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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2022-5423
July 5, 2022

The University of Virginia Medical Center (“the agency”) 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 11784. For the reasons set forth below, EDR remands the matter to the hearing officer for compliance with agency policy.

FACTS

The relevant facts in Case Number 11784 concern the grievant’s removal from employment for just cause for failing to be vaccinated against COVID-19.¹ The grievant timely grieved his removal, and a hearing was held on May 11, 2022.² In a decision dated May 31, 2022, the hearing officer upheld the grievant’s removal.³ However, the hearing officer also determined that the method of removal should have been by “administrative action” and, accordingly, ordered that the grievant be paid severance to reflect a notice period. The agency now appeals this portion of the hearing decision to EDR.⁴

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.”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 a 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

¹ Decision of Hearing Officer, Case No. 11784 (“Hearing Decision”), May 31, 2022, at 1-5.

² See Hearing Decision at 1.

³ *Id.* at 12.

⁴ The grievant did not submit an appeal of the hearing decision. As such, EDR will not address the hearing officer’s determinations regarding the grievant’s claims, including, for example, the issue of religious accommodation.

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

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

decision comports with policy.⁷ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that the hearing officer failed to comply with agency policy in determining that the proper method of the grievant's removal should have been by "administrative action" and that a severance payment was due. In the decision, the hearing officer explained his determinations as follows:

The University erred in the application of its policies by removing Grievant for "Just Cause." The University's definition of Just Cause under Policy 105 lists behaviors that are disciplinary in nature. Grievant was obligated to be vaccinated with the COVID-19 as a condition of employment. His failure to do so was not disciplinary in nature. Policy 104 provides, "[a]n employee failing to complete required screenings, vaccinations and/or any other immunizations are subject to disciplinary action in accordance with Medical Center Human Resources Policy No. 701 "Employee Standards of Performance and Conduct". However, an employee failing to be vaccination is removed by "administrative action" not disciplinary action under Policy 701. The University should have removed Grievant by administrative action and not by Written Notice of Intended Action.

Because Grievant should not have been removed for Just Cause, he should have been given a Notice Period based on his length of employment and paid severance in accordance with Policy 1.05.⁸

As the agency points out in its appeal, the grievant was a management-level employee.⁹ By its terms, Policy 701 does not apply to management-level employees, who are instead subject to Policy 105.¹⁰ Therefore, the hearing officer's conclusion that Policy 701 should have governed the grievant's removal does not appear to be supported by the record evidence.¹¹ The agency effectuated the grievant's separation under Policy 105 as a removal for just cause.¹² Members of management who are removed for just cause are ineligible for severance.¹³ Accordingly, the hearing officer's determination by reference to Policy 701 that the grievant should be awarded severance was inconsistent with agency policy and must be removed from the decision.

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

⁸ Hearing Decision at 12.

⁹ Agency Request for Review at 4-5. The hearing decision describes the grievant's title as "Assistant Nurse Manager," which is consistent with a status of management employee. Hearing Decision at 2. The grievant has not submitted anything to object to the accuracy of this employment status.

¹⁰ Agency Ex. 1 at 3, n.1.

¹¹ While Policy 104 states that employees who fail to receive a required vaccination are subject to disciplinary action under Policy 701, footnote 1 in Policy 701 states that the policy does not apply to management-level employees like the grievant. The policy expressly redirects consideration to Policy 105 for such management-level employees, which is how the agency handled the grievant's situation. EDR would further note that we find no basis for severance even if the grievant were required to be removed by administrative action under Policy 701.

¹² Hearing Decision at 1, 5; Agency Ex. 9.

¹³ Agency Ex. 12 at 3.

EDR is not persuaded by the hearing officer's analysis that a removal for just cause under the agency's Policy 105 would exclude a failure to obtain a required vaccination. While the term "just cause" is not specifically defined in the policy, the policy provides a non-exhaustive list of examples of just cause.¹⁴ It appears that the hearing officer relied on these enumerated examples to conclude that "just cause" refers only to conduct subject to "disciplinary" action as contemplated under its general standards of conduct policy (Policy 701) – which arguably provides a non-disciplinary procedure for failure to obtain required vaccinations.¹⁵ However, given that those provisions cannot be said to apply to the grievant, as explained above, EDR does not find anything in the list of examples or the applicable policies more widely that would prevent the agency from considering a management employee's failure to meet an employment requirement or to comply with a work rule as "just cause" for removal. As the hearing officer determined, the agency presented sufficient evidence to establish that the grievant was properly separated from employment for failure to comply with agency policies on vaccinations.¹⁶ A failure to comply with policy that rises to the level of a terminable offense clearly falls within "just cause" to support removal in Policy 105. Accordingly, EDR finds that the agency's removal for just cause without severance was consistent with Policy 105.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer to remove the order of relief in the form of a severance payment. The hearing officer is directed to issue a revised decision consistent with the determinations of policy in this ruling.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the revised decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.¹⁷ 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.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

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¹⁴ Hearing Decision at 7; Agency Ex. 12 at 3.

¹⁵ Hearing Decision at 5; Agency Ex. 1 at 5.

¹⁶ Hearing Decision at 7. Unlike a removal for just cause, separation by notice of cessation under Policy 105, which would potentially entitle a management-level employee to severance, does not require the agency to establish a "for cause" basis to terminate an employee as the agency has established in this case. Agency Ex. 12 at 1-3.

¹⁷ See *Grievance Procedure Manual* § 7.2.

¹⁸ *Id.* § 7.2(d).

¹⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁰ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).