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ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2023-5573
July 19, 2023

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 11941. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11941, as found by the hearing officer, are as follows:¹

Old Dominion University [(the "university" or "agency")] employed Grievant as an Administrative and Office Specialist III.

On April 27, 2022, Grievant received a Counseling Memorandum regarding her disruptive behavior. Grievant was counseled regarding her argumentative, disrespectful, and unprofessional behavior towards the Supervisor. She was advised to act in a professional manner in the future and comply with DHRM Policy 2.35, Civility in the Workplace.

On October 19, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance which was to remain in effect until December 19, 2022.

On October 25, 2022, Grievant received an annual performance evaluation with an overall rating of "Contributor." Grievant received below contributor ratings for several core responsibilities within the annual evaluation. Grievant disagreed with those ratings.

¹ Decision of Hearing Officer, Case No. 11941 ("Hearing Decision"), June 9, 2023, at 2-3.

Grievant met with the Supervisor on November 14, 2022 to discuss Grievant's work performance. The Supervisor had to remind Grievant several times to allow him to talk and not interrupt him and for Grievant not to raise her voice.

The University issued Grievant a Group I Written Notice dated December 8, 2022 regarding Grievant's unsatisfactory performance. The Group I Written Notice advised Grievant, "Your display of your unprofessional behavior towards me during meetings is unacceptable and my expectation going forward will be for you to conduct yourself in a professional manner at all times while performing the duties of your position. *** Further occurrences will result in further disciplinary action up to and including termination."

The Supervisor presented the Group I Written Notice to Grievant on December 8, 2022. Grievant responded by being loud, disruptive, and not allowing the Supervisor to speak. Grievant mocked the Supervisor by saying, "you never trained me." The Supervisor decided to leave the meeting and as he left Grievant said, "there you go again closing your door and walking away from me."

On December 19, 2022, the Supervisor met with Grievant to discuss completion of the Notice of Improvement Needed/Substandard Performance. The Supervisor told Grievant she should complete her work duties.

An employee sent the Supervisor an email about a work-related injury. The email came into the "intake portal" for the division so everyone in the unit received an incident report. The Supervisor sent an email informing the employee to notify the human resource department since his department did not address workers' compensation. On December 21, 2022, Grievant sent an email with "reply all" to the Supervisor and many other employees. Her email asked how many tasks she was to be given and questioned the Supervisor's leadership and decision-making. Grievant should have replied only to the Supervisor and not the entire unit. The Supervisor counseled Grievant about her behavior. On December 22, 2022, the Supervisor sent Grievant an email stating, "your comment was out of place, and I will not allow you to question my abilities in that way again." The Supervisor added, "your Needs Improvement Plan was completed as we discussed.["]

The Supervisor asked Grievant to be prepared to discuss her work progress in a meeting scheduled for January 6, 2023. On January 6, 2023, Grievant appeared at the meeting but had not prepared any documents and was not able to respond to the Supervisor's questions about her work.

On January 17, 2023 the university issued a Group III Written Notice of disciplinary action with removal for unsatisfactory performance and disruptive behavior.² The grievant timely grieved

² Agency Ex. L; Hearing Decision at 1.

her separation from employment and a hearing was held on March 17, 2023.³ In a decision dated June 9, 2023, the hearing officer found that the university had “presented sufficient evidence to support the issuance of a Group III Written Notice,” and upheld the removal of the grievant.⁴ 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”⁵ 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.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ 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”⁸ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁹ 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.¹⁰ 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.¹¹ 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 maintains that she had recordings of conversations with the Supervisor that would dispute the evidence put forth by the university. Further, she states that she told and reminded all parties at the hearing that the recordings were available, but no one requested for them to be played.¹² EDR interprets this argument to challenge the hearing officer’s findings regarding the sufficiency of the university’s evidence to prove their dismissal claim in light of the record evidence.

³ See Hearing Decision at 1.

⁴ *Id.* at 4-5.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

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

¹¹ *Grievance Procedure Manual* § 5.8.

¹² EDR has no record of the grievant providing such recordings for review, whether as record evidence or otherwise.

EDR has thoroughly reviewed the hearing record and finds there is record evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the university's disciplinary documents, that this behavior constituted misconduct, and that the discipline was consistent with law and policy. It was found by the hearing officer and supported by the agency exhibits that the agency presented documents reflecting that, on April 27, 2022, the grievant received counseling regarding disruptive behavior and performance issues,¹³ and later received a Notice of Improvement Needed/Substandard Performance on October 19, 2022.¹⁴ On December 8, 2022, the university issued a Group I Written Notice for failure to follow the Notice of Improvement Needed and further disruptive behavior.¹⁵ Upon receipt of the Group I Written Notice from the Supervisor, the grievant interrupted the discussion and mockingly stated "you never trained me," and when the Supervisor began to leave, the grievant stated "there you go again closing your door and walking away from me."¹⁶ On December 21, 2022, the grievant sent a "reply all" email to the division "intake portal" about her Notice of Improvement Needed and questioned the Supervisor's leadership and decision-making.¹⁷ On January 6, 2023, the grievant failed to prepare for a meeting concerning her work progress and therefore could not respond to the Supervisor's questions.¹⁸ In that meeting, the grievant accused the Supervisor of fraudulent behavior, left the meeting, and later suggested the Supervisor had doctored the email.¹⁹ When the grievant's manager present for the meeting tried to prove the validity of the original email, the grievant took the email out of his hands and had to be asked to return it.²⁰ Based on this evidence, EDR finds no error in the hearing officer's finding that the university provided sufficient evidence to support the issuance of a Group III Written Notice for violation of DHRM Policy 2.35, *Civility in the Workplace*, and failure to follow a supervisor's instructions.²¹

Nevertheless, the grievant contends that the hearing officer did not consider or request available evidence (audio recordings of conversations) that the grievant argues would have shown that the statements of the Supervisor were false.²² In dismissal cases "the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline."²³ Therefore, it was the grievant's responsibility to present any evidence that she believed would support her defense against dismissal.²⁴ The hearing officer, by

¹³ Agency Ex. F; Hearing Decision at 2.

¹⁴ Agency Ex. G; Hearing Decision at 2

¹⁵ Agency Ex. J; Hearing Decision at 3.

¹⁶ Agency Ex. K; Hearing Decision at 3.

¹⁷ Agency Ex. L at 136; Hearing Decision at 3.

¹⁸ Agency Ex. L at 137; Hearing Decision at 3.

¹⁹ Agency Ex. L at 137.

²⁰ *Id.*

²¹ Hearing Decision at 4.

²² The grievant's appeal does not provide any detail as to what statements she is arguing were false.

²³ *Grievance Procedure Manual* § 5.8(2).

²⁴ The grievant first raised the availability and content of the recordings during her cross-examination of the employee relations manager, who suggested raising the issue with the grievant's direct supervisor instead. Hearing Recording at 23:55-24:20. However, the grievant did not mention the recordings during the subsequent cross-examination of her supervisor. The grievant referenced the availability of the recordings during the cross-examination of the second supervisor but did not introduce them into evidence. *Id.* at 1:57:45-1:58:10. The grievant also did not introduce the recordings into evidence when asked by the hearing officer if there were any documents to submit before the close of

contrast, is responsible for receiving evidence presented by the parties for admission into the record.²⁵ The grievant did not testify or present the recordings as evidence at the hearing.²⁶ Accordingly, we decline to disturb the hearing decision on these grounds.²⁷

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.²⁸ 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.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰

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the evidentiary record. *Id.* at 2:31:20-2:32:45. The hearing recording shows that the grievant had ample opportunity to submit the recording(s) into evidence.

²⁵ See *Rules for Conducting Grievance Hearings* § II.

²⁶ Hearing Decision at 4; Hearing Recording at 2:31:20-2:32:45.

²⁷ While not necessary to resolve this matter, EDR agrees with the university's claim that such recordings would not be considered "newly discovered evidence" upon administrative review, as the grievant claimed to have this evidence readily available at the hearing but failed to submit it prior to the close of the evidentiary record.

²⁸ *Grievance Procedure Manual* § 7.2(d); see *Grievance Procedure Manual* § 7.2(b); see also *Rules for Conducting Grievance Hearings* IV(G) (outlining the narrow exception to prohibition of evidence after the close of the evidentiary record).

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).