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ADMINISTRATIVE REVIEW

In the matter of Central Virginia Community College
Ruling Number 2023-5494
January 30, 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 11859. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11859, as found by the hearing officer, are as follows:¹

The Virginia Community College System [(the "college" or "agency")] employed Grievant as an Administrative Assistant III at one of its Colleges. She had been employed by the College for over ten years. Grievant reported to Dr. W, the Associate Vice President.

Grievant did not testify or call any witnesses to testify. Her evidence consisted of documents presented during the hearing.

When Grievant began working for the College, she worked in an office with office hours from 8:00 a.m. until 4:30 p.m. or 5 p.m. Office hours were Monday through Friday when the College was open. Grievant's position was a "public-facing" position. She was responsible for greeting students and visitors when they came to the office to speak with other employees. Grievant was also expected to answer questions and provide services to students and visitors.

Grievant's position description required her:

To provide office support for the Associate Vice President, faculty and staff in the division, administrative oversight and support for the

¹ Decision of Hearing Officer, Case No. 11859 ("Hearing Decision"), December 7, 2022, at 2-6.

... City Early College program, and work in collaboration with division staff to ensure quality services for faculty and students.

Her core responsibilities included, in part:

Serves as the office manager and receptionist for the Arts and Sciences Division. Provides excellent customer service to students, colleagues, and the general public.

Provide a warm and welcoming atmosphere.

Oversee the general office.

Serve as an assistant to the Associate Vice-President.

Supervise work study students.

Assists all faculty with supplies, forms, copying needs, and related office needs pertinent to instruction and division events.

Provides general information regarding program pathways and instructors for phone and in-person questions.

Maintains informational boards and TV monitors as appropriate.

Proctors classes/tests for faculty as needed.

A measure of her core responsibilities included, in part:

All faculty and students entering the office are warmly greeted and requests are met as necessary. All faculty and students entering the office are warmly greeted and requests are met as necessary. ***

In-person requests, phone calls and emails regarding division information are answered in a timely and appropriate manner.

In March 2020, the campus closed due to the COVID19 pandemic. Students did not attend classes in-person. The College operated virtually due to the COVID-19 pandemic. Grievant teleworked full-time during this period.

In January 2021, Grievant contracted COVID19 which materially affected her health. Grievant continued to experience long-term complications of the illness, but she remained able to perform some of her job duties remotely.

In mid-2021, the college began preparations to re-open its facilities for in-person services, including mandatory onsite work for most employees. On June 28, 2021, the College President sent employees an email stating

we will reopen the campus to the public on Tuesday, July 6, the date on which employees will return to campus. *** While we will review individual requests to telework on a case-by-case basis, as a rule, we will require that employees carry out their duties on campus, just as they did before we transitioned to remote services.

We will entertain exceptions to that rule as we respond to documented needs and compelling situations, but we will not permit employees to work routinely and exclusively from home for the sake of personal ease, convenience, or preference.

Grievant presented a note dated June 29, 2021 from her Nurse Practitioner stating Grievant:

experienced a pretty significant case of Covid in January of this year. She continued to have complications including ongoing fatigue and episodes of weakness. As we do not know the extent of post covid symptoms, I feel it would be in her best interest to have the ability to work from home at minimum 3 days per week. At this time we agree she may try to return full time with these accommodations. She may increase on campus time if she tolerates her return to work with these accommodations.

On July 6, 2021, the College resumed normal working operations. Its campus was open for in-person education with faculty, staff, and students returning to the campus. Grievant's full time teleworking privileges were removed. She was expected to report to the office. She was not able to report to work five days per week because of her medical condition.

Beginning July 6, 2021, Grievant worked in the office on Mondays and Thursdays from 8 a.m. to 5 p.m. For the other three days, she took leave or was on disability status.

If Grievant was not in the office, her absence could disrupt the work of other employees. For example, if the Associate Vice President was in a meeting and someone came to the reception area of the office, the Associate Vice President would have to interrupt the meeting to attend to the visitor.

On July 12, 2021, Grievant completed a Workplace Accommodation Request Form. She described the conditions limiting the essential functions of her job as:

Walking due to post covid syndrome swelling in joints.
Sitting due to post covid syndrome swelling in joints.
Dizziness to the point of not driving when it is an issue.
Breathing – super sensitive lungs from covid pneumonia, oxygen level drops low which makes tiredness and weakness more of an issue.
Ear pain and headaches, hard to tolerate noise and concentrate.

Grievant sought an accommodation to telework three days per week.

On August 3, 2021, Grievant completed a Request for Family or Medical Leave for a serious health condition making her unable to perform her work duties. Grievant's medical provider concluded Grievant could return to work on August 13, 2021 with restrictions of "ability to work from home with a maximum 2 days in office."

On August 12, 2021, Grievant sent the Dean an email stating:

I am carrying a ton of stress over this. My entire body has been affected from Covid. One of my struggles right now is my lungs. For instance, Tuesday my oxygen level was 84. And that is just one of the many post Covid issues I have.

During July and August 2021, while waiting for a determination on her accommodation request, Grievant reported for onsite work two days each week and drew on her paid leave balances for the remaining three weekdays.

At some point, the College suggested Grievant file for Short-term Disability (STD). Grievant submitted a claim and was awarded STD effective August 13, 2021. Grievant was approved by the College to work a reduced in-person work week throughout the short-term disability period. She received STD through February 10, 2022.

On February 11, 2022, the Third Party Administrator granted Grievant continuous long-term disability (LTD) from February 11, 2022 through August 31, 2022.

On February 14, 2022, Grievant reported to work. The Associate Vice President was surprised Grievant came to work. She instructed Grievant to speak with the Human Resource Director. Grievant met with the HR Director who told Grievant to leave work since her long-term disability had been confirmed.

The College did not consider placing Grievant on LTD-Working because the Virginia Sickness and Disability Policy required employees to work 20 hours. Grievant was authorized to work only two days for a total of 16 hours.

On February 16, 2022, the Associate Vice President sent an email to staff, "Unfortunately, [Grievant] will no longer be working in the Arts & Sciences Division, effective this past Friday."

On July 25, 2022, the HR Director sent Grievant an email:

Option to be reinstated to your previous position – The position is currently open. If you are willing to return to work at [College] that is a viable option. The position is still public facing. However, we

are allowing employees to telework one day per week as a relief for the high gas prices. If you are able to work on campus the other four days, we would love for you to return.

On March 4, 2022, the grievant initiated a grievance to challenge her separation from employment. EDR subsequently qualified the grievance for a hearing,² which occurred on November 16, 2022.³ In a decision dated December 7, 2022, the hearing officer denied the grievant's requested relief, finding that she had not proven by a preponderance of the evidence that the college's actions were inconsistent with policy or otherwise improper.⁴ 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”⁵ 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.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant maintains that a “health insurance full premium that was deducted out of my last paycheck was wrongfully taken,” and she questions whether the hearing officer understood the nature of this issue in her grievance. She also appears to argue that the college wrongfully failed to pay her for outstanding leave time upon her separation. In support, she cites an email exchange she had with college management regarding potential settlement of her grievance, in which the college seemingly offered to repay the disputed health insurance deduction and to restore her annual leave balance in the event she returned to employment.⁸

Upon a thorough review of the record, EDR cannot find that the hearing officer insufficiently considered the material issues of the case or otherwise failed to comply with the grievance procedure. As correctly noted in the hearing decision, the grievant had the burden to prove the issues in her grievance.⁹ Because she did not offer any testimony at the hearing, her supporting evidence was limited to her documentary exhibits as admitted into the record. Our review of these documents does not reveal any evidence relating to her last paycheck and/or

² EDR Ruling No. 2022-5398.

³ See Hearing Decision at 1.

⁴ *Id.* at 7-8.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

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

⁸ Agency Ex. at 136.

⁹ Hearing Decision at 2; EDR Ruling No. 2022-5398 at 8.

deductions, other than the grievant's statement of the relief she was seeking through the grievance process, *i.e.* repayment of an "auto charge of over \$1,100 for insurance."¹⁰

As an initial matter, we do not find that the hearing officer materially misunderstood the issue of the insurance deduction. The hearing decision listed four issues for determination, including: "Whether the College misapplied policy by automatically paying Grievant's insurance premium after she was no longer employed and then deducting that amount from her pay."¹¹ This articulation appears to be an accurate statement of the issue as presented by the grievant in her requested relief.

To the extent that the hearing officer did not fully understand the grievant's claim with regard to the insurance deduction,¹² we observe that the burden of proof places responsibility on the burdened party to demonstrate the nature and merits of their claim for the hearing officer. Although testimony is not an absolute requirement to carry the burden of proof, it can provide an opportunity to explore and clarify relevant issues for the hearing officer. In this case, EDR is unable to identify evidence in the record as to specific details of the grievant's insurance claim (e.g. amount of wrongful deduction, policy governing appropriate deductions) that might have provided a reasonable basis to find in the grievant's favor on these issues. Similarly, we are unable to identify record evidence that could reasonably have proven any error with respect to how the agency administered the grievant's leave payout upon her separation.¹³ Therefore, in light of the grievant's burden to prove her claims at the hearing, we cannot find that the hearing officer's consideration of the evidence was unreasonable or otherwise in error with respect to the grievance procedure.

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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

¹⁰ Grievant Ex. at 4.

¹¹ Hearing Decision at 2; *see also* EDR Ruling 2022-5398 at 7-8.

¹² *See* Hearing Decision at 8 (finding that the grievant "did not present testimony to explain the issues [of insurance or leave] or establish any errors by the College that the College had not yet corrected").

¹³ In her request for review, the grievant argues that the college would not have offered to settle these matters with her had they been administered correctly. As a general matter, EDR encourages parties to seek resolution of state employment disputes on mutually agreeable terms, and accordingly we do not agree that a party's proposal of settlement terms tends to demonstrate wrongdoing. In any event, we find no basis to disturb the hearing officer's findings that the evidence did not prove any policy violation by the college.

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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