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SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5782
November 14, 2024

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 Reconsideration Decision in Case Number 12152. For the reasons set forth below, EDR remands the matter for further consideration by the hearing officer consistent with this ruling.

PROCEDURAL HISTORY

The relevant facts in Case Number 12152, as found by the hearing officer in the original hearing decision, are hereby incorporated by reference.¹ In the resulting Reconsideration Decision, the hearing officer made clarifications regarding his determinations concerning mitigation, back pay and benefits, and reasonable attorneys’ fees, to address questions EDR had required to be considered in the first administrative review in this case, EDR Ruling Number 2025-5757 (“prior ruling”). The hearing officer determined that, because there is insufficient evidence that dictates the appropriate position to which to demote the grievant, the demotion would be rescinded in favor of a suspension without pay for 30 days.² However, the hearing officer did not reopen the evidentiary record prior to the issuance of the Reconsideration Decision, stating that the agency was “time barred” after not timely responding to the grievant’s initial request for administrative review. Thus, the hearing officer upheld the Written Notice as a Group III but issued a suspension without pay for 30 days in lieu of the demotion with 5% pay reduction that was dictated in the original hearing decision.³ The agency 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 . . . procedural compliance with the grievance procedure”⁴ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in

¹ Decision of Hearing Officer, Case No. 12152 (“Hearing Decision”), Aug. 27, 2024, at 3-5.

² Reconsideration Decision of Hearing Officer, Case No. 12152 (“Reconsideration Decision”), Oct. 12, 2024.

³ *Id.* at 2.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁵ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁶ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Mitigation of disciplinary action

The hearing officer found that, based on the available evidence in the record and a lack of clarity regarding the level of demotion, the grievant's demotion should be rescinded in favor of a suspension without pay for 30 days. The hearing officer further made the determination to not reopen the evidentiary record prior to the issuance of the Reconsideration Decision. While the hearing officer does generally have discretion whether to reopen the evidentiary record, an appropriate assessment of the matter to be determined on remand hinged on reopening the evidentiary record. The decision to direct that the grievant be demoted is a matter involving the consideration of a variety of issues EDR could not determine in the prior ruling due to the lack of evidence in the record or submitted as part of EDR's review, which is what necessitated the remand to the hearing officer. As the hearing officer has not identified record evidence as to whether demotion was or was not an appropriate remedy, EDR is remanding the matter to clarify the parameters of an appropriate demotion as indicated in the prior ruling.

In making a mitigation determination, "the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness."⁷ While it is possible for a hearing officer to direct a demotion as a reduction of a disciplinary action,⁸ the essence of a demotion is a reassignment of an employee, which is a type of relief narrowly curtailed under the grievance procedure⁹ as it necessarily involves managerial judgment and the assessment of various factors.¹⁰ Thus, it is an unusual form of mitigation, one that probably would only be appropriate in very limited circumstances. However, such circumstances do appear to exist in this case.¹¹ In the original hearing decision, the hearing officer appears to be attempting to resolve an apparent disparity in discipline between the grievant and his supervisor – both of whom appear to have engaged in similar behavior – such that they receive the same discipline (a Group III with a demotion).¹²

While we can understand the result reached in the original decision, there should be an assessment of information from agency management incorporated into the hearing officer's determination of an appropriate demotion, a decision normally within the discretion of management. For example, the hearing officer notes that "[n]either the Grievant nor the Director

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁷ *Rules for Conducting Grievance Hearings* § VI(B)(2).

⁸ See *Grievance Procedure Manual* § 5.9(a).

⁹ See *Rules for Conducting Grievance Hearings* § VI(D)(3).

¹⁰ See, e.g., DHRM Policy 1.60, *Standards of Conduct*, at 9 (describing demotion as an alternative to termination for the receipt of a Group III Written Notice based on agency management's consideration of mitigating circumstances).

¹¹ See EDR Ruling No. 2025-5757 at 5-8.

¹² Hearing Decision at 6-7. Indeed, mitigation to a demotion, the same discipline received by the grievant's supervisor, appears to be more consistent than the 30-day suspension imposed in the Reconsideration Decision.

have offered any authority holding that once an employee is at the lowest level of one position, they are now exempt from demotion.”¹³ EDR concurs with this statement. We did not intend the prior ruling to suggest that the grievant is exempt from demotion (or even that he could not be demoted to a non-supervisory position). However, the particulars of the position for appropriate demotion is a necessary consideration in these situations, both to ensure that such a position is available¹⁴ and that it is consistent with the hearing officer’s remedy. While it would be within the discretion of agency management to determine an appropriate position into which to place a demoted employee, because this relief is part of a reduction of a disciplinary action, there is necessarily a portion of this determination that is within the purview of the hearing officer. Thus, accepting and considering information from the agency (and any additional input from the grievant in response) is needed for the hearing officer to properly assess whether a demotion is an appropriate remedy as mitigation. For example, in most cases a demotion to a position down one level in the employee’s reporting line would seem to be the most common result, but EDR has no basis to know whether such a result is appropriate in this case or consistent with the hearing officer’s intended mitigation remedy. The hearing officer should hear from both parties on this issue before deciding.

While the hearing officer argues that the agency is time barred from submitting information because they did not timely respond to the grievant’s request for administrative review, EDR does not agree. EDR issued the prior ruling following the lack of rebuttal proffered by the agency and made the determination to have the matter remanded to clarify the parameters of the demotion. However, the agency was not barred from submitting any additional evidence prior to the hearing officer’s Reconsideration Decision. The suggestion that the agency is time barred from presenting information at this stage was not an appropriate basis to determine that the record should not be reopened. Given the discussion above, EDR finds that the hearing officer must reopen the record on remand to allow for information to be considered from both parties that is necessary to resolve the matter of the grievant’s demotion.

Attorneys’ Fees

The agency also notes in its request for administrative review that the hearing officer improperly found that the grievant’s counsel was entitled to reasonable attorneys’ fees. It is EDR’s view that to “substantially prevail” so that reasonable attorneys’ fees can be awarded, all that is necessary is that the grievant is reinstated.¹⁵ In both the original hearing decision and the Reconsideration Decision, the grievant’s termination was rescinded. Thus, in both instances, the grievant substantially prevailed and his counsel is entitled to reasonable attorneys’ fees. For the foregoing reasons, EDR declines to disturb the Reconsideration Decision with respect to the issue of attorneys’ fees.

¹³ Reconsideration Decision at 1.

¹⁴ *Cf. Rules for Conducting Grievance Hearings* § VI(D)(3) (“Due consideration should be given to whether there is an available position to which a transfer can be ordered.”)

¹⁵ *See Grievance Procedure Manual* § 7.2(e). While the language of this provision dictates that an employee must be reinstated to a “former (or an equivalent) position,” it is EDR’s practice that it is not necessary to be reinstated to a specific position, so long as the employee is reinstated.

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, EDR finds that the Reconsideration Decision must be reconsidered by the hearing officer as described above. Both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any *new matter* addressed in the second reconsideration decision (i.e., any matters not previously part of the original or remand decisions).¹⁶ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.¹⁷

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued their remanded decision.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

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¹⁶ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

¹⁷ See *Grievance Procedure Manual* § 7.2.

¹⁸ *Id.* § 7.2(d).

¹⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁰ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).