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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2023-5443
August 23, 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 Number 11807. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11807, as found by the hearing officer, are as follows:¹

The University of Virginia Health System employed Grievant as a Physical Therapist. He had been employed by the University for approximately 35 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in the Annex. Over 100 employees worked in the Annex including Ms. P and Ms. M. Grievant attempted to avoid Ms. P when they were working because they had had conflict several years prior to December 21, 2021. Ms. M did not know Grievant.

The Annex hallways were narrow and sometimes difficult to pass if employees were meeting in the hallway. Employee work spaces had walls that were approximately five feet high. The hallways were bounded by these walls with gaps where employees could enter and exit their work spaces.

In the morning, on December 21, 2021, Ms. M and Ms. P were standing in the hallway talking about patient care for the day. Ms. M was leaning against the wall. Her left shoulder was resting against the corner of the wall where the wall allowed an opening into her workspace. The tip of Ms. M’s left shoe was in the hallway approximately one to one and a half feet away from the base of the wall.

¹ Decision of Hearing Officer, Case No. 11807 (“Hearing Decision”), July 26, 2022, at 2-4.

When Ms. W was talking to Ms. P, Ms. W's peripheral vision enabled her to see someone walking in the hallway and approaching from Ms. W's left side.

Ms. P was standing in the hallway. The tip of her right shoe was less than a foot and a half from the tip of Ms. M's left shoe. Ms. P was standing with her right shoulder closer to Ms. M and her left shoulder farther away from Ms. M. When Ms. P was talking to Ms. M, Ms. P's peripheral vision did not enable her to see someone walking in the hallway and approaching from Ms. P's right side.

In the hallway was a large stand-alone printer. The printer was against the wall on side of the hallway where Ms. P was standing. The printer was located approximately a foot and a half from Ms. P. Ms. P could not see the printer while she was talking to Ms. M because the printer was not within Ms. P's peripheral vision.

Grievant walked out of his workspace. He was "running late" to see a patient and he intended to leave the building. He had attempted to print his patient list but the printer was malfunctioning. Grievant was holding a clipboard with papers in his left hand and a lab coat with his arm. He wanted to check to see if he had any papers at the printer. He walked down the hallway towards the printer and towards Ms. P and Ms. M. Grievant could see that Ms. P and Ms. M were standing in the hallway talking. As he passed the printer, he glanced at the printer to see if any of his documents had been printed. He saw nothing in the printer so he did not stop. He continued walking towards Ms. P and Ms. M. He did not say "excuse me" or otherwise inform them that he was going to walk between them. Ms. M could see with her peripheral vision someone approaching to her left. Grievant turned his body slightly and walked between Ms. P and Ms. M at a "quick rate of speed." Because his body was wider than the gap between Ms. P and Ms. M, the left side of Grievant's body hit the back right shoulder of Ms. P causing her body to move from her right to her left in the direction Grievant was walking.

Ms. P was startled by Grievant's bumping into her. She did not see or hear him approaching her. She did not preemptively move backwards because she was unaware of Grievant's approach. Grievant caused Ms. P's body to move and to lose balance, but she did not fall over or to the ground. Ms. P described it as a "hard impact. It moved me." Ms. P was not bruised.

As Grievant passed Ms. P, Ms. M exclaimed to Ms. P, "He could have said 'excuse me.' He just rammed right into you." Grievant ignored Ms. M and continued walking down the hall towards the building exit. Ms. M asked Ms. P if she was okay.

On December 21, 2021, Ms. P reported Grievant's behavior to the unit Director.

During the University's pre-determination disciplinary meeting, Grievant did not apologize or show remorse. He suggested the two employees should have

moved apart to let him pass. Grievant said he attempted to “make himself small” in order to pass between the two employees.

On January 21, 2022, the agency issued to the grievant a Step 4 Performance Improvement Counseling Form with termination for gross misconduct of physical abuse and disrespectful conduct.² The grievant timely grieved the disciplinary action and a hearing was held on July 6, 2022.³ In a decision dated July 26, 2022 upholding the grievant’s removal, the hearing officer found that “Grievant’s behavior is consistent with the definition of Gross Misconduct” because witness “testimony was credible and sufficient to show that Grievant intentionally bumped into Ms. P.”⁴ The hearing officer further determined that there were no circumstances warranting mitigation of the agency’s discipline.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 the request for administrative review, the grievant addresses the receipt of a copy of the grievant’s personnel file after the hearing, which had been requested from the agency. The grievant states that the matter was discussed at hearing and the agency represented that the file had been mailed well in advance of the hearing. The grievant states that the file was received on July 15, 2022, after the hearing date but before issuance of the decision, with a postmark of July 13, 2022. The grievant argues that the denial of access to the personnel file denied the grievant due process. The grievant additionally suggests that the agency’s “behavior in this matter should call into question the credibility of all the [agency’s] witnesses.”⁹ The grievant seeks to have the disciplinary action rescinded and/or the hearing reopened for the introduction of new evidence and cross-examination of agency witnesses regarding alleged misrepresentations.

The agency’s counsel has responded to indicate that although the file had been provided to other human resources employees to mail in advance of the hearing, they were unaware that the file had not been postmarked until July 13, 2022. The agency further represents that although the full file was mailed late, the grievant received before the hearing 41 pages of performance evaluations from 2014-21, the grievant’s “local HR file” (the file maintained by the grievant’s managers from 2014 to present), and all documents relating to the incident giving rise to the

² Agency Ex. at 2-4.

³ *Id.* at 1; *see* Hearing Decision at 1.

⁴ Hearing Decision. at 4.

⁵ *Id.* at 5.

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).

⁹ Grievant’s Administrative Review Request at 2.

disciplinary action in this case.¹⁰ The agency maintains that no misrepresentations or other covert activity has occurred.

The grievance statutes provide that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party.”¹¹ Pursuant to the *Rules for Conducting Grievance Hearings*, a hearing officer may “issue an order for . . . the production of documents” upon request by a party.¹² In cases where a party fails to produce relevant documents, a hearing officer has the authority to draw an adverse inference against that party if it is warranted by the circumstances.¹³ The hearing decision does not reflect any discussion about the personnel file so it is not clear whether the grievant sought an adverse inference at the hearing. EDR’s review of the hearing record does not find that the grievant requested an order from the hearing officer for the production of the personnel file.

Regardless of any procedural issues, EDR has not reviewed anything to indicate that the late receipt of the personnel file impacted the outcome of the case such that the grievant suffered any material prejudice. Although the grievant has been in possession of the full personnel file for over a month, no information has been provided to EDR about any contents of that file that would have been relevant or material to the hearing officer’s determinations in this case, much less that the outcome would have been different. The grievant has not presented any information at all about any document in the file that they would have sought to introduce at hearing. In the absence of evidence showing that the agency failed to comply with a directive from the hearing officer or that the grievant’s ability to mount a defense to the charges was materially prejudiced because of the agency’s alleged actions, EDR finds no error with respect to this issue and declines to disturb the decision on this basis.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”¹⁴ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.¹⁵ However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that

- (1) the evidence is newly discovered since the judgment was entered;
- (2) due diligence on the part of the movant to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.¹⁶

¹⁰ The grievant has submitted nothing to dispute these claims by the agency.

¹¹ Va. Code § 2.2-3003(E); *see Grievance Procedure Manual* § 8.2.

¹² *Rules for Conducting Grievance Hearings* § III(E).

¹³ *Id.* § V(B).

¹⁴ *Cf. Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

¹⁵ *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

¹⁶ *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

Having reviewed the grievant's administrative review request, EDR finds that he has not provided evidence to support a basis for the presentation of newly discovered evidence under this standard. The grievant can reasonably establish that the records would be newly discovered¹⁷ and due diligence was exercised by the grievant to obtain them. However, as indicated above, the grievant has not submitted any information about any records within the personnel file that they would have sought to present at hearing. Consequently, EDR has no basis to find that the new evidence the grievant seeks a reopened hearing to introduce is material or likely to produce a new outcome. Upon consideration of the grievant's submission, EDR has reviewed nothing to suggest that any items in the personnel file¹⁸ would have any impact on the hearing officer's findings. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of this additional evidence.

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.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹

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¹⁷ It appears that the grievant received the personnel file before the hearing decision was issued but after the hearing. Whether the grievant should have raised the matter to the hearing officer at that time and what effect the failure to do so has on the request to introduce newly discovered evidence at this time need not be determined in this ruling based on the discussion herein.

¹⁸ The agency maintains that any contents of the personnel file that the grievant did not already have in advance of the hearing would have been records from 2014 or earlier.

¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).