



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2023-5474
November 4, 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 11822. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11822, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services employs Grievant as a Licensed Practical Nurse at one of its facilities. Grievant's position was designated as "Mission Critical." Grievant had prior active disciplinary action. On August 6, 2020, Grievant received a Group I Written Notice for poor attendance.

On November 23, 2021, Grievant received an Employee Counseling regarding disruptive behavior. Grievant was directed to, "[p]lease follow the policy and/or supervisors directive. According to A.P. 27, the Supervisor or RN charge nurse make staffing decisions regarding emergency stayover. *** Please display positive, professional behaviors including following directives given by a supervisor."

Grievant's regular work shift was from 3 p.m. to 11 p.m.

The Facility operated on a continuous basis. It had to be staffed at all times. If Facility supervisors expected an oncoming shift to be inadequately staffed, they could notify employees on a list to report to work or remain at work until a shift to ensure the shift was adequately staffed. The Facility had a stay over list which listed

¹ Decision of Hearing Officer, Case No. 11822 ("Hearing Decision"), September 9, 2022, at 2-3 (footnotes omitted).

employee names. Employees were to be selected on a rotating basis. The list was posted on the notice board at the Facility.

On February 11, 2022, Facility managers concluded that the shift beginning at 11 p.m. lacked adequate staffing. They were unable to obtain volunteers to work overtime so they reviewed the stay over list.

On February 11, 2022 at approximately 7 p.m., the Supervisor informed Grievant that she needed to stay and work beyond her regular shift. Grievant said, “No, I can’t stay.” At approximately 8:30 p.m., the Supervisor asked Grievant again to work overtime. Grievant refused. When Grievant’s shift ended at 11 p.m., she did not continue working at the Facility.

On or about February 18, 2022, the agency issued to the grievant a Group II Written Notice, based on “Insubordination/being disruptive and refusing mandatory overtime.”² The grievant timely filed this grievance, and a hearing was held on September 9, 2022.³ In a decision dated September 26, 2022, the hearing officer determined that the agency “presented sufficient evidence to support the issuance of a Group II Written Notice.”⁴ Finally, the hearing officer found no mitigating circumstances to reduce the agency’s disciplinary action.⁵ 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 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.

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

² Agency Exs. at 5.

³ Hearing Decision at 1.

⁴ *Id.* at 4.

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(14), 2.2-3006(A); see *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).

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 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 upon 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 her request for administrative review, the grievant appears to assert that she should not have been given the Group II Written Notice. However, the hearing officer found that the grievant refused to follow the supervisor's instructions to stay after her normal shift ended.¹³ EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged in the Group II Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy.¹⁴

At the hearing, the supervisor testified that, at 7 p.m. on February 11, 2022, she asked the grievant during her normal 3 p.m. to 11 p.m. shift to stay overtime, and the grievant refused.¹⁵ Other witness testimony and the grievant's testimony both affirmed that the grievant was asked multiple times before the end of her shift to stay, and the grievant refused to do so in all instances.¹⁶ Although the grievant argued that she was not in the first position on the stay-over list, the hearing officer found that the grievant had not presented evidence that her place on the list meant that the Facility had violated agency policy by asking her to stay over.¹⁷ To the contrary, both the supervisor and a human resources (HR) representative testified that even if an employee was not first on the list, they would still be eligible to be asked to stay over if the acting supervisor felt that extra workers would be needed at the end of the day.¹⁸ They also testified that not all of those who are asked to stay over based on predicted needs may be required to actually stay if they are not ultimately needed.¹⁹ In summary, there is record evidence supporting the hearing officer's finding that a Group II Written Notice was appropriate for the grievant's refusal to follow the supervisor's instructions regarding overtime. Accordingly, EDR has no basis to disturb the hearing officer's determinations in this regard.

In her appeal, the grievant also expressed disapproval of her loss of a quarterly bonus as a result of the Group II Written Notice. In addressing this argument in his decision, the hearing officer appeared to find no evidence that withholding the bonus was improper,²⁰ and we find no error in his assessment. At the hearing, the agency's HR representative testified that, per General Assembly guidelines for recently-enacted quarterly bonuses, an employee who receives a written notice is not eligible for the bonus for the quarter during which the underlying incident took

¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Decision at 3, 4.

¹⁴ See DHRM Policy 1.60, *Standards of Conduct* (2011), at 8 (identifying Group II as an appropriate level of discipline for insubordination and policy violations).

¹⁵ Hearing Recording at 25:00-26:30 (Supervisor's testimony).

¹⁶ *Id.* at 17:20-18:20 (Grievant's testimony).

¹⁷ Hearing Decision at 4.

¹⁸ Hearing Recording at 30:00-31:00 (Supervisor's testimony), 54:30-57:40 (Human Resource Representative's testimony).

¹⁹ Hearing Recording at 59:00-59:50 (Human Resources representative's testimony); see also Agency Exs. at 15.

²⁰ Hearing Decision at 4.

place.²¹ The grievant has not presented EDR with evidence or other information that could support a finding that the hearing officer's determination regarding her quarterly bonus, or the agency's underlying disciplinary action, was inconsistent with state or agency policy or otherwise improper. Accordingly, we decline 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 on the grounds cited in the grievant's request for administrative review. 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 would be 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.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴

Christopher M. Grab
Director
Office of Employment Dispute Resolution

²¹ Hearing Recording at 101:50-102:55 (Human Resources representative's testimony). To the extent this rule may arise from other authority, it does not appear in other record evidence except agency testimony that the General Assembly is responsible for the rule.

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).