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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5449
September 8, 2022

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 11718/11751. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11718/11751, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services [(the "agency")] employed Grievant as a Program Administrative Specialist III at one of its locations. He was responsible for maintaining a data management system and related utilization review. He managed, "the production of ongoing and SSAS reports and the analysis of those reports in a way that is meaningful to the business users." He began working for the Agency on January 25, 2016. Grievant's position was exempt from the Fair Labor Standards overtime pay requirements.

Grievant did not speak until the age of three and when he spoke, he spoke using full sentences. From ages eight to eighteen, Grievant communicated using Morse code. He was first in his class of electrical engineers in college.

In 2017 and 2018, Grievant received an "Extraordinary Contributor" rating on his annual performance evaluations. He received an overall rating of "Extraordinary Contributor" on his October 20, 2020 evaluations. The evaluation stated, in part, "[Grievant] is an essential member of [the Unit]. *** [Grievant's] skillset as it relates to mining, querying, automating, and enduring the quality of the WaMS data is nothing short of amazing!" On October 1, 2020, the Former Supervisor issued to Grievant an Acknowledgment of Extraordinary Contribution

¹ Decision of Hearing Officer, Case No. 11718/11751 ("Hearing Decision"), July 25, 2022, at 2-10 (citations and footnotes omitted).

for his work. He was described as a “steady asset to both the Commonwealth and the Department.” The Operations Director thanked Grievant for his extraordinary service.

Grievant reported to the Former Supervisor until December 30, 2020 when she left the Agency. He had reported to the Former Supervisor for approximately four years. Grievant began reporting to the Supervisor on January 4, 2021. The Supervisor reported to the Operations Director who reported to the Assistant Commissioner.

Beginning in February 2020, many Agency employees including Grievant began working remotely and holding virtual meetings. When Grievant met with the Supervisor, they usually met via video or audio conference.

When someone outside of the Unit wanted information, the Requestor was supposed to complete a Data Request Form identifying the information needed. The Data Request form asked the Requestor to identify if the request was New (one-time), New (ongoing), or Update Existing Ongoing Report. The Requestor was to provide a description of the request and the “Date Needed.”

The Requestor was supposed to send the DR form to the Supervisor who reviewed the request, assigned a DR number and then assigned it to Grievant or another data analyst. Grievant was to complete the report and then provide the information to the person requesting information. For a new request, Grievant was expect to complete the report in ten business days.

The DR form replaced the “T” reference system. Grievant created this system which was similar to the Dewey Decimal System to avoid confusion in terminology. The Supervisor changed the requests from T numbers to “DR” numbers to standardize the data request process. Grievant was used to using T numbers so the Supervisor continued to refer to data requests with T numbers as well as DR numbers.

The Unit had a standard operating procedure reflecting the data request process. It was marked “draft” because Unit managers were often adding tasks to or revising the process. Grievant had processed data request in accordance with the standard operating procedures.

Some Requestors had data requests that did not change over time but needed to be updated with new data. The Supervisor had discretion to accept the request without having the Requestor create a new DR form. Instead, the data request was to be based on prior request forms and simply updated with new data.

On February 19, 2021, Grievant received a counseling memorandum regarding his work performance:

Following Supervisory Instructions: When requested to complete task, instructions and requests are often questioned and disputed prior to completion even with routine tasks that you have completed previously.

Communicating Inappropriately: Email communications from you have been challenging and disrespectful to your supervisor and others. You have taken conversations out of context and mischaracterize what others are communicating to you.

Timeline Response to Request: Through your communication and questioning of tasks, [work unit] had delayed implementation of report reduction but ultimately providing exactly what was asked for but delaying it through questioning and challenging the request. ***

Expectations Going Forward:

Improved Communication: It is understandable that there will be questions regarding requests. However, it is expected that once clarification and direction are provided, you will communicate in a professional manner and without sarcasm. All written communications, including emails are presented in a positive and productive way and that as previously discussed, all formal proposals and provenances represented by [the Unit] (both in written and verbal format) refrain from containing commentary or opinions but only the steps involved in accomplishing the request.

Timely Response to Requests: Requestors of data that need reports in a timely manner. As a matter of practice, we will only request clarifications to requests one time and will produce reports within the timeframes we agreed to as team.

Following Supervisory Instructions: While I am here to support you and help you to gain clarity that is needed, you need to understand that when I make requests of you they need to be completed. I am not intentionally trying too upset or frustrate you. If you need me to present information in a particular way to help you be more successful, you need to help me, help you.

Your failure to adhere to these concerns may result in formal disciplinary action under the Department of Human Resource Management Policy #1.60, Standards of Conduct.

Grievant met with the HR Manager, the Operations Director, and the Supervisor to discuss the counseling memorandum. The meeting lasted for approximately 45 minutes.

On February 22, 2021, Grievant filed a grievance challenging the Counseling Memorandum. Grievant asked to report to a supervisor other than the Supervisor and Operations Director. The Agency did not rescind the Counseling Memorandum. The Agency did not grant Grievant's request to report to a different supervisor.

The Operations Director believed that when the Former Supervisor left and Grievant began reporting to the Supervisor, Grievant "changed." On March 12, 2021, the Operations Director described Grievant's work performance as "a far cry from what it was four months ago."

On March 2, 2021, Grievant filed a grievance. He asked not to work for the Supervisor or the Operations Director. The Agency did not grant his request to work for a different supervisor.

Employee V was hired in March 2021 as a data analyst. This employee could complete data reports if Grievant did not have sufficient time to complete his assigned data reports. The Supervisor could transfer responsibility for one or more of Grievant's data reports to Employee V if necessary.

On March 9, 2021, the Supervisor asked Grievant to provide Employee V with a 30-minute overview of his work. Grievant refused to do so. Grievant said he was not a trainer and he felt Employee V was there to replace him. Grievant said the Supervisor should do the training. The Supervisor sent Grievant an email on March 9, 2021, "I am very disappointed that when I asked you to assist with acclimating new staff with [the Unit] and to discuss your role in a 30 minute overview that you refused to participate."

On March 19, 2021, Grievant filed a grievance. He asked not to work with the Supervisor or the Operations Director. The Agency did not grant Grievant's request to work for a different supervisor.

Grievant obtained a note dated April 15, 2021 written by Dr. K stating, in part, "I do recommend workplace accommodations for Autism Spectrum Disorder."

On April 15, 2021, Grievant sent the Supervisor an email stating:

I hereby request the accommodations as recommended by my Doctor for Autism Spectrum Disorder, specifically:

Telework 7:30 to 4 M – F;
Excuse from work on weekends and holidays;
Supervisor prioritize his tasks with need dates provided as opposed to due dates;
Supervisor and Requestor be available to work with him and discussed tasks else he be allowed to move on with another task.

On April 28, 2021, the Supervisor sent Grievant a memorandum in response to his request for accommodation. The Supervisor granted Grievant's request to telework but advised Grievant that may be necessary "to work beyond 40 hours of the week to meet a deadline. Exempt employees are expected to work the number of hours necessary to get their jobs done." The Supervisor informed Grievant that he was expected to complete all of his assignments within the workweek, Monday through Friday within his established work hours. The Supervisor did not ask Grievant to work on holidays or weekends. The Supervisor was available to assist Grievant with prioritizing his tasks but the Agency required "due dates" because requestors needed information on a timely basis to complete their reports which sometimes had mandatory deadlines. Grievant was informed, "urgent requests are out of the supervisor's control and the expectation is that deadlines, due dates and need by time are met." The Supervisor and Requestors were available to Grievant to discuss tasks. The Supervisor informed Grievant, "[w]hile communication is essential to understand the content of the request, it needs to be noted that requestors have limited time to go back and forth regarding requests. Questions regarding the requests should be limited to clarifying regarding data fields that are needed in order to fulfill the request."

Mr. W wanted several reports to be produced by the Unit. Several of the requests were recurring meaning that Mr. W had requested the information previously and the information only needed to be updated in a new report. He typically needed . . . reports updated every six months.

On June 10, 2021, the Supervisor assigned Grievant responsibility for completing one of Mr. W's reports - DR0017, New to Waiver, data request. The Supervisor told Grievant he could continue using T numbers but should include the DR number in emails.

On June 14, 2021, the Supervisor met with Grievant to discuss each of Mr. W's data requests. The Supervisor informed Grievant of the DR number assigned to each request and discussed each request. The reports were: DR0017, New to Waiver, DR0018, Age – Time on Waitlist, DR0019, Children's Waiver Residential, DR0020, Services by Region, DR0021, ISP Supplemental Data, DR0022, Integrated Localities, and DR0023, Integrated Employment Day. The Supervisor informed Grievant that Mr. W wanted the reports done by June 30, 2021 in order to complete Mr. W's report. The Supervisor asked Grievant to determine what he

could accomplish by June 30, 2021 or if he needed obtain any additional information from Mr. W.

Grievant sent the Supervisor an email about whether she had assigned DR0019 to another employee. The Supervisor told Grievant she had not assigned DR0019 to another employee but that she could do so to “take it off his plate.” She asked Grievant to let her know if he wanted her to do so. Grievant did not ask the Supervisor to assign DR0019 to another employee.

On June 15, 2021, Grievant sent the Supervisor an email saying only DR0017 had a DR form and he needed DR forms for the other reports. Grievant informed the Supervisor he did not know that he could have the work done by June 30, 2021. Grievant changed the name of DR0017 to “ActiveintegratedAuthSIS” even though the Supervisor had previously asked him not to do so.

Grievant sent Mr. W an email indicating that he had a DR form for DR0017 but needed DR forms for the other reports as well as an “As of date.” On June 16, 2021, Mr. W emailed Grievant to inform Grievant that the request were all “standing reports without changes.” Mr. W provided the “As of Dates.” The Supervisor told Grievant that the reports Mr. W wanted were the same reports Grievant had completed for Mr. W earlier in the year. She said that Mr. W does not need to complete new DR forms if the specs had not changed. The Supervisor asked Grievant what could be completed by June 30, 2021.

Grievant and the Supervisor had a one-on-one meeting on June 17, 2021. Grievant continued to say he needed new DR forms to complete Mr. W’s requests.

On June 17, 2021, the Supervisor sent Grievant an email about their June 14, 2021 meeting. The Supervisor wrote, in part:

On Monday June 14 we had a successful meeting to discuss [Mr. W’s] Data Requests (listed below) to match the new DR numbers assigned with the previous Task Numbers and also the due date of June 30. These requests have been completed in the past and are being asked to be re-run for a new Provider reports. On Tuesday June 15 you said you needed new DRFs. I asked that you work directly with [Mr. W] for any information you do not have. [Mr. W] said these are standing reports and do not have any changes; and [they] do not need new DRFs. *** When we met today you continued to state that you need a new request form although I said that for this request [it] was not necessary. As I mentioned before, not every situation and circumstance is the same, *** I wish for our team to be flexible in our process to meet the client’s needs. *** You stated that due to having a Level 2 Notice that you had to go by a process and could not be flexible. After going back and forth and

much discussion, I asked if you are able to complete the tasks as requested. You said that you are only able to complete Task DR0017 as you do not have a DRF for the other tasks.

[DR0017, DR0018, DR0019, DR0020, DR0021, DR0022]

We also discussed [Mr. H's] request (Data_Quality_ActiveNoAuth T2716) in our meeting. I asked you to explain why you were unable to complete the task as he has requested. You stated we do not have data from 10 years ago (which is true). I said I will discuss with [Mr. H].

On June 17, 2021, the Supervisor sent Grievant an email:

In our meeting this morning, you said that [Mr. H] was asking for data from 10 years ago (which, as we discussed, do not have in WaMS). I talked with [Mr. H] and he said that he is only asking for the data that meets the criteria for what is available in WaMS. [Mr. H] understands that cannot provide what is not in WaMS. *** [G]o ahead and generate the report the last Authorized End Date for all individuals who have a previously authorized service in WaMS as [Mr. H] had requested.

Grievant met with the Supervisor on June 23, 2021. The Supervisor asked Grievant if he understood or had questions about what was needed in Mr. W's reports. She told Grievant again that they would not require Mr. W to draft new data request forms. She confirmed that Grievant was working on DR0017. The Supervisor asked Grievant to let her know if the requests could not be completed by June 30, 2021. She asked him what was needed to determine if the tasks should be divided between him and another employee.

On June 24, 2021, Grievant sent Mr. W the completed DR0017 report. The Supervisor reminded Grievant that all the reports they discussed were due June 30, 2021. The Supervisor asked Grievant to look at his list and let her know what he could do so that she could reassigned reports to another employee if necessary. Grievant responded that the first report on the list was DR0018 which needed a new DR form. Grievant sent the Supervisor's email to Mr. W and asked Mr. W to initiate DR0018, DR0019, DR0020, DR0021 and DR0022 if he wished. The Supervisor reiterated that Mr. W did not need to complete new DR forms for those requests and that she still needed to know what could not be completed by Grievant so she could reassign reports as needed.

On June 25, 2021, the Supervisor sent Grievant an email asking if there was one report from the list he could complete right now based on the information he already had. Grievant replied that he had no standard operating procedure to do his

work and that he was under a Group II allegation so it was very difficult. Grievant said he needed a new DR form for each report.

On June 25, 2021, Mr. W sent the Supervisor an email with a copy to Grievant indicating that the remaining requests carried equal weight and priority. He wanted to know when the reports would be ready.

On June 28, 2021, the Supervisor spoke with Mr. W to let him know she wanted an extension of the June 30, 2021 due date. Mr. W agreed with the reports being provided as they were completed.

On June 30, 2021, Grievant met with the Supervisor and the Assistant Commissioner to discuss the outstanding data requests. Grievant also emailed the Assistant Commissioner claiming that he had not been assigned the data request reports until June 30, 2021. Grievant asked to work on DR0018 through DR0022 on the holiday July 5, 2021 and earn compensatory time. Grievant's request to work compensatory time was denied.

On July 1, 2021, the Assistant Commissioner asked Grievant to complete the remaining data reports by July 7, 2021. She asked Grievant to email the reports he completed each day.

On July 1, 2021, the Assistant Commissioner sent Grievant an email:

Except you didn't take the appropriate next step ... you were told you did not need the DRs for these reports by [Mr. W] and by [the Supervisor] and continue to ask for them as opposed to completing the reports. So, please complete the reports between today and close of business next week.

On July 2, 2021, the Supervisor emailed Grievant to ask if he needed an extra day to complete the data reports since he had asked for compensatory leave. Grievant replied that he did not know and that he did not know what the tasks were. The Supervisor emailed Grievant that the tasks and time-frame are included in the prior email from the Assistant Commissioner.

On July 2, 2021, the Assistant Commissioner sent Grievant an email asking Grievant to update her on what was completed and telling him not to work on the holiday.

On July 8, 2021, Grievant sent the Assistant Commissioner an email stating:

DR0017 Complete
DR0018 Complete
DR0019 DR Spec received 7/8 9:32 a.m. so that is my StartDate

DR0020 Complete
DR0021 T2748 in Progress
DR0022 Complete

On July 8, 2021, The Assistant Commissioner asked Grievant when he would have DR0019 and DR0021 completed. On July 9, 2021, Grievant said the turnaround time for data requests was ten days according to the standard operating procedures.

On July 9, 2021, Grievant wrote that he was scheduled to be off on that day. The Assistant Commissioner sent Grievant an email that he was expected to have the two remaining data reports done by July 14, 2021. Grievant completed those data reports by July 14, 2021.

On July 9, 2021, Grievant obtained a note from Dr. K indicating Grievant had undergone neurocognitive and psychological testing and diagnosed with ADHD-inattentive type and Autism Spectrum Disorder. Dr. K recommended that Grievant be provided with a written list specifying leadership/chain of command authority, a standard operating procedure manual and be excused from working on weekends and holidays. Dr. K also recommended, “requests for task completion be provided in writing, and that the patient be afforded the opportunity to follow-up and ask questions regarding clarification of tasks assigned.”

On July 28, 2021, the HR Manager spoke with Grievant and sent Grievant an email notifying Grievant of the supervisors in his chain of command. Grievant was advised he could ask follow-up questions regarding clarification of tasks and that he would be notified if there was a need for him to work more than 40 hours per week. He was reminded that working more than 40 hours and on weekends and holidays was not typical. He was advised that his request for standard operating procedures would be finalized by the Operations Director.

The agency issued to the grievant two Group II Written Notices, respectively dated April 21, 2021 (“First Written Notice”) and September 14, 2021 (“Second Written Notice”), both citing unsatisfactory performance, failure to follow instructions, and disruptive behavior.² The Second Written Notice also noted termination of employment. The grievant timely grieved these disciplinary actions, and EDR consolidated the grievances for a single hearing, which was held in two sessions on February 23, 2022 and March 17, 2022.³ In a decision dated July 25, 2022, the hearing officer determined that the agency had presented sufficient evidence to support both Written Notices on grounds that the grievant failed to follow instructions and, thus, the grievant’s removal must be upheld.⁴ The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.⁵

² Agency Exs. A, C.

³ See Hearing Decision at 1; EDR Ruling No. 2022-5314.

⁴ See *id.* at 11-13.

⁵ *Id.* at 14.

The grievant now appeals the hearing 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 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 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 conclusion that the grievant failed to follow instructions with respect to training Employee V and completing data reports on deadline. The grievant also points out that the agency did not grant certain accommodations he had requested.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ 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.¹¹ 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.¹² 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.

Failure to Follow Instructions

First Written Notice

The grievant contends that he did not fail to follow his supervisor’s instructions with respect to giving a training overview to Employee V, contrary to the hearing officer’s findings sustaining the First Written Notice. The grievant alleges that the supervisor essentially withdrew

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

her instructions for the grievant to give the new employee an overview of his job duties, but the grievant nevertheless did prepare the overview as requested.

The hearing officer found that, on March 9, 2021, the “Supervisor asked Grievant to provide Employee V with a 30-minute overview of his work. Grievant refused to do so.”¹³ Evidence in the record supports the hearing officer’s determinations in this regard. The Supervisor testified that she asked the grievant to attend a meeting with Employee V, a recently-hired support person, and “just tell [Employee V] about what he does.”¹⁴ According to the Supervisor, the grievant refused, arguing that training was the Supervisor’s job.¹⁵

Disputing that he failed to follow the Supervisor’s instructions in this regard, with his request for administrative review the grievant has submitted an audio recording of what appears to be a meeting between himself and the Supervisor, in which she directed him to give a 30-minute overview of his job to Employee V. This audio recording does not appear to have been entered into the evidentiary record for the hearing officer’s consideration. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”¹⁶ 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.¹⁷ For consideration of such evidence after the evidentiary record has been closed, the proffering 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.¹⁸

Here, the grievant has not asserted that he discovered the audio recording only after the hearing officer’s decision. Moreover, even assuming he had discovered the recording only recently despite due diligence, EDR cannot conclude that this evidence would be likely to produce a new outcome. The proffered recording reflects that the discussion became contentious following the Supervisor’s request for the grievant to provide an overview of his role to a new employee who would be working with him. In the recording, the grievant repeatedly objected to this request, primarily on grounds that assisting with onboarding of Employee V was not his job and was “not going to work.” Ultimately, the Supervisor stated: “You know what, never mind. Don’t worry about it.” Thus, the recorded discussion does not suggest that the Supervisor changed her mind about whether the grievant should give an overview of his job. Instead, it reflects the Supervisor’s

¹³ Hearing Decision at 5.

¹⁴ See, e.g., Hearing Recording Pt. I at 6:06:50-6:07:28 (Supervisor’s testimony).

¹⁵ See Hearing Decision at 5.

¹⁶ 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).

¹⁷ See *Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

¹⁸ *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

decision to end the discussion after the grievant repeatedly indicated he would not follow her instructions. Therefore, we cannot conclude that the proffered recording, even if newly discovered, would be likely to produce a new outcome as to the First Written Notice and its charge that the grievant failed to follow instructions.

The grievant further argues that, despite the nature of that discussion, he ultimately did attempt to give an overview to Employee V as requested and has submitted another audio recording to substantiate this position. Like the recording discussed above, it does not appear that this evidence was part of the evidentiary record. Similarly, there is no basis for EDR to find that this recording is newly discovered or that this evidence would produce a new outcome as to the First Written Notice. The First Written Notice was upheld on grounds that the grievant refused the Supervisor's instructions when they were given.¹⁹ The grievant does not assert that he ever indicated to the Supervisor that he would comply with her request to help orient Employee V after initially refusing to do so. Further, we find no error in the hearing officer's assessment of the evidence in the record or his conclusion that the agency's evidence was sufficient to support the charges against the grievant in the First Written Notice.²⁰ 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. Accordingly, the grievant's arguments do not present a basis to disturb the hearing officer's findings as to the First Written Notice.

Second Written Notice

The grievant argues that the agency failed to provide him with the information needed to complete the data requests referenced in the Second Written Notice. He disputes the hearing officer's characterization of these tasks as simple updates of past work, and he alleges he asked for assistance multiple times without receiving clarification.

The hearing officer found that the Supervisor discussed the data requests in detail with the grievant, noting they were due on June 30, 2021, and offering to assign to other staff if the grievant did not believe he could complete them alone in that timeframe.²¹ Noting the grievant's explanation that he "delayed completing the reports because he did not have new DR forms," the hearing officer found that "the Supervisor instructed him several times that new DR forms were not necessary."²² The hearing officer found that the "Supervisor would have considered assigning some of the reports to another employee if Grievant had indicated he needed assistance. Grievant did not say he needed assistance."²³

Evidence in the record supports the hearing officer's determinations in this regard. The Supervisor's notes reflect that she discussed the requests with the grievant in detail on June 14,

¹⁹ Hearing Decision at 11.

²⁰ *Id.*

²¹ *Id.* at 6-10.

²² *Id.* at 12.

²³ *Id.*

2021.²⁴ She also stated in her notes and testimony that, in discussions ongoing over the next two weeks, the grievant insisted he needed the requester to provide new forms and was not able to adopt a flexible approach because of receiving the First Written Notice.²⁵ According to her notes, the Supervisor repeatedly asked the grievant what he was unable to complete by June 30 so that she could reassign for more timely completion.²⁶

The grievant argues that, contrary to the hearing officer's findings, he did seek assistance in completing the requests by asking for clarifications from the requester and his Supervisor. However, we find no error in the hearing officer's finding that the grievant did not seek assistance in the form of reassignment of these time-sensitive tasks to other employees, despite the Supervisor's requests. Moreover, the grievant's requests for clarifications align with his continuing argument that the data requests were not presented on the correct form, leading to confusion. But as the hearing officer noted, the Supervisor repeatedly instructed the grievant to complete the requests without new forms. In addition, in his request for administrative review, the grievant confirms that his director "said [he] could disregard the Data Request Process."²⁷ To the extent the grievant alleges it was not possible to follow these instructions from agency management, he had the burden to prove that defense, and it appears the hearing officer was not persuaded by the evidence presented. 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.²⁸

Accommodations

Finally, the grievant argues that he did not receive disability accommodations he requested as of July 12, 2021 – namely, a "standard operating procedure manual" regarding his work duties and "requests for task completion . . . provided in writing."²⁹ As a general rule, the Americans with Disabilities Act (ADA) requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."³⁰ "Reasonable accommodations" include "[m]odifications or

²⁴ Grievant's Exs. at 109.

²⁵ *Id.* at 109-119; Hearing Recording Pt. I at 6:09:05-6:12:20 (Supervisor's testimony).

²⁶ Grievant's Exs. at 109-119.

²⁷ Request for Administrative Review; *see* Grievant's Exs. at 139.

²⁸ *See, e.g.*, EDR Ruling No. 2020-4976.

²⁹ Request for Administrative Review; *see* Grievant's Exs. at 127.

³⁰ 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business."). In this case, the parties do not appear to dispute that the grievant would be considered an individual with a disability under the ADA.

adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”³¹

Addressing the grievant’s disability arguments, the hearing officer found that the grievant’s “disability contributed to his inability to effectively communicate and collaborate with the Supervisor This inability to effectively communicate resulted in disciplinary action against Grievant.”³² However, the hearing officer concluded that “a reasonable accommodation would not include reversing or reducing disciplinary action even though the disciplinary action was caused, in part, by Grievant’s disability.”³³

The grievant’s request for administrative review presents no basis for EDR to find that the hearing officer’s analysis was in error in this regard. As an initial matter, the hearing officer did not find that standard and/or inflexible procedures would have constituted a reasonable accommodation, given the grievant’s essential job functions. Further, even assuming that it would have been reasonable for the grievant to operate by more standardized procedures following his July 12 accommodation request, it is not clear how such an accommodation would impair the Second Written Notice, which addressed the grievant’s failure to follow instructions set forth in multiple written communications during June and July 2021. Upon a thorough review of the record, we find no grounds to disturb the hearing decision’s conclusions with respect to the grievant’s ADA claims.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer’s decision in this matter. 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.³⁴ 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.³⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁶

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³¹ 29 C.F.R. § 1630.2(o)(1)(iii); see 42 U.S.C. § 12111(9)(B).

³² Hearing Decision at 13.

³³ *Id.* (quoting *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999)); see also *Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 305 (4th Cir. 2016) (“[T]he ADA does not require an employer to simply ignore an employee’s blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition.”); Equal Emp. Opp. Comm’n, *Applying Performance and Conduct Standards to Employees with Disabilities*, Sept. 3, 2008, available at www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities.

³⁴ *Grievance Procedure Manual* § 7.2(d).

³⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁶ *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).