VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: EDR CASE NO.: 11442

DECISION OF HEARING OFFICER

HEARING DATE: JANUARY 13, 2020
DECISION ISSUED: JANUARY 28, 2020

I. PROCEDURAL BACKGROUND

The Virginia Department of Behavioral Health and Developmental Services (hereinafter the "Agency") issued the grievant a Group III Written Notice on September 5, 2019 and terminated him from employment. He filed this grievance on October 3. The Office of Employment Dispute Resolution appointed me as Hearing Officer effective October 22, 2019. I conducted a prehearing conference by telephone and set the matter for hearing on December 2, 2019. At the request of the grievant, the hearing was cancelled and rescheduled for January 13, 2020. The hearing was held as scheduled and lasted approximately two hours forty minutes.

II. APPEARANCES AND KEY EVIDENTIARY RULINGS

The Agency was represented by an advocate and called five witnesses. Nine exhibits were offered and accepted into evidence without objection. One of the agency witnesses (hereafter referred to as "Employee A" or "EA") was originally scheduled to testify in person. On the morning of the hearing she contacted a Human Resource Officer and advised that she wished to testify only by telephone. The grievant objected to that; I overruled the objection. In the course of her testimony by phone, during cross-examination by the grievant, the boyfriend of the witness interrupted and attempted to bring the cross-examination to an end. The witness stated that the

boyfriend had been present throughout her testimony. The grievant moved to strike the testimony of EA based on this violation of his right to a closed hearing. After consideration of a possible alternative to the request, I granted the motion.

The grievant represented himself and served as his only witness. He proffered eleven exhibits which were accepted into evidence without objection.

III. ISSUE

Whether the Agency acted properly in issuing the grievant a Group III Written Notice on September 5, 2019 and terminating him from employment?

IV. FACTS AND EVIDENCE

On August 8, 2019 the grievant was working at an agency facility in his capacity as a Nursing Supervisor. Employee A reported to another male Registered Nurse on August 11 that the grievant made unwelcome sexual advances toward her on August 8. According to EA, while on duty the grievant and EA went to a patient clothing room. Employee A reported that the grievant asked if he could "just grab her butt once." After she refused, according to EA he continued to try to grab her to hug her and grab her butt.

Employee A made this report to that male nurse during a conversation with him. As part of the conversation he was coaching her about establishing boundaries when interacting with certain patients. He became concerned when she made the comment to the effect that "some employees need to learn about boundaries." She described to him the incident in the clothing room, expressing that she "had to fight him off." She showed him a conversation on Facebook Messenger between her and the grievant.

These messages were exchanged subsequent to the grievant and EA being in the clothing

room together. The exact amount of time that passed between the visit to the clothing room and the messages is unclear. The first message from the grievant to EA stated, "I don't mean to be a pervert but you looks very hot in them blue scrubs I love it." The grievant testified that prior to that message he had discussed with EA a set of blue scrubs that he felt were somewhat provocative to male patients in a certain unit.

Fifty-four minutes after that first Facebook message, Employee A messaged him back inquiring about the name of a local store from which she was ordering pizza for the employees, for which the grievant had agreed to pay. Forty-nine minutes later, Employee A messaged the grievant that she had placed the order at the store. She indicated that she needed to finish with a patient before going to pick up the pizza. The grievant responded "okay besides you looking to hot for me to ride with you lol." Employee A replied, "you right about that" and added an emoji at the end of the message. From the document submitted in evidence it is unclear whether the emoji is a smiling, laughing face or a crying face. At 6:37 p.m. Employee A messaged the grievant "where ya at I'm on 6 come get a slice."

After the reports made by Employee A on August 11, a formal investigation was commenced by the Agency. Four additional employees were interviewed, and written statements obtained from EA, the male nurse, and two other employees. The investigation did not include an interview with or statement from the co-worker named by EA as an individual to whom she spoke on the date of and after the clothing room visit. The investigation also included a written statement from the grievant concerning a second alleged incident involving the grievant on August 13, 2019. That later incident was not referenced in the Written Notice issued to him on September 5. That Written Notice alleged that the grievant had violated the Department of Human Resource

Management Policy 2.35 (Civility in the Workplace), (DHRM Policy 1.60), (Standards of Conduct) and Agency Policy DI 507 (HRM) 06 Workplace and Sexual Harassment on August 8, 2019.

V. ANALYSIS AND DISCUSSION

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedural Manual* (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The agency has accused the grievant of both unwanted physical contact and sexual innuendo. The grievant denied any improper physical contact on August 8. He does not deny sending and receiving the Facebook messages shown on pages 4 and 5 of grievant's Exhibit 4. He provided explanations to put the remarks in context.

In determining the truth of the allegations, I am hamstrung by the lack of testimony from Employee A. As stated above, her attempt to testify by phone at the hearing was cut short for good cause. I chose to strike that testimony. As the advocate for the agency correctly points out, a version of events given by Employee A are found in the written statement found at page 2 and 3 of grievant's Exhibit 4. Because they were proffered by the grievant and accepted into evidence, I have considered them in reaching my decision.

I carefully observed the demeanor of the grievant when he testified. His testimony was consistent with his prior written statements found in the record. He speculated as to possible motives for EA to make up the story of the assault. He believed that she resented his having corrected her behavior when she was found using an e-cigarette device on facility property, a violation of agency policy. He also believed that she was frustrated by her inability to curry favor with him in order to obtain better assignments, which were within his discretion as a Supervisor. In assessing the story of Employee A, I have considered that the corporate compliance officer did not recall her saying when interviewed anything about a grabbing by the grievant. When EA spoke with the nurse to whom she first reported the events on August 11, he described her discussion with him as being "conversational." The Human Resources Director described EA as being very "matter of fact about it when discussing the alleged incident." These observations contradict the

written statement by EA that she was extremely upset by the alleged assault.

EA reported the events on that night (according to her written statement) to a co-worker. If this co-worker was interviewed or submitted a written statement, neither is found in the record in this matter. No explanation was provided as to why a written statement was not obtained from her as was obtained from other employees, none of whom also first-hand information regarding the alleged assault. Pursuant to Section V(B) of the *Rules of Conducting Grievance Hearings*, I have drawn an adverse inference against the agency – the inference being that any statement from that employee would have not been favorable to the agency.

I cannot find that the agency has established by a preponderance of the evidence that the described physical assault took place on August 8. The same cannot be said about the Facebook messages. The grievant testified that the subject of the blue scrubs worn by EA had been discussed between them in the context of whether certain male patients at the facility found them to be provocative. This testimony is consistent with the written statement dated October 4, 2019 provided by the grievant in response to the issuance of the written notice. It is not contested that the other male nurse who testified had been "coaching" Employee A on August 11 about appropriate boundaries with patients when she mentioned problems with the grievant. As recited above, at 4:08 p.m. on that date the grievant complimented EA, stating that she "looks very hot in them blue scrubs I love it." This exchange followed the grievant and EA being in the clothing room together where the alleged assault took place. The exchange of messages continued with a discussion of EA picking up pizza for dinner as authorized by the grievant. The exchange, as far as evidenced in the record, concluded with EA inviting the grievant to come to her assigned floor to have a slice of the pizza.

The flirtatious and suggestive comments by the grievant to the EA are clearly inappropriate conduct under DHRM Policy 2.35. Under that policy sexual harassment is defined as "any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers, or non-employee." A violation of Policy 2.35 subjects an employee to discipline pursuant to the Standards of Conduct, DHRM Policy 1.60. The Standards of Conduct and Policy 2.35 do not specify a particular level of offense for which a violation of Policy 2.35 is presumed to be appropriate. Unlike at least one other agency of the Commonwealth, this agency has not further specified that a violation of the civility policy can be charged as any of the three levels of offense for written notices.

The grievant was issued a Group III Written Notice. Those offenses are defined in Policy 1.60 as including acts of "misconduct of such a severe nature that a first occurrence normally should warrant termination." A Group II offense is an act of "misconduct of a more serious and/or repeat nature that requires formal disciplinary action" and a second active Group II should normally result in termination. The lowest level of offenses punished by written discipline, Group I offenses, are "act of minor misconduct that require formal disciplinary action." That level of discipline is deemed to be appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require former intervention.

In circumstances, such I have found, where a portion of the agency's charges have not been sustained, a hearing officer may reduce the penalty to the maximum reasonable level consistent with law and policy. *Rules for Conducting Grievance Hearings* Section VI (B). I cannot find that under these specific facts an employee should be terminated for moderate flirtation. Therefore, I believe I must reduce the discipline to the grievant to either a Group I or a Group II. From the

reactions of Employee A, the extent to which the unprofessional comments by the grievant were unwelcome is unclear. I agree with the assertion in the written statement by EA that the grievant crossed the line of appropriate boundaries in his comments. I am not "blaming the victim" or saying she invited the comments but am making an effort to objectively assess the seriousness of the offense. The prior relationship between EA and the grievant cannot be ignored, nor can I ignore her inviting the grievant to share the pizza. Her choice of words ("where ya at I'm on 6 come get a slice") is not indicative of her having viewed the flirtation as being so serious that a repeat of similar comments would justify the issuance of a Group II with termination from employment as the normal consequence. Applying an objective standard to the comments, I reach the same conclusion.

VI. DECISION

For the reasons stated, I hereby reduce the level of the Written Notice given the grievant to a Group I. He shall be reinstated to employment in his same position with a full award of back pay and benefits.

VII. APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail to EDR.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15- calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.

RENDERED this January 28, 2020.

/s/Thomas P. Walk, Hearing Officer

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: EDR CASE NO.: 11442

DECISION OF HEARING OFFICER UPON REMAND

HEARING DATE: JANUARY 13, 2020
DECISION ISSUED: JANUARY 28, 2020
ADMINISTRATIVE REVIEW DECISION ISSUED: MARCH 9, 2020
SUPPLEMENTAL HEARING: APRIL 24, 2020
SUPPLEMENTAL DECISION ISSUED: May 1, 2020

I. SUPPLEMENTAL PROCEDURAL MATTERS

I issued my original decision in this matter on January 28, 2020. Reference is made to that decision for the initial procedural matters, factual findings, and analysis and decision. The agency requested an administrative review, which resulted in DHRM Ruling No. 2020-5054. Upon receipt of the administrative review, I scheduled a reconvened hearing for April 6, 2020. The hearing was to be held by telephone by the agreement of the parties considering health concerns and restrictions on access to agency facilities. On April 5, the agency advocate apprised me that the witness for the reconvened hearing was unavailable due to experiencing Covid-19 symptoms on April 4. By conference call on April 6 the parties agreed to a rescheduling of the hearing for April 24. The reconvened hearing was conducted by me by conference call on that date. Employee A was re-sworn and examined by the parties in supplementation of her previously erroneously stricken testimony. This decision is based on her prior testimony as well as that on April 24.

II. SUPPLEMENTAL ANALYSIS AND DISCUSSION

In my original decision I distinguished between the allegations that the grievant had made unwanted physical contact with Employee A with those of his making inappropriate verbal remarks to her. The grievant denies any inappropriate behavior other than the indisputable Facebook messages introduced as exhibits. These denials include that regarding physical contact or other oral inappropriate comments of a sexual nature.

To resolve this credibility contest I reviewed the written statements from Employee A, her entire testimony, other portions of agency exhibit D (the investigative report, which included statements from other individuals), the testimony of other agency witnesses, and the testimony of the grievant. The version of events laid out by Employee A has not been consistent. In her first written statement regarding the events of August 8, 2019 (agency exhibit D, page 2 and 3), she describes verbal harassment by the grievant such as grunting and asking her twice while in the clothing closet if he could grab her butt. She told him no. According to her, he then "grabs me to give me a hug and tries to grab my butt." That statement describes the only unwanted physical conduct as being the grabbing to give a hug.

Her testimony on April 24 described much more. She testified initially that he did in fact grab her left butt cheek with his right hand. That detail was not included in the written statement. She further testified that the grievant kissed her on the forehead. That detail was also not included in the statement that was made three days after the encounter in the clothing room. Less than seven minutes later in her testimony on April 24 she said that the grievant grabbed her right butt cheek.

Employee A testified that she did not immediately report the battery because of the time of

day at which it occurred, being around the time when administrators would be gone from the facility. She stated that she also wanted to take time to think through her options as she was afraid of being “reprimanded.” My review of her entire testimony leads me to conclude that what she feared is best termed retaliation (rather than reprimanding) from the grievant if she reported him to a supervisor or administrator. Common human experience is that retaliation could occur whether a report was founded or unfounded.

In her August 11, 2019 written statement Employee A described herself as being “very uncomfortable, violated, and discusted {sic}.” These characterizations must be contrasted with her actions on August 8. She testified that less than three hours after the clothing room encounter she considered riding in a vehicle with the grievant to pick up pizza that she had ordered from a nearby market. She testified that she did this to avoid confrontation. She said that she was “trying to make light of the situation.”

After the clothing room encounter on August 8, Employee A first complained to a supervisor on August 11. His written statement and testimony were clear that the report came only after the topic of appropriate boundaries with patients was mentioned to her. In her recent testimony, Employee A denied that the Supervisor had been involved in coaching or counseling her regarding boundaries prior to her making the report to him. I found his testimony to be entirely credible. As mentioned in my prior ruling, the coaching aspect is consistent with the testimony of the grievant as to comments he had made to Employee A regarding a set of blue scrubs worn by her.

Employee A has maintained in her written statement and oral testimony that she told a coworker of the allegations against the grievant on August 8. That coworker was not called upon

to give a written statement nor did she testify at the initial hearing on January 13 or the reconvened hearing on April 24. Some evidence from that coworker might have served to corroborate the evidence from Employee A. As directed in the administrative review ruling, I am not using the absence of the evidence as the basis for an adverse difference against the agency. I have no need to do so, considering my assessment of the credibility of Employee A.

In my initial decision I discussed other factors I considered in determining whether there was any unwanted physical contact between the grievant and Employee A. Based on those factors, together with the inconsistency of the statements of Employee A, both internally and as compared to her actions and the testimony of others, I again conclude that the agency has not met its burden of proof that any physical contact occurred.

I have been directed to also reconsider whether the agency gave the most appropriate level of discipline to the grievant. In particular, I was directed to consider the impact on agency operations. The evidentiary record, after the resolution of the primary credibility issue, shows only that the grievant engaged in inappropriate oral comments, not an actual physical touching. The agency issued a Group III Written Notice and terminated him from employment based in part on its finding of a physical touching. That touching was a repeated offense. The grievant had previously been issued a Group I Written Notice for unwanted physical contact of another employee in 2018. Had that prior discipline not been issued, I cannot find that it would have been reasonable for the agency to issue the grievant a Group III Written Notice solely for the comments made on or around August 8, 2019. My initial decision focused on the subjective effect they had on Employee A, as viewed in light of the testimony up to that point. The testimony received on April 24 did nothing to dissuade me from my belief that she was not overly bothered by the

comments.

No relevant evidence was presented as to the impact that the behavior and comments of the grievant had on agency operations. Applying an objective standard to the comments of the grievant, viewed in light of the prior active Group I Written Notice, the highest level of discipline supported by the evidence is that of a Group II Written Notice. The agency viewed the earlier situation with the different employee as supporting only a Group I. I am now asked to consider approving raising that by two levels based on that prior event. As noted in the administrative review ruling, the repetition of a Group I level offense should normally constitute or support the issuance of a Group II. Although the decision of an agency in determining the level of discipline is afforded a wide range of deference, I decline to give undue deference to the issuance of the Group III where it was based, in part, on findings of improper physical contact not supported by the entire record before me. I do find, however, that the grievant should be the subject of a Group II Written Notice. Concerns over whether the agency could be viewed as condoning inappropriate conduct or language by minimizing or not issuing a formal discipline are satisfactorily addressed by that level of punishment.

III. DECISION

For the reasons stated above and in my prior decision, I hereby reduce the level of the Written Notice given the grievant a Group II. As previously ordered, he shall be reinstated to employment in his same position with a full award of back pay and benefits as provided by policy.

VII. APPEAL RIGHTS

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1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all your appeals to the other party, EDR, and the

hearing officer. The hearing officer's **decision becomes final** when the 15- calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.

RENDERED this May 1, 2020.

/s/Thomas P. Walk, Hearing Officer