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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5469
November 4, 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 11820. For the reasons discussed below, EDR will not disturb the hearing officer's decision.

BACKGROUND

The relevant facts in Case Number 11820, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services [(the "agency")] employed Grievant as a Procurement Officer I at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for making "small" amount purchases for the Facility. The Agency provided her with a Small Purchase Card. Grievant was required to use the Commonwealth's procurement portal, eVa.gov, to purchase items for the Facility.

The Facility had "delegated authority" from the Department of General Services [DGS] meaning that it could make small purchases without prior approval from DGS. The Facility's delegated authority was further delegated to Facility procurement staff including Grievant. If Grievant failed to follow the proper procurement requirements, she could undermine the Agency's delegated authority.

On April 21, 2021, Grievant received a Notice of Improvement Needed / Substandard Performance. As part of an Improvement Plan, Grievant was required to take additional training and meet with the Supervisor on a daily basis.

¹ Decision of Hearing Officer, Case No. 11820 ("Hearing Decision"), September 23, 2022, at 2-3 (footnotes omitted).

On October 14, 2021, Grievant's delegation authority was removed by the Agency. Grievant was told that all of her purchase orders placed in eVa.gov had to be reviewed and approved by the Supervisor or Deputy Director.

On October 26, 2021, Grievant placed an order for a sump pump and an adapter using the online order system of the Store. She did not have a purchase order approved by the Supervisor at that time. She did not use eVa.gov to order and purchase the items.

On October 26, 2021 at 5 p.m., Grievant told the Supervisor she was going to pick up a sump pump on the way home. The Supervisor told Grievant not to pick up the sump pump because of the lack of controls in place, for example, that the sump pump would be left unsecured in her car overnight and that either Buildings and Grounds or Warehouse staff should pick up the sump pump on the following day. Grievant did not pick up the part on October 26, 2021.

On October 28, 2021, Grievant went to Store 1 and obtained an adapter. Grievant paid cash for the adapter instead of using the Small Purchase Card. On November 3, 2021, the Warehouse Specialist received the adapter and took it to Building and Grounds staff on November 4, 2021.

On October 29, 2021, Grievant cancelled the adapter on the Store's online order system but did not cancel the item on the purchase order.

On November 2, 2021, Grievant went to Store 2 and obtained a sump pump. Grievant kept the sump pump in her personal vehicle overnight. . . .

On February 18, 2022, the Department of Behavioral Health and Developmental Services (the "agency") issued to the grievant a Group III Written Notice with termination for failure to follow its procurement policies.² The grievant timely grieved the agency's disciplinary action, and a hearing was held on September 7, 2022.³ In a decision dated September 23, 2022, the hearing officer upheld the agency's discipline, finding that the evidence proved that the grievant failed to follow policies of such significance that a Group III Written Notice was justified.⁴ The hearing officer further concluded that no mitigating circumstances existed to reduce the disciplinary action.⁵ 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 . . .

² See *id.* at 1; Agency Ex. A.

³ See Hearing Decision at 1.

⁴ *Id.* at 4.

⁵ *Id.*

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 her request for administrative review, the grievant appears to object to the hearing officer’s decision to hold the hearing as scheduled despite the grievant’s request for a continuance. She also argues that the level of discipline she received was not warranted and that mitigating circumstances “ought to be addressed.” She has requested “another hearing in which I can participate.”

Continuance

EDR has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, including whether the hearing officer abused his discretion by failing to grant a party’s request for a continuance.⁹ Under the *Rules for Conducting Grievance Hearings*, a hearing officer may “grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request.”¹⁰ In cases where a party objects, “the hearing officer may only grant extensions of time [f]or just cause – generally circumstances beyond a party’s control.”¹¹ In the past, EDR has taken the approach that a hearing officer’s denial of a motion for continuance should be disturbed only if it appears that (1) circumstances beyond the party’s control existed justifying such an extension; (2) the hearing officer’s refusal to grant the extension of time was an abuse of discretion;¹² and (3) the objecting party suffered undue

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 § 2.2-1202.1(5).

¹⁰ *Rules for Conducting Grievance Hearings* § III(B).

¹¹ *Id.*

¹² Courts have defined “abuse of discretion” in this context as “an unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay.” *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). More generally, “abuse of discretion can occur in three principal ways: ‘when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.’” *Graves v. Shoemaker*, 299 Va. 357, 361, 851 S.E.2d 65, 66-67 (2020) (quoting *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011)). The “abuse-of-discretion standard includes review to determine that the [exercise of] discretion was not guided by erroneous legal conclusions, because a court also abuses its discretion if it inaccurately ascertains [the] outermost limits of the range of choice available to it.” *Lambert v. Sea Oats Condo. Ass’n*, 293 Va. 245, 253, 798 S.E.2d 177, 182 (2017) (internal quotation omitted) (alterations in original); see also *United States v. Jenkins*, 22 F.4th 162, 167 (4th Cir. 2021) (A tribunal abuses its discretion “when it acts arbitrarily or irrationally, fails to consider . . . recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.”).

prejudice because of the denial.¹³ Assessing whether an abuse of discretion occurred in these circumstances depends mainly upon the reasons presented at the time the request is denied.¹⁴

In this case, EDR sent correspondence to the parties on April 20, 2022, confirming the September 7 hearing date and directing the parties to provide their respective exhibits and witness lists on or before August 31, 2022. On September 6, less than 24 hours before the scheduled hearing, the grievant sent the following message to the hearing officer and to the agency:

I am requesting this hearing be rescheduled for a later date. I am seeking legal representation. Soon, I will forward some additional dates for rescheduling.

The hearing officer called for an emergency pre-hearing conference to discuss the grievant's request, but the grievant did not respond. In the absence of a response, the hearing officer nevertheless notified the parties that he would hold a pre-hearing conference at 1:30 p.m. on September 6. The hearing officer and the agency's representative apparently attended the conference; the grievant did not appear. Following the conference, the hearing officer concluded that a need to find an attorney the day before a hearing was not sufficient grounds to grant the continuance, and he directed that the hearing would go forward as scheduled. His determination was conveyed to the parties on September 6 at 4:21 p.m.

At 5:29 a.m. on September 7, the morning of the hearing, the grievant sent the following message:

I am not able to attend this schedule[d] meeting due to no legal representation and now added stress being placed on my health. I am under a doctors' care. Soon a doctors' notice will be forwarded to you.

Notwithstanding this message, the hearing officer determined that the hearing should go forward because the grievant had not presented sufficient detail about her health concerns to justify a same-day delay, and because it appeared the grievant was also declining to participate due to lack of representation.¹⁵ At 2:45 p.m. on September 7, EDR received a letter from the grievant's primary care physician. The letter confirmed that the grievant had experienced medical issues that morning that could "result in emergency complications" with increased stress. Following these communications, however, EDR received no further requests or information from the grievant regarding her desire to participate in the hearing process until she submitted the present request for administrative review.

¹³ See, e.g., EDR Ruling No. 2018-4716. This approach is consistent with analogous judicial opinions that, though not binding in this context, are nevertheless persuasive. See *Venable v. Venable*, 2 Va. App. 178, 181, 342 S.E.2d 646, 647 (1986) ("The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." (citing *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982))); see also *Bakker*, 925 F.2d at 735 ("to prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby." (citing *United States v. LaRouche*, 896 F.2d 815, 823-25 (4th Cir. 1990))).

¹⁴ See *LaRouche*, 896 F.2d at 823; see, e.g., EDR Ruling No. 2008-2005.

¹⁵ Hearing Recording at 1:10-2:44.

As to the grievant's request for a continuance the day before the hearing, EDR cannot find that the hearing officer abused his discretion by denying the request. The grievant indicated that she sought a postponement in order to find "legal representation." However, the *Rules for Conducting Grievance Hearings* permit, but do not require, representation by an attorney.¹⁶ In addition, given that the grievant in this case appears to have had at least four months to arrange for counsel if she so desired, lack of representation the day before the hearing would not ordinarily constitute a circumstance beyond the grievant's control. Moreover, the grievant did not attend the pre-hearing conference or provide any additional information to the hearing officer to explain why a continuance would be reasonable under the circumstances. Accordingly, we find no abuse of discretion in the hearing officer's denial of the grievant's September 6 request.

As to the grievant's follow-up communication on September 7 regarding her health status, we similarly find no abuse of discretion in the hearing officer's decision to conduct the hearing as scheduled. Assuming that the September 7 communication was a new continuance request, the hearing officer was not required to accept this message as a "justifiable request for delay" at the time the hearing went forward.¹⁷ Although the grievant asserted she was "under a doctor's care," her engagement with the hearing process up to that point gave little indication she had been intending to attend the hearing in any event. For example, there is no indication she submitted any evidentiary materials to the hearing officer by the August 31 deadline. On September 6, she had requested to postpone the hearing for reasons unrelated to her health. She had not attended a prehearing conference to discuss that issue or offered any alternative means to present her position. Given this history and the lack of detail in the September 7 message, we cannot say that the hearing officer's decision to hold the hearing, allowing the agency to call its prepared witnesses, represented "an unreasoning and arbitrary insistence on expeditiousness."¹⁸

Further, even if the grievant effectively requested a continuance based on documented medical concerns by the close of business on September 7, we find nothing to indicate that she suffered undue prejudice because the hearing proceeded as scheduled. We observe that the hearing officer did not issue a decision in this matter for more than two weeks following the hearing. During this period, the hearing officer could have heard additional argument as to whether additional proceedings were appropriate, and/or whether the evidentiary record should be reopened to accept the grievant's evidence. However, EDR has no record of receiving any communications from the grievant during this time. In addition, the grievant's request for administrative review does not suggest what evidence or arguments she would have presented that might have led the hearing officer to different conclusions.

In sum, because it is not clear that the grievant presented the hearing officer with a justifiable reason for delay prior to the hearing, and because there is nothing to indicate that she was unduly prejudiced when the hearing went forward as scheduled, we will not disturb the decision on these grounds.

¹⁶ *Rules for Conducting Grievance Hearings* § IV(A).

¹⁷ See *Bakker*, 925 F.2d at 735.

¹⁸ See *id.*

Consideration of Evidence

In her request for administrative review, the grievant also argues that the hearing officer incorrectly upheld the discipline imposed by the agency, on grounds that the level of discipline was too severe in light of mitigating circumstances. Again, we find no error by the hearing officer in this regard.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”²⁰ 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.²¹ 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.²² 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.

In his decision, the hearing officer found that the grievant, as a procurement officer, failed to use the required state procurement portal with appropriate approvals to purchase items for her work facility, failed to use an agency card to make a purchase, and also disregarded her supervisor’s instructions regarding safe custody of a purchased item.²³ The hearing officer also found that these lapses occurred despite recent informal corrective actions the agency took to address the grievant’s similar past performance problems (*i.e.* failure to follow procurement procedures).²⁴ Evidence in the record supports the hearing officer’s conclusions as to the grievant’s conduct,²⁵ and the grievant does not appear to dispute these findings.

Instead, the grievant argues that she “should not have been given a [Group II Written Notice]; it was also wrong to be given a [Group III].” As the hearing officer acknowledged, DHRM Policy 1.60, *Standards of Conduct*, lists policy violations among offenses meriting discipline at the Group II level.²⁶ By comparison, Group III offenses are generally appropriate for “acts of misconduct of a most serious nature that severely impact agency operations,”²⁷ including acts that

¹⁹ Va. Code § 2.2-3005.1(C).

²⁰ *Grievance Procedure Manual* § 5.9.

²¹ *Rules for Conducting Grievance Hearings* § VI(B).

²² *Grievance Procedure Manual* § 5.8.

²³ Hearing Decision at 4.

²⁴ *Id.* at 2.

²⁵ See, e.g., Hearing Recording at 7:10-14:00, 42:45-49:05; Agency Exs. B, C, F, H, J.

²⁶ DHRM Policy 1.60, *Standards of Conduct* (2011), at 8.

²⁷ DHRM Policy 1.60, *Standards of Conduct*, Att. A: Examples of Offenses Grouped by Level.

constitute “neglect of duty” or “other serious violations of policies, procedures, or laws.”²⁸ The policy also provides that:

Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher-level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.²⁹

Here, the hearing officer found that elevation of the grievant’s misconduct to Group III was justified “because Grievant violated State statute and undermined the Agency’s delegated authority” to manage procurements.³⁰ The hearing officer also found that procurement employees such as the grievant “are held to a high standard regarding compliance with purchasing requirements.”³¹ Evidence in the record supports the hearing officer’s conclusions in this regard as well. The grievant’s Employee Work Profile states that, in her procurement duties, she must “[m]aintain[] high standards of professional behavior, accountability, and responsibility at all times.”³² The agency’s evidence includes copies of internal policies and state law articulating requirements to use the “central electronic procurement system” maintained by DGS for “the purchase of goods and services” by “using agencies” such as the agency in this case.³³ Moreover, the agency’s disciplinary documents reference the agency’s consideration of the effect of the grievant’s performance on the agency’s “compliance with procurement regulations and laws,” including specific provisions of the Virginia Procurement Act.³⁴ Therefore, we find no basis in the record to disturb the hearing officer’s conclusions as to the appropriate level of discipline in this case. To the extent the grievant argues that the hearing officer failed to consider mitigating factors, we are unable to identify any such factors in her submissions.

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.³⁵ 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.³⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁷

²⁸ DHRM Policy 1.60, *Standards of Conduct*, at 9.

²⁹ *Id.* at 8.

³⁰ Hearing Decision at 4.

³¹ *Id.*

³² Agency Ex. L at 3; *see also* Hearing Recording at 35:20-37:00; Agency Ex. H at 52-53.

³³ Agency Exs. G, H.

³⁴ Agency Exs. A at 1, B at 1; *see also* Hearing Recording at 21:10-24:45.

³⁵ *Grievance Procedure Manual* § 7.2(d).

³⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁷ *Id.*; *see also* Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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