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ADMINISTRATIVE REVIEW

In the matter of the Virginia State Police
Ruling Number 2023-5514
March 2, 2023

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 11888. For the reasons discussed below, EDR will not disturb the hearing officer's decision.

BACKGROUND

The relevant facts in Case Number 11888, as found by the hearing officer, are as follows:[1]

> The Virginia State Police employed Grievant as an Equipment Repair Tech. He began working for the Agency in November 2019. He had favorable work evaluations.
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> On April 12, 2022, Captain B asked Agency managers to require Grievant to complete a Fitness for Duty Examination based on Grievant's unusual behavior. The request was approved by Major P and Lieutenant Colonel R. On April 19, 2022, Grievant was placed on Leave with Pay status. Grievant was informed he would have to participate in a Fitness for Duty evaluation on April 25, 2022.
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> On April 25, 2022, the First Sergeant arrived at Grievant's residence to escort Grievant to the Fitness for Duty Examination. Grievant either was not at the residence or did not answer the door. The First Sergeant used his mobile phone to call and speak with Grievant. Grievant said he did not intend to go to the appointment. Grievant indicated he was aware of the appointment.
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> On April 28, 2022, the First Sergeant called Grievant to inform Grievant that the First Sergeant would be delivering a memorandum dated April 27, 2022, a copy of the General Order ADM 14.10, the Authorization to Release or Obtain

[1] Decision of Hearing Officer, Case No. 11888 ("Hearing Decision"), February 2, 2023, at 2-3 (footnotes omitted).

> Confidential Health Information form and the VCU Department of Psychiatry fitness for duty instructions. The First Sergeant instructed Grievant to review, complete, and return the forms to the Human Resource Division before his next scheduled fitness for duty appointment set for May 9, 2022. The First Sergeant told Grievant that failure to complete the paperwork and noncompliance could lead to disciplinary action. On April 28, 2022, the First Sergeant delivered the documents to Grievant's home and taped them on to the front door.
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> On April 29, 2022, the First Sergeant took copies of the documents he taped to Grievant's door and mailed them to Grievant by USPS certified mail.
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> Grievant was informed he was to attend a second Fitness for Duty appointment on May 9, 2022. On May 9, 2022, the Lieutenant picked up Grievant at his residence and escorted him to the fitness for duty examination scheduled with Dr. W at the VCU office. The Lieutenant was within Grievant's chain of command. At the doctor's office, Grievant refused to sign a Consent for FFD Examination – Psychiatrist Form required by Dr. W. Grievant's refusal to sign the form prevented Dr. W from conducting the fitness for duty examination. The Lieutenant told Grievant he was obligated to sign the form. The Lieutenant observed Grievant refusing to sign the form. The Lieutenant transported Grievant back to Grievant's residence.

On August 25, 2022, the Virginia State Police (the "agency") issued to the grievant a Group III Written Notice with termination for violation of General Order ADM 11.00, paragraph 2(c)(4), "Refusal to take physical or mental examination as required."[2] The grievant timely grieved the agency's disciplinary action, and a hearing was held on January 23, 2023.[3] In a decision dated February 2, 2023, the hearing officer upheld the agency's discipline, finding that the evidence proved that the grievant failed to follow policies of such significance that a Group III Written Notice was justified.[4] The hearing officer further concluded that no mitigating circumstances existed to reduce the disciplinary action.[5] The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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

[2] *See id.* at 1; Agency Ex. 4 at 17-18.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 4.
[5] *Id.*
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant appears to object to the hearing officer's decision to hold the hearing as scheduled despite the grievant's request for a continuance. He has requested "an opportunity to present [his] case and to clear [his] name of misconduct, as [he] complied with all the requirements of [his] duties . . . ."

Continuance

EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including whether the hearing officer abused his discretion by failing to grant a party's request for a continuance.[9] Under the *Rules for Conducting Grievance Hearings*, a hearing officer may "grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request."[10] In cases where a party objects, "the hearing officer may only grant extensions of time [f]or just cause – generally circumstances beyond a party's control."[11] In the past, EDR has taken the approach that a hearing officer's denial of a motion for continuance should be disturbed only if it appears that (1) circumstances beyond the party's control existed justifying such an extension; (2) the hearing officer's refusal to grant the extension of time was an abuse of discretion;[12] and (3) the objecting party suffered undue prejudice because of the denial.[13] Assessing whether an abuse of discretion occurred in these circumstances depends mainly upon the reasons presented at the time the request is denied.[14]

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[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-1202.1(5).
[10] *Rules for Conducting Grievance Hearings* § III(B).
[11] *Id.*
[12] Courts have defined "abuse of discretion" in this context as "an unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay." United States v. Bakker, 925 F.2d 728, 735 (4th Cir. 1991) (quoting Morris v. Slappy, 461 U.S. 1, 11-12 (1983)). More generally, "abuse of discretion can occur in three principal ways: 'when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.'" Graves v. Shoemaker, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011). The "abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it." Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); *see also* United States v. Jenkins, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion "when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.").
[13] *See, e.g.*, EDR Ruling No. 2018-4716. This approach is consistent with analogous judicial opinions that, though not binding in this context, are nevertheless persuasive. *See* Venable v. Venable, 2 Va. App. 178, 181, 342 S.E.2d 646, 647 (1986) ("The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." (citing Autry v. Bryan, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982))); *see also Bakker*, 925 F.2d at 735 ("to prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby." (citing United States v. LaRouche, 896 F.2d 815, 823-25 (4th Cir. 1990))).
[14] *See LaRouche*, 896 F.2d at 823; *see*, *e.g.*, EDR Ruling No. 2008-2005.

In this case, the hearing officer sent correspondence to the parties on September 20, 2022, confirming the January 23 hearing date and directing the parties to provide their respective exhibits and witness lists on or before January 17, 2023. On January 10, the grievant sent an email to the hearing officer and to the agency, which included the following statement: "As of yesterday, I am on a newly ordered government assignment and will not be available for a hearing session until the month of May."

On January 11, the hearing officer gave his days of availability (January 12, 17, and 18) to the grievant and the agency in an attempt to schedule a conference call to discuss the grievant's request for a continuance. The agency responded with specific timeframes during each of those three days that they were available. The grievant responded the following day, again asking for the hearing to be set in May or June, and indicating that he was not available for a meeting. When the hearing officer clarified that another hearing date could not be scheduled before a pre-hearing conference call, the grievant responded that his only known available time for a conference call was January 22 from 2:00 p.m. - 4:00 p.m., and that he would communicate to EDR if another date for a telephone conference became available. He also noted that he is typically not available from 9 a.m. - 5 p.m. Monday - Friday because he is not permitted to carry a personal cell phone during work hours. On January 17, the hearing officer then informed the grievant that because of the grievant's limited schedule to hold a conference call, the hearing would proceed as scheduled. EDR and the hearing officer did not hear from the grievant again regarding this matter.

On the day of the hearing (January 23), the grievant was emailed at 9:19 a.m. asking him to connect to the electronic meeting as soon as possible. The grievant did not attend the hearing at any point and did not communicate further until January 29, stating, in part: "From your message I would conjecture that the above date was utilized to confer on a new hearing date or possibly a hearing actually went forward in my absence."

On February 2, the hearing officer issued a hearing decision, which was sent to the grievant the same day. On February 5, the grievant replied to the hearing decision, stating:

> As was expressed to [EDR], I was unable to be present at the hearing and had requested a date in which I would be free of the intensive defensive training that I am required to participate in as I serve the Commonwealth. I had believed that my situation was clear and [an EDR representative] had informed me that "you understood." . . . I was unable to scan email to you without secretarial assistance. . . . I request an opportunity to present my case and to clear my name of misconduct . . . .

EDR interpreted this communication as a request for administrative review. The grievant then followed up with a collection of images as evidence for the review on February 11, none of which related to the reason expressed for a requested continuance.

As to the grievant's request for a continuance on January 10, EDR cannot find that the hearing officer abused his discretion by denying the request. The grievant indicated that he sought a postponement until May because of a "newly ordered government assignment," which he later

clarified was an "intensive defensive training" in which he was required to participate. When given options for a time to discuss the continuance via teleconference, the grievant stated that he did not know when he was free during working hours, but suggested the afternoon of January 22, a Sunday, which was not one of the days offered by the hearing officer. After the hearing officer responded by saying the hearing would continue as scheduled, the grievant did not respond further. Given that the grievant in this case appeared to have 13 days since the original continuance request to provide details as to why he could not take the time during working hours to attend a call, the lack of an agreed upon date for the conference call would not ordinarily constitute a circumstance beyond the grievant's control. While the grievant stated that he does not have his personal cell phone available during these hours, without additional information, such as a reason why he was unable to take a short break to use his cell phone for a call, EDR cannot find that the hearing officer was incorrect in determining that the grievant had not presented a sufficient reason for a continuance. Accordingly, we find no abuse of discretion in the hearing officer's denial of the grievant's January 10 request.

As to the grievant's follow-up communication on January 29, we similarly find no abuse of discretion in the hearing officer's decision to issue the hearing decision. This follow-up occurred six days after EDR reached out to the grievant during the hearing, giving the grievant sufficient time to either seek clarification of any misunderstanding he had or to elaborate on his unavailability, neither of which occurred. Regardless, the hearing officer sufficiently made clear via communication with the grievant that the hearing would continue as scheduled as stated in the January 17 email. Once the hearing was completed, the standard of review is whether the hearing officer abused their discretion with the evidence at hand during the hearing. Given that there was no new information regarding the grievant's situation at the time of the hearing, any subsequent communication from the grievant would have little effect on the hearing decision itself unless it clearly illustrated just cause for the delay.

Further, even if the grievant effectively requested a continuance based on the reason of required training, we find nothing to indicate that he suffered undue prejudice because the hearing proceeded as scheduled. We observe that the hearing officer did not issue a decision in this matter for 10 days following the hearing. During this period, the hearing officer could have heard additional arguments as to whether additional proceedings were appropriate, and/or whether the evidentiary record should be reopened to accept the grievant's evidence. However, EDR has no record of receiving any communications from the grievant during this time, other than the grievant's brief January 29 email. In addition, the grievant's request for administrative review does not suggest what evidence or arguments he would have presented that might have led the hearing officer to different conclusions.

In his appeal, the grievant does not provide any details regarding the training he was attending – just that it is an "intensive defensive training." He later followed up with some documents on February 11, nine days after the hearing decision, but none of the documents relate to the reason for his inability to participate in a pre-hearing conference call or the hearing until May. In consideration of all of the above, EDR finds that the grievant did not present the hearing officer with a justifiable reason for delay prior to the hearing, and because there is nothing to

indicate that he was unduly prejudiced when the hearing went forward as scheduled, we will not disturb the decision on these grounds.

Consideration of Evidence

While the grievant in his appeal did not dispute any evidence used by the agency in the hearing, nor did he argue for mitigating circumstances, EDR will nonetheless consider the evidence presented by the agency. We find no error by the hearing officer in his decision to uphold the agency's disciplinary action and termination.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[16] 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.[17] 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.[18] 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.

In his decision, the hearing officer found that the grievant failed to follow a supervisor's instructions and/or failed to comply with policy when he refused to attend a Fitness for Duty evaluation that the agency deemed necessary given his recent behavior, and when he refused to sign a consent form when he showed up to the make-up evaluation due to his refusal of the initial evaluation.[19] The hearing officer also found that while a failure to follow supervisory instructions should normally be considered a Group II Written Notice offense, the agency presented sufficient evidence to elevate the discipline to a Group III Written Notice because of the unique impact on the agency.[20] Due to the grievant's misconduct, the agency was unable to evaluate whether the grievant could perform his job duties, which included interacting with other employees in a professional manner.[21] Evidence in the record supports the hearing officer's conclusions as to the grievant's conduct,[22] and the grievant does not appear to dispute these findings.

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[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.
[17] *Rules for Conducting Grievance Hearings* § VI(B).
[18] *Grievance Procedure Manual* § 5.8.
[19] Hearing Decision at 4.
[20] "Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher-level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceed agency norms." DHRM Policy 1.60, *Standards of Conduct*, at 8.
[21] *Id.*
[22] *See, e.g.*, Hearing Recording at 11:45-13:00, 39:00-39:45, 42:30-43:15.

The hearing officer additionally found that the grievant "displayed behavior that was sufficient for the Agency to be concerned about his fitness for duty," and that the grievant was properly referred to a fitness for duty evaluation.[23] Evidence in the record supports the hearing officer's conclusions in this regard as well. The agency's witnesses at the hearing testified that the grievant demonstrated a history of workplace behavior and that "unusual activity" by the grievant had inhibited his coworkers' ability to focus on their work.[24] Once the fitness for duty evaluation was ordered, the grievant was given opportunities to comply,[25] and the agency made clear to him on multiple occasions that refusal to take part in the required evaluation could lead to termination.[26] The agency provided copies of several internal policies, including: (1) General Order 11.00, *Standards of Conduct*, which includes the violation of refusing to take physical examinations as required by the agency;[27] (2) General Orders 12.00 and 12.02, the internal policies on administrative investigations and the disciplinary measures used to issue Written Notices;[28] and (3) General Order ADM 14.10, the policy that governs Fitness for Duty evaluations.[29] Given all of the preceding facts and the hearing officer's ultimate finding, we find no basis in the record to disturb the hearing officer's conclusions 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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[23] Hearing Decision at 3.
[24] Hearing Recording at 29:30-30:15, 34:45-35:30, 36:50-37:20.
[25] A make-up evaluation was scheduled when the grievant did not attend the first one.
[26] Hearing Recording at 37:30-39:00 (discussing the April 19 meeting between the grievant and the agency that outlined the logistics of the upcoming evaluation).
[27] Agency Ex. 13 at 184; Hearing Decision at 4.
[28] Agency Exs. 14, 15.
[29] Agency Ex. 17.
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).