Issue: Administrative Review of Hearing Officer's Decision in Case No. 10895; Ruling Date: January 17, 2017; Ruling No. 2017-4452; Agency: Virginia Department of Health; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Health
Ruling Number 2017-4452
January 17, 2017

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10875. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10875, as found by the Hearing Officer, as are follows: [2]

> The Virginia Department of Health employs Grievant as a Special Projects Coordinator. She had been a Case Surveillance Supervisor but was transferred to the Special Projects Coordinator position as part of the disciplinary action. Grievant has been employed by the Agency for approximately 12 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> The Agency combined nine separate factual scenarios to justify issuance of a Group II Written Notice. The Hearing Officer must evaluate each scenario separately to determine if any one of them rises to the level of a Group II offense. Several of the Agency's allegations do not rise to the level justifying disciplinary action. Several of the Agency's allegations do not rise higher than a Group I offense. A Group II Written Notice is only supported by Grievant's failure to follow policy.
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> Grievant was required to travel to a training conference held at a Hotel in a locality outside of Virginia. The training was scheduled for April 19, 2016 to April 22, 2016. Grievant assumed that because the Agency required her to attend

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] Decision of Hearing Officer, Case No. 10875 ("Hearing Decision"), November 17, 2016, at 2-4 (citations omitted).

the training, the Agency had also arranged for her travel lodging. She thought the trip was a "direct bill" completed by the Administrative Assistant. When Grievant arrived at the Hotel, she realized she did not have a reservation. Grievant called the Supervisor but the Supervisor did not answer her telephone. Grievant contacted the Division Director at approximately 10 p.m. and discussed her lodging. The Division Director said Grievant should stay at that Hotel and the next day they would see about conducting travel correctly.

Grievant obtained a room at the Hotel and attended the training on the following day. On April 19, 2016 at 9:10 a.m., Grievant received an email identifying a different hotel away from the training location that was within the State guidelines. Grievant remained at the same Hotel and incurred lodging fees in excess of the State guidelines.

On April 22, 2016, the training was to last for approximately four hours. Grievant did not attend the training that day. Grievant claimed she was ill and had to remain in her Hotel room. She took medication that made her drowsy. At 9:28 a.m., the course Trainer sent Grievant an email asking if Grievant was okay. At 10:33 a.m., Grievant replied to the Trainer. Grievant checked out of the Hotel by 11 a.m. She left the locality where the training was held. Grievant did not contact her Supervisor on April 22, 2016 to obtain permission to take sick leave.

Grievant paid for the cost of her lodging. She sought reimbursement and was provided reimbursement in accordance with the State travel guidelines. The amount reimbursed was less than the cost Grievant paid.

Division staff maintained personal health information regarding Virginia citizens. The Unit had a locked storage area where all personal health information was to be stored. Employees could remove the information from the storage area and review it at their desks as long as the information was returned to the storage area by the end of the work day. On January 13, 2016, the Division Director sent staff including Grievant an email stating:

> Please note that [Division's] Security and Confidentiality Policies and Procedures REQUIRE that documents containing patient identifiers shall be secured at the end of each workday in designated storage areas. Any variance from this rule requires prior supervisory approval and shall be minimal.

When Grievant returned to work on April 25, 2016, the Agency removed her supervisory duties and moved her office to another location. She was placed on pre-disciplinary leave.

At some point, the Agency reviewed the contents of Grievant's office files. Grievant had in her office personal health information relating to nine or ten

citizens. She had not returned the information to the Unit's central storage area as required.

On June 13, 2016, the agency issued the grievant a Group II Written Notice with a ten workday suspension for "attendance/excessive tardiness, leaving work without permission, failure to follow instructions and/or policy, workplace harassment, abuse of State time, obscene or abusive language, disruptive behavior, unauthorized use of State property or records, and threats or coercion."[3] In addition, the grievant was transferred from a supervisor position to a non-supervisory position.[4] The grievant timely initiated a grievance to challenge the Group II Written Notice, and a hearing was held on October 28, 2016.[5] In a decision dated November 17, 2016, the hearing officer found that agency established the grievant had failed to follow instructions and/or policy by not handling personal health information in the manner required by policy and by failing to request sick leave during a training session.[6] The hearing officer concluded that the agency did not establish any of the other allegations cited in the Written Notice and ordered that the Written Notice be revised accordingly.[7] The grievant has now requested administrative review of the hearing decision.

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 either party; the sole remedy is that the hearing officer correct the noncompliance.[9]

Inconsistency with Agency Policy

In her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] Accordingly, pursuant to the *Grievance Procedure Manual*, the grievant's policy claims will be addressed in a separate policy review.

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[3] Hearing Decision at 1; *see* Agency Exhibit 1. The agency subsequently apparently elected not to pursue the workplace harassment claim.
[4] *See* Hearing Decision at 1; Agency Exhibit 1 at 5.
[5] Agency Exhibit 2; Hearing Decision at 1.
[6] Hearing Decision at 4-5.
[7] *Id.* at 4-6, 7-9.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3). The agency asserts that EDR is "without authority to rule on the substance of [the] grievant's appeal," because the grievant has neither asserted that the decision fails to comply with a particular grievance procedure nor identified any newly discovered evidence. These assertions rely on an overly technical reading of the grievance procedure and are not consistent with EDR precedent.
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations, in particular his conclusion that she failed to follow policy. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and grounds in the record for those findings."[12] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[13] 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.[14] 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 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.

In this case, the grievant asserts that, contrary to the hearing officer's conclusions, she did not improperly fail to comply with agency policy regarding sick leave, and as such, the hearing officer's decision to uphold the Group Notice was erroneous. This argument fails for two reasons. First, the grievant does not argue that she did, in fact, contact her supervisor prior to taking leave, as found by the hearing officer: to the contrary, she admits that she violated agency policy. Rather, she argues that it was permissible to provide leave forms after an absence and suggests that other employees have not been disciplined as harshly, although she fails to identify any record evidence to support this claim. In conjunction with this argument, she asks EDR for "a review of [agency] employees who have been disciplined" for failing to follow policy. While the grievant is correct that inconsistent treatment could be a basis for the mitigation of discipline, the grievant bore the burden of producing such information, to the extent it exists, at hearing.[15]

More important, even if EDR were to assume that the hearing officer erred in concluding that the grievant had failed to follow the agency's policy regarding sick leave, there would be no impact on the outcome of the decision. The grievant's failure to follow the sick leave policy was only one of two bases on which the hearing officer upheld the Group II Written Notice. The grievant offers no argument that the hearing officer erred in his conclusion that she violated the agency's policies on personal health information, and, indeed, the record evidence supports the hearing officer's conclusions.[16] This finding, supported by evidence, is sufficient in itself to warrant a Group II Written Notice. As such, because the hearing officer's decision to uphold the Group II Written Notice is based upon evidence in the record and the material issues of the case,

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[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.
[15] *See Rules for Conducing Grievance Hearings* VI(B).
[16] *See, e.g.*, Agency Exhibit 4 at 4-16, 4-17, 4-20

EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the decision on this basis.

Failure to Request Relief

The grievant also asks that the decision be remanded to allow the hearing officer to reinstate her to her previous position. In the decision, the hearing officer noted that he believed the agency's decision to transfer the grievant was not allowed under policy, but that the grievant did not request reinstatement.[17] The grievant asserts that at the time of the hearing, she did not understand that she could request reinstatement from the hearing officer and acted on the advice of her attorney.

While the grievant's desire for reinstatement is understandable, EDR cannot find that the hearing officer erred or failed to comply with the grievance procedure. The hearing officer specifically asked the grievant during the hearing whether she sought reinstatement, and she responded that she did not.[18] Although the grievant may now regret her representation, the hearing officer's reliance on that representation does not constitute hearing officer error and may not serve as a basis for remand.[19] Accordingly, the decision will not be disturbed on this basis.

Improper Motive

The grievant also appears to argue that the agency acted from an improper motive. 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]."[20] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[21] More specifically, the *Rules* provide that in disciplinary grievances, if 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 and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[22]

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[17] Hearing Decision at 1 n.1.
[18] Hearing Recording. Track 2 at 20:25-20:30.
[19] It is also unclear whether the hearing officer was correct that the transfer was not permitted under the Standards of Conduct. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.
[20] Va. Code § 2.2-3005(C)(6).
[21] *Rules for Conducting Grievance Hearings* § VI(A).
[22] *Id*. § VI(B)(1).

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[23] EDR will review a hearing officer's mitigation determination for abuse of discretion,[24] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[25]

In this case, the grievant asserts that the agency was attempting "to settle a personal vendetta" and wanted another person in the grievant's position. Although the hearing officer appears to have sympathized with the grievant's concerns regarding the agency's motives, he ultimately concluded that the grievant had not met her "high" burden to show that mitigation was warranted.[26] A hearing officer may "not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[27] EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

Reimbursement of Attorney's Fees

The grievant also asserts that she is entitled to attorneys' fees because the hearing officer stated "that he 'would have reinstated [her to her] former position if [she] had asked for this relief.'" Under Section 7.2(e) of the *Grievance Procedure Manual*, a grievant "who substantially prevails on the merits of a grievance challenging his/her discharge is entitled to recover reasonable attorneys' fees." In this case, however, the grievant was merely transferred, not discharged from employment. As the grievant was not discharged from employment, attorneys' fees are not available. The hearing decision will therefore not be disturbed on this basis.

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[23] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving 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).

[24] "'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.*

[25] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[26] Hearing Decision at 7 n. 14.

[27] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision.[28] Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[29] 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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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[28] To the extent this ruling does not address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that any such issue is not material, in that it has no impact on the result in this case.
[29] *Grievance Procedure Manual* § 7.2(d).
[30] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[31] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).