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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Behavioral Health and Developmental Services
Ruling Number 2023-5491
January 4, 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 Number 11881. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11881, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employed Grievant as a Lead at one of its facilities. He began working for the Agency on February 10, 2021. No evidence of prior active disciplinary action was introduced during the hearing.

On October 26, 2021, Grievant received a written counseling because, “it was reported that you were in the medication room all morning talking to the medication nurse.” Grievant was advised, “You are expected to remain on your unit your entire shift, except during breaks and when responding to codes, engaging with patients in a therapeutic manner.”

Grievant’s work shift was from 7 a.m. to 3 p.m. Ms. C initially worked on Grievant’s shift but changed her work shift to begin at 11 p.m. and end at 7 a.m. She changed her shift to avoid encountering Grievant.

On May 9, 2022, Grievant came to work at 6:45 a.m. prior to his scheduled shift beginning. Ms. C was upstairs in the Unit Office alone. Grievant entered the office and “snuck up” on Ms. C. He pressed his body against Ms. C’s body and began rubbing Ms. C’s right shoulder. He then slid his hand down her back to her lower back. He said, “Good morning Ms. [C]” in what Ms. C considered to be a

¹ Decision of Hearing Officer, Case No. 11881 (“Hearing Decision”), Dec. 8, 2022, at 2-3.

“provocative way.” Ms. C shoved Grievant away and told him never to touch her again.

Ms. C walked out of the office and down the stairs. She encountered Mr. H. Mr. H could see that Ms. C was upset. Mr. H asked Ms. C, “What’s wrong?” Ms. C told Mr. H that Grievant pressed up against her and put his hands on her while they were in the Unit Office. Mr. H said he was going up there and talk to Grievant right now. Mr. H walked up the stairs and observed Grievant looking out the window. Grievant had seen Ms. C speaking with Mr. H. Grievant asked Mr. H what was wrong with Ms. C and why was Ms. C upset with Grievant. Mr. H told Grievant what Ms. C had said about Grievant and told Grievant “you can’t do that, that ain’t cool, you can’t be doing that.” Grievant said he was going to call Ms. C and attempted to do so. Ms. C did not answer Grievant’s calls.

May 9, 2022 was not the first time Grievant had behaved inappropriately towards Ms. C. In order to avoid encountering Grievant, Ms. C began placing her bag in the women’s restroom and not the Unit Office so that she could leave the Facility without having to return to the Unit Office and possibly encounter Grievant.

On July 2, 2022, Ms. C sent Agency managers an email asking not to have Grievant as her supervisor and be transferred to another division.

The agency issued to the grievant a Group III Written Notice on August 18, 2022 with removal for lack of civility in the workplace.² The grievant timely grieved the disciplinary action, and a hearing was held on November 18, 2022.³ In a decision dated December 8, 2022, the hearing officer determined that the agency had presented sufficient evidence to support the Written Notice on grounds that the grievant created a hostile work environment and, thus, the grievant’s removal must be upheld.⁴ The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.⁵ 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”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 either 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.

² Hearing Decision at 1; Agency Exs. at 55.

³ See Hearing Decision at 1.

⁴ *Id.* at 4-5.

⁵ *Id.* at 5.

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

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

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of Evidence

The grievant 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”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ 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.¹¹ 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.¹² 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 argues that the agency lacks a preponderance of evidence because the only evidence admitted is witness testimony, as opposed to physical evidence such as audio or video. The grievant also argues that the employee who reported the harassment had a motive of jealousy due to the grievant recently being promoted to a supervisor position. In the hearing decision, the hearing officer found that the grievant created a hostile work environment, particularly by “[sneaking] up behind [an employee], press[ing] his body against her body, rubb[ing] her shoulder, and mov[ing] his hand down her back.”¹³ While the grievant contests these findings,¹⁴ there is evidence in the record to support the hearing officer’s determinations, including direct testimony from the relevant employees who either witnessed inappropriate acts or comments, heard of the acts or comments, or experienced them firsthand.¹⁵ 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. The hearing officer further assessed the grievant’s arguments and rejected them.¹⁶

As to the claim that the agency lacks a preponderance of evidence because there is no physical evidence outside of witness testimony, the hearing officer made clear in the hearing and

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹² *Grievance Procedure Manual* § 5.8(2).

¹³ Hearing Decision at 4.

¹⁴ See Hearing Recording at 42:00-43:00 (the grievant arguing that there is no proof), 56:25-57:00 (the grievant arguing that there was a jealousy motive), 5:37:10-5:38:00 (the grievant reaffirming the stance that everything that has been reported in the investigation and hearing is a lie).

¹⁵ For example, the agency employee who described being touched by the grievant testified under oath at the hearing. The hearing officer found her testimony credible. Hearing Decision at 4.

¹⁶ Hearing Decision at 4-5.

in the decision that sworn testimony alone is sufficient to support a disciplinary action.¹⁷ EDR concurs with the hearing officer in this regard. By definition, a preponderance of evidence requires only “[e]vidence which shows that what is intended to be proved is more likely than not,” or “evidence that is more convincing than the opposing evidence.”¹⁸ The combination of several employees’ sworn testimonies, in contrast to the lack of any sworn testimony by the grievant,¹⁹ supports the hearing officer’s determination that the agency has sufficiently met its burden of proof by a preponderance of the 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.²⁰ Accordingly, EDR declines to disturb the hearing decision on these grounds.

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³

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¹⁷ Hearing Decision at 4; Hearing Recording at 1:45:50-1:46:15 (hearing officer affirming that such testimony can be proof by itself).

¹⁸ *Grievance Procedure Manual* § 9.

¹⁹ Hearing Decision at 5.

²⁰ See, e.g., EDR Ruling No. 2020-4976.

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).