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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2022-5291
August 17, 2021

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11661. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11661, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Probation Officer at one of its locations. She began working for the Agency in October 2018. The organizational objective of her position was:
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> > To enhance public safety in the Commonwealth by investigating, controlling, and supervising adult offenders in a humane cost-efficient manner consistent with sound community correctional principles and constitutional standards.
>
> No evidence of prior active disciplinary action was introduced during the hearing.
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> The Agency classified probationers as High, Medium, or Low depending on the level of supervision required by Probation Officers. Level High probationers were the most likely to recidivate.
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> Grievant received training regarding how to perform her duties including the Agency's expectation that Grievant comply with Operating Procedures 920.1 and 920.6. She attended a two-day training session for probation officers in February 2020. This training included the topics of processing Level High probationers and initiating waivers.

[1] Decision of Hearing Officer, Case No. 11661 ("Hearing Decision"), July 9, 2021, at 2-4 (citations omitted).

On September 4, 2019, Grievant received a Notice of Improvement Needed/Substandard Performance. Out of 18 of Grievant's cases reviewed by the Agency, 12 needed further action. Grievant was given 90 days to bring her cases into compliance.

Grievant was assigned initially to serve as a Probation Officer with duties requiring her to go to Court. In order to reduce Grievant's workload, the Agency removed her Court duties in May 2020. Grievant remained a Probation Officer with case management duties but in a different locality. The type of Probationers on her caseload changed. She began supervising Level High Probationers for the first time. Approximately a quarter of her caseload consisted of Level High Probationers. The Chief and Deputy Chief believed that reducing Grievant's duties would enable her to be successful in reaching her performance expectations.

Grievant reported to Mr. J from May 4, 2020 to June 10, 2020 when she began reporting to Ms. H. Mr. J observed Grievant "struggling" with her caseload and believed she would benefit from a change in her work duties.

On May 28, 2020, Grievant received an Interim Employee Evaluation. Grievant was informed that out of 111 case reviews, 59 cases required further action due to missing log note entries, a failure to promptly follow-up on technical violations and/or other forms of case management deficiencies. Grievant was advised to continue her evidence based training and to stay abreast of new VADOC policies and procedures.

Because of the COVID19 pandemic, Probation Officers were not required to have in-person meetings with offenders. From March 16, 2020, all cases were placed in "waiver status." Grievant worked remotely and reported to the office only one or two days per week. On July 15, 2020, that restriction was removed and Probation Officers were expected to resume meeting in-person with Level High Probationers. During monthly staff meetings, the Chief Probation Officer stressed the importance of meeting with probationers.

Grievant began supervising [the Offender] on May 4, 2020. Grievant spoke with [the Offender] by telephone on May 13, 2020 and June 17, 2020. She was unable to reach [the Offender] by telephone on July 30, 2020. Grievant contacted the [the Offender] by telephone on August 18, 2020 and September 1, 2020. Grievant did not have personal contact with [the Offender] in July, August, October, November, and December 2020 as required for a Level High offender. [The Offender] had an active misdemeanor warrant in August 2020 and Grievant addressed the warrant when she spoke with him on September 1, 2020. She met with [the Offender] in person on September 15, 2020 but did not follow-up to determine if the warrant remained active. Grievant could have had [the Offender] arrested on September 15, 2020 if the warrant remained active.

On September 22, 2020, [the Offender] reported a change of address to a New Location. Grievant requested a transfer of [the Offender] to the Agency's office handling probationers in the New Location. On September 28, 2020, Mr. W

> from the New Location attempted to contact [the Offender], but was unable to do so. Mr. W attempted to contact [the Offender] again on November 17, 2020, but was unable to reach.
>
> Grievant completed a CSR for [the Offender] on November 19, 2020, but she did so without meeting with him.
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> Grievant was on vacation from November 25, 2020 through December 2, 2020 and had to quarantine for 14 days when she returned to Virginia.
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> [The Offender] was served with a warrant on approximately December 17, 2020 for an offense date of July 9, 2020.
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> On December 27, 2020, [the Offender] kidnapped and abducted a mother and her 12 year old child. On December 27, 2020, Grievant submitted a Probation and Parole After Incident Review in response.
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> On January 7, 2021, the Agency conducted a review of Grievant's remaining 18 Level High probationer cases. The review showed Grievant failed to meet with Level High probationers monthly or request a waiver. She had no personal contact with approximately 16 of 18 Level High Probationers on one or more months during 2020. Grievant failed to complete a Case Supervision Review (CSR) following a new arrest or pending charges for five probationers. Grievant failed to submit a Major Violation Report for three probationers as required by Operating Procedure 920.6.

On January 28, 2021, the agency issued to the grievant a Group III Written Notice with termination for unsatisfactory performance, failure to follow policy, and gross negligence.[2] The grievant timely grieved the disciplinary action and a hearing was held on May 27, 2021.[3] In a decision dated July 9, 2021, the hearing officer found that the agency's evidence was insufficient to demonstrate that the grievant had engaged in gross negligence, but that she had nevertheless failed to comply with agency policy, which is typically a Group II offense.[4] The hearing officer went on to conclude that the grievant's multiple violations of policy, considered as a whole, were sufficient "to support the issuance of a Group III Written Notice," and thus "the Agency's decision to remove Grievant must be upheld."[5] The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.[6] The grievant now appeals the 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

[2] Agency Ex. 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 6.
[5] *Id.* at 7.
[6] *Id.* at 8.

. . . procedural compliance with the grievance procedure . . . ."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[8] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[9] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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 argues that the hearing officer's decision is inconsistent with DHRM Policy 1.60, *Standards of Conduct*.[14] In particular, the grievant asserts that Policy 1.60 does not authorize the consideration of misconduct collectively as a basis for elevating disciplinary action.[15] The grievant contends that Policy 1.60 only permits elevation of disciplinary action based on the nature of the offense, not the number of offenses, and further alleges that her failure to follow policy in this case was not sufficiently serious to justify elevation to a Group III offense.[16]

The hearing officer considered the evidence in the record and concluded that the agency had not established that the grievant's misconduct amounted to gross negligence as charged on the Written Notice.[17] However, the hearing officer did find that the grievant "failed to comply with policy because she did not consistently make monthly person-to-person contact with [the Offender] and several other probationers."[18] The hearing officer noted that "each month Grievant failed to have a person-to-person meeting with a probationer she violated policy thereby constituting a 'particular offense.'"[19] Although the hearing officer determined that "[n]one of those

[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Request for Administrative Review at 1.
[15] *Id.* at 1, 4.
[16] *Id.* at 5.
[17] Hearing Decision at 6.
[18] *Id.*
[19] *Id.*.

violations," on its own, "was an extreme circumstance that would justify elevating a Group II offense to a Group III offense,"[20] the hearing officer further addressed the collective impact of the grievant's repeated misconduct:

> Not only did [the grievant] fail to meet with [the Offender] in person on a monthly basis, she failed to meet with other Level High probationers and violated other provisions of policy. The Agency could have issued separate Group II Written Notices for failing to comply policy but it chose to consider Grievant's behavior collectively. When Grievant's behavior is considered collectively, there is sufficient evidence to support the issuance of a Group III Written Notice.[21]

The determination whether a Written Notice was issued at the appropriate level is a mixed question of fact and policy.[22] On appeal, the grievant challenges the hearing officer's underlying interpretation of DHRM Policy 1.60 as permitting consideration of the grievant's conduct collectively rather than individually. The grievant does not appear to dispute the hearing officer's factual determination that she engaged in misconduct that amounted to multiple Group II offenses, but only alleges that the hearing officer's application of policy to the facts of this case is inconsistent with Policy 1.60.[23]

Here, the agency essentially considered the grievant's repeated failure to follow policy in its entirety, resulting in a single disciplinary action.[24] Though the grievant's behavior *could* be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency's approach here.[25] The resulting charges in the disciplinary action at issue in this case are defined by their totality and reasonably viewed as a repeated and ongoing course of behavior—the grievant's failure to "consistently make monthly person-to-person contact" with multiple probationers[26]—and not a collection of unrelated, distinct issues of misconduct.

Failure to follow policy is normally a Group II offense.[27] The hearing officer clearly found that the grievant violated agency policy. As provided in DHRM Policy 1.60, however,

> [u]nder certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.[28]

Therefore, although each of the grievant's violations of policy would normally be a Group II offense, Policy 1.60 permits an agency to consider the unique circumstances of a particular case and elevate a disciplinary action when, for example, the misconduct or its consequences

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[20] *Id.* at 6-7.
[21] *Id.* at 7.
[22] *See* EDR Ruling No. 2018-4620.
[23] *See* Request for Administrative Review at 3.
[24] *See* Agency Ex. 1.
[25] EDR Ruling No. 2020-5003.
[26] Hearing Decision at 6.
[27] DHRM Policy 1.60, *Standards of Conduct*, Att. A: Examples of Offenses Grouped By Level.
[28] *Id.* at 8.

substantially exceed agency norms. Here, the agency effectively considered the totality of the grievant's conduct to determine that her behavior implicated this section of the policy, justifying elevation to a Group III offense.

Nevertheless, the grievant argues that the facts in this case are substantially different from those in a previous ruling where EDR also determined that collective consideration of misconduct addressed in a single Group III Written Notice was consistent with DHRM Policy 1.60.[29] The grievant argues that, in Ruling Number 2020-5003, the charged misconduct occurred over a "brief" period and involved use of state equipment "to download and forward offensive emails, videos, and files," further noting that management was unaware of the pattern of behavior until it was discovered.[30] By contrast, the grievant contends that the misconduct charged on the Written Notice in the present case "occurred over an eight month period during which [the grievant] was constantly supervised and even received a Performance Plan evaluation . . . which raised no concerns at over her failure to follow policy even though many of the incidents already had occurred."[31] As a result, the grievant argues that EDR should reach a different result here as compared with the outcome in Ruling Number 2020-5003.

The hearing officer addressed the evidence about the grievant's work performance in the decision, describing the grievant's assertion that "she lacked adequate training to perform her job duties" and finding that it was "not supported by the evidence."[32] The hearing officer went on to note that "[t]he Agency provided Grievant with adequate training including on-the-job training[,] . . . reviewed Grievant's work[,] and provided her with criticism and instruction to complete required training."[33] Although the grievant disagrees, the hearing officer was entitled to consider the evidence in the record on these matters and to accept the agency's interpretation of events as more persuasive. Indeed, conclusions as to the credibility of witnesses 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.[34]

In conclusion, we find that the hearing officer's ultimate determinations in this case are consistent with DHRM's interpretation of the *Standards of Conduct* policy. If the policy were interpreted as the grievant argues, an agency would be compelled to issue multiple Written Notices in a situation such as this one. DHRM does not interpret Policy 1.60 to be so rigid as to prevent an agency, given the appropriate circumstances, from treating a course of similar or connected behavior collectively for purposes of disciplinary action.[35] Moreover, where the hearing officer

[29] Request for Administrative Review at 5 (discussing EDR Ruling No. 2020-5003).
[30] *Id.*
[31] *Id.*
[32] Hearing Decision at 7.
[33] *Id.* at 7-8.
[34] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[35] For example, an employee who is disciplined for engaging in workplace harassment will not usually be disciplined for each individual incident of harassing behavior, any one of which could amount to a finding of misconduct. Rather, the employee would be disciplined for the ongoing course of harassing conduct as a whole, which amounts to many different actions or inactions over time.

has found that the grievant has engaged in ongoing misconduct that warranted termination, such a result (termination) cannot be said to be inconsistent with the facts or with policy.[36]

Accordingly, and based on the discussion above, EDR finds no error in the hearing officer's application of DHRM Policy 1.60 to the facts of this case. We therefore decline to disturb the decision on the grounds cited by the grievant in her request for administrative review.

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.[37] 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.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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[36] *See Rules for Conducting Grievance Hearings* § VI(B)(1) ("[I]f the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld," absent evidence of mitigation).
[37] *Grievance Procedure Manual* § 7.2(d).
[38] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[39] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).