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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5590
August 17, 2023

The Department of Corrections (the “agency”) 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 11939. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11939, as found by the hearing officer, are as follows:¹

The Department of Corrections [(the “agency”)] employs Grievant as an Adult Education Instructor at one of its locations. She began working for the Agency on September 25, 2008. The Supervisor described Grievant as “an excellent teacher.” No evidence of prior active disciplinary action was introduced during the hearing.

Before Grievant began working for the Agency, she worked for another employer who provided retirement benefits under the Virginia Retirement System. Grievant was entitled to retirement benefits based on her years of service with the prior employer and the Agency.

The Agency wanted to compare the compensation of its employees with the compensation of teachers in other school systems. The Agency decided to obtain data from its teachers by sending them a survey. The Agency intended to use the data from its teachers to determine whether its teachers were over or under paid as compared to teachers in other organizations.

The Agency has a Research Department. The Research Department did not draft the survey. The ITC worked in a division responsible for implementing technology for inmates to use in the classroom. The SAC also worked with the ITC.

¹ Decision of Hearing Officer, Case No. 11939 (“Hearing Decision”), June 27, 2023, at 2-4.

They were not in Grievant's chain of command and not part of the Research Department. The ITC and SAC put together a three question survey for teachers.

On September 9, 2022, the SAC instructed Grievant and over 90 other teachers to complete a Correctional Education Personnel Survey by September 16, 2022. The Survey asked:

How many years of service do you have with VRS (Virginia Retirement System) as an educator?

How many years of service do you have with DOC (Department of Corrections) as an educator and/or academic personnel?

What is your highest level of degree obtained?

The reasons for conducting the survey were not shared with Grievant or other employees asked to participate in the survey. Grievant initially believed that the survey could be related to budget cuts, moving teachers, or restructuring the Agency. She did not want to participate in the survey.

On September 19, 2022, the ITC sent Grievant and other staff an email reminder to complete the survey.

On September 21, 2022, the ITC sent Grievant and other staff an email reminder to complete the survey.

On September 27, 2022, the ITC sent Grievant an email to Grievant reminding her to complete the survey. He asked that she complete the survey by September 28, 2022.

On October 3, 2022, the ITC sent Grievant's Supervisor an email asking him to follow up with Grievant to have the survey completed.

On October 5, 2022, Grievant informed the ITC he could obtain answers to the survey from the Agency's human resource department and the Virginia Department of Education for accuracy.

On October 23, 2022, the Supervisor sent Grievant an email with the survey attached and told her to complete the survey by close of business October 24, 2022. He told her that her failure to do so would be considered insubordination and result in disciplinary action.

On October 23, 2022, the Supervisor met with Grievant and instructed her to complete the survey.

On October 25, 2022, Grievant declined to complete the survey.

Grievant did not complete the survey.

On November 15, 2022, the agency issued to the grievant a Group I Written Notice citing failure to follow instructions.² The grievant timely grieved the disciplinary action, and a hearing was held on June 7, 2023.³ In a decision dated June 27, 2023, the hearing officer determined that the agency had not presented sufficient evidence to support its disciplinary action and consequently rescinded the Group I Written Notice.⁴ The agency now appeals the hearing decision to EDR.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”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.

In its request for administrative review, the agency contends that the hearing officer “ignore[d] the facts presented by the Agency” in order to conclude that the agency’s instructions to the grievant were improper.⁹ The agency argues that the grievant’s rationale for failing to complete the survey as instructed “did not exist at the time she was disciplined” and, as such, should not have been accepted as a defense.¹⁰

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹¹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹² Further, in cases involving discipline, the hearing officer reviews the facts

² Agency Ex. 1; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4-5.

⁵ The agency’s request for administrative review is accepted as timely filed. Per section 7.2 of the *Grievance Procedure Manual*, requests must be “**received by** EDR within 15 calendar days of the date of the original hearing decision.” EDR received the agency’s written request for administrative review by email on July 12, 2023 at 9:25 p.m. Although the grievant argues that EDR should consider the request untimely if received after business hours, nothing in the grievance procedure imposes such a limitation. Accordingly, EDR has long considered emailed requests timely if received by 11:59 p.m. on the due date, which occurred here. *See* EDR Ruling No. 2014-3887 (interpreting a “calendar day” as ending at midnight); *see, e.g.*, EDR Ruling No. 2009-2255; EDR Ruling No. 2007-1556.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See* *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Request for Administrative Review at 6.

¹⁰ *Id.*

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

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.¹³ 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.¹⁴ 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 his decision, the hearing officer concluded that the grievant's "length of service with the VRS was confidential personnel information" under DHRM Policy 6.10, *Personnel Records Management*, and DHRM Policy 6.05, *Personnel Records Disclosure*.¹⁵ Reasoning that an agency "cannot compel an employee to produce [their] confidential personnel information without that employee's agreement," the hearing officer concluded that the grievant "was not obligated to follow an instruction improperly given."¹⁶

As a matter of DHRM policy, EDR finds no error in this analysis. Under Policy 6.05, "personal information" includes "[a]ll information that . . . [d]escribes, locates or indexes anything about an individual including . . . his or her education . . . and the record of his or her presence, registration, or membership in an organization or activity . . ."¹⁷ Among the categories of records that "may not be disclosed to third parties without the written consent of the subject employee" are "retirement records" and "applications for employment."¹⁸ Although the employee's supervisor and higher-level managers may access such records "with justification," the policy instructs that "[a]ll requests" for such information "be directed to the agency's human resource officer."¹⁹ Moreover, under Policy 6.10, "[a]ll records maintained on employees" are considered personnel records.²⁰ Such records "are confidential in nature" and should not be collected unless "necessary for the effective and efficient operation of the Commonwealth's agencies."²¹ Accordingly, it is clear that an employee's length of service under VRS and with the agency, as well as her educational level, would have constituted both "personal information" and, if collected, "personnel records" under DHRM policies. Appropriate disclosure, particularly without an employee's consent, is extremely limited for both categories and should be managed by agency human resources staff. Therefore, we decline to disturb the hearing officer's finding that the grievant's withholding of consent in this context did not constitute misconduct.

¹³ *Rules for Conducting Grievance Hearings* § VI(B)(1).

¹⁴ *Grievance Procedure Manual* § 5.8(2).

¹⁵ Hearing Decision at 4.

¹⁶ *Id.*

¹⁷ DHRM Policy 6.05, *Personnel Records Disclosure*, "Definitions".

¹⁸ DHRM Policy 6.05, "Disclosure of Information to Third Parties".

¹⁹ DHRM Policy 6.05, "Requests for Information – General".

²⁰ DHRM Policy 6.10, *Personnel Records Management*, at 1.

²¹ *Id.* at 2.

EDR is not persuaded by the agency's contention that "the information requested by the survey was not confidential" or that the grievant's reason for failing to provide the information "did not exist" when discipline was issued.²² The DHRM policies described above are long-established standards, and the record presents no basis to question whether they would have applied to the information at issue here. Although the agency nevertheless characterizes the grievant's objection to disclosure as "pretextual" and insincere,²³ we cannot find that the record evidence should have compelled the hearing officer to agree. As reflected in the agency's exhibits, the grievant provided a response to the survey request that suggested the involvement of human resources and inquired how the requested information would be used.²⁴ Following the disciplinary due process meeting, the grievant expressed that she felt she was being punished for "advocat[ing] for [her] own privacy rights."²⁵ At the hearing, the grievant testified that she was uncomfortable with providing the requested information because it was "private" and appeared to be sought without the involvement of human resources.²⁶ She was also concerned about the purpose for which the information was sought, as it did not appear that the data would be anonymized.²⁷ Moreover, the grievant expressed surprise both during the disciplinary process and at the hearing that answering such a survey would be considered mandatory.²⁸ EDR identifies nothing in the record to indicate that the agency was not on sufficient notice regarding the grievant's concerns, or that the hearing officer erred in considering whether the instructions to the grievant in this case were consistent with long-standing DHRM policies.

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.²⁹ 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.³⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³¹

²² Request for Administrative Review at 6.

²³ *See id.* at 5.

²⁴ Agency Exs. at 20-21.

²⁵ *Id.* at 22.

²⁶ Hearing Recording at 2:06:35-2:08:45, 2:10:05-2:11:58 (grievant's testimony). The agency argues that it is contradictory for the grievant to argue on one hand that her information was confidential and, on the other, that the agency already had it. However, DHRM Policies 6.05 and 6.10 make clear that personnel records are both confidential and held only in the custody of appropriate agency staff. Agencies, and human resources departments in particular, are responsible for maintaining the confidentiality of such records both internally and externally. As such, employees can defer to their human resources departments to disclose confidential information only as necessary and permitted by law and policy, including to internal requestors.

²⁷ *Id.*

²⁸ *Id.*; Agency Exs. at 20-22.

²⁹ *Grievance Procedure Manual* § 7.2(d).

³⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³¹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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