all the facts and circumstances.

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]."[18] 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."[19] 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.[20]

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.[21] 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."[22] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[23] and will reverse the determination only for clear error.

Agency's Disciplinary Process

As to the grievant's confidentiality allegations, EDR finds no basis to disturb the hearing officer's decision on these grounds. While EDR would counsel agencies to protect employees'

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[18] Va. Code § 2.2-3005(C)(6).
[19] *Rules for Conducting Grievance Hearings* § VI(A).
[20] *Id.* § VI(B).
[21] 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).
[22] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[23] "'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.*

privacy as it relates to grievance proceedings,[24] allegations of indiscretion, while concerning, are not necessarily susceptible to remedy by the hearing officer (or by EDR in reviewing his decision) under the grievance procedure.[25] Even assuming that the grievant proved improper disclosures in this case, it is unclear how these procedural objections should have informed the hearing officer's mitigation analysis of whether the agency's discipline for proven misconduct exceeded the bounds of reasonableness. Accordingly, while the grievant's objections to these alleged indiscretions may be reasonable, such objections do not bear on the decision to uphold the grievant's removal.

Similarly, the grievant's due process claims do not present a basis for remand as to mitigation. The grievant appears to contend that the agency violated her due process rights[26] by failing to hold a disciplinary meeting with her prior to terminating her employment.[27] The hearing officer concluded that "[a]ny defect in the Agency's procedural due process is cured by the hearing process," and the "[g]rievant could have submitted any evidence or arguments during the grievance hearing that she could have submitted to the Agency prior to her removal."[28]

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[29] On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an

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[24] The grievant claims that an agency human resource officer violated the confidentiality of the grievance process by having a third employee deliver grievance forms to the grievant and by including scheduling information about the grievant's hearing in a facility-wide email. Request for Administrative Review at 1.

[25] A hearing officer's authority to grant relief at a grievance hearing is limited by statute. *See* Va. Code § 2.2-3005.1(A); *Grievance Procedure Manual* §§ 5.9(a), (b).

[26] EDR notes that constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard," is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review. *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974). Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will addresses the issue in this ruling.

[27] Request for Administrative Review, at 1-2.

[28] Hearing Decision at 7. EDR does not interpret the hearing decision to find that the agency violated the grievant's due process; likewise, nothing in this ruling should be read to conclude that the agency in fact violated the grievant's due process rights during the disciplinary proceedings.

[29] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). The pre-disciplinary notice and opportunity to be heard need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-46. State policy requires that

> [p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1).

opportunity to present evidence; and the presence of counsel.[30] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[31]

The grievant does not appear to dispute that she had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Instead, she contends that an in-person meeting would have constituted a better attempt to resolve the disciplinary issues at the lowest possible level.[32] But even if EDR were to accept this argument, it presents no basis to conclude that the grievant ultimately lacked either notice or an opportunity to be heard in connection with the disciplinary action taken against her. Under these circumstances, EDR is persuaded by the reasoning of many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies,[33] to the extent any occurred here. Thus, we perceive no error in the hearing officer's conclusion that the grievant received adequate due process in this case.

Retaliation

Finally, the grievant argues that the agency took disciplinary action against her only after she filed a grievance, and she objects to the hearing decision's silence on this issue. Because the agency proved that the grievant engaged in misconduct warranting a Group III Written Notice, the grievant had the burden at the hearing to demonstrate by a preponderance of the evidence that the action was nevertheless a pretext for retaliation that would not have occurred but for the grievant's protected activity.[34]

In her request for administrative review, the grievant points to specific hearing testimony by the HRO regarding the timing of the disciplinary action. The HRO testified that she received instructions from agency headquarters to wait to issue written discipline to the grievant until the grievant returned from "sick leave," but those instructions changed after the grievant filed a

[30] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[31] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[32] Request for Administrative Review at 1.

[33] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572, at 5 (and authorities cited therein).

[34] *See Rules for Conducting Grievance Hearings* § VI(B)(1); Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)). In the state grievance context, participation in the grievance process is one example of a protected activity. *See* Va. Code § 2.2-3004(A).

grievance.[35] The grievant's advocate asked whether the agency issued written discipline because of the grievance, and the HRO responded: "No. They told me to proceed with the Written Notice because it looked like she was not coming back, so . . . they told me to process it, so I processed it."[36] In his decision, the hearing officer concluded that no circumstances warranted mitigation.[37]

The grievance procedure does not require that a hearing officer specifically discuss every argument made by a party or the testimony of each witness who testifies at a hearing; thus, mere silence as to specific arguments, testimony, and/or other 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 evidence presented by the parties. Here, it would appear that the hearing officer did not explicitly address the issue of retaliation in the decision because he did not identify relevant, credible, and/or persuasive evidence tending to show that the agency would not have issued the Group III Written Notice but for retaliatory motives. While the grievant perceives retaliation based on the timing of the grievance in combination with the procedural allegations addressed above, nothing indicates that the hearing officer's consideration of the evidence regarding mitigation was in any way unreasonable or not based on the actual evidence in the record. Because the hearing officer's findings in this case are based upon 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. Accordingly, EDR declines to disturb the hearing decision on this basis.

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.[38] 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.[39] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[40]

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[35] Hearing Recording at 5:26:40-5:29:15 (HRO's testimony).
[36] *Id.* at 5:26:55-5:27:30 (HRO's testimony).
[37] Hearing Decision at 7.
[38] *Grievance Procedure Manual* § 7.2(d).
[39] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[40] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).