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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5527
March 29, 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 11844. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11844, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [(the "agency")] employed Grievant as a Corrections Officer at one of its facilities. She began working for the Agency on March 16, 2020. Grievant had prior active disciplinary action. On July 26, 2021, Grievant received a Group III Written Notice with a 23 hour suspension for violation of workplace harassment. On September 20, 2021, Grievant received a Group I Written Notice for unsatisfactory performance.
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> On December 25, 2021 at approximately 2:30 p.m., Grievant entered the Watch Commander's Office and approached the Lieutenant. Grievant asked the Lieutenant if she was the only one there. The Lieutenant said, "Yes." Grievant walked to the desk where the Lieutenant was sitting. Grievant said to the Lieutenant, "I bet I can eat your coochie better than your boyfriend can." The Lieutenant said that there were certain things that she was cool about, but Grievant's statement was not one of them. The Lieutenant instructed Grievant to leave the Watch Office. Grievant then asked, "I can't sit in here with you?" The Lieutenant said, "No" and again instructed Grievant to leave the office. Grievant asked the Lieutenant if there were any recording devices in the office and asked the Lieutenant not to report her because "we go way back." The Lieutenant said that just because they went to high school together does not give Grievant permission to approach the Lieutenant in that manner and make statements such as that.

[1] Decision of Hearing Officer, Case No. 11844 ("Hearing Decision"), February 22, 2023, at 2-3 (footnotes and citations omitted).

The Lieutenant was offended by Grievant's statement and considered it to be of a sexual nature. Grievant and the Lieutenant had attended the same high school but did not have any relationship other than of being co-workers at the Facility. The Lieutenant took no actions towards Grievant that would cause Grievant to believe that the Lieutenant would welcome Grievant's statement.

On Saturday, March 19, 2022, Grievant's daughter was scheduled to play in a basketball game. Grievant coached the team. Grievant wanted to attend the game but had not requested and received leave to be away from work.

On March 19, 2022, Grievant was scheduled to report to work at 5:45 a.m. and work until 6:15 p.m. At 5:40 a.m., Grievant called the Watch Office and spoke with Major M. Grievant said she needed to report for duty late and would be at the Facility by 11 a.m. Major M asked Grievant why she would be late and Grievant said her child had a basketball game. Major M told Grievant that her absence would be unexcused.

Grievant reported to work at 6:18 a.m.

Grievant was entitled to take a one hour lunch break. Grievant asked Major M if she could take a two hour lunch to go watch her daughter's game. Major M said, "No" and explained that the Facility was short-staffed that day.

At 9:40 a.m., Grievant spoke with Major M and said that Grievant's mother called and said there was an emergency with Grievant's child. Major M said that if Grievant had to leave, Grievant was to return with a doctor's note dated March 19, 2022. While exiting the Facility, Grievant told Major T that she was going to watch her daughter's ball game. Major T asked Grievant if she had permission to go and Grievant said, "No." Major T advised Grievant to seek permission before leaving. Grievant left the Facility.

Major M "clocked out" Grievant from the Facility.

After 11 a.m., Grievant called the Facility and spoke with the Lieutenant who transferred the call to Major M. Major M told Grievant that Grievant had been "clocked out". Grievant said that since she had been "clocked out" she did not intend to return to the Facility for the remainder of her shift.

Grievant did not present a doctor's note excusing her absence on March 19, 2022.

On April 28, 2022, the agency issued to the grievant a Group III Written Notice for violation of DHRM and agency workplace civility policies, as well as a Group II Written Notice

for leaving the worksite during work hours without permission.[2] Both written notices indicated termination. The grievant timely grieved these disciplinary actions, and a hearing was held on February 3, 2023.[3] In a decision dated February 22, 2023, the hearing officer determined that the agency presented sufficient evidence to support both written notices. In addition, the hearing officer did not find mitigating circumstances to reduce the disciplinary action.

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."[4] 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.[5] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[6] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant argues that "there were absolutely no substantial fact findings." The grievant maintains that discussion with the Lieutenant on December 25, 2021 was friendly but not sexual. She also argues that she did not leave the worksite without permission because she was authorized to take a lunch break.

Consideration of Evidence

The grievant essentially challenges the hearing officer's factual findings. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[8] 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.[9] 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.[10] 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

[2] Agency Ex. 1.
[3] *See* Hearing Decision at 1.
[4] Va. Code §§ 2.2-1202.1(2), (3), (5).
[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[7] Va. Code § 2.2-3005.1(C).
[8] *Grievance Procedure Manual* § 5.9.
[9] *Rules for Conducting Grievance Hearings* § VI(B).
[10] *Grievance Procedure Manual* § 5.8.

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.

As to the Group III Written Notice, the grievant claims in her appeal that she made a statement to the Lieutenant on December 25, 2021 to the effect that "if I was your boyfriend I would make you feel a lot better." She maintains that she was referencing an earlier exchange about what the Lieutenant received from her boyfriend for Christmas. However, there is evidence in the record to support the hearing officer's finding to the contrary, *i.e.* that the grievant made a comment to the Lieutenant that referenced a sex act, which offended the Lieutenant.[11] The Lieutenant's initial report of the incident, which she sent by email on December 25, 2021 approximately 45 minutes after her interaction with the grievant, contained the same description of the grievant's statement as was given in the Lieutenant's testimony.[12]

The grievant testified that she said only that she would make the Lieutenant feel better by talking together, because the Lieutenant seemed sad.[13] However, the hearing officer found that the Lieutenant's testimony was credible, and he noted that the grievant's own statement confirmed she had made a seemingly suggestive comment about making the Lieutenant "feel better" than her boyfriend could.[14] 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.[15]

As to the Group II Written Notice, the grievant argues that she took an approved lunch break and therefore did not leave the workplace without permission on March 19, 2022. The hearing officer addressed this argument in his decision, finding that the grievant "did not have permission to leave the Facility for an extended lunch break of two hours."[16] At the hearing, the grievant testified that she had extended her lunch break to about two hours.[17] She further testified that she was not aware of any need for permission to extend her lunch break.[18] The grievant's testimony supports the hearing officer's finding that she took unauthorized leave beyond her lunch break, as charged on the Written Notice.[19] Accordingly, EDR declines to disturb the hearing decision on these grounds.

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[11] Hearing Decision at 1, 5.
[12] Agency Exs. at 6; Hearing Recording at 33:50-38:30 (Lieutenant's testimony).
[13] Hearing Recording at 1:28:35-1:29:30 (Grievant's testimony).
[14] Hearing Decision at 5; Agency Exs. at 7.
[15] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[16] Hearing Decision at 5-6.
[17] Hearing Recording at 1:29:35-1:31:00 (Grievant's testimony).
[18] *Id.* at 1:37:15-1:38:25.
[19] The hearing officer also concluded that the grievant left work in order to attend her child's sports event while claiming her child had an emergency. Hearing Decision at 5. The grievant's appeal does not appear to dispute this finding.

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.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22]

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[20] *Grievance Procedure Manual* § 7.2(d).
[21] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[22] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).