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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5399
April 28, 2022

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 11723. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11723, as found by the hearing officer, are as follows:¹

The Department of Corrections employed Grievant as Human Resource Officer (HRO) at one of its facilities. He was employed by the Agency for approximately ten years. He began working as the HRO on November 10, 2019. Grievant’s evaluations showed satisfactory work performance. No evidence of prior active disciplinary action was introduced during the hearing.

[Ms. A] worked as a Psychology Associate at the Facility. She is biracial. She had been working at the Facility for approximately three and a half months. [Ms. A] and Grievant had a work relationship and not a personal relationship outside of work. They talked at work during their breaks. They shared jokes and stories. [Ms. A] told Grievant about an interaction she had with a man she met through a dating app.

[Ms. B] was a Psychology Associate at the Facility. She was [Ms. A’s] “direct counterpart.” [Ms. A] and [Ms. B] reported to [the supervisor].

[Ms. B] met with the former Warden and Grievant on July 15, 2020. The purpose of the meeting was to discuss why [Ms. B] was missing a lot of time from work. [Ms. B] was pregnant and the former Warden was asking her how the Agency could help her improve her attendance. The former Warden asked [Ms. B] if her children had the same father. He was trying to determine the amount of help [Ms.

¹ Decision of Hearing Officer, Case No. 11723 (“Hearing Decision”), March 31, 2022, at 2-4 (footnotes omitted).

B] had available to care for her children. [Ms. B] said her children had the same father. Once [Ms. B]'s child was born, [Ms. B] posted pictures of her baby on social media sites. The pictures showed that the baby was biracial. [Ms. B's] older child was not biracial. Grievant observed one of the pictures and knew that [Ms. B's] baby was biracial.

On May 28, 2021, Grievant spoke with [Ms. A] by telephone while both employees were working at the Facility. Grievant asked [Ms. A] how she was doing working at the Facility with [Ms. B]. Grievant asked [Ms. A] if she "had to cut a bi-ch" referring to [Ms. B]. [Ms. A] responded, "No, why would I." Grievant then asked [Ms. A] "[i]s her baby Black" referring to [Ms. B's] baby. [Ms. A] said she believed the baby was biracial. Grievant told [Ms. A] that before [Ms. B] left on maternity leave, [Ms. B] told Grievant that her children had the same father. [Ms. A] told Grievant she did not know what to tell him related to [Ms. B's] personal life but he could ask [Ms. B] instead. Grievant then asked [Ms. B] if she thought [the supervisor] liked the new Warden as Unit Head. [Ms. A] said he could ask [the supervisor] that question if he wanted an answer because she could not speak for [the supervisor]. Grievant told [Ms. A] that he had sent her a message on Instagram.

On May 28, 2021, [Ms. A] approached [Ms. B] and told [Ms. B] of Grievant's comments about [Ms. B] including Grievant's comment about "cut a bi-ch" and the race of [Ms. B's] child. [Ms. B] was upset by Grievant's comments. [Ms. B] felt that Grievant was suggesting [Ms. B] was causing trouble even though she did not have a problem working at the Facility. [Ms. B] felt she could no longer trust Grievant because he was sharing confidential information she disclosed during the July 2020 meeting.

After [Ms. A] left work on May 28, 2021, she viewed the Instagram message from Grievant. The message contained a picture which was framed in a manner that created the impression it was a picture of a female engaging in oral sex. When the picture framing was expanded, it showed a female holding a white cat and the cat's paw in the female's mouth. The picture contained a caption stating words to the effect of "I know we are friends if we saw the same thing first."

[Ms. A] was offended by Grievant's message. [Ms. A] immediately deleted the message and blocked Grievant so that she could no longer receive any messages from Grievant on Instagram. [Ms. A] acted quickly to delete the message because she knew she was a probationary employee and feared Grievant could affect her position since he was a Human Resource Officer.

On May 28, 2021, Grievant called [the supervisor] while both employees were working. Grievant asked [the supervisor] "what is wrong." [The supervisor] said nothing was wrong. Grievant asked [the supervisor] if she liked the new Warden. [The supervisor] said she really did not know the new Warden but he was their Warden and she was just getting to know him. Grievant replied, "you just

don't seem like you like him." [The supervisor] said Grievant could make that assumption, but that did not make it true. Later in the day, [Ms. A] approached [the supervisor] and said that she received a call from Grievant. [Ms. A] told [the supervisor] that Grievant asked [Ms. A] if [the supervisor] liked the new Warden and said he did not believe [the supervisor] liked the new Warden.

Grievant later saw [Ms. B] in the parking lot and she seemed upset. He apologized to her for his comment. He also apologized to [the supervisor].

On July 8, 2021, the agency issued to the grievant a Group III Written Notice with termination for failure to follow policy and conduct unbecoming a human resource officer.² The grievant timely grieved the disciplinary action, and a hearing was held on March 11, 2022.³ In a decision dated March 31, 2022, the hearing officer determined that the agency had "presented sufficient evidence to support" its discipline pursuant to DHRM Policy 2.35, *Civility in the Workplace*.⁴ The hearing officer also found no mitigating circumstances to reduce the disciplinary action.⁵ The grievant has requested that EDR administratively review the hearing officer's 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."⁶ 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 a party; the sole remedy is that the hearing officer correct the noncompliance.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Findings of Fact

In his request for administrative review, the grievant first objects to the hearing officer's findings of fact that do not cite to specific evidence in the record as to "hotly contested" issues.⁹ As a result, the grievant argues, the record is "inadequate" for review on further appeal.¹⁰

² See *id.* at 1; Agency Ex. 1.

³ Hearing Decision at 1.

⁴ *Id.* at 5.

⁵ *Id.* at 5-7.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Request for Administrative Review at 7-10.

¹⁰ *Id.* at 10.

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 the grounds in the record for those findings.”¹² 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.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 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.

Here, the grievant appears to challenge several findings of material fact set forth in the hearing decision, on grounds that the decision fails to cite supporting evidence. For example, as to Ms. A, the hearing officer found that she did not have a personal relationship with the grievant outside of work; that the grievant asked her if she had “had to cut a bitch” in reference to Ms. B; that the grievant engaged her in gossip about the paternity of Ms. B’s children; and that the grievant sent Ms. A a sexually suggestive picture via social media. As to Ms. B, the hearing officer found that she had previously discussed the paternity of her children in the grievant’s presence, that the grievant disclosed this information to Ms. A, and that Ms. B learned of this disclosure and subsequently felt she could trust the grievant. The grievant argues that the hearing officer was required to cite specific evidence to support these findings, given that the record contains conflicting evidence as to these material facts.

Upon our review of the record, we find evidence in direct support of each of the hearing officer’s findings. At the hearing, Ms. A specifically testified that she did not have a personal relationship with the grievant outside of work.¹⁵ She further described a phone discussion with the grievant in which he inquired about her interactions with Ms. B and asked Ms. A if she “had to cut a bitch yet.”¹⁶ According to Ms. A’s testimony, the grievant then began to discuss the paternity of Ms. B’s children, noting that Ms. B had told him earlier that both of her children had the same father and yet they appeared to be of different races.¹⁷ Finally, Ms. A testified that, after she left work for the day, she found that the grievant had sent her a photo via social media that appeared to show a sexual image.¹⁸ She confirmed that two exhibits presented by the agency showed the same photo that the grievant had sent to her.¹⁹ These allegations also appear in Ms. A’s initial statement to the facility warden.²⁰ Similarly, Ms. B testified, consistent with her initial statement to the agency, that the grievant was present for a discussion she had had with the previous warden,

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 Hearing Recording 17:10-17:55 (Ms. A’s testimony).

¹⁶ *Id.* at 19:03-20:45.

¹⁷ *Id.* at 20:50-21:15.

¹⁸ *Id.* at 28:15-36:20; *see* Agency Exs. 11b, 11c.

¹⁹ *Id.*

²⁰ Agency Ex. 11.

in which she told the warden that her children had the same father.²¹ She also testified that, after learning that the grievant had disclosed this detail of her personal life to Ms. A, she felt she could no longer trust him as a human resource officer.²²

By statute, a decision rendered following a grievance hearing must “contain findings of fact as to the material issues in the case and the basis for those findings.”²³ Similarly, the grievance procedure requires a written hearing decision to “contain . . . the grounds in the record for” findings of fact on the material issues of the grievance.²⁴ The grievant correctly points out that the hearing decision does not include specific citations to the record in support of the hearing officer’s findings of fact. However, even if we were to conclude that the decision fails to comply with the grievance procedure in this regard, we are not persuaded that remand is necessary or appropriate where ample evidence to support the hearing officer’s findings is readily apparent from the record. EDR may remand hearing decisions when, upon administrative review, we are unable to determine the evidence that informed the hearing officer’s conclusions. However, this is not such a case. Here, there is every indication that the hearing officer, presented with conflicting testimony, made findings of fact in accordance with the testimony he found most credible – as hearing officers routinely do. Indeed, the hearing officer specifically noted that he found Ms. A’s testimony credible where it conflicted with that of the grievant.²⁵

Nevertheless, the grievant argues that, when witnesses’ testimony conflicts, “there must be some sort of analysis from the hearing officer of the credibility of the witnesses.”²⁶ We are aware of no such requirement in the grievance procedure. A hearing officer must “identify and explain the reasoning in resolving” issues of disputed facts,²⁷ and such reasoning may include a determination that one witness is more credible than another. However, consistent with our deferential standard of review as to findings of fact, only exceedingly rare circumstances might merit remand with instructions for the hearing officer to justify a credibility determination. Ultimately, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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. Hearing officers may, but are not required to, detail each of these potential considerations in the hearing decision. Weighing the evidence and rendering factual findings is squarely within the hearing officer’s authority and, absent evidence that a hearing officer’s credibility determination may have been tainted by improper bias, EDR will not second-guess those findings 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.²⁸

²¹ Hearing Recording at 1:21:30-1:24:25 (Ms. B’s testimony); Agency Ex. 10.

²² *Id.* at 1:24:50-1:30:25.

²³ Va. Code § 2.2-3005.1(C).

²⁴ *Rules for Conducting Grievance Hearings* § V(C).

²⁵ Hearing Decision at 6.

²⁶ Request for Administrative Review at 10.

²⁷ *Rules for Conducting Grievance Hearings* § V(C).

²⁸ *See, e.g.*, EDR Ruling No. 2020-4976. Because we conclude that the record contains ample evidence to support the hearing officer’s findings of fact, we find no basis to doubt the adequacy of the record for purposes of further appeal.

Accordingly, EDR will not disturb the hearing decision in this case for insufficient citation or analysis in support of its findings of fact.

Violations of Policy

The grievant additionally appears to contend that the hearing decision fails to adequately support its conclusion that the grievant's conduct violated DHRM Policy 2.35, *Civility in the Workplace*. Specifically, he disputes whether an objective reasonable person would consider the photo shared with Ms. A to be offensive and, thus, prohibited under the policy.²⁹ He also disputes whether he disclosed information about Ms. B to others in a manner that violated the policy.³⁰

In his decision, the hearing officer noted that DHRM Policy 2.35 prohibits “[s]ubjecting others to communication or innuendoes of a sexual nature”; “[b]ehaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others”; “[m]aking unwelcome or suggestive comments or jokes”; and “discussing sensitive, private information about someone to others.”³¹ He then concluded that

Grievant sent a message to [Ms. A] with the innuendo of a female engaged in oral sex. Grievant's behavior was offensive and not welcome. Grievant attended a meeting with the Warden and [Ms. B]. [Ms. B] answered a question about her family which Grievant should have recognized as private information about [Ms. B]. Grievant discussed [Ms. B]'s private information with [Ms. A] without the permission of [Ms. B]. Grievant's actions were contrary to DHRM Policy 2.35.³²

Upon a thorough review of the record, we find evidence to support the hearing officer's conclusions. It is undisputed that the grievant sent a photo to Ms. A via their personal social media accounts.³³ Ms. A testified that the photo, reproduced in the agency's exhibits, appeared to show a sexual image.³⁴ She also testified that she found the photo offensive and that receiving it from the grievant made her fearful of losing her job.³⁵ Likewise, Ms. B testified that she had addressed the paternity of her children in an earlier discussion with management, including the grievant.³⁶ She further testified that she considered this information personal such that it was not appropriate for discussion with others in the work setting.³⁷

²⁹ Request for Administrative Review at 11-13.

³⁰ *Id.* at 13-14.

³¹ Hearing Decision at 4-5; DHRM Policy Guide – *Civility in the Workplace*; see generally DHRM Policy 2.35, *Civility in the Workplace*.

³² Hearing Decision at 5 (footnote omitted). The hearing officer further concluded that, because the grievant was a human resource officer, he “was expected to have specialized knowledge of human resource policies including DHRM Policy 2.35” and “was in a position to learn private information that he was expected to keep confidential.” *Id.* Accordingly, the hearing officer found, the grievant's misconduct rose to the level of a Group III Written Notice. *Id.*

³³ See, e.g., Grievant Ex. C, at 3.

³⁴ Hearing Recording at 28:15-36:20 (Ms. A's testimony); see Agency Exs. 11b, 11c.

³⁵ Hearing Recording at 33:30-36:05.

³⁶ *Id.* at 1:21:35-1:24:25 (Ms. B's testimony).

³⁷ *Id.*

Nevertheless, the grievant asserts it is unclear from the hearing decision how the photo identified by Ms. A would violate DHRM Policy 2.35.³⁸ Because violations under Policy 2.35 are determined using the objective “reasonable person” standard, the grievant contends that the hearing officer “was required to discuss the frequency of the conduct, the severity of the conduct, whether it is physically threatening or humiliating, or simply a mere offensive utterance. He was required to provide an analysis on whether there was a reasonable interference with the employee’s work performance.”³⁹

EDR cannot agree that the hearing officer’s consideration in this regard was insufficient. As stated above, the hearing officer found based on the evidence that the grievant “sent a message to Ms. A with the innuendo of a female engaged in oral sex.”⁴⁰ DHRM Policy 2.35 specifically provides that prohibited behaviors may include “[s]ubjecting others to communication or innuendoes of a sexual nature.”⁴¹ As a matter of DHRM policy, subjecting coworkers to sexual innuendo is presumptively unprofessional and inappropriate by a “reasonable person” standard. However, Policy 2.35 recognizes that the relevant “context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited.”⁴² Here, the hearing decision specifically addressed the grievant’s management role as a human resource officer, as compared with Ms. A’s position as a new associate at her facility.⁴³ The hearing officer also found that the two employees did not have a relationship or course of conduct that would imply “she would welcome the picture he sent her.”⁴⁴ The grievant points to no other context that might have rendered a sexually suggestive photo inoffensive under Policy 2.35. Considering all of the hearing officer’s findings of fact and conclusions of policy as to the photo at issue, EDR perceives no deficiency in the hearing decision in this regard.

The grievant further asserts that the hearing officer failed to support his conclusion that the grievant violated DHRM Policy 2.35 when he “discussed Ms. B’s private information with Ms. A without the permission of Ms. B.”⁴⁵ Again, we disagree. As the hearing officer noted, Policy 2.35 specifically provides that prohibited behaviors may include “discussing sensitive, private information about someone to others.”⁴⁶ He concluded based on the evidence that the grievant “told Ms. A that before Ms. B left on maternity leave, Ms. B told Grievant that her children had the same father” and implied to Ms. A that they in fact had different fathers.⁴⁷ EDR finds no error in the hearing officer’s conclusion that information regarding the paternity of an employee’s children, disclosed to supervisors in a performance management meeting, would be considered “sensitive” and “private” as a matter of DHRM policy. The grievant offers no reasoning to support a contrary conclusion. Accordingly, we will not disturb the hearing decision on this basis.

³⁸ Request for Administrative Review at 11.

³⁹ *Id.* at 12.

⁴⁰ Hearing Decision at 5.

⁴¹ DHRM *Policy Guide – Civility in the Workplace*.

⁴² *Id.*

⁴³ Hearing Decision at 2, 5.

⁴⁴ *Id.* at 5, n.5.

⁴⁵ *Id.* at 5.

⁴⁶ DHRM *Policy Guide – Civility in the Workplace*.

⁴⁷ Hearing Decision at 3.

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.⁴⁸ 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.⁴⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁵⁰

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⁴⁸ *Grievance Procedure Manual* § 7.2(d).

⁴⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁵⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).