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ADMINISTRATIVE REVIEW

In the matter of George Mason University
Ruling Number 2020-5080
April 30, 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 11438. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11438, as found by the hearing officer, are as follows:[2]

> George Mason University [the "university"] employed Grievant as a Commissioning Engineer. He began working for the University in March 2010. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant was covered by the Virginia Sickness and Disability Program. Grievant stopped working and entered short-term disability status.
>
> Grievant suffered from sleep apnea and depression. His depression "kicked in" in June 2018 and he was diagnosed with depression. Grievant used a machine to treat his sleep apnea.
>
> Dr. C completed a Return to Work Certification on August 5, 2019 and sent it to the University. Dr. C wrote that Grievant was under his care from June 19, 2019 to July 23, 2019 and "will be able to return to work on 8/5/2019." Dr. C circled the answer "No" in response to the question, "Are there any job modifications required?"

[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. 11438 ("Hearing Decision"), March 18, 2020, at 2-5 (citations omitted).

On August 6, 2019, the Employee Relations Consultant sent Grievant an email:

> I understand that since filing a claim to evoke the LTD benefit, you have since obtained a return to work dated 8/5/19. We will need to meet with you in Human Resources prior to any return to work. I am available tomorrow anytime between 8 a.m. and 2 p.m.

On August 7, 2019, the Employee Relations Consultant sent Grievant an email:

> This is to follow up on yesterday's email. You have been cleared to return to work however we have not heard from you. Please contact me regarding a time to meet and discuss your employment status.

On August 8, 2019, Grievant replied to the Employee Relations Consultant that his primary care physician had not returned the long-term disability paperwork or the return to work information. He said he would not be available to meet for the rest of the week. He inquired about coverage under FMLA.

On August 8, 2019, the Employee Relations Consultant sent Grievant an email stating:

> As of now, you have exhausted your FMLA benefits and all are no longer in an approved leave status. Your FMLA expired in April 2019 and your VSDP leave benefit expired on July 30, 2019. As of August 5, 2019, you were cleared to return to work. Please see the attached documentation that was sent to [Third Party Administrator] and Human Resources on your behalf. Given the fact that you were cleared for full duty, the expectation was for you to return to work on August 6, 2019. Your failure to report to work as a violation of DHRM policy 1.60 Standards of Conduct "Absence in excess of three work days without authorization" and "Inability to meet working conditions". If you are interested in resuming your employment with GMU, please plan to return to work tomorrow August 9, 2019 and meet in Human Resource [location]. If you simply would like to discuss your current status, I am available to meet tomorrow for that as well.

On August 9, 2019, Grievant's doctor, Dr. C, faxed an Attending Physician's Statement Long Term Disability to the Third Party Administrator as part of Grievant's application for long-term disability. Dr. C wrote that Grievant

was "feeling depressed, fatigued, lack of energy, inability to sleep, difficulty with staying focused, short term memory, attentiveness, following direction." Dr. C concluded Grievant was totally disabled.

On August 19, 2019, Grievant sent the Employee Relations Consultant an email stating, [“]I would like to return to work. I am able to meet in person today. I am available in the afternoon; or possibly this morning." The Employee Relations Consultant replied at 8:03 a.m., "[Benefits Administrator] and I will be here awaiting your arrival to discuss your employment status." The Employee Relations Consultant called Grievant at approximately 3 p.m. and left a voice mail. At 4:01 p.m. on August 19, 2019, the Employee Relations Consultant sent Grievant an email:

> This message is to follow up on a call and voicemail that I recently left you (approximately 3 p.m. today) and to also note that [Benefits Administrator] and I have anticipated your arrival since 8 a.m. this morning to no avail."

On August 20, 2019, Grievant sent the Employee Relations Consultant an email stating, "Sorry, I was planning on coming in; but, I became very ill yesterday afternoon. *** Is there a time on Wednesday we can meet."

On August 20, 2019, the Employee Relations Consultant sent Grievant an email:

> As previously stated, please be advised that you are no longer in an approved leave status. Dating back to August 6, 2019 when you were cleared to return to work, I have made several attempts to meet with you to discuss your employment status however, you have not made arrangements to come in and do so. Your communications have been insufficient and have not provided any substantive information related to your return to work. Yes, I am available Wednesday at 11 a.m. to meet with you.

On August 26, 2019, Grievant sent the Employee Relations Consultant an email:

> Sorry I missed this email when it came through. I have been addressing additional health issues and I am in my physician's office currently. I think that we should probably wait till after Labor Day to meet.

On August 30, 2019, the Employee Relations Consultant sent Grievant an email with a due process notification attached. The due process notification advised Grievant that he had been absent from work without authorization in

> excess of three workdays and that the University expected to issue him a Group III Written Notice with removal. Grievant was advised he could meet with the Employee Relations Consultant on September 4, 2019 to present "any reasons why you believe this action should not be taken."
>
> Grievant met with the Employee Relations Consultant on September 4, 2019. Grievant's Counsel participated in the meeting by telephone. She sent a letter to the Assistant Director with a copy to the Employee Relations Consultant stating Grievant "would like to return to work, but would require a reasonable accommodation to perform the essential functions of his job." During the meeting, Grievant indicated he had received and read the due process notification. Grievant spoke without interruption for approximately twenty minutes. He discussed his father and his love for the University. He did not discuss his depression. The Employee Relations Consultant concluded, "[d]uring this time, he did not share any reasons why he was unable to return to work since July 30, 2019 or any reasons for unauthorized absences since that time."

On September 6, 2019, the university issued to the grievant a Group III Written Notice with removal for being absent in excess of three workdays without authorization.[3] The Written Notice specified that the grievant's absences as of August 8, 2019 were not approved. The grievant timely grieved the university's disciplinary action, and a hearing was held on February 27, 2020.[4] In a decision dated March 18, 2020, the hearing officer determined that the Group III Written Notice with removal was warranted.[5] The hearing officer reasoned that the university "was entitled to rely on Grievant's . . . doctor's note indicating he was able to return to work without restriction."[6] He further concluded 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

[3] *See* Hearing Decision at 1.
[4] *See id.*
[5] *Id.* at 1, 5-6.
[6] *Id.* at 6.
[7] *Id.* at 6-7.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).

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 his request for administrative review, the grievant argues that the university failed to engage in an interactive process to determine a reasonable accommodation for him, as required by the federal Americans with Disabilities Act ("ADA").[11] He also claims he did not receive due process before the termination of his employment.[12]

Reasonable Accommodation

The grievant contends that, despite his request for a reasonable accommodation, the university failed to engage in an interactive process to identify such accommodations. Specifically, the grievant argues that the university never referred him to its formal accommodation process to explore options, such as additional leave – *i.e.* authorization to be absent.[13]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[14] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[15] 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.[16] 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.[17] 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.

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*. . ."[18] Under this policy, "'disability' is defined in accordance with the [ADA]," the

[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Request for Administrative Review at 6-10.
[12] *Id.* at 10-12.
[13] *See id.* at 6-7. The hearing officer concluded that, as of August 8, 2019, the grievant did not have available disability or family and medical leave to apply to his continued absences. Hearing Decision at 5-6. The grievant does not appear to argue, and the record does not reflect, that he requested any other type of leave on or after August 8.
[14] Va. Code § 2.2-3005.1(C).
[15] *Grievance Procedure Manual* § 5.9.
[16] *Rules for Conducting Grievance Hearings* § VI(B).
[17] *Grievance Procedure Manual* § 5.8.
[18] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

relevant law governing disability accommodations.[19] Like Policy 2.05, the 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]

As a general rule, an employer must make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[22] "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."[23] In order to determine the appropriate reasonable accommodation, it may be necessary for [the employer] "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[24]

In this case, the grievant's federal and state disability rights interact with his disability benefits as provided by DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Policy 4.57 entitles employees eligible for short-term disability ("STD") to receive income "for up to 125 workdays when the employee is unable to work due to an illness or injury that has been qualified by the [state's third-party benefits administrator]."[25] 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."[26] 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."[27] When an employee's maximum STD period expires, eligible employees may claim long-term disability benefits that "provide employees with income replacement if they become disabled and are unable to perform the full duties of the job without any restrictions."[28]

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[19] *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 parties do not appear to dispute 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).
[22] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[23] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B). A reasonable accommodation encompasses "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. § 1630.2(o).
[24] 29 C.F.R. § 1630.2(o)(3).
[25] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 13.
[26] *Id.* at 33.
[27] *Id.*
[28] *Id.* at 21.

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. Based on the evidence, the hearing officer found that the grievant's physician completed a return-to-work certification with no restrictions as of August 5, 2019.[29] On August 8, 2019, a university human resources consultant advised the grievant that he was absent without authorization and that, in order to resume his employment or discuss his status, he should meet with the consultant the following day.[30] On August 19, 2019, the grievant indicated he wished to meet with university staff that day in order to return to work, but he ultimately did not appear for a meeting.[31] On August 26, 2019, the grievant advised the consultant that he was "addressing additional health issues" and suggested further postponing for another week any meeting about returning to work.[32]

The grievant asserts that, on August 8, 2019, he communicated his need for an accommodation by asking if his continued absences could be classified as authorized family and medical leave.[33] However, even assuming that this inquiry should have triggered the university's interactive-process obligation under the ADA, the evidence cited in the hearing decision reflects that the university's response included repeatedly offering to meet with the grievant to discuss his status and/or return to work. The hearing officer did not find, and the record does not suggest, that the grievant accepted these offers. While the grievant may have experienced legitimate difficulty in navigating the processes of his employer, its third-party benefits administrator, his own medical provider, and other benefits-connected entities,[34] university staff made clear on August 20, 2019 that the grievant's own "communications ha[d] been insufficient" regarding his intentions and status.[35] The grievant's response, almost a week later, provided no further substantive information and proposed to further delay discussion. Under these circumstances, EDR perceives no error in the hearing officer's determination that the grievant had not proven a disability-related defense to the university's discipline.

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]."[36] 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."[37] 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)

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[29] Agency Ex. 6, at 4.
[30] *Id.* at 1.
[31] Agency Ex. 12, at 2-4.
[32] *Id.* at 1.
[33] *See* Request for Administrative Review at 7.
[34] *See Hearing Recording* at 2:21:20-2:22:10 (Grievant's testimony).
[35] Agency Ex. 11, at 1.
[36] Va. Code § 2.2-3005(C)(6).
[37] *Rules for Conducting Grievance Hearings* § VI(A).

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.[38] EDR will review a hearing officer's mitigation determination for abuse of discretion[39] 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.[40] 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 workforce.[41] 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.

Due Process

In his request for administrative review, the grievant also contends that he did not receive due process regarding the termination of his employment.[42] Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[43] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[44] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

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.[45] On the other hand, post-disciplinary due

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[38] *Id.* § VI(B).

[39] "'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.*

[40] *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).

[41] *See* Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings* § VI(B)(2).

[42] *See* Request for Administrative Review at 10-12.

[43] *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).

[44] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

[45] 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

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 opportunity to present evidence; and the presence of counsel.[46] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[47]

The grievant argues in his request for administrative review that the university had already decided to terminate his employment prior to its predetermination meeting on September 4, 2019.[48] However, the grievant appears to have 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. 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, to the extent any occurred here.[49]

The grievant nevertheless contends that the hearing did not ultimately satisfy his due process rights because his physician, Dr. C, did not testify.[50] To the extent that the grievant argues that he did not receive a full and fair grievance hearing before the hearing officer, EDR finds no basis to support such a conclusion. EDR can identify no instance in which the hearing officer ever denied an attempt by the grievant to introduce testimony, or its equivalent, by Dr. C.[51] Further, while the grievant argues that he should have had an opportunity to offer medical support for an accommodation from Dr. C, it does not appear that the university ever denied the

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> 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).

[46] 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))).

[47] 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).

[48] *See* Request for Administrative Review at 10-11.

[49] *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). Nothing in this ruling should be read to conclude that the university's pre-disciplinary process did in fact violate the grievant's due process rights or that its process was otherwise deficient.

[50] Request for Administrative Review at 12.

[51] The *Rules for Conducting Grievance Hearings* provide for alternatives to witness testimony when a witness not under control of either party is unavailable to testify. *Rules for Conducting Grievance Hearings* § IV(E). EDR notes that, on the grievant's motion, the hearing was rescheduled to accommodate the grievant's wish to present witness testimony from Dr. C, who was apparently not available to appear at the original hearing date. The grievant has represented that Dr. C also was not available on the rescheduled hearing date. Request for Administrative Review at 12. There is no indication that the grievant requested that the hearing officer leave the record open for further submission of evidence from Dr. C or otherwise continue the case to allow him to present such evidence.

grievant such an opportunity during the time when Dr. C was reportedly available to provide input. Instead, the hearing officer found that the university solicited information regarding the grievant's status multiple times and began the disciplinary process for unauthorized absences only after the grievant failed to provide any substantive response. Because it appears that the grievant had notice of these charges and an opportunity to be heard, EDR declines to disturb the hearing decision on due process grounds.

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.[52] 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.[53] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[54]

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