STATE OF NEW JERSEY

In the Matter of Scott Mueller, New Jersey Veterans Memorial Home at Menlo Park	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
	:	Minor Discipline Appeal
CSC Docket No. 2018-290	:	

ISSUED: SEPTEMBER 5, 2018 (ABR)

Scott Mueller, a Section Chief Healthcare Facility at the New Jersey Veterans Memorial Home at Menlo Park (Menlo Park), Department of Military and Veterans Affairs (DMAVA), appeals a five working day suspension issued by the appointing authority.

By way of background, on May 22, 2017, the appointing authority served the appellant with a Preliminary Notice of Disciplinary Action (PNDA) which proposed a five working day suspension based upon charges of conduct unbecoming a public employee; neglect of duty; other sufficient cause; and violation of a DMAVA Departmental Directive regarding neglect of duty, idleness or willful failure to devote attention to tasks which could result in a danger to persons or property. Specifically, the appointing authority alleged that the appellant failed to ensure that video surveillance captured in March 2017 was properly saved and recorded in connection with four incidents of alleged abuse and/or neglect of residents at Menlo Park. The appointing authority maintained that the appellant's failure to do so severely compromised its ability to properly evaluate and take disciplinary action with regard to the aforementioned incidents.

The appellant subsequently appealed the disciplinary action and a departmental hearing was held on June 12, 2017. At the hearing, K.I., an Employee Relations Coordinator, testified that although the appellant was responsible for saving requested video surveillance, he failed to do so on several occasions in March and April 2017. The Hearing Officer, in his decision dated June 19, 2017, found it significant that the appellant did not testify or dispute that he

failed to provide video footage for four disciplinary cases, as shown through the testimony of the Employee Relations Coordinator and the emails submitted as evidence by the appointing authority. Accordingly, the Hearing Officer sustained the charges against the appellant and found that, based upon DMAVA policy, a five working day suspension was an appropriate penalty for a first infraction for a neglect of duty charge. The appointing authority issued a Final Notice of Disciplinary Action (FNDA) on July 11, 2017, serving the appellant with it on the same date.

On appeal to the Civil Service Commission (Commission), the appellant argues that the appointing authority failed to timely notify him of the departmental hearing decision within 20 days, as required under *N.J.A.C.* 4A2-2.6(d) and his collective bargaining negotiations agreement. In this regard, he submits that although the hearing was held on June 12, 2017, he was not served with a copy of the Hearing Officer's determination until 29 days later, on July 11, 2017. The appellant also argues that he did not get a fair and impartial departmental hearing, as the appointing authority prevented two of his "critical" witnesses from testifying: his supervisor, the Chief Executive Officer (CEO) of Menlo Park, and the Director of Human Resources. He submits that the CEO would have testified that the CEO was never notified about the investigation and he was not consulted about possible discipline until after the PNDA was issued. The appellant contends that the CEO "verbalized…that he was not in agreement with the issuance of this discipline and penalty" and he proffers that the CEO would have stated that he would have advocated for a less severe penalty given the appellant's strong employment record.

Additionally, the appellant argues that the Hearing Officer erroneously found that if the appellant were to testify regarding what he saw on the lost videos at a disciplinary hearing, his testimony would be considered inadmissible hearsay. In this regard, the appellant cites various legal authorities to support his contention that such testimony is not hearsay because it is in-court testimony about his perceptions of the video. Furthermore, the appellant complains that the appointing authority improperly relied upon DMAVA Departmental Directive 25.3 as a basis for the relevant charges because even though the policy sets forth that it was to be given to all authorized personnel, he never received a copy of it.

The appellant also argues that the appointing authority and the Hearing Officer failed to consider any mitigating factors when determining the appropriate penalty in this matter, namely the lack of prior discipline in his employment record, his exemplary attendance record and his strong PAR evaluations. Moreover, the appellant contends that he was subjected to disparate treatment by the appointing authority because it did not offer him the same opportunity to settle the matter or the ability to break up his suspension over multiple pay periods that has been typically provided to other employees. Finally, the appellant asserts that the charges against him were flawed and that DMAVA did not conduct an adequate

investigation, but provides no supporting arguments. Based upon the foregoing, the appellant requests a hearing at the Office of Administrative Law and/or that the charges and penalty against him be dismissed or reduced.

In response, the appointing authority, represented by Susan Sweeney, Esq., Administrator, Employee Relations, argues that the Commission lacks jurisdiction as to the issue of whether the appellant was timely served with the Hearing Officer's decision, as it is a subject covered under the appellant's collective bargaining negotiations agreement and thus not reviewable by the Commission. Nevertheless, it contends that it timely served the Hearing Officer's decision. Specifically, it states that it received the Hearing Officer's decision on July 10, 2017 and provided it to the appellant's union representative on the same date.

Additionally, it argues that the charges against the appellant should be sustained because the preponderance of the evidence supports them, the appellant was given a full and fair opportunity to review the evidence against him and the ability to present and examine witnesses at the departmental hearing. It proffers that the Hearing Officer was an unbiased party in the matter, as he was not an employee of DMAVA and did not have any knowledge of the parties or the matter prior to the departmental hearing. The appointing authority emphasizes that the Employee Relations Coordinator credibly testified that she asked the appellant for video footage of the four alleged incidents within 30 days of each event and that the appellant did not timely respond to her or take action to preserve the requested footage before he knew it would be deleted. The appointing authority contends that the appellant's failure to do so compromised several investigations into the alleged abuse and neglect of its residents.

The appointing authority also notes that the Hearing Officer considered mitigating evidence in the appellant's favor, including his attempt to provide a timeline of his observations from the video of the March 2017 incident to Employee Relations after the recording could not be recovered and his lack of a history of prior discipline. However, the appointing authority submits that the appellant was held to a higher standard as an Assistant CEO at Menlo Park and that mitigating evidence did not overcome the fact that the appellant's neglect of his duties to preserve and copy surveillance video or to notify Employee Relations that he was unable to do so in time for the footage to be preserved.

Moreover, it notes that the appellant received representation from his union, International Brotherhood of Electrical Workers (IBEW) Local 30, and his union representative cross-examined the witnesses presented at the departmental hearing. It submits that it did not prevent the CEO or the Director of Human Resources from testifying at the departmental hearing. Rather, it maintains that both individuals declined the opportunity to testify at the hearing.

Finally, the appointing authority contends that the appellant fails to support his claim that it failed to conduct a proper investigation. In this regard, it submits that its investigation provided clear evidence that the appellant failed to ensure that video surveillance of the four underlying incidents was properly saved and recorded in connection with several alleged incidents of abuse and neglect of residents at Menlo Park. Based upon the foregoing, the appointing authority contends that its disciplinary action should be affirmed.

In reply, the appellant reiterates his claim that he was denied a fair hearing and due process because the CEO and the Director of Human Resources were prevented from testifying. He states that, after the hearing, "[a]t least one (if not both) told [him] that he/she was advised he/she could not testify." He adds that the appointing authority told his union representative at the departmental hearing that neither was allowed to testify. He states that his union representative would be able to provide a further summary of what the appointing authority said to her on that issue. However, it is noted that he does not submit her account of that exchange.

CONCLUSION

Initially, the appellant requests a hearing in this matter. Minor discipline appeals are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Civil Service Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service,* 155 *N.J. Super.* 517 (App. Div. 1978).

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed to the Commission. The rule further provides:

> 1. The Civil Service Commission shall review the appeal upon a written record or such other proceeding . . . and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the Commission's decision will be a final administrative decision.
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> 2. Where such issues or evidence under (a)1 above are presented, the Commission will render a final administrative decision upon a written record or such other proceeding as the Commission directs.

This standard is in keeping with the established grievance and minor disciplinary procedure that such actions should ordinarily terminate at the departmental level.

Moreover, in considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the appointing authority. The Commission will also not disturb Hearing Officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010). A review of the record evidences no showing that either factor, which would warrant further Commission review is present in this case.

With regard to the appellant's claim that the FNDA was not served on him within the required timeframe, it is noted that this alleged procedural flaw is not material to the facts or resolution of the appellant's appeal and is not sufficient to warrant dismissal of the charges. Additionally, while the appellant asserts that he was subjected to disparate treatment because he was not offered a chance to settle the matter or the ability to break up his suspension over multiple pay periods, he fails to offer any proof that such differential treatment was the product of invidious discrimination. Furthermore, the appellant offers no proof to support his claim that the appointing authority prevented two of his witnesses from testifying. Moreover, there was no obligation on the part of the Hearing Officer or the appointing authority to compel their testimony. In this regard, it is noted that neither a hearing officer nor an appointing authority can compel a witness to testify at a departmental level hearing. *See In the Matter of Adrian Ellision* (CSC, decided October 16, 2013), *aff'd on reconsideration* (CSC, decided April 23, 2014).

With regard to the appellant's arguments concerning hearsay, it is noted that the Hearing Officer did not make a determination as to whether the appellant's testimony about the timeline and contents of the lost videos would be considered hearsay. Moreover, that consideration is irrelevant to the instant matter, as the appellant was charged with regard to his failure to properly secure the requested video surveillance. Accordingly, there is no basis to disturb the appointing authority's imposition of a five working day suspension in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 5TH DAY OF SEPTEMBER, 2018

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