



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 Corrections
Ruling Number 2024-5592
July 28, 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 11953. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11953, as found by the hearing officer, are as follows:¹

The Department of Corrections [(the "Agency")] employs Grievant as a Support Specialist IV at one of its locations. She has been employed by the Agency for approximately 42 years. The Warden described Grievant as an expert at performing her duties.

Ms. P reported to Grievant. It was raining outside and Ms. P was discussing whether to go out to lunch. Grievant said, "it doesn't look like you missed too many meals." Ms. P was uncomfortable with Grievant's comment because she believed Grievant was saying Ms. P was too heavy. Ms. P heard Grievant cuss at work. She also heard Grievant tell an inmate that he had not had any pu—y since it had him. On one occasion, Ms. P assisted a Sally Port Officer and he appreciated her help. The next day he called and asked for "Ms. Wonderful." Grievant began referring to the Sally Port Officer as Ms. P's boyfriend. Ms. P told Grievant that she did not need a boyfriend since she was happily married. Grievant continued to refer to that Sally Port Officer as Ms. P's boyfriend even though Ms. P had asked Grievant to stop. Ms. P transferred out of the Unit because of the atmosphere in the office.

Ms. A reported to Grievant. In October 2021, Grievant and Ms. A met for a written counseling. The CHAP also attended the meeting. During the meeting, Grievant asked Ms. A if she could read. Grievant asked Ms. A if she had short term

¹ Decision of Hearing Officer, Case No. 11953 ("Hearing Decision"), July 3, 2023, at 2-3.

memory. Ms. A was shaking uncontrollably. Grievant's demeanor was strong and overpowering. The CHAP believed Grievant's comments were rude and unprofessional.

Grievant was asking staff including Ms. A about things the Unit might need to obtain. Grievant said she had been trying to get new chairs for the Unit and that she had been falling out of her chair. Ms. A said she would switch chairs with Grievant. Grievant said, "Why would you do that since your butt is bigger than mine." Ms. H heard Grievant's comment and felt it was inappropriate.

On July 1, 2022 the agency issued a Group I Written Notice of disciplinary action for failure to maintain civility in the workplace.² The grievant timely grieved the agency's action and a hearing was held on June 13, 2023.³ In a decision dated July 3, 2023, the hearing officer found that the agency had "presented sufficient evidence to support the issuance of a Group I Written Notice," and upheld the disciplinary action.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

² Hearing Decision at 1. The hearing decision appears to include an error, listing the date of issuance as being in 2023 instead of the correct date in 2022. *See* Agency Exs. at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4.

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).

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 does not believe all relevant information was reviewed at the hearing and that the EEO investigator concluded the charges against her were "unfounded."¹² EDR interprets this argument to challenge the hearing officer's findings regarding the sufficiency of the agency's evidence to prove the disciplinary charge.

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 I Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy. The hearing officer determined that the grievant "made denigrating comments about her subordinates."¹³ For example, with one subordinate, the grievant made upsetting comments related to the subordinate's weight; telling her, "it doesn't look like you missed too many meals."¹⁴ The grievant also repeatedly referred to another employee as the subordinate's boyfriend despite requests to stop and the subordinate stating that she was happily married and did not need a boyfriend.¹⁵ The subordinate transferred out of the unit because of the grievant and the atmosphere in the office.¹⁶ With another subordinate, the grievant made inappropriate comments in a meeting to discuss a written counseling; the grievant asked the subordinate if she knew how to read and if she had short-term memory problems.¹⁷ On a separate occasion, grievant made inappropriate comments about the subordinate's weight and body.¹⁸ EDR finds no error in the hearing officer's finding that the Agency provided sufficient evidence to support the issuance of a Group I Written Notice for violation of DHRM Policy 2.35 governing Civility in the Workplace.¹⁹

Nevertheless, the grievant contends that the hearing officer did not consider all relevant evidence available. In disciplinary actions "the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline."²⁰ Therefore, it was the grievant's responsibility to present any evidence that she

¹¹ *Grievance Procedure Manual* § 5.8.

¹² The EEO report determined the allegations of workplace harassment based on the complainant's race and gender were "unfounded." However, the report determined the grievant's communication style violated multiple agency policies. See Agency Exs. at 68-69, 91-92. The Written Notice and hearing did not address allegations of workplace harassment based on protected categories, but instead only addressed violations of the applicable agency policies and DHRM Policy 2.35 for the grievant's "inappropriate and offensive comments." Agency Exs. at 1-4.

¹³ Hearing Decision at 3.

¹⁴ Hearing Decision at 2; Agency Exs. at 74, 91.

¹⁵ Hearing Decision at 2; Hearing Recording at 18:30-19:15.

¹⁶ Hearing Decision at 2; Agency Exs. at 74.

¹⁷ Hearing Decision at 2-3; Agency Exs. at 43, 77.

¹⁸ Hearing Decision at 3; Agency Exs. at 70, 73, 87.

¹⁹ Hearing Decision at 3-4.

²⁰ *Grievance Procedure Manual* § 5.8(2).

believed would support her defense against discipline. The hearing officer, by contrast, is responsible for receiving evidence presented by the parties for admission into the record.²¹ The grievant provided limited testimony, did not examine any witnesses, and did not submit any evidence into the record.²² The grievant has also not identified in her appeal any record evidence that the hearing officer failed to consider. Therefore, we cannot find that the hearing officer's consideration of the evidence was unreasonable or otherwise in error with respect to the grievance procedure.

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵

Christopher M. Grab
Director
Office of Employment Dispute Resolution

²¹ See *Rules for Conduct Grievance Hearings* § II.

²² Hearing Decision at 2:11:05-2:11:57.

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).