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ADMINISTRATIVE REVIEW

In the matter of the Department of Environmental Quality
Ruling Number 2024-5601
September 25, 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 Numbers 11958 and 11959. For the reasons set forth below, EDR remands the hearing decision for reconsideration.

FACTS

On January 17, 2023, the agency issued to the grievant a Group II Written Notice citing failure to follow instructions and unsatisfactory performance (the "First Written Notice"). The grievant timely grieved this disciplinary action, and the grievance (the "First Grievance") proceeded through the management steps. On March 22, 2023, the agency issued to the grievant three additional written notices, each charging the grievant with misconduct related to the second management step of the First Grievance. Specifically, the agency issued: (1) a Group III Written Notice (the "Second Written Notice") for providing unethical and "factually inaccurate" testimony during the second-step meeting; (2) a Group II Written Notice (the "Third Written Notice") for a separate instance of "factually inaccurate" testimony during the second-step meeting; and (3) a Group II Written Notice (the "Fourth Written Notice") for failing to provide the full grievance record to the second-step respondent. Each written notice issued on March 22 indicated termination of the grievant's employment. The grievant timely filed a Dismissal Grievance to challenge his termination. EDR consolidated the two grievances for a single hearing and appointed a hearing officer to the matter.¹

The relevant facts in resulting Case Numbers 11958 and 11959, as found by the hearing officer, are as follows:²

The Agency's first witness [w]as the Human Resource Manager III, Director-HR and the immediate superior and supervisor of the Grievant, an HR Manager. The witness testified that the witness had been employed at the Agency

¹ EDR Ruling No. 2023-5547.

² Decision of Hearing Officer, Case Nos. 11958 and 11959 ("Hearing Decision"), July 21, 2023, at 2-4 (citations omitted).

for four and a half years and had been in the field of Human Resources for twenty-five years, nineteen years with the Commonwealth of Virginia. The witness reviewed the Grievant's work profile and the percentage allocation of core responsibilities as well as the EWP Attachment-Program Manager Self-Tracking Form. The witness emphasized that in addition to the Standards of Conduct, the Grievant was required to abide by the Mission Statement and Code of Ethics.

The witness testified that the Grievant began employment on June 10, 2022 and was included in a management team of three (including the Grievant) which met weekly. The witness testified that the witness began receiving various complaints from staff in the early weeks of Grievant's employment. Reviewing the Grievant's Performance Evaluation conducted on November 30, 2022 the witness pointed out that although the Grievant received either a contributor or strong contributor in each category, there were multiple comments including the evaluation noting that the Grievant needed improvement in the following areas: demonstrate self-awareness, cultivates productive work relationships, understands the business and communicates proficiently. In addition, the performance evaluation noted the following: “[Grievant] has had some difficulty with [Grievant's] interactions with [Grievant's] colleagues; [Grievant] needs to be more proactive with monitoring and managing the recruitment workflow for the HR Generalist assigned to [Grievant's] team; [Grievant] did not take my feedback well nor some of the additional feedback from the team. This resulted in me having to directly address the interaction with [Grievant] and my expectations for how we would interact and give/take feedback moving forward.”

The witness went on to say that the Grievant's response to the performance evaluation was concerning:

And, it should be noted that per the HR Director these two employees are known for being opinionated about people and would be most resistant to change. I will also note that out of the staff of 5 people to ask about working with me (to provide info for my evaluation-I guess), the HR Director only picked these two to census.

The witness noted that the statement by the Grievant was false and that the witness did not only pick two to census. The Hearing Officer notes that the witness also redacted the Grievant's comments in his response because other employees could have read Grievant's comments in his response and been negatively impacted. Hearing Officer notes that this the first time that the Hearing Officer has known of a supervisor redacting comments in an employee's response to a performance evaluation.

The witness next testified as to the Group II Written Notice issued January 17, 2023 (citing unsatisfactory performance, failure to follow instructions or policy and willful misconduct). The Written Notice stated “In summary, your actions include, but were not limited to the following: in your evaluation response you wrote derogatory comment...; you failed to provided Agency leadership with an accurate work product which resulted in an employee that you supervised having to complete the project you were assigned; you failed to utilize the HR shared drive (U-drive) to save working documents after being instructed to on numerous occasions, both verbally and in writing...; after numerous reminders to all HR staff, you failed to enter your leave on the shared calendar and inform all the employees that are relying on you for' supervision and/or guidance that you are going to be on leave...; you failed to complete the Knowledge Transfer Exercise with a former employee that you supervise after I instructed you to do both verbally and in writing; you failed to follow through with on-boarding a new employee by ensuring that she had the access and training that she needed of the PRIMARY system that she needs access to in order to perform ALL the essential functions of her job; you failed to ensure that a new employee, who was promoted to a higher role in the higher level duties, was sufficiently trained to perform the critical duties of her job, including employee payroll; you failed to actively monitor the work of those employees that you supervise, even after my repeated feedback that work assignments were not completed. Your conduct shows disregard for DEQ Values, expectations of conduct as outlined in the DEQ Code of Ethics and lack of respect for Agency leadership, me as your supervisor, your colleague, and subordinates. Your expected to serve as a role model through your compliance with Agency protocols and best practices in leading and communicating with your subordinate employees.”

The witness then reviewed the specifics of the alleged violations as set out in the Due Process Memorandum dated January 4, 2023. The witness supported the various allegations by referring to Agency Exhibit 17 regarding the problems with U-drive; Agency Exhibit 18 and Exhibit 19 regarding the “huge” project involving Organizational Charts, specifically reviewing the email thread pages 22-26 of Exhibit 19. In addition, the witness referred to Agency Exhibit 21 in discussing Grievant's failure to enter the Grievant's leave properly on HR calendar, failing on three occasions to do so.

The witness further testified that the Grievant did not follow the witness's instructions in completing the Knowledge Transfer Exercise, for which the witness included a link to the guide document for the Grievant to use.

The witness went on to testify regarding the witness's frustration with the Grievant not properly and timely assuring that an employee gained Cardinal user access. The witness reviewed the relevant email threads at Agency Exhibit 23. In addition, the witness testified as to the Grievant's failure to deal with a Wage

Timesheet Report issue that caused another employee to work at night to assure that certain employees got paid. Specific reference was made to the email thread at page 28 of agency Exhibit 23. In conclusion, the witness testified that in issuing the single Group II Written Notice, rather than multiple Written Notices, mitigation was considered in the way of the employee's otherwise good work record but also the aggravating circumstance of the content of the Notice of Improvement needed/Substandard Performance issued by the Department of Corrections on August 10, 2021, citing behavior by the Grievant which if substantiated at the Grievant's present Agency would have possibly resulted in termination.

The Agency's second witness was the Director of Administration for the Agency who had a strong background in auditing. In the Agency organization chart, the witness reports to the Agency Head.

The witness then testified at length referring to the witness's notes from interviews with the Grievant, Grievant's supervisor and two other employees. The witness noted that [] Exhibit [26] sets out in black the responses or arguments made by the Grievant and sets out in blue the witness's notes regarding the witness's interviews with the Grievant and the other employees. When interviewing the Grievant, the Grievant was asked about the relief requested by the Grievant "Group Notice be rescinded, and I be given an equitable opportunity to be successful with no t[h]reat or action of retaliation or hostility moving forward." When asked if the Grievant believed that the Grievant had been retaliated against or was being treated in a hostile manner, the Grievant said "yes, all of this" has been hostile. When the witness asked for clarification and examples, the Grievant said everything about this has been hostile and others are noticing it as well. The witness asked what others have noticed and the Grievant replied that an individual in HR has come to the Grievant to let the Grievant know that she went to [Grievant's] supervisor and expressed her concerns that [Grievant] was being singled out, treated unfairly, and that there is hostility that [Grievant] supervisor has instigated with [Grievant]. The witness followed up with Grievant's supervisor asking if any employee had come to the supervisor expressing concerns about a hostile work environment or expressing concerns about Grievant being treated hostilely or unfairly. The Grievant's supervisor told the witness that no one had made any such comment or complaint to the supervisor. When the witness followed up with the Grievant asking the Grievant to identify the individuals who had made the comments to the Grievant and to the Grievant's supervisor, the Grievant identified a specific employee. When the witness then followed up with that employee, the employee denied that the employee ever had the conversation with Grievant's supervisor, and that the employee did not feel that way or witness any such behavior from the supervisor.

The witness testified that he concluded that the Grievant demonstrated a pattern of dishonesty, with the single instance of the Grievant falsely claiming that a specific employee had complained to Grievant's supervisor about the hostile work

environment would be grounds for a Group III with termination. As a result, the witness "called up the line for an opinion." The witness testified that the Group III Written Notice was issued indicating that the Grievant had demonstrated falsification of the official grievance records by willfully making false statements, orally during the second step meeting. The Group III Written Notice charged that the Grievant failed to follow multiple policies of the most serious nature; disruption of the workplace; falsifying records; and unethical conduct/misconduct that is of a most serious nature and significantly impacts Agency operations. In support, the witness testified that the Standards of Conduct require that employees resolve work-related issues and disputes in a professional manner and through established business processes; make work-related decisions and/or take actions that are in the best interest of the Agency; conduct themselves at all times in a manner that supports the mission of their Agency and the performance of their duties. The witness testified that the Standards of Conduct further expect supervisors and managers to serve as role models through their compliance with policies, Agency protocols and best practices in leading and communicating with their subordinate employees. The witness testified that the Grievant violated these Standards of Conduct as well as the Grievance Procedure Manual which sets out that the procedure is not to be used to harass or otherwise impede the efficient operation and that parties and advocates shall not engage in conduct that offends the dignity and decorum of the grievance proceedings, including, but not limited to, the second step fact-finding meeting.... The witness further testified that the Standards of Conduct set out a glossary of offenses which set out behaviors which constitute disruptive behavior/disruption of the workplace, falsification and fraud. The witness testified that the Grievant's behavior did in fact fall under each of these three categories.

The witness testified that as to issuing the Group III Written Notice mitigation was considered in the way of the positive aspects of the Grievant's performance evaluation, which mitigation was offset by the aggravating consideration that the Grievant's actions negatively impacted the Grievant's credibility as a supervisor/manager

The witness concluded by reviewing the two Group II Written Notices issued on the same day as the Group III Written Notice. As to the Group II Written Notice set out at Agency Exhibit 5, again the Grievant made false statements regarding follow-up on user access for one of Grievant's new employees. Again, false statements by a supervisor being of the most serious nature and justifying termination of employment. As to the Group II Written Notice set out at Agency Exhibit 6, it was concluded that the Grievant failed to provide the full response documentation as requested during the Due Process Procedure and constituted willful misconduct demonstrating disregard for DEQ Values (7Cs), expectations of conduct as outlined in the DEQ Code of Ethics, and a lack of respect for Agency

leadership and Grievant's supervisor, colleagues and subordinates and justifying termination.

The Agency's final witness was the employee the Grievant identified as being the employee who complained about harassment. The witness testified that the witness did not make any statement about a hostile work environment; never witnessed Grievant's supervisor being hostile to the Grievant or any other employee and did note however that an employee who left the Agency did not give the Grievant certain things the Grievant needed. The witness testified that the witness was very upset by the Grievant's false statement and that the witness went home and cried.

In a decision dated July 21, 2023, the hearing officer determined that the agency had met its burden of proof as to each of the four written notices and, accordingly, upheld the grievant's termination.³ 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.”⁴ 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.⁵ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁶ 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”⁷ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰ Where the evidence conflicts or is subject to varying interpretations, hearing

³ *Id.* at 8-9.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ *See Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

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.

In his request for administrative review, the grievant challenges the hearing officer's conclusions as to each of the four written notices. As to the First Written Notice, the grievant argues that in addition to being inconsistent with state and agency policy, the agency failed to provide evidence of instructions not followed and relied on inappropriate factors in its decision process. As to the other three written notices issued in March, the grievant argues that these written notices were not consistent with the grievance procedure, the agency's Code of Ethics, or DHRM policy.

First Written Notice

The First Written Notice charged the grievant with multiple instances of unsatisfactory performance and failure to follow instructions. The hearing officer found that the agency "proved by a preponderance of the evidence each item of misconduct set out in the written notice" ¹¹ In summary, these items were:

- 1) Including in a document a derogatory comment about an employee who would see the document
- 2) Failing to provide accurate work product as instructed
- 3) Failing to follow instructions to save working documents to the shared office drive
- 4) Failing to indicate availability on the shared office calendar as instructed
- 5) Failing to complete required departure documentation with a departing employee
- 6) Failing to complete onboarding for a new employee by ensuring she had access to the primary system she would use for all of her job duties
- 7) Failing to provide adequate training for another subordinate
- 8) Failing to supervise employees' work and ensure that assignments were completed. ¹²

Evidence in the record supports the hearing officer's findings in this regard.

For example, as to Item One, the grievant's supervisor, the agency's HR Director, testified that the grievant's annual performance evaluation, like all evaluations, was to be reviewed for compliance by an HR generalist who the grievant supervised. ¹³ In his response to his performance evaluation, the grievant asserted that the HR Director characterized the HR generalist as "opinionated about people" and "resistant to change." ¹⁴ The HR Director denied that she had

¹¹ Hearing Decision at 8.

¹² See Agency Ex. 2.

¹³ Hearing Recording at 39:00-39:30 (HR Director's testimony).

¹⁴ Agency Ex. 14 at 6.

characterized their subordinate in that way and felt she had to redact the grievant's response in order to avoid "turmoil" within the team when the HR reviewer read the comments about herself.¹⁵

As to Items Two and Three, the grievant's supervisor testified that the grievant had been instructed by management to prepare an updated organizational chart for the agency.¹⁶ She testified that the chart he provided contained several errors and/or was not complete, which was initially discovered while the grievant was on leave.¹⁷ Because the grievant had not saved related documents to the shared office drive as instructed, other staff could not easily correct the errors in the grievant's absence and had to recreate the information.¹⁸

As to Item Four, the HR Director testified that their office used a shared online calendar to track staff availability, and that she had instructed all HR staff including the grievant to note all leave on the shared calendar for coordination purposes.¹⁹ She testified that there were three occasions where the grievant had failed to note his planned absences on the shared calendar, at least one of which caused problems when staff members believed he would be available to resolve work issues and he was not.²⁰

As reflected in the hearing decision, the HR Director's testimony further supported the additional items charged in the First Written Notice,²¹ and we find no error in the hearing officer's conclusion that the charges were appropriately characterized as unsatisfactory performance and/or failure to follow instructions.²²

The grievant nevertheless challenges the hearing officer's findings in this regard on grounds that there was no evidence of actual instructions that were not followed. However, as detailed in the foregoing paragraphs, the HR Director testified to specific instructions she gave the grievant, with additional reference to relevant written instructions.²³ The grievant further argues that the First Written Notice was inconsistent with DHRM Policy 1.60, *Standards of Conduct*, in that no corrective action or progressive discipline preceded formal discipline. He further claims that the Written Notice improperly took into account informal discipline that the grievant received at his former employing agency. Contrary to the grievant's arguments, DHRM policy does not mandate corrective action prior to the issuance of a written notice;²⁴ moreover, the grievant's supervisor testified extensively about her efforts to communicate issues to the grievant by way of

¹⁵ Hearing Recording at 39:45-42:10 (HR Director's testimony).

¹⁶ See *id.* at 44:15-1:01:06 (HR Director's testimony); Agency Exs. 17, 18, 19.

¹⁷ Hearing Recording at 44:30-45:05, 48:30-50:40 (HR Director's testimony); see also Agency Ex. 19 at 5.

¹⁸ Hearing Recording at 44:30-45:05, 1:01:00-1:02:25 (HR Director's testimony).

¹⁹ *Id.* at 1:02:30-1:05:00 (HR Director's testimony).

²⁰ *Id.*

²¹ Hearing Decision at 4.

²² See DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped by Level" (identifying failure to follow instructions as an example of a Group II offense).

²³ See, e.g., Hearing Recording at 45:45-48:12, 1:10:45-1:13:51 (HR Director's testimony); Agency Ex. 17 at 1; Agency Ex. 22.

²⁴ DHRM Policy 1.60, *Standards of Conduct*, at 6 (stating that while counseling is typically the first level of corrective action, it is "not a required precursor to the issuance of Written Notices").

his annual performance evaluation and verbal and written feedback.²⁵ Furthermore, upon our review of the First Written Notice, there is no indication that it was based on informal discipline issued by another agency.²⁶ Accordingly, we cannot find that the grievant has presented a basis to remand the hearing decision's findings as to the First Written Notice.

Discipline Arising from Grievance Process

The Second, Third, and Fourth Written Notices each charge the grievant with committing misconduct during the grievance process, which the grievant initiated to challenge the First Written Notice. As such, our review of these three disciplinary actions, and our administration of the grievance procedure more generally, is guided by the statutory requirement that state “employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.”²⁷ The importance of free and interactive discussion in successful employment dispute resolution is also reflected in the grievance statutes’ requirement that the procedure include “[a]t least one face-to-face meeting between the employee and management” to discuss the issues raised in the grievance.²⁸

Consistent with this mandate, the grievance procedure provides for a meeting to be held at the second management resolution step.²⁹ The *Grievance Procedure Manual* emphasizes that the second-step meeting

should include open discussion of the grievance issues to promote understanding of the other party’s position and possible resolution of the workplace issues. Accordingly, the parties are encouraged to present information relevant to the grievance at this meeting. While the parties may question one another regarding disputed facts and issues, the meeting should not be adversarial or treated as a hearing.³⁰

During the meeting, managers “should not prohibit an employee from disclosing relevant information not previously provided.”³¹ They should also be mindful that adverse responses to the grievant’s disclosures can create the appearance of retaliation and potentially chill future participation in the grievance process, both by the grievant and by other employees.

With all of this in mind, the free and open discussion contemplated by section 3.2 of the *Manual* is not without limit. Pursuant to the grievance procedure’s Code of Conduct and Civility:

²⁵ See Hearing Recording at 28:55-30:50, 45:45-48:12, 1:10:45-1:13:51 (HR Director’s testimony); Agency Ex. 14; Agency Ex. 17 at 1; Agency Ex. 22.

²⁶ See Agency Ex. 2.

²⁷ Va. Code § 2.2-3000(A).

²⁸ *Id.* § 2.2-3003(D).

²⁹ *Grievance Procedure Manual* § 3.2.

³⁰ *Id.*

³¹ *Id.*

Parties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications.

Parties and advocates shall not engage in conduct that offends the dignity and decorum of grievance proceedings, including, but not limited to, the second step fact-finding meeting and the grievance hearing.

Parties and advocates shall not engage in conduct that undermines the integrity of the grievance process including, but not limited to, behavior that unnecessarily delays the process or unfairly prejudices the opposing party.³²

Moreover, nothing in the grievance procedure negates DHRM Policy 1.60, *Standards of Conduct*, or DHRM Policy 2.35, *Civility in the Workplace*, including their respective provisions governing appropriate disciplinary actions in response to employee misconduct.

In light of these standards, EDR administers the grievance procedure in a manner intended to prevent abuse of the process by any party. Although we would typically expect management's exercise of disciplinary authority **in connection with the grievance process** to undermine the integrity of the process, a grievance does not shield an employee against appropriate disciplinary action for misconduct. Ultimately, in situations where management believes that an employee has engaged in misconduct during the grievance process, disciplinary determinations must account for the imperatives of both the grievance procedure and applicable standards of conduct.

Finally, EDR would emphasize that authority to administer and enforce the state employee grievance procedure lies with this Office, on behalf of the DHRM Director.³³ To the extent that a party fails to comply with any requirement of the grievance procedure, the grievance procedure provides for a specific process to address such non-compliance.³⁴ For the reasons discussed above, EDR does not interpret the grievance procedure to permit unilateral enforcement of the procedure by an agency party, via formal discipline or otherwise.

In sum, it should be the exceedingly rare case in which an employee's participation in the grievance process gives rise to warranted disciplinary action under DHRM Policy 1.60. We review the hearing officer's determinations as to the Second, Third, and Fourth Written Notices in light of the foregoing considerations, and the record as a whole.

Second Written Notice

The Second Written Notice, issued at the Group III level, charged the grievant with failure to follow multiple policies of a most serious nature, disruption of the workplace, falsification of records, and unethical conduct. Specifically, the Second Written Notice (prepared by the second-step respondent) alleged:

³² *Id.* § 1.9.

³³ *See* Va. Code § 2.2-1202.1.

³⁴ *Grievance Procedure Manual* § 6.1, 6.3.

During our Second Step Resolution Meeting on Monday, March 6th, we discussed the relief you requested as part of the grievance. You provided verbal testimony regarding the HR Director subjecting you to a hostile work environment and, when asked if you had been retaliated against or treated hostilely at this time, you claimed that “yes, all of this” has been hostile. I asked for clarification and examples, and you said, “everything about this has been hostile and others are noticing it as well.” I asked what others have noticed, and you replied that an individual in HR told you that they went to the HR Director and expressed their concerns that you were singled out, treated unfairly, and that there is hostility that the HR Director has instigated with you. When I asked if you were saying that an individual in HR went to the HR Director and expressed concerns that she (HR Director) was creating a hostile work environment for you, you confirmed my statement as being accurate and you added that the individual let you know because she was sticking up for you.

....

Your testimony on this matter was factually inaccurate and proven to be false by the testimony of your subordinate employee who completely denied any such comments were made to the HR Director, and the witnesses further denied the content of your comments were witnessed or perceived at any time.³⁵

Consistent with these charges, the second-step respondent testified that he specifically asked clarifying questions regarding who was alleged to be creating the hostile work environment, to verify that it was indeed the HR Director.³⁶ He also referred to contemporaneous notes that he testified he had typed during the second-step meeting, reflecting that he “asked to verify that [the grievant] was saying that an individual in HR went to [the HR Director] and expressed concerns that she [the HR Director] was creating a hostile work environment for [the grievant].”³⁷ Due to his explicit clarification of the grievant’s statements, the second-step respondent testified that he had no uncertainty as to who was said to be creating a hostile work environment, according to the subordinate employee.³⁸

The subordinate employee herself testified that, although she did not discuss a “hostile work environment” with the grievant or attribute it to the HR Director, she did “share” with him that she had told the HR Director that “I felt that there were some people who were not giving [the

³⁵ Agency Ex. 4.

³⁶ Hearing Recording 1:55:07-1:59:07 (second-step respondent’s testimony).

³⁷ Agency Ex. 26 at 8. Upon review of Agency Exhibit 26, it appears that only some of the respondent’s notes as reflected in this exhibit were contemporaneous with the second-step meeting, as they include and reference information gathered afterward. However, he testified that he was typing notes regarding the meeting with the grievant contemporaneously during the meeting. Hearing Recording at 1:51:05-1:52:00.

³⁸ Hearing Recording at 1:56:20-1:57:45 (second-step respondent’s testimony).

grievant] the tools and the resources, and not exchanging information,” and that this lack of facilitation was “impacting [his] ability to be successful.”³⁹

Consistent with the subordinate employee’s testimony, the grievant testified:

As I shared during [the second-step] discussion . . . I didn’t assert that the employee in question came to me because of the hostility she felt [the HR Director] was directing toward me, but instead noted that she talked with [the HR Director] about hostility she felt two of our coworkers . . . had toward me This whole conversation took place after we discussed all my grievance points I never asserted any other claims to be investigated

The points that were . . . given to me as issues [in the First Written Notice] . . . were coming to [the HR Director] from people who, I think, who did not have credible sources or the best intentions To solidify my point that people are going to [the HR Director] who I believe are not giving her fair or accurate information, I did at that point mention that someone came to me and they told me that they also believe that there are people who are not being fair toward me, and they went to [the HR Director] and they shared that with her.⁴⁰

In his decision, the hearing officer found that the agency “proved by a preponderance of the evidence that the Grievant’s conduct was in violation of the Standards of Conduct specifically making false statements and unethical conduct of the most serious nature and significantly impacting Agency operations” during the second-step meeting of the grievance process.⁴¹ The hearing officer also noted that, although the grievant offered testimony in his own defense, “the Grievant did not rebut the [second-step respondent] who testified in detail about the witness’s interview with the Grievant”⁴² Moreover, the hearing officer found that the grievant, “when given the opportunity to provide any information which would support Grievant’s statement, did not or could not.”⁴³

Under DHRM policy, “intentional misrepresentation of facts” is an example of unethical conduct, which generally merits disciplinary action at the Group III level.⁴⁴ As to the facts allegedly misrepresented in this case, nothing in the record suggests that the grievant would have had first-hand knowledge of what the subordinate employee actually told the HR Director. Moreover, the hearing decision does not indicate that the grievant’s broader allegations of hostility were false.⁴⁵ Rather, the Second Written Notice, as upheld by the hearing officer, essentially

³⁹ *Id.* at 2:45:35-2:47:10, 2:49:05-2:49:45 (subordinate employee’s testimony).

⁴⁰ *Id.* at 3:26:40-3:33:35 (grievant’s testimony).

⁴¹ Hearing Decision at 9.

⁴² *Id.* at 7.

⁴³ *Id.*

⁴⁴ DHRM Policy 1.60, *Standards of Conduct*, Att. A: “Examples of Offenses Grouped by Level,” at 2, 6.

⁴⁵ EDR observes that the charges articulated by the Second Written Notice appear overbroad to an extent that could easily create the appearance of retaliation, given that they arose from the grievance process itself. For example, the charging narrative details the grievant’s broader comments about the hostility he perceived, but nothing in the record

charges the grievant with lying to the second-step respondent about what the subordinate employee told him – that is, intentionally misrepresenting that other employees viewed the HR Director as hostile toward the grievant. As to this charge, the second-step respondent testified extensively as to how he clarified at the meeting precisely what the subordinate employee had told the grievant. In contrast, the grievant testified that he had relayed an account to the second-step respondent that was consistent with the subordinate employee’s testimony.

Based on the evidence in the record, the hearing officer could have concluded that the agency failed to meet the preponderance-of-the-evidence standard on grounds that both witnesses were equally credible as to what the grievant told the second-step respondent. But he instead concluded that the second-step respondent’s testimony about what the grievant said in the meeting was more credible, and EDR has no basis to question that determination. Although all discussions in the context of the grievance procedure should be open and resolution-oriented, management is not required to overlook instances of overt dishonesty merely because they occurred during the grievance process. In addition, 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. Accordingly, both the second-step respondent and the hearing officer in this case were entitled to draw conclusions about the grievant’s credibility and intentions – with the second-step respondent’s testimony and the grievant’s own testimony both subject to the hearing officer’s evaluation. 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.⁴⁶ Accordingly, notwithstanding our reservations about the use of formal discipline in connection with the grievance process, we perceive no reversible error in the hearing officer’s analysis with regard to the Second Written Notice in this case.

Third Written Notice

The Third Written Notice, issued at the Group II level, charged the grievant with failure to follow multiple policies, disruption of the workplace, falsifying records, and unethical conduct regarding the grievant’s discussion in the second-step meeting of Item Six charged in the First Written Notice (failing to properly onboard a new employee). Specifically, the Third Written Notice (again prepared by the second-step respondent) charged:

suggests that such comments, which are not unusual for employees to express in grievance discussions, could constitute misconduct. In addition, the Written Notice characterizes the grievant’s statements during the second-step meeting as “testimony” for the “official grievance record.” As explained above, the second-step meeting is a discussion, not a hearing, and is not to be recorded except by the written agreement of both parties. *Grievance Procedure Manual* § 3.2. These aspects of the charges would not appear to be consistent with the free and open discussion that the second-step meeting is meant to facilitate. However, because the hearing officer does not appear to have upheld the Second Written Notice on these grounds, we do not review them further here.

⁴⁶ See, e.g., EDR Ruling No. 2020-4976.

During our Second Step Resolution Meeting . . . [y]ou provided verbal testimony regarding follow-up on user access for one of your new employees, and you claimed to have several additional emails and verbal communications with the Information Security Officer (ISO) that would demonstrate that you made multiple attempts to follow-up After the 2nd step meeting, you provided only one email string regarding the Cardinal access issue. However, the email string provided did not contain subsequent follow-up attempts I interviewed the ISO to determine if he recalled any verbal follow-up requests, and he did not recall any verbal communication from you on the issue

Your testimony on this matter was factually inaccurate and proven to be false by your inability to provide any follow-up emails and the testimony of the ISO denying that you made any verbal follow-up request attempts. The fact that you made these inaccurate and false statements in our second step resolution meeting is unacceptable⁴⁷

In support, the second-step respondent testified that

[The grievant] claimed during our meeting that he had several emails with regard to follow up, he made several phone calls to [the ISO] [The ISO] was not aware of any verbal conversations with [the grievant] regarding this, not aware of any follow-up requests whether verbal or written After speaking with [the ISO], I determined [the grievant's claims in the second-step meeting] to be false.

I asked [by subsequent email] if there was any other evidence or documentation he wanted to provide, since he said there were several email and several phone calls The only contact [the grievant] made that we have evidence was providing the corrected form. That's not follow-up. That's submitting the form properly.⁴⁸

By contrast, the grievant testified to confirm the information he provided to the second-step respondent via email on March 8, 2023, two days after their meeting.⁴⁹ That information included an email from the grievant dated December 10, 2022, and his assertion that this email was "a follow up to the [November] 30 email that I sent [the ISO] [U]pon my return to the office [on December 8] I circled back with [the ISO and the affected employee]."⁵⁰ At the hearing, the grievant testified: "I made no other assertions other than [the information detailed in the March

⁴⁷ Agency Ex. 5.

⁴⁸ Hearing Recording at 2:06:45-2:11:17 (second-step respondent's testimony); *see* Agency Ex. 27 at 7. The second-step respondent's notes of the meeting do not provide additional details of what was said, but they are consistent with his hearing testimony that the grievant "claimed to have several emails and that he made multiple calls . . . to follow up and requesting updates." Agency Ex. 26 at 4.

⁴⁹ Agency Ex. 27 at 5-6.

⁵⁰ *Id.*

8 email]. I never said that I had any follow-up after [December] 10th Never did I make any assertions other than that.”⁵¹

The hearing officer upheld the Third Written Notice on the same grounds as the Second – that is, the agency proved by a preponderance of the evidence that the grievant made false statements to the second-step respondent, constituting unethical conduct.⁵² Based on our review of the record, the Third Written Notice was upheld essentially on grounds that, during the second-step meeting, the grievant intentionally misrepresented facts about how he followed up with appropriate persons to secure system/user access for one of his new employees.

However, as to the Third Written Notice, EDR is unable to identify evidence in the record to support the hearing officer’s findings as to the misconduct charged. A grievance allows an employee to challenge an agency action or omission that affects the grievant’s work.⁵³ This process typically involves conflicting perspectives, disputed facts, and different interpretations of the available evidence. The second-step meeting is an opportunity for the grievant to present their perspective and evidence to management via open discussion,⁵⁴ and they must be able to do so without fear of disciplinary action up to and including termination. During this open discussion, a grievant may present evidence in a light most favorable to the grievant and/or state claims about which the grievant is simply mistaken. In this context, a statement that the management respondent deems “inaccurate” is not, without more, grounds for discipline under DHRM Policy 1.60. To prove “intentional misrepresentation of facts” under the circumstances, the agency must present evidence that the grievant was not merely advancing their claims, but attempting to deceive or mislead the management respondent to base their decisions on facts that the grievant knows to be false.

Unlike its analysis of the Second Written Notice, the hearing decision does not include clear findings as to exactly what the grievant said to the second-step respondent during the meeting that amounted to an intentional misrepresentation. According to the second-step respondent, the false statements consisted of the grievant’s representations that he had “several” calls and emails with the agency’s ISO on the topic of his employee’s user access.⁵⁵ Ultimately, only one email was identified, and the ISO “was not aware of any verbal conversations” on the issue when asked.⁵⁶ Unlike the subordinate employee whose comments were at issue in the Second Written Notice, the ISO did not testify at the hearing. Also unlike the Second Written Notice, the grievant could – and did – subsequently produce his evidence for direct review.⁵⁷

Even assuming that the grievant incorrectly told the second-step respondent that he remembered multiple emails and calls about user access, we find nothing in the record to support

⁵¹ Hearing Recording at 3:36:30-3:37:54 (grievant’s testimony).

⁵² Hearing Decision at 9.

⁵³ *Grievance Procedure Manual* § 2.4.

⁵⁴ *Id.* at § 3.2.

⁵⁵ See Agency Ex. 5.

⁵⁶ *Id.*; Agency Ex. 26 at 4.

⁵⁷ See Agency Ex. 27 at 5-6.

a finding that these statements were an intentional misrepresentation aimed at deceiving the second-step respondent, given that the grievant effectively resolved any discrepancy shortly thereafter by disclosing the actual evidence. As a result, the hearing decision must be remanded for reconsideration of the Third Written Notice. To uphold this disciplinary action, the hearing officer must make additional findings as to what the grievant actually said about his evidence during the second-step meeting (*i.e.* the conduct charged) and what his intentions were (*i.e.* whether the conduct was misconduct), with appropriate citations to supporting evidence. If the record does not support findings that the grievant intentionally (or with willful disregard) misrepresented his evidence to management during the second step of the grievance process, then the Third Written Notice cannot be sustained.

Fourth Written Notice

The Fourth Written Notice, issued at the Group II level, charged the grievant with failing to follow instructions and multiple policies, as well as unethical conduct. Specifically, the Written Notice (again prepared by the second-step respondent) alleged:

I received your request to proceed to the 2nd step in your grievance with [four] attachments The next day . . . I began reviewing the documentation and contacted you regarding the missing Attachment A from the [Grievance Form A]. You responded to ask if I see all four attachments, and I replied that I did with the clarification that I was looking for an attachment referenced on Form A with more response details. I also reattached the Form A documentation I referenced, highlighting and circling in red the referenced attachment that was missing. You responded: “Got it . . . the attachments I was referencing are the three attachments provided. I didn’t place them on a form, as I was not aware they needed to go on a particular form. My understanding was to simply note you have an attachment and to ensure to include them with your Form A submission.” I then replied: “Oh no, I have your attachments I just don’t have the continuation of the first step response because it was not part of the attached form A.” You did not respond to my last email . . . any time prior to our 2nd Step Resolution Meeting

Despite three requests and providing a highlighted and red circled pdf to reference my specific ask, you failed to provide Attachment A of the First Step Response As a result, you did not provide me the full Grievance Form A and First Step Response Your failure to provide the full response documentation as requested is a failure to follow my instructions and willful misconduct⁵⁸

The hearing officer concluded that the grievant “failed to provide the full response documentation” to the second-step respondent when advancing his grievance, as charged.⁵⁹ Evidence in the record supports the hearing officer’s conclusions in this regard. The First

⁵⁸ Agency Ex. 6.

⁵⁹ Hearing Decision at 6, 9.

Grievance record indicates that it was initiated on or about February 15, 2023.⁶⁰ On February 23, 2023, the first-step respondent indicated as follows on the Grievance Form A:

I am unable to grant a portion of the relief requested, as you have failed to provide additional factual information to support rescinding the Group II Written Notice issued on January 18, 2023 (See Attachment A for my detailed response). However, I am able to grant your request, with the highest level of assurance, that you will be given an equitable opportunity to be successful with no threat or action of retaliation or hostility.⁶¹

The second-step respondent's request to the grievant for the full grievance record clarified that he was seeking the first-step respondent's "Attachment A."⁶² This Attachment A, as it appears in the agency's exhibits and in the grievance record initially provided to EDR in this matter, is a six-page document addressing the grievant's claims point by point.⁶³ There is no evidence that the grievant ever forwarded this attachment to the second-step respondent.

According to the grievance procedure, a grievant wishing to advance their grievance to the second management resolution step must "[i]ndicate on the Grievance Form A their intention to continue to the second-step meeting and submit the form to the second-step respondent."⁶⁴ As a matter of the grievance procedure, submission of the "form" would include attachments "joined with the grievance form in the resolution steps."⁶⁵ As such, it would appear that the grievant's failure to forward the first-step respondent's full response, with attachment, to the second-step respondent was not fully in compliance with the grievance procedure's requirements.

However, even assuming that the grievant failed to comply with the grievance procedure by not forwarding the first-step respondent's attachment, such a failure is not a legitimate basis for discipline under DHRM Policy 1.60. As discussed at the outset of this section, the procedures outlined in the grievance statutes are implemented, administered, and enforced by EDR under statutory authority granted to DHRM.⁶⁶ As the neutral administrator of the grievance procedure, we reserve the DHRM Director's authority to resolve issues of procedural compliance with finality. In doing so, we have never viewed procedural non-compliance as a disciplinary matter, recognizing that the process is severely undermined as a dispute-resolution method if employees fear that filing a grievance may result in disciplinary action. Accordingly, a grievant's non-compliance with the grievance procedure will rarely, if ever, be an appropriate basis for disciplinary action against the grievant under DHRM Policy 1.60.

⁶⁰ Agency Ex. 1 at 1.

⁶¹ *Id.*

⁶² Agency Ex. 27 at 1-2.

⁶³ Agency Ex. 1 at 32-38.

⁶⁴ *Grievance Procedure Manual* § 3.1.

⁶⁵ *Id.* at § 9.

⁶⁶ Va. Code § 2.2-1202.1(2), (3), (5).

Instead, the grievance procedure provides a specific process to address party non-compliance.⁶⁷ To the extent that a grievant fails to comply with any requirement of the grievance procedure, the grievance procedure provides that the agency may seek a remedy by: (1) notifying the grievant of the non-compliance, (2) allowing five workdays for grievant to correct the non-compliance, and (3) if needed, seeking a ruling from EDR, “which is authorized to issue final, nonappealable rulings on compliance challenges.”⁶⁸ While the agency did repeatedly tell the grievant exactly what portion of the grievance form was required, there is no indication that the agency followed the formal process for correcting the grievant’s non-compliance.

Our analysis of applicable policy does not change if a manager specifically instructs the grievant to comply with the grievance process. The grievant’s alleged misconduct in this case is a minor matter of compliance with the grievance process. The supervisor’s directive does not transform this noncompliance into a disciplinary matter under these facts. The grievance process provides parties adequate means to address such issues of non-compliance without resorting to an exercise of supervisory authority. Furthermore, it is EDR’s authority to determine the proper navigation of the grievance process by parties. Concluding otherwise would substantially erode EDR’s authority to enforce procedural compliance by allowing supervisors’ instructions to become an exception that swallows the rule.

Accordingly, EDR concludes that the behavior charged on the Fourth Written Notice does not constitute misconduct under state policy. Because the hearing officer’s findings to the contrary are not consistent with policy, the decision must be remanded for reconsideration in accordance with the policy interpretations as articulated in this ruling.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR concludes that the hearing decision is not fully consistent with the grievance procedure or state policy, to the extent described herein. EDR thus remands this case to the hearing officer for additional consideration of the evidence in the record and further findings and conclusions consistent with this ruling. Both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.⁶⁹

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.⁷⁰ Within 30 calendar days of a final hearing decision, either party may appeal the final

⁶⁷ *Grievance Procedure Manual* § 6.3.

⁶⁸ *Id.* at § 6.1, 6.3.

⁶⁹ *See Grievance Procedure Manual* § 7.2.

⁷⁰ *Id.* § 7.2(d).

decision to the circuit court in the jurisdiction in which the grievance arose.⁷¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁷²

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⁷¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁷² *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).