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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia
Ruling Number 2020-5075
April 27, 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 11463. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11463, as found by the hearing officer, are as follows:[2]

> The University of Virginia [the "university"] employed Grievant as a Quality Assurance Inspector. An essential function of her job was to be present on the University's campus to inspect Facilities to ensure University staff are properly cleaning University Buildings.
>
> Grievant was injured at work on June 4, 2019. Grievant submitted a claim for short-term disability to the Third Party Administrator. On June 21, 2019, Ms. R sent Grievant a letter advising Grievant:
>
> > because you have worked for the University for at least 12 months and meet the hours of service requirement in the 12 months preceding your disability leave, you are also eligible for the Family and Medical Leave (FMLA). FMLA and STD leave run concurrently. *** Keep in contact with supervisor about your leave status. This includes notification when you return date may change as a result of filing a claim extension, etc.

[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. 11463 ("Hearing Decision"), March 11, 2020, at 2-4 (citations omitted).

Grievant was on short-term disability from June 4, 2019 through August 11, 2019.

On August 6, 2019, the Manager sent Grievant an email indicating she had not received any communication from Grievant since July 17, 2019 and that she had left Grievant a voice message. Grievant replied, "[a]ll additional information has been sent to [Third Party Administrator] who then forwards to UVA HR. The last date is through 08/08. *** Please let me know if you haven't received this information and I will have it forwarded to you."

She did not return to work on August 12, 2019 and did not contact the Supervisor regarding her status.

On August 13, 2019, Ms. R received a doctor's note dated August 7, 2019 indicating Grievant should remain out of work for three weeks.

The Third Party Administrator notified Ms. M that on August 8, 2019, Grievant requested an extension of benefits until September 4, 2019. On August 28, 2019, the Third Party Administrator denied Grievant's request.

On August 28, 2019, Ms. R sent Grievant an email indicating the University was notified by the Third Party Administrator that Grievant's claim from August 12, 2019 through September 4, 2019 was denied. She informed Grievant, "we would expect that you return to work."

Ms. M sent Grievant a certified letter dated August 30, 2019 advising Grievant's last day of approved leave was August 11, 2019. Ms. M wrote:

> It is imperative that you return to work immediately with a doctor's note indicating your ability to do so or provide a written request with appropriate supporting documentation for a formal leave of absence for management's consideration. *** Failure to do so by Friday, September 6, 2019 may result in additional action up to and including termination in accordance with the Standards of Conduct.

On September 4, 2019, Ms. R sent Grievant an email asking, "is your doctor returning you to work as of tomorrow, 9/5/19?"

On September 10, 2019, Ms. B sent Grievant an email:

> As of today, September 10, 2019, our records indicate that we have not heard [a] response from you in regard to your return to work, nor have you communicated with your [Manager] as is required throughout the short-term disability leave process. *** At this

> time, we require that you respond within 24 hours to your direct supervisor. Failure to do so will be viewed as a violation of "3 days absent without authorization." This is a serious offense considering that you've been out on unapproved leave since August 12, 2019, and could result in separation of employment.

Ms. B attached a copy of Ms. M's August 30, 2019 letter to Ms. B's email to Grievant.

On September 10, 2019, Grievant sent the Manager an email indicating she had not received a letter via certified mail and had spoken with Ms. R on September 4, 2019 to provided updated information regarding her status. Grievant wrote:

> [a]t this point, I have no additional information to provide other than I am not in a position to return to work. I cannot sit, stand or walk for extended periods of time. *** In addition to the foot injury, I have a back injury. *** I am happy to work remotely, however, the department wasn't willing to accommodate that previously. If that accommodation can now be met, please let me know and provide any tasks that are available.

Grievant was seen by a doctor on September 11, 2019. The doctor wrote a note, "[s]he will begin PT for back pain, date to return to work to be determined after assessment."

On September 11, 2019, Grievant sent the Manager an email indicating she had not received the certified letter and did not know she had a deadline of September 6, 2019 to respond. She wrote, "[m]y health restrictions don't allow me to perform my current position or modified duties in office at this time."

On September 30, 2019, the university issued to the grievant a Group III Written Notice with removal for being absent in excess of three workdays without authorization; the university issued a revised Written Notice on January 3, 2020.[3] The Written Notice specified that the grievant's absences beginning on August 29, 2019 and continuing through September 10, 2020, were not approved. It also charged that the grievant failed to maintain regular contact with her supervisor as required during her disability leave. The grievant timely grieved the university's disciplinary action,[4] and a hearing was held on February 20, 2020.[5] In a decision dated March 11, 2020, the hearing officer determined that the Group III Written Notice with removal was

[3] *Id.* at 1. The revised January 3 Written Notice made certain factual corrections to the charges but maintained most of the substantive allegations and resulting disciplinary actions.

[4] The grievant filed her dismissal grievance within 30 calendar days of the effective date of her termination, which was later than the issue date of the Group III Written Notice. *See* EDR Ruling No. 2020-5013. EDR concluded that the dismissal grievance was timely under these circumstances. *Id.*

[5] Hearing Decision at 1.

warranted because the grievant's approved absences were exhausted on August 28, 2019 and her absences continued thereafter without authorization.[6] The hearing officer also concluded that the grievant's proposed disability accommodation was not reasonable and that no mitigating circumstances existed to reduce the disciplinary action.[7]

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."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant appears to contend that she adequately communicated with the university regarding her return-to-work status and that the university should have permitted her to work remotely and/or use her annual leave to cover her continued absences.[11] Accordingly, she argues that the hearing officer did not adequately consider whether the university's disciplinary actions constituted discrimination on the basis of a disability.

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] As long as the hearing officer's findings are based on evidence in

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[6] *Id.* at 5.
[7] *Id.*
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] The grievant's request for administrative review also raises several challenges to the university's original Written Notice dated September 30, 2020. Because the hearing and hearing decision addressed only the Written Notice issued on January 3, 2020, EDR finds no basis for remand on grounds related to the September 30 Written Notice.
[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.

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.

Findings of Hearing Officer

In this case, the hearing officer made appropriate factual determinations that the grievant engaged in the misconduct charged on the Written Notice by being absent for more than three workdays without authorization. The hearing officer found that the university authorized the grievant's absences only through August 28, 2019, the day on which the third-party benefits administrator denied her claim to extend her short-term disability period.[16] Beginning on that date, the university made multiple requests for the grievant to return to work with medical clearance or to request an alternate arrangement.[17] The hearing officer concluded that, as of August 29, 2019, the grievant had exhausted any applicable sick leave and family and medical leave, in addition to disability benefits.[18] The hearing decision identified no other basis on which the university would have been able or obligated to approve the grievant's absences on and after August 29.

The grievant argues that she sufficiently communicated medical justifications for her continued absences to the university. She also contends that her absences could have been covered by accrued annual leave and that she could also have performed up to 50 percent of her duties remotely. Essentially, then, the grievant contends that these potential accommodations should have prevented the university from considering her absences unauthorized beginning on August 29, 2019, and that its failure to grant them was a form of disability discrimination.

DHRM Policy 2.05, *Equal Employment Opportunity*, "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or *disability*. . ."[19] Like Policy 2.05, the Americans with Disabilities Act [ADA] prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[20] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[21]

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[16] Hearing Decision at 3; *see* Hearing Recording at 1:03:20-1:04:25 (Manager's testimony).
[17] *See* Hearing Decision at 3-4; Agency Ex. 7 at 1, 32-33, 35; Agency Ex. 8 at 4-5, 8, 10.
[18] Hearing Decision at 5.
[19] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added). Under this policy, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations. *Id.*; *see* 42 U.S.C. §§ 12101 through 12213. A disability may refer to "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1). Because the record presents no dispute on this issue, EDR presumes for purposes of this ruling that the grievant satisfies the definition of an individual with a disability.
[20] 42 U.S.C. § 12112(a).
[21] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). "Reasonable accommodations" include "[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(iii); 42 U.S.C. § 12111(9)(B).

In this case, the grievant's federal and state disability rights interact with her disability benefits as provided by DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Under Policy 4.57, "[a]gencies may allow employees to [return to work] full-time/full-duty, no restrictions, if they present a doctor's note with full [return to work] indicated."[22] If an employee provides a medical release to return to work *with* restrictions, "the agency must review the request and determine if the restrictions can be accommodated."[23] Here, the hearing officer did not find, and the record does not indicate, that the grievant provided the university with a medical release to return to work after August 28, 2019, with or without restrictions.

Upon a thorough review of the record, EDR concludes that evidence supports the hearing officer's conclusion that the university's disciplinary action was warranted and appropriate, in that the grievant was unable to perform an essential function of her job and had not demonstrated the existence of a reasonable accommodation that would allow her to overcome that limitation. As an initial matter, under DHRM Policy 4.57, the grievant's return to work was conditioned on her providing a medical release. Further, even if the grievant had been medically cleared to work remotely, the hearing officer found that "an essential function of Grievant's job was to be present on the University's Grounds to conduct inspections."[24] Record evidence supports this conclusion: the grievant's supervisor testified that 90 percent of the grievant's job duties involved on-site visual inspections at university facilities.[25] While the grievant may disagree with her supervisor's assessment, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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.[26]

The grievant further alleges that she had sufficient annual leave to cover her continued absence. Although the hearing officer made no specific findings on this issue, EDR cannot find that this silence creates grounds for reconsideration. There is no requirement under the grievance procedure that a hearing officer specifically discuss each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular 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 and arguments presented. Here, the record does not indicate that the grievant may have requested to apply annual leave to her absences following the expiration of her disability benefits. Even if she had, the evidence does not suggest that the university would have been required to approve such a leave request or that an accommodation in this regard would have been reasonable in the absence of an apparent

[22] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 33.
[23] *Id.*
[24] Hearing Decision at 5.
[25] Hearing Recording at 2:31:30-2:32:45 (Manager's testimony).
[26] *See, e.g.*, EDR Ruling No. 2020-4976.

plan from the grievant to resume the essential functions of her job. Accordingly, EDR declines to disturb the ruling on this basis.

Finally, a crucial aspect of the misconduct alleged in the Group III Written Notice was the grievant's failure to adequately communicate with the university regarding her intentions after August 28. EDR's review of the evidence as a whole indicates that the grievant's infrequent communications with her employer as of August 28 primarily confirmed that she remained unable to perform the essential functions of her job and offered no basis for the university to maintain her position, given that her benefits had expired. After the grievant learned that she was expected to return to work as of August 28, there is no indication that she attempted to discuss her status and/or potential solutions with her supervisor until at least September 10, 2019, nearly two weeks following the expiration of her disability benefits.[27] Under these circumstances, EDR finds no error in the hearing officer's decision to uphold the university's disciplinary action based on the grievant's failure to appropriately seek authorization for her continued absences.

For similar reasons, EDR cannot conclude that the hearing officer erred in declining to mitigate the university'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* 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 university's charge of being absent in excess of three workdays without authorization. Thus, he appropriately upheld the university's conclusion, in its discretion, that this misconduct warranted disciplinary action at the level of a Group III Written Notice with removal.[32] Even if the hearing officer himself would have imposed a less severe disciplinary action, he lacked authority to mitigate the penalty by substituting his own judgment for the university's discretion to maintain an effective

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[27] *See, e.g.*, Agency Ex. 8, at 1-12.
[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 "absences in excess of three days without authorization" as an example of an offense meriting a Group III Written Notice).

workforce.[33] Thus, EDR cannot say that the hearing officer abused his discretion in finding that the university's Group III Written Notice with removal 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.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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[33] *See* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings*§ VI(B)(2).
[34] *Grievance Procedure Manual* § 7.2(d).
[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).