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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Social Services  
Ruling Number 2023-5538  
April 21, 2023

The Department of Social Services (the “agency”) 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 decision in Case Number 11893. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11893, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Social Services employed Grievant as a Licensed Inspector at one of its locations. Grievant presented persuasive evidence that she was a productive and well-liked employee. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant contracted COVID19 in 2020. She was vaccinated two times yet contracted COVID19 again in November 2021. At one point, Grievant was so ill from long COVID19 that she could not talk. She stopped being able to do simple things like writing a check.

On February 10, 2022, Grievant was approved to receive Family Medical Leave. Grievant took Family Medical Leave until March 11, 2022. She was on Family Medical Leave again from April 1, 2022 to May 9, 2022.

On May 17, 2022, Grievant experienced a medical emergency due to her health condition.

On May 18, 2022, Grievant initiated a Short-term Disability (STD) claim with the Third Party Administrator (TPA). She was approved for STD.

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<sup>1</sup> Decision of Hearing Officer, Case No. 11893 (“Hearing Decision”), March 9, 2023, at 2-5 (citations omitted).

On June 9, 2022, the Supervisor sent Grievant a Notice of Intent (NOI) that the Agency was considering issuing her a Group III Written Notice and ending her employment with the Agency for absences of three days or more without approval.

Grievant's STD was approved through June 30, 2022.

Grievant sought an extension of the STD benefit through November 30, 2022. The TPA approved Grievant's request but only through July 30, 2022. The Agency withdrew the June 9, 2022 NOI.

Although the Grievant's STD ended on July 30, 2022, the Agency extended Grievant's leave until August 18, 2022.

Because of her level of frustration, depression, and anxiety, Grievant decided to seek treatments from chiropractors, acupuncturists, and nutritionists. On August 3, 2022, Grievant met with a Doctor in Greece to consider additional treatment options for COVID19.

Grievant received a call from the TPA case manager. He told Grievant, "Don't tell me you are in Greece." Grievant replied, "Yes I am." Grievant believed that the case manager incorrectly no longer considered her to be ill because she was in Greece.

On August 10, 2022, Grievant exhausted all of her available Family Medical Leave.

On August 15, 2022, the TPA notified Grievant that her request to extend STD from July 31, 2022 to November 16, 2022 was denied. The TPA indicated:

[TPA] discussed paperwork requirements with you on 05/18/2022, 06/07/2022, 6/28/2022, 08/01/2022, and 08/03/2022.

[TPA] advised your paperwork was due by 08/12/2022. \*\*\*

Reason for Denial:

Medical documentation received is insufficient to determine disability benefits from 07/31/2022 through your return to work. \*\*\*

If you disagree with [TPA's] decision regarding your STD/LTD benefit, you may appeal this benefit denial (in whole or in part) by filing an appeal. You must file your appeal within 180 days from your receipt of the denial letter. \*\*\* To appeal this denial of a claim, write to: [address] Attention: Appeals Department. \*\*\* We will review your claim, taking into account all comments, documents, records and other information you submit relevant to your claim. \*\*\* The review on appeal will not consider the initial denial and it will be conducted by an individual who is neither the individual who initially denied the claim nor the subordinate of such individual.

On August 18, 2022, Grievant sent the HR Department and the Supervisor an email stating:

I received a call on 8/17/2022 at 12:05 p.m., from the case manager at [TPA] that he determined that my current case for disability ended effective 7/30/2022. As I remain under extensive medical care, I will appeal this decision as instructed. In the meantime as I await the decision, I am ready to take whatever action is needed to maintain by employment at VDSS. Please keep me advised if actions are required during this appeal process. Thank you.

Grievant did not file an appeal with the TPA to appeal the TPA's decision.

On August 22, 2022, Grievant sent a text message to the Supervisor stating:

I hope you are well. I sent an email last week to you and HR and have not heard anything back. Did you receive my email? Also could you forward to me the name of the actual person who I should be communicating with at HR since that may be easier to get a response and guidance. Thank you.

The Supervisor did not reply to Grievant's text message.

On August 29, 2022, the Supervisor emailed Grievant a Notice of Intent indicating that the Agency intended to issue her a Group III Written notice with removal.

On September 1, 2022, Grievant had not returned to work. The Agency issued the Group III Written Notice with removal.

Once Grievant was removed from employment, she mistakenly thought she had to go through the grievance process to reverse the STD denial decision. She did not file an appeal with the TPA as previously directed.

Grievant sought treatment from many different medical professionals without significant improvement. Grievant began receiving telehealth treatment from Dr. T in August 2022. Dr. T focused on treating patients with long COVID19. Dr. T's treatment was to focus on priming one's immune system so it could fix itself. Grievant visited Dr. T's clinic in October 2022. When Dr. T first met Grievant, Grievant had limited ability to complete mundane tasks. She could not manage any tasks of significance. Grievant had a chronic cough. She experienced forgetfulness. Grievant's blood pressure had been high for over a year. After one treatment from Dr. T, it dropped to a normal level. She began to regain her sense of smell and her cough subsided. Grievant has not yet fully improved.

Dr. T testified that at the time of the hearing, Grievant was unable to work at full capacity.

The agency issued to the grievant a Group III Written Notice with removal on September 1, 2022 for absence of three or more consecutive workdays without approval.<sup>2</sup> The grievant timely grieved the disciplinary action, and a hearing was held on February 15, 2023.<sup>3</sup> In a decision dated March 9, 2023, the hearing officer determined that the agency did not present sufficient evidence to support a Group III Written Notice with removal, primarily on grounds that the grievant's absence was due to her ongoing disability and resulting need for leave, of which the agency was aware. Thus, the hearing officer ordered that the grievant must be reinstated to the position she was in prior to her removal, and that the disciplinary action must be reversed.<sup>4</sup> 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 . . . .”<sup>5</sup> 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.<sup>6</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>7</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

The agency challenges the factual determinations made by the hearing officer. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>8</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.

The agency first asserts that the hearing officer was wrong to make medical determinations regarding the grievant, and argues that role is reserved for the “subject matter experts” at the Third-

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<sup>2</sup> Hearing Decision at 1; Agency Exs. at 7.

<sup>3</sup> See Hearing Decision at 1.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>11</sup> *Grievance Procedure Manual* § 5.8(2).

Party Administrator (“TPA”). The hearing officer relied on DHRM Policy 4.57, which governs the Virginia Sickness and Disability Program (VSDP). The hearing officer described the application of the policy to his factual findings:

[The policy] defines disability as:

An illness or injury or other medical condition, including pregnancy, that prevents an employee from performing the duties of his or her job. A disability can be total or partial.

The Hearing Officer believes that Grievant suffered from long COVID19 that rendered her disabled from the time she began STD at least through the time of the hearing. Grievant has established that she was disabled at the time the TPA denied her request to extend STD. The Hearing Officer believes the TPA likely mistakenly failed to extend Grievant’s STD benefits. The actions of the TPA are attributable to the Agency.<sup>12</sup>

The agency appears to contend that these determinations can only be made by the TPA, who determined that the grievant had insufficient medical evidence of the illness/injury that prevented her from returning to work. The agency contends it has no control over this determination.<sup>13</sup> Nevertheless, the grievant’s disability status and related matters are clearly “material issues” in this case. Therefore, the hearing officer has authority to make factual findings in this regard.<sup>14</sup> The hearing officer, relying on the testimony of the grievant and her witnesses, including her doctor, determined that the grievant was disabled when she sought to extend STD and that the TPA “likely mistakenly failed to extend Grievant’s STD benefits.”<sup>15</sup> To the extent the agency disputes the hearing officer’s factual findings, the agency does not cite to any record evidence the hearing officer failed to consider in making these findings.

It should also be noted that the hearing officer did not order that the agency pay disability benefits as a form of relief.<sup>16</sup> Rather, the hearing officer’s statements about this issue were in the context of the policy discussion assessing the grounds for the grievant’s removal. Indeed, the hearing decision expressly contemplates that the grievant would be reinstated to her same position prior to removal, along with back benefits, and was encouraged to appeal the denial of the STD

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<sup>12</sup> Hearing Decision at 5.

<sup>13</sup> Hearing Recording Part 1 at 55:00-57:30 (Benefits Manager testimony).

<sup>14</sup> In its request for administrative review, the agency contests the hearing officer’s determination that the grievant had put the agency on sufficient notice that she was an individual with a disability in need of reasonable accommodations. The hearing officer found that the grievant notified her supervisor that she “remain[ed] under extensive medical care” following the end of her leave period but desired to “take whatever action is needed to maintain [her] employment.” Hearing Decision at 4. EDR identifies no basis to disturb the hearing officer’s conclusion that this and other communications from the grievant put the agency on reasonable notice that she was requesting disability accommodations.

<sup>15</sup> Hearing Decision at 5; *see generally* Hearing Recording Part 1 at 59:20-1:09:40 (Doctor testimony); Hearing Recording Part 2 at 19:30-52:15 (Grievant testimony); *see, e.g.*, Hearing Recording Part 2 at 00:40-4:30, 8:25-10:00 (Grievant testimony).

<sup>16</sup> Hearing Decision at 6, 8.

extension.<sup>17</sup> EDR finds that the hearing officer's conclusions are based upon evidence in the record and the material issues of the case, and that there was no abuse of discretion by the hearing officer in those findings. Accordingly, EDR declines to disturb the hearing decision on these grounds.

In its appeal, the agency has also argued that its communications to the grievant during her employment were sufficient in light of the grievant's own communication failures. The hearing officer assessed the evidence and found that, following the denied extension of STD benefits, the grievant attempted to reach out to the agency to determine what action was required on her end, receiving no response from the agency.<sup>18</sup> The agency argues that the grievant was at fault for not submitting a return-to-work certification or an appeal to the TPA. The hearing officer, however, concluded that email correspondence from the grievant should have prompted the agency to communicate further with the grievant to clarify her obligations and options.<sup>19</sup> The hearing decision cites to DHRM Policy 4.57, which requires the agency to "[c]ommunicate with employee during absence if employee is physically able."<sup>20</sup> To the extent that the agency required specific medical documentation as part of any disability accommodation process, the hearing officer did not find that any such requirement was reasonably conveyed to the grievant. Considering the factual findings that the grievant sought assistance from agency management prior to her removal and received no response, the hearing officer found that the agency failed to respond in a manner that satisfied its obligations under DHRM Policy 4.57. Regarding this issue, EDR finds that the hearing officer did not abuse his discretion with respect to the findings of fact and his subsequent determination based on those facts. Accordingly, EDR declines to disturb the hearing decision on these grounds.

Having thoroughly reviewed the hearing record in this case, EDR finds that there is evidence in the record to support the hearing officer's conclusions. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer 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.<sup>21</sup> Accordingly, EDR cannot substitute its own judgment for that reflected in the hearing decision and has no basis to remand the matter to the hearing officer to correct the relief awarded in this case.

### 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.<sup>22</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

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<sup>17</sup> Since the hearing decision, the grievant has made EDR aware that she appealed the extension denial to the TPA, and that her appeal was denied. Within the appeal denial letter was a clause stating that she can appeal this denial again within 60 days of such denial.

<sup>18</sup> Hearing Decision at 4-6.

<sup>19</sup> *Id.* at 5-6.

<sup>20</sup> Hearing Decision at 6.

<sup>21</sup> *See, e.g.*, EDR Ruling No. 2020-4976.

<sup>22</sup> *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.<sup>23</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>24</sup>

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<sup>23</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>24</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).