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ADMINISTRATIVE REVIEW

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2023-5584
July 18, 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 11975, which addresses a grievance with Virginia Tech (the "university" or "agency"). For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11975, as found by the hearing officer, are as follows:[1]

> At the time of the alleged violation, the Grievant was employed at Virginia Tech. The Grievant continues to be an employee of Virginia Tech. [Mr. L], an Assistant Director of IT stated that he and the Grievant were friends for some years prior to this incident. According to [Mr. L], their relationship was social, not related to their jobs. [Mr. L] was not the Grievant's supervisor nor did they work together. They did work in the same building from 2008 to 2010. [Mr. L] was also friends with the Grievant's brother.
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> Sometime in or about 2017, there was an incident that soured the relationship between [Mr. L], the Grievant and the Grievant's brother. This incident had nothing to do with Virginia Tech or the employment or either the Grievant or [Mr. L]. Due to this incident, [Mr. L], via his personal [Google] email account, notified the Grievant to not contact him. In this email, [Mr. L] told the Grievant that he was done with the Grievant and his brother. [Mr. L] specifically told the Grievant to not contact him again under any circumstance.
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> Apparently there was no contact between the Grievant and [Mr. L] until March 2023. In March 2023, the Grievant, using the Virginia Tech email system, email [Mr. L] on his Virginia Tech email account, asking about the alleged incident of 2017. This contact upset [Mr. L] significantly.

[1] Decision of Hearing Officer, Case No. 11975 ("Hearing Decision"), June 29, 2023, at 2-4 (citations omitted).

> After he received the email, [Mr. L] contacted Virginia Tech Human Resources about this email. The email questioned [Mr. L] about his involvement in, or knowledge of, the 2017 incident.
>
> … [T]he Grievant's supervisor[] became involved after [Mr. L] contacted Human Resources. After investigating, [Grievant's supervisor] issued a Group II Written Notice based upon [Mr. L's] complaint to Human Resources. [Grievant's supervisor] determined that the Grievant violated Policy 7000: Acceptable use of Information Systems. The violation was an email, using Virginia Tech email system, sent to [Mr. L's] Virginia Tech email account after [Mr. L] told the Grievant that he was not to contact [Mr. L].
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> The email the Grievant sent to [Mr. L] was not related to any work; it was a personal matter between the two.
>
> … [The] Chief of Staff in the Graduate School and Head of Human Resources stated that the Grievant had a prior incident of using the Virginia Tech email system to another employee after being informed that he was not to contact that person. This was a violation of Policy 7000 as well. This written notice was dismissed as there was some question about whether the contact was to the correct individual.
>
> The Grievant presented no evidence, did not call any witnesses and did not present any defense. He did not present any evidence for mitigation.[2]

On March 31, 2023, the agency issued to the grievant a Group II Written Notice for failure to follow instructions or policy.[3] The grievant timely grieved the disciplinary action and a hearing was held on June 26, 2023.[4] In a decision dated June 29, 2023, the hearing officer found that the grievant "clearly violated Policy 7000."[5] The hearing officer concluded that the agency had presented sufficient evidence to support the issuance of a Group II Written Notice because the grievant used the Virginia Tech email system to send an email to a coworker after being notified to have no contact with that coworker, a "clear violation of the University policy 7000."[6] The grievant now appeals the decision to EDR.

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[2] While the hearing officer is correct that the grievant did not offer any exhibits or witnesses at the hearing, the grievant had submitted electronic links to various documents in advance of the hearing to both the hearing officer and university representatives. Had the grievant wanted those potential exhibits admitted into the record, he had the opportunity to present them at the hearing. However, based on EDR's review of the record, it is not clear whether the hearing officer was aware of the grievant's submission or why the emailed information was not discussed based on how this portion of the hearing was handled. Nevertheless, EDR has reviewed the grievant's submitted materials in conducting this review. While the grievant does not explicitly request remand for the purpose of this evidence to be considered, we do not find a basis to remand. The content of the potential evidence concerns primarily the grievant's allegations about the 2013 incident and prior communications with coworkers unrelated to the conduct for which the grievant was disciplined. As there does not appear to be any information in these potential exhibits that would have had an impact on the outcome of this case, there is no basis for the case to be remanded for consideration of this evidence.

[3] Hearing Decision at 1; Agency Exs. at 2-3.

[4] *See* Hearing Decision at 1.

[5] *Id*. at 5.

[6] *Id*. at 4-5.

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 . . . ."[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 either 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.

In his request for administrative review, the grievant argues that because he did not contact Ms. M once officially told not to do so by his supervisor, he properly respected and observed University Policy 7000 ("Policy 7000"). He also asserts that him simply asking Ms. M and Mr. L to talk to the police does not trigger the standard of behavior required by Policy 7000. Finally, the grievant adds that the facts in the hearing officer's decision are incorrect and in contradiction with the recording of the hearing.

Hearing Officer's Findings of Fact

The grievant alleges on appeal that the hearing officer's findings of fact in his decision are inconsistent with the testimony and evidence given in the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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.

After reviewing the record and the decision, it appears that some details in the findings of fact are indeed inconsistent with the record and the hearing recording itself. These inconsistencies revolve around the alleged incident from several years ago that caused the grievant to reach out to his coworkers with his Virginia Tech email, and the timeline of communication between the grievant and one of those coworkers, Mr. L. Most significantly, while the record shows that the

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[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.

alleged incident occurred in December 2013, the hearing officer's findings of fact states that the incident occurred in 2017.[14] The record does, however, state that Mr. L had a falling out with the grievant's brother in 2017, which led to Mr. L ceasing regular communication with the grievant and his brother; this may be the 2017 incident that the hearing officer is referring to.

Second, the hearing officer states that after the incident, there was no contact between the grievant and Mr. L until 2023.[15] This statement is also inaccurate based on the record. Both the exhibits and the hearing testimony indicate communication between the grievant and Mr. L in 2020, in which the grievant asked Mr. L questions via Google Voice about the alleged 2013 incident.[16] Mr. L also testified that the grievant initially reached out via his Virginia Tech email in 2020, before they transitioned to Google Voice.[17] While the rationale behind these errors is unclear, they have little bearing on the basis for the disciplinary action at issue in the case.

While the grievant's allegations are indeed a serious matter, the only relevant matter to discuss in this case is whether the grievant violated agency policy by using his Virginia Tech email to inquire about personal matters with his coworkers, and whether such violation rose to the level of a Group II Written Notice. The hearing decision contains findings, supported by record evidence, that the grievant was told by Mr. L to not contact him again, and that he contacted him again in 2023.[18] Because the findings of fact still include the essential, accurate facts that reflect the violation of Policy 7000, EDR finds no reason to reverse or remand the hearing decision on these grounds.

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 on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy. 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.[19] Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the hearing decision on this basis.

Policy Interpretation

The grievant alleges on appeal that his behavior was not a violation of Policy 7000. The relevant portion of Policy 7000 states that "[i]n making acceptable use of resources [the grievant] must use resources only for authorized purposes . . . [and the grievant] must NOT . . . use mail or messaging services to broadcast unsolicited messages, by repeatedly sending unwanted mail …."[20] In other words, and as explained by the agency, the Policy dictates that the grievant may only use university resources, such as his Virginia Tech email, for authorized uses, and an example of an

[14] Agency Exs. at 27, 30; Hearing Decision at 3.
[15] Hearing Decision at 3.
[16] Agency Exs. at 28-29; Hearing Recording at 19:45-25:00 (testimony of Mr. L).
[17] Hearing Recording at 15:20-19:00 (testimony of Mr. L).
[18] Hearing Decision at 3-4.
[19] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[20] Agency Exs. at 24-25 (Standard for *Acceptable Use of Information Systems at Virginia Tech*).

unauthorized use is repeatedly sending unwanted messages. Agency testimony and the letters sent to the grievant by the agency make clear that a violation of Policy 7000 includes using his Virginia Tech email to send messages to coworkers that are unrelated to work, despite the coworkers making clear that they do not want to be contacted by the grievant.[21] The grievant does not dispute that he sent a personal-related email to Mr. L with his Virginia Tech email, nor that Mr. L requested to not be contacted by the grievant further.

The grievant appears to argue on appeal that he did not violate Policy 7000 because the subject matter of his messages did not rise to the behavior prohibited by the Policy. The grievant is likely referring to the fact that in the hearing, the grievant's supervisor testified that per the Policy, communications cannot be "unprofessional or threatening."[22] While the hearing officer concludes that the grievant violated agency policy by sending unwanted messages with his Virginia Tech email, he does not discuss the subject matter or tone of the messages. However, the agency's Human Resources representative testified that *any* personal communication with a Virginia Tech email goes against Policy 7000, and that "the line is crossed" when the communication is unwanted.[23] The grievant received the Group II Written Notice specifically for engaging in unwanted contact with Mr. L with his Virginia Tech email.[24] The record and Mr. L's testimony make clear that Mr. L informed the grievant during their conversation in Google Voice in 2020 that he did not want to be contacted by him again.[25] Therefore, regardless of whether the nature of the grievant's email sent to Mr. L was polite and respectful, the fact that Mr. L explicitly stated that he did not want to be contacted by the grievant is sufficient for the grievant to be in violation of Policy 7000. For these reasons, EDR declines 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.[26] 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.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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[21] Hearing Recording at 1:03:30-1:05:30 (testimony of Agency Human Resources representative); *See* Agency Exs. at 10-11.
[22] Hearing Recording at 46:10-47:10 (testimony of grievant's supervisor).
[23] *Id*. at 1:03:30-1:05:30 (testimony of Agency Human Resources representative).
[24] Agency Exs. at 2; Hearing Decision at 3.
[25] Hearing Recording at 25:00-25:30 (testimony of Mr. L).
[26] 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 is warranted in this case.
[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).