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ADMINISTRATIVE REVIEW

In the matter of the Department of Health
Ruling Number 2023-5555
June 6, 2023

The grievant 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 Numbers 11884, 11926.[1] For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Numbers 11884, 11926 as found by the hearing officer, are incorporated by reference within this ruling.[2]

The agency issued the grievant a Group II Written Notice on July 8, 2022 with suspension for five working days, as well as six more Written Notices on November 22, 2022 (two Group III Written Notices and four Group II Written Notices), all with termination of employment.[3] The grievant timely grieved the July 2022 Written Notice on July 16, 2022, and a hearing was scheduled for December 1, 2022.[4] However, after the grievant was terminated on November 22, 2022, EDR determined that in light of a forthcoming dismissal grievance, the July 2022 grievance would be consolidated with the forthcoming grievance into a single hearing, and the December 1 hearing was thereby cancelled.[5] The grievant initiated six separate grievances on December 19, 2022, one for each November 2022 Written Notice, and then initiated a dismissal grievance on December 20. Because the dismissal grievance encapsulated the six prior grievances, those six grievances were dismissed, leaving the final dismissal grievance to qualify for a hearing.[6] A consolidated hearing was then scheduled for April 3, 2023.[7] In a decision dated April 13, 2023, the hearing officer determined that the agency had presented sufficient evidence to support all Written Notices on grounds that the grievant exhibited insubordination, disruption of the workplace, failure to follow instructions, intentional disrespect, and failure to follow policy

[1] Decision of Hearing Officer, Case Nos. 11884, 11926 ("Hearing Decision"), April 13, 2023, at 1.
[2] *Id*. at 3-11.
[3] *Id*. at 1-2; Agency Exs. 2, 44, 46, 51, 53, 55, 57.
[4] *See* Hearing Decision at 1; Agency Ex. 1.
[5] *See* EDR Ruling No. 2023-5487.
[6] Hearing Decision at 1; Agency Ex. 59.
[7] Hearing Decision at 1.

regarding electronic communications, and, thus, the grievant's removal must be upheld.[8] The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.[9] The grievant 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 . . . ."[10] 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.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing Officer's Consideration of Evidence

The grievant on appeal primarily argues that the hearing officer did not consider certain pieces of evidence in his decision. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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.[16] 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 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.

The grievant is arguing that the hearing officer failed to consider certain pieces of evidence, including audio recordings the grievant made of two separate conversations with a supervisor and screenshots of employees and non-employees viewing his social media page. The grievant also states that the hearing officer failed to address the July 2022 Written Notice. However, the hearing officer outlines each of the seven Written Notices in his procedural history, then details the extent of the agency's witness testimony that discusses the July 2022 Written Notice and the six

[8] Hearing Decision at 12-13.
[9] *Id.* at 13.
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[16] *Grievance Procedure Manual* § 5.8(2).

November 2022 Written Notices in his findings of fact.[17] The hearing officer makes note of the grievant's testimony regarding the July 2022 Written Notice, as well.[18]

The screenshot of the grievant's former supervisor on social media, referred to as the "sexually explicit photograph," was also mentioned in the findings of fact, as it was discussed thoroughly in the agency's testimony.[19] Likewise, the hearing officer included in his findings of fact the grievant's explanation of the photograph through his testimony.[20] The hearing officer does not seem to mention the other screenshots taken by the grievant of other employees and non-employees viewing his social media. The grievant's reasoning of including the other screenshots was the same as his reasoning for including the sexually explicit photograph (to provide proof of agency-affiliated personnel viewing his social media), and the hearing officer appears to have found that such reasoning was insufficient to mitigate or rescind the resulting Written Notice. As a general matter, the grievance procedure does not require that a hearing officer specifically discuss every argument or fact presented by a party; thus, a hearing decision's mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand.[21] EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact related to this issue presented by the grievant. In the decision, the hearing officer describes the grievant's belief that other employees were harassing him over social media.[22] However, showing that others viewed someone's public social media page is different than showing evidence of harassment. To the extent the grievant is arguing he was harassed over social media, the grievant has not identified such evidence of harassment presented at hearing that the hearing officer failed to consider. Consequently, to the extent the hearing officer determined the screenshots of others viewing his social media as not relevant, and therefore not necessary to be discussed in the decision, EDR has no basis to dispute such a determination.

Finally, the audio evidence mentioned by the grievant was also considered by the hearing officer. Specifically, the grievant is referring to the recordings he made of his mid-year follow up meeting on August 18, 2022 and a check-in meeting with his supervisor on July 29, 2022.[23] He argues in his appeal that the recordings show that the supervisor, acting as a witness, lied about what happened in those meetings. Both recordings were mentioned in the hearing officer's findings of fact, as well as the grievant's testimony regarding the evidence, and the tapes themselves were played in the hearing for the hearing officer.[24] Nothing in the record indicates that the hearing officer failed to consider any piece of evidence as the grievant claims. It appears that the grievant is specifically arguing that the witness lied about the grievant's mannerisms, such as making a sarcastic comment. The grievant and the witness both gave their side of the incident, and the recording was provided.[25] The hearing officer therefore had all available evidence to determine the credibility of the statement. 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

[17] Hearing Decision at 3-9.
[18] *Id*. at 10; *see* Hearing Recording Part 2 at 56:45-57:45.
[19] Hearing Decision at 6, 9-10; *see, e.g.*, Hearing Recording Part 1 at 1:23:30-1:24:00, 5:14:20-5:14:50, 5:37:40-5:41:30.
[20] Hearing Decision at 10.
[21] *See, e.g.*, EDR Ruling No. 2020-5075; EDR Ruling No. 2020-5073.
[22] Hearing Decision at 10.
[23] *Id*. at 8; Hearing Recording Part 1 at 3:27:15-3:28:45, 3:47:15-3:48:30; *see* Agency Exs. 44-45, 46-47.
[24] Hearing Decision at 7-8, 10; Hearing Recording Part 1 at 4:20:30-4:22:30, 4:39:00-4:41:00.
[25] Hearing Recording Part 1 at 3:27:15-3:28:45, 4:20:30-4:22:30; Hearing Recording Part 2 at 36:40-38:40.

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. For the reasons given, EDR adheres to the hearing officer's findings of fact and does not find any abuse of discretion. Accordingly, EDR will not disturb the hearing decision on these grounds.

Hearsay Testimony

The grievant also claims that the hearing officer allowed hearsay from one of the agency's witnesses. While the hearing officer does not explicitly mention this hearsay testimony in his findings of fact, it is commonly held that hearsay rules do not apply in hearings.[26] No provision of the grievance procedure or state policy would prevent such hearsay evidence to be used to support a disciplinary action at a grievance hearing. Although the grievant disagrees, witnesses are allowed to speak as to what other people have said, regardless of their availability to testify, and the hearing officer was entitled to evaluate the testimony of the witnesses on these matters.[27] Regardless, the hearsay testimony in question had little to no effect on the hearing officer's final determination. Consequently, the grievant's assertions about hearsay evidence, which is admissible in grievance hearings, does not serve as an appropriate basis for remand here.

Retaliation

The grievant also asserts on appeal that the issuance of the July 2022 Written Notice was done so for retaliatory reasons. Specifically, the grievant claims that after he reported to his supervisor that his fellow coworkers viewed his social media pages, that supervisor initiated the July 2022 Written Notice. This was also discussed by the grievant during his testimony.[28] To prevail at a hearing on a claim that the agency's disciplinary action was improperly motivated by retaliation, a grievant must ultimately prove by a preponderance of the evidence that, but for his engagement in an activity protected from such retaliation, the agency would not have taken its disciplinary action against him.[29] The hearing officer considered the evidence in the record and found that the decision to issue the various disciplinary actions against the grievant was consistent with law and policy.[30] While the hearing decision does not include analysis of the grievant's retaliation claim, the hearing officer's findings indicate that the grievant did not establish his retaliation claim by implication. Upon reviewing the record, EDR cannot find any evidence ignored by the hearing officer that would establish that the agency's action was the result of unlawful retaliation.

Determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. As discussed above, the agency presented sufficient evidence to support its decision to issue the Written Notices to the grievant. The evidence in the record supports the hearing officer's apparent conclusion that the agency's decision to discipline the grievant did

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[26] *See*, *e.g.*, EDR Ruling No. 2020-5121; EDR Ruling No. 2019-4945.
[27] *See Rules for Conducting Grievance Hearings* § IV(D); *cf.* Hayes v. Dep't of Navy, 727 F.2d 1535, 1538-39 (Fed. Cir. 1984) (holding that hearsay is generally admissible as substantial evidence in administrative proceedings if a reasonable person could consider it credible under the circumstances).
[28] Hearing Recording Part 2 at 56:45-58:45.
[29] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[30] Hearing Decision at 12-13.

not have a retaliatory motive. EDR has reviewed nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motivation for issuing the discipline was in any way unreasonable or inconsistent with the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and we cannot conclude that the hearing officer's decision on this issue constitutes an abuse of discretion in this case. Considering that the grievant bore the burden to prove retaliation by a preponderance of the evidence,[31] EDR will not disturb the hearing decision on this basis.

Other Disputed Findings of Fact

Finally, the grievant makes note of a myriad of facts pertaining to the context of each of the Written Notices, arguing that the hearing officer's findings of fact were inaccurate. For example, the grievant claims that the supervisor who issued him the July 2022 Written Notice was not the grievant's supervisor at the time it was issued, and also disputes the specific facts related to his job duties that lead to each Written Notice. As to the issue with the grievant's supervisor, the July Written Notice spans from January 2021 through July 2022.[32] The supervisor became the grievant's supervisor in or around February 2022.[33] No applicable state or agency policy restricts the issuance of a Written Notice to a specific supervisor or member of management. While the grievant's supervisor was not his supervisor in January 2021 when the issues began, she was his supervisor during the bulk of incidents that led to the disciplinary action, and was still his supervisor when she issued the Written Notice on July 8, 2022.[34] For that reason, EDR can find no basis in policy to disturb the hearing decision on these grounds.

Regarding the remainder of contested facts in the grievant's appeal, as was discussed previously, determining the credibility of witness testimony on disputed facts is solely for the hearing officer to decide, absent any abuse of discretion in doing so. For example, the grievant also on appeal asserts, along with documentation, that a supervisor has shown the potential to lie,[35] making him an unreliable witness in the eyes of the grievant. 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. 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.[36] EDR therefore

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[31] *See Rules for Conducting Grievance Hearings* § VI(B)(1). EDR's analysis of these claims is based on a review of the evidence admitted into the hearing record by the hearing officer.
[32] Agency Ex. 2.
[33] *Id*.; *see also* Hearing Recording Part 1 at 1:54:45-1:56:30.
[34] Agency Ex. 2; Hearing Recording Part 1 at 1:54:45-1:56:30. The record reflects the fact that this witness was the grievant's supervisor from February 2022 through the time of the grievant's termination. The majority of the incidents that led to the July 2022 Written Notice came about from issues spanning from February through May 2022 – during all of which the individual was the grievant's supervisor and the issues were directly relevant to her.
[35] The grievant identified a particular email between him and his other supervisor, who testified at the hearing primarily regarding the sexually explicit photograph. The email shows the supervisor discussing his problems with the grievant's inconsistent whereabouts, probing hypotheticals suggesting that when the (former) director tells the supervisor she would like to speak with the grievant and he is not present, the supervisor would have to explain the grievant's whereabouts to avoid the director questioning the grievant's absence.
[36] *See*, *e.g.*, EDR Ruling No. 2020-4976.

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.

Newly Discovered Evidence

As a final matter, the grievant has submitted new evidence that was not included in the original exhibits, nor were they specifically mentioned in the hearing or discussed in the hearing decision. The majority of this new evidence appears to be additional email chains between the grievant and his then-supervisor from the time of March through May 2022. Many of these emails discuss the logistics of certain job responsibilities that were discussed in the hearing, such as the proper procedure for conducting site visit reports, monthly invoice reports, and split funding, and the grievant's interpretation of how he conducted these responsibilities.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[37] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[38] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[39]

EDR finds that the grievant has not provided evidence to support a position that his evidence submitted on appeal should be considered newly discovered evidence under this standard. Indeed, much of this evidence appears to have been in the grievant's possession prior to the hearing but was not submitted as part of the record. Furthermore, EDR cannot find that the evidence submitted is likely to produce a new outcome if the evidence were considered. There is no basis for EDR to re-open or remand the hearing for consideration of any new evidence submitted by the grievant on appeal.

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.[40] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

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[37] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[38] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[39] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[40] *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.[41] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[42]

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[41] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[42] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).