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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2023-5569
July 13, 2023

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 11930. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11930, as found by the hearing officer, are as follows:¹

The Department of Juvenile Justice [(the "agency")] employed Grievant as a Human Resource Assistant at one of its locations. She had been employed by the Agency for approximately 24 years without prior active disciplinary action. She began working for the Agency as a Juvenile Correctional Officer. She worked at several facilities including one with residents who were developmentally delayed. Grievant's performance evaluations showed she met or exceeded the Agency's performance expectations.

Grievant previously worked as Resident Specialist. As a Resident Specialist, she had the authority to restrain residents if they began fighting.

Grievant suffered an injury in 2020. She had surgery in 2020 and again in September 2021. She was out of work but returned to work in March 2022 to perform light duty. She transitioned to become an HR timekeeper in July or August 2022. Grievant began reporting to the Supervisor. Grievant's salary was reduced approximately \$10,000 because of the transition. Grievant believed the Agency misapplied policy by reducing her salary without negotiating the amount of the reduction. Grievant was able to see how many hours staff worked and who was receiving overtime compensation.

¹ Decision of Hearing Officer, Case No. 11930 ("Hearing Decision"), May 31, 2023, at 2-3.

Ms. J had been working in the same building with Grievant for approximately one month. Their jobs did not require much interaction between them. They worked on different teams.

On September 16, 2022, Ms. J was in her office. Grievant left Grievant's office and walked to Ms. J's office. Grievant began talking to Ms. J about Grievant's desire to work overtime as a Resident Specialist. Grievant wanted to earn overtime pay. Grievant described how she could perform the duties of the position. Ms. J told Grievant she could submit her resume to the [agency] recruit inbox.

Grievant was frustrated that the Supervisor would not grant Grievant's request to work overtime as a Resident Specialist.

Grievant said she would "slap the s—t out of [Supervisor]." Ms. J was "taken aback" by Grievant's comment. Ms. J "just stared at her." Ms. J became fearful of Grievant. Ms. J did not know what Grievant was capable of doing. Ms. J was not fearful that Grievant would harm her that day. Ms. J was fearful of what Grievant would do given that she worked inside the Human Resources Department.

Grievant told Ms. J that Grievant used to work at O Facility. Grievant said that several years ago she was forced to move to another Facility and was allowed to select that Facility. Grievant said she chose O Facility because it had only 40 residents at that time and they were "retarded muther—kers." O Facility closed several years before Ms. J began working for the Agency.

Grievant remained in Ms. J's office for approximately 30 minutes. The conversation between Grievant and Ms. J ended when Ms. J received a telephone call from her daughter's father. Ms. J began speaking on the telephone and Grievant left Ms. J's office.

Shortly after Grievant left Ms. J's office, Ms. S came to Ms. J's office. Ms. J said that she did not want to be left alone in the office with Grievant because she felt Grievant was crazy.

In the afternoon of September 16, 2022, Ms. J called Mr. C to "vent." Ms. J told Mr. C about Grievant's behavior. She sought advice on how to handle the situation. Mr. C told Ms. J he was a mandatory reporter and had to report it. Ms. J asked Mr. C not to report the incident, but he indicated he would have to do so.

The Agency investigated the incident. Grievant told the Investigator that she did not say she would slap the s—t out of the Supervisor. Grievant told the Investigator she did not say residents at O Facility were retarded mutherf—kers. Grievant said she did not talk like that.

On January 13, 2023, the agency issued to the grievant a Group III Written Notice for threatening to harm another agency employee, as well as a Group II Written Notice with termination for providing false or misleading information during the agency's subsequent investigation of the allegations against her.² The grievant timely grieved her separation, and a hearing was held on May 8, 2023.³ In a decision dated May 31, 2023, the hearing officer determined that the agency had "established that Grievant threatened violent behavior thereby justifying the issuance of a Group III Written Notice."⁴ The hearing officer further determined that the agency "presented sufficient evidence to support the issuance of the Group II Written Notice."⁵ Finally, the hearing officer concluded that no mitigating circumstances existed to reduce the agency's disciplinary action.⁶

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 . . . procedural compliance with the grievance procedure."⁷ 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.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Consideration of Evidence

In her request for administrative review, the grievant primarily challenges the hearing officer's conclusions as to the credibility of Ms. J. The grievant points to several alleged inconsistencies regarding Ms. J's account of the statements the grievant made to her. In his decision, the hearing officer found that the grievant "spoke with Ms. J and threatened to slap Grievant's Supervisor."¹⁰ The hearing officer explained that "Ms. J's testimony was credible" because "[s]he was reluctant to report the matter" and "had only known Grievant for approximately one month."¹¹ Based on the finding that the grievant did make the alleged statements, the hearing officer upheld both written notices – the Group III for making the statements, and the Group II for denying having done so to the agency investigator.¹²

² Agency Exs. at 21-26; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ *Id.*

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Hearing Decision at 4.

¹¹ *Id.*

¹² *Id.* at 4-5.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁴ 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.¹⁵ 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.¹⁶ 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 challenges the hearing officer’s reasoning that Ms. J was credible on numerous grounds. The grievant argues that Ms. J gave conflicting information about whose phone call ended her discussion with the grievant on the day in question, and also that Ms. J’s behavior following their discussion did not suggest that the grievant’s conduct had made her fearful or upset. The grievant also questions why Ms. J did not report the grievant’s alleged threats herself. As to her own testimony, the grievant contends that, contrary to the hearing officer’s findings, she was not “frustrated” about management’s decision regarding her pay, but was simply asking questions about it.¹⁷ She also maintains that she “did not interfere” with the agency’s investigation of Ms. J’s allegations and “did not lie but gave her account of the alleged incident” to the investigator.¹⁸

Upon a thorough review of the evidence, EDR finds no grounds to disturb the hearing officer’s determination as to the relative credibility of witnesses. At the hearing, Ms. J testified that, during a conversation with the grievant, Ms. J became uncomfortable when the grievant commented that she would “slap the s—t out of” her supervisor due to the supervisor denying approval for the grievant to work overtime.¹⁹ Ms. J described this comment as being in the context of other specific statements of frustration by the grievant, to the effect that the grievant intended to take various steps to improve her situation at work.²⁰ Ms. J further testified that, later the same day, she told Mr. C about the interaction in order to “vent” and seek advice because it had made her uncomfortable.²¹ Moreover, she testified that the grievant’s statements caused her to fear what the grievant was capable of doing in general, because she did not know the grievant well.²²

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

¹⁷ Request for Administrative Review at 2.

¹⁸ *Id.* at 7.

¹⁹ Hearing Recording at 20:15-20:50 (testimony of Ms. J).

²⁰ *Id.* at 20:50-22:50.

²¹ *Id.* at 24:45-25:35; *see also id.* at 1:29:30-1:30:10 (testimony of Mr. C).

²² *Id.* at 1:15:10-1:19:30.

While the grievant raises several questions about Ms. J's account that she believes should undermine Ms. J's credibility, EDR cannot find that the hearing officer abused his discretion in drawing different conclusions based on his evaluation of the witness testimony. In this case, the hearing officer was required to resolve the question of whether the grievant made the threatening statements as alleged by Ms. J, as a material issue in the grievance. The conflicting testimony presented at the hearing on that question reflects the type of evidentiary dispute that hearing officers in grievance hearings frequently encounter. Consistent with hearing officers' authority and discretion in this regard, 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. Here, the hearing officer concluded that "Ms. J testified truthfully."²³ 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.²⁴

Given the hearing officer's finding that the grievant did in fact make the threatening statements as alleged in the Group III Written Notice, EDR has no basis to disturb the hearing decision as to the Group II Written Notice, which charged the grievant with lying to the investigator about the incident. The hearing officer found that the grievant "interfered with the Agency's investigation by failing to accurately inform the Investigator of Grievant's conversation with Ms. J."²⁵ The grievant maintains on appeal that she answered the investigator's questions truthfully. However, because the record contains evidence to support the hearing officer's findings that (1) the grievant made threatening statements to her coworker and (2) she told the investigator that she did not make the statements, EDR cannot find that the hearing officer abused his discretion in upholding both Written Notices issued to the grievant.

Document Requests

Finally, the grievant's request for administrative review appears to challenge the hearing decision on grounds that other agency employees who engaged in similar misconduct were offered

²³ Hearing Decision at 4. In her request for administrative review, the grievant argues among other things that the hearing officer wrongly excluded testimony as to whether Ms. J had personal reasons to be anxious or upset when discussing the alleged incident with agency managers. *See* Request for Administrative Review at 4. However, it is not clear how such evidence would have changed the hearing officer's conclusions. Even assuming that Ms. J was not visibly upset by grievant's statements, as the grievant suggests, Ms. J testified at the hearing that the grievant made specific threatening statements, and the hearing officer found this testimony credible. Although the grievant also takes issue with the agency's pre-disciplinary process, including the quality of its investigative findings and the involvement of Mr. C, EDR finds no indication that the agency's pre-disciplinary process affected the hearing officer's ability to weigh the evidence presented at the hearing in an impartial manner.

²⁴ *See, e.g.*, EDR Ruling No. 2020-4976. EDR notes that the grievant's request for administrative review expresses disagreement with several factual findings stated in the hearing decision. To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, 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.

²⁵ Hearing Decision at 5.

mediation instead of disciplinary termination of employment. The grievant requests that the hearing officer's decision "be placed on hold" until the agency provides information about incidents involving these other employees.²⁶ The grievant has further requested that EDR "make a ruling about the agency providing copies" of documents she sought in writing on June 8, 2023.

In disciplinary hearings, the grievant bears the burden to prove affirmative defenses, including claims that the agency disciplined similarly-situated employees less harshly for similar misconduct.²⁷ Upon a thorough review of the record, it does not appear that the grievant presented material evidence in support of such a claim to the hearing officer. Indeed, the grievant characterizes this claim, as raised on appeal, as based on "new information" regarding the possibility that other employees may have been offered mediation in lieu of termination.²⁸ The grievant further suggests that the agency has wrongly withheld documents responsive to requests she made following her appeal to EDR.

Because of the need for finality, evidence not presented at a grievance hearing cannot be considered upon administrative review unless it is "newly discovered evidence."²⁹ 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.³⁰ 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.³¹

Here, the grievant appears to have requested that the agency provide disciplinary documentation regarding three specific employees. The request was initially submitted in writing to the agency on June 8, 2023 – the day after the grievant requested EDR's administrative review of the hearing officer's decision. To the extent that the grievant now seeks evidence to support a claim of inconsistent discipline, EDR is not aware of any reason why the grievant would not have been able to discover such evidence through due diligence prior to the hearing, at which she was represented by counsel.³² Although the grievant may now realize that she could have explored

²⁶ Request for Administrative Review at 11.

²⁷ *Rules for Conducting Grievance Hearings* § VI(B)(1).

²⁸ Request for Administrative Review at 10.

²⁹ *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).

³⁰ *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

³¹ *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

³² *See generally Grievance Procedure Manual* § 8.2. EDR has not been presented with information to suggest that the agency has failed to comply with any provision of the grievance procedure addressing the production of relevant documents. To the extent that the grievant seeks to enforce the requirements of the Virginia Freedom of Information

additional defenses and/or offered more evidence at the hearing, EDR cannot remand the hearing officer's decision on this basis.

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.³³ 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.³⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁵

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Act, EDR lacks the authority to enforce those statutory requirements and, accordingly, declines to opine on their applicability here.

³³ *Grievance Procedure Manual* § 7.2(d).

³⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).