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ADMINISTRATIVE REVIEW

In the matter of University of Virginia
Ruling Number 2023-5437
August 15, 2022

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 Numbers 11774/11782. For reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11774/11782, as found by the hearing officer, are as follows:¹

The University of Virginia employed Grievant as a Facility Inspector. He began working for the University in October 1996. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was an Academic Division employee who supported the Health System and was obligated to comply with the Health System’s policies regarding vaccination. He was responsible for inspecting Hospital facilities by entering those facilities.

COVID-19 is a highly contagious virus that presented a safety risk to employees, their co-workers, and Hospital patients.

The University created an electronic system called VaxTrax to allow employees to submit request for exemption to the University’s vaccination policy. The University refers to its employees as team members.

On August 25, 2021, the Executive Vice President sent an email to staff informing them that the University would “now require all team members without a religious or medical exemption to be vaccinated against COVID-19 by November

¹ Decision of Hearing Officer, Case No. 11774/11782 (“Hearing Decision”), July 12, 2022, at 2-8 (footnotes omitted).

1, 2021. Any team member not meeting the vaccination requirement deadline will be subject to disciplinary action up to and including termination.”

The University assigned responsibility to a group of human resource employees to determine whether a request for exemption met the requirements of its vaccination policy. These employees received training on the University’s policies and applicable laws. The Assistant Vice President described the employees as diverse in ethnicity and religion and having the ability to “look at information that was not black and white.” If the outcome of a case was not clear, the committee decided the issue by majority vote.

The University’s objective was to distinguish between employees holding religious beliefs that precluded the taking of COVID-19 vaccines and employees using the color of religion to express personal objections to being vaccinated. Drawing this distinction was not a simple task.

The University identified all of the reasons an employee listed for refusing to take the vaccine. The University then looked at each reason to determine if it showed a religious belief precluding vaccination or reflected a personal preference. For example, if a reason reflected false information or misinformation, the University concluded the reason did not arise because of a religious belief. If the reason reflected a personal preference such as a political opinion or healthy lifestyle choice, the University concluded that the reason was not based on a religious belief. Based on this analysis, the University determined whether the employee’s application for religious exemption should be granted. The group did not document their reasoning or vote to grant or deny a request.

Employees were permitted to submit additional information after denial. Some employees submitted information three or four times. Each submission was to be reviewed by the committee. The group met daily.

On September 2, 2021, Grievant sent the Supervisor an email:

In the event I am not approved for a vaccine exemption, I would like to know what options I do have first within our department, then within FM, and UVa.

I would not object to considering work only on the only Academic side, offgrounds data work within our department from home or transferring to another department within FM or UVa that does not have vaccine requirements or any responsibilities within the medical community.

Grievant sought exemption from the flu vaccine and COVID-19 vaccine based on his claim of holding a sincerely held religious belief.

On September 3, 2021, Grievant sought exemption from the flu vaccine. He asserted his request was granted but that the University deleted information about its approval.

On September 3, 2021, Grievant submitted his request for religious exemption to the COVID-19 vaccine using VaxTrax:

As a devout Christian, I am guided in everything I do by my faith in God and the Bible, which I believe to be God's revealed and inspired Word (2 Timothy 3:16-17). I do believe my body is the temple of the Holy Spirit. ***

While I understand I am not legally required to justify the basis for my sincerely held religious belief, nevertheless, I will provide a few of the reasons why this vaccination policy violates fundamental aspects of my Christian faith – and why I cannot, therefore, in good conscience take part in it.

1. The scriptures I used are just a few of many that have informed my religious convictions regarding my physical and spiritual health that I live by, including my sincere religious objection to receiving any of the COVID vaccines.

I must honor God with my spirit, mind, and body, and therefore I must guard what I put into my body. That includes avoiding, whenever possible, knowingly receiving foreign toxins with harmful or unknown effects, while also maximizing nutrition and cultivating a healthy natural immune system in accordance with God's design.

2. I firmly believe that the COVID vaccines are experimental. The experimental COVID vaccine ingredients are contaminants that are harmful to my body, and in addition to the commonly known health risks, there are many unknown risks due to the lack of standard testing and long-term study of these substances. The COVID-19 vaccines are unique in that they do not contain the typical viral ingredients, but rather they have never-before-used (at least to this extent) components and designs such as synthetic mRNA and lipid nanoparticles. Very little is scientifically known about these substances in humans including their short term or long-term effects on the body. In taking this vaccine, I would be taking part in an experiment I believe to be unsafe, but most importantly to me, I would be dishonoring God.

3. Due to my sincerely held religious convictions that may seem illogical or unreasonable to others, I am not able to receive this vaccine because there are other known, safe, and effective alternatives both to treat and prevent COVID-19, including well

known substances and holistic methods to nurture and boost my God-given immunity, I cannot justify being injected with the COVID-19 vaccines and still be consistent with my sincere Christian faith.

4. I have been a Christian since 1997. As a believer in Jesus, the Holy Spirit lives in me. Jesus said the Holy Spirit will guide each person who repents of their sin and believes upon Him in all truth. I seek God's will for my life through prayer, reading the Bible, and relying on the power of the Holy Spirit to help me to do God's will. I believe God's promise that "if anyone lacks wisdom, let him ask of God, who gives to all liberally." (James 1:5) I have prayed about how to respond to the COVID vaccine directives considering my religious beliefs. Since my conversion, I have committed to obey God, be willing to help humanity, and please my employer by going above and beyond what was required of me. I do believe the vaccine will harm my body. As I have prayed for answers and guidance, the Holy Spirit has moved on my heart and conscience giving me peace that whatever is done without faith is sin (Romans 14:23).

5. Taking this vaccine would not be in faith to my God or my conscience. I must not accept the COVID vaccine because that decision would be sin to me because I have not received a peace that comes in prayer and approval to take this vaccine. As well as the common side effects that are considered minor, the CDC gives this warning "...As with any medicine, there is a very remote chance of a vaccine causing a severe allergic reaction, other serious injury, or death..." Essentially, this is Russian Roulette, and I could be committing suicide by taking this vaccine. The Prophet Jeremiah says in 29:11 "For I know the plans I have for you," declares the LORD, "plans to prosper you and not to harm you, plans to give you hope and a future." If I were to go against the moving of the Holy Spirit, I would be sinning and jeopardizing my relationship with God and violating my conscience. ***

What is not done in faith is sin to me and I cannot take the COVID vaccine without violating my conscience or my faith in my God because I would be disobedient, and it could be suicide. I thank you in advance for honoring my sincerely held religious convictions.

Grievant added as his explanation:

Please describe the religious principle, tenet, or belief for your request.

These scriptures are taken from the Holy Bible, the New International Version.

Exodus 20:3 ***

Jeremiah 10:2: ***

Leviticus 18:3: ***

Jeremiah 17:5: ***

Romans 1:25: ***

Psalms 20:7: ***

My sincere belief conflicts with and prevents me from receiving this vaccination because:

Exodus 20:3 “You shall have no other gods before Me.”: I have surrendered my life to the authority of Jesus the Christ who is the son of God and the atoning sacrifice that reconciles me to God in heaven. I have a prayer life and dialogue with God through Jesus and the Holy Spirit. I have requested guidance about taking the COVID vaccine. After suffering through much silence anxiety, I received an answer not to follow anyone but Him, “you, trust in me”. If my God tells me to take the vaccine, I will trust Him and I will sign up to get vaccinated and be the first one in line to become vaccinated. As of today, that answer is still “no”. My God wants me to trust in him. ***

As it was in biblical times where God instructed some to go into Egypt, I will take the vaccine if my God gives me permission to take the vaccine. ***

I would not want to gain the world or keep my job if it meant denying what my God has presently decided for me. If I am given the approval to take the vaccine, I will take the vaccine. ***

Respectfully, my sincere belief in the God I serve prevents me from taking this vaccination since I would be disobedient to my God and sinning against my God if I exchanged the knowledge I sincerely believe to be true about my God for the knowledge the CDC and my employer seeks to impose on me.

Please describe the religious principle, tenet, or belief for your request

The religious principle I submit to you is a need to obey the authority over us. These scriptures I present to you are taken from the Berean study bible.

Luke 20:25: ***

Romans 13:7: ***
Romans 13:1: ***
II Timothy 2:19: ***
II Timothy 2:12: ***
Acts 5:29: ***

Please describe why this principle, tenet or belief conflicts with or precludes you from receiving a vaccination or immunization.

The above scriptures represent a small example of the many aspects within my faith. While there is no direct scripture that prevents me from taking the vaccine, these scripture represent a small portion of my relationship to my creator and subjection to him as his child. That relationship starts with my believing in the one that he sent to this earth, and to seek my God, to love my God, and to obey my God first before everything else.

In prayer regarding this request for an exemption I was admonished that I had not properly recognized the authority given to you by my God. It was revealed to me that even though I was complying with your authority by making my exemption requests through your office, I was not truly submitted to you with a gentle spirit or a graceful attitude. I want to apologize to you and your office for my blindness; I was in sin. I try my best to be submitted to my God. I am sorry for my ungodly attitude and rebellion, and I ask you and your office for forgiveness in this matter. Please forgive me.

During my recent revelation regarding your authority in this matter, I asked my God if this means I should become vaccinated. ***

I have sought the will of my God in this matter and His answer to me is to continue to trust him regardless of what others are doing. Respectfully, I must obey my God rather than men and I humbly I ask that you consider my request knowing the authority we both are subject to, and the power granted you. I will be happy to give you a personal interview if required. Therefore, I humble myself and I appeal respectfully to your authority and request that your office grant me my request for a religious exemption to this vaccine.

On September 15, 2021, Grievant's request was denied in VaxTrax:

Dear Applicant, Thank you for your request for a religious exemption under the OCH-002-Health Screening Policy. At this time your request is denied. To qualify for a religious exemption, you must briefly explain the religious principle, tenet or belief and how that religion's principles, tenets or beliefs conflict with or preclude you from receiving a vaccination. If you have additional information to submit in support of your request, you may email

uvahrscreening@virginia.edu. For information on becoming compliant with OCH-002, please visit Immunize UVA.

Grievant submitted additional requests for religious exemption using VaxTrax.

On September 29, 2021, Grievant was informed:

Dear Applicant, We have received your additional information, our decision remains denied. Please be aware that failure to be in compliance with the vaccination requirement by November 1, 2021, may result in disciplinary action.

The University denied Grievant's final request for exemption from the COVID-19 vaccination. Grievant was not vaccinated for COVID-19 on November 1, 2021. The University issued the first Group III Written Notice with suspension. When Grievant again refused to become vaccinated, the University issued the second Group III Written Notice with removal.

The grievant timely grieved the disciplinary actions and a hearing was held on June 22, 2022.² In a decision dated July 12, 2022, the hearing officer found that the University of Virginia ("university" or "agency") had "presented sufficient evidence" to support the issuance of both Group III Written Notices with removal.³ The hearing officer also evaluated the grievant's religious exemption claim, finding that the grievant had "not established that his sincerely held religious beliefs preclude him from taking the COVID-19 vaccine."⁴ The hearing officer further determined that there were no circumstances warranting mitigation of 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.

In his request for administrative review, the grievant challenges the hearing officer's conclusions regarding his religious exemption claim, as well as the legality of the vaccine mandate

² See Hearing Decision at 1.

³ *Id.* at 9.

⁴ *Id.* at 12.

⁵ *Id.*

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).

at the university. The grievant also asserts that the hearing officer inappropriately shifted the burden of proof in this case.⁹

Religious Exemption

The grievant challenges the hearing officer's conclusions regarding the religious exemption claim. It should first be noted that neither the hearing officer nor EDR dispute the sincerity of the grievant's religious beliefs;¹⁰ rather, the question is whether those religious beliefs serve as a basis to support the requested religious exemption under the applicable legal framework. As a matter of the grievance procedure, EDR does not have a basis to disturb the hearing officer's findings, which appear to have grappled with the understandably difficult questions involved in evaluating applicable legal precedents of a religious exemption in the employment context.

For example, as the hearing officer identified, the grievant's request for a religious exemption "made numerous arguments about the safety and possible harm to his body that may result from the COVID-19 vaccine."¹¹ The hearing decision cites to legal authority in support of the proposition that such assertions do not meet the standard for a religious exemption.¹² While the grievant also testified about seeking God's guidance through prayer and that he received an answer to not get the vaccine,¹³ it also appears that the grievant had sought that guidance at least in part because of his concerns about the safety of the vaccine.¹⁴ Thus, while the grievant undoubtedly asserted religious beliefs, the extent to which they were intertwined with secular concerns can explain the hearing officer's resulting determinations.¹⁵ Ultimately, the question as to whether the university's denial of the grievant's religious exemption was appropriate involves the application of legal precedents to the facts of the case. Such issues of law are outside the authority of EDR to determine with finality. Accordingly, if the grievant wishes to pursue his

⁹ The grievant has also objected to the university's submission of a memorandum of law and authorities submitted after the conclusion of the hearing. The grievance procedure permits a hearing officer to allow parties additional time after the hearing to submit such a brief. *See Rules for Conducting Grievance Hearings* § IV(G). The grievant objects to the hearing officer's acceptance of the brief as providing the university a "private and unchallenged platform." However, the university's submission of the brief was not "private" as the grievant received a copy. Further, the hearing officer advised the grievant at the hearing that he would have the opportunity to submit a response to the brief. Hearing Recording at 3:57:04-3:57:16. Accordingly, we do not find the grievant's objection to the university's brief to demonstrate any noncompliance with the grievance procedure. Similarly, the grievant objected to the university's submission of a rebuttal brief on August 5, 2022. However, the rebuttal brief was received within the prescribed timeframe established in Section 7.2(a) of the *Grievance Procedure Manual* (within 10 calendar days of the conclusion of the original 15-day appeal period).

¹⁰ *E.g.*, Hearing Decision at 11.

¹¹ *Id.*

¹² *Id.* at 10-12. The hearing decision does not exhaustively discuss relevant legal precedents, nor does it need to, but EDR can find additional support for the general propositions relied upon in the decision. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the U.S. Supreme Court discussed that claims "must be rooted in religious belief" to receive protection, rather than "based on purely secular considerations." *Id.* at 215. "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 215-16.

¹³ Hearing Recording at 2:25:10-2:33:38.

¹⁴ *Id.*; Hearing Decision at 4-7, 11.

¹⁵ Hearing Decision at 11-12; *see also* *Moore-King v. County of Chesterfield*, 708 F.3d 560, 571 (4th Cir. 2013) (finding that *Yoder* requires that a plaintiff "must offer some organizing principle or authority other than [themselves] that prescribes [their] religious convictions, as to allow otherwise would threaten 'the very concept of ordered liberty'").

challenge regarding the religious exemption, it is a question for the appropriate circuit court in an appeal of the hearing decision.¹⁶

Burden of Proof

The grievant correctly identifies that the university has the burden of proof in disciplinary cases to establish by a preponderance of the evidence that the discipline was warranted and appropriate.¹⁷ However, in such cases, the “employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.”¹⁸ The grievant’s challenge to the discipline as discrimination on the basis of religion and/or failure to accommodate his request for a religious exemption are affirmative defenses. Accordingly, to the extent the hearing officer’s determinations were predicated on which party had the burden of proof, the hearing officer appears to have assigned the respective burdens appropriately.¹⁹

The grievant’s appeal includes allegations about the information contained within and communications by the VaxTrax system. Hearing officers are authorized to make “findings of fact as to the material issues in the case”²⁰ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”²¹ 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.²² 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.²³ 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 has raised certain allegations about “secret disqualifiers,” a flu vaccine exemption, and “scrubbed” data. The hearing officer addressed the grievant’s allegations in the decision.²⁴ EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer’s determinations. 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

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a). Further, because we do not have a basis to disturb the hearing officer’s threshold determination of the religious exemption issue, we do not reach any other questions involving a failure to accommodate or additional portions of the religious discrimination claims. Such matters may be questions for the circuit to resolve in determining whether the hearing decision is contradictory to law.

¹⁷ *Grievance Procedure Manual* § 5.8.

¹⁸ *Id.* (emphasis omitted).

¹⁹ See Hearing Decision at 2, 11-12.

²⁰ Va. Code § 2.2-3005.1(C).

²¹ *Grievance Procedure Manual* § 5.9.

²² *Rules for Conducting Grievance Hearings* § VI(B)(1).

²³ *Grievance Procedure Manual* § 5.8(2).

²⁴ Hearing Decision at 12-13.

contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.²⁵ Accordingly, EDR declines to disturb the hearing decision on these grounds.

Legality of Mandate

The grievant's appeal also appears to challenge the legality of the vaccine mandate, noting as well that the Governor issued a directive retracting vaccine mandates after his termination. While we understand the points raised, issues of employee discipline are evaluated under the policies in effect at the time the conduct occurred. EDR has not reviewed anything to indicate that the hearing officer applied an inapplicable policy to the facts of this case.²⁶ To the extent the grievant seeks to raise a legal question regarding the vaccine mandate he was held to have violated, such a question is more properly within the purview of the appropriate circuit court in an appeal to address whether the hearing decision is contradictory to law.²⁷ Thus, EDR has no basis 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. To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

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.²⁸ 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.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰

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²⁵ See, e.g., EDR Ruling No. 2020-4976.

²⁶ Hearing Decision at 8-9.

²⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Grievance Procedure Manual* § 7.2(d).

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).