Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 11096, 11097; Ruling Date: April 9, 2018; Ruling No. 2018-4692; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2018-4692
April 9, 2018

The Department of Corrections (the "agency") has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's reconsideration decision in Case Number 11096/11097. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The hearing officer's findings of fact in his November 22, 2017 decision in Case Number 11096/11097, as recounted in EEDR's first administrative review in this case, EEDR Ruling Number 2018-4654, are hereby incorporated by reference.[1] In brief, the grievant was issued a Group III Written Notice with termination for workplace violence for allegedly threatening his Supervisor.[2] In the original hearing decision, the hearing officer determined that the agency had not presented sufficient evidence to show that the grievant engaged in the charged misconduct, rescinded the disciplinary action, ordered the agency to reinstate the grievant, and directed that he be provided with back pay for the period of his removal.[3] The agency requested administrative review from EEDR on the basis that the decision was inconsistent with state policy.[4]

In EEDR Ruling Number 2018-4654, this Office found that the hearing decision was not consistent with state policy because the hearing officer had not properly applied the provisions of DHRM Policy 1.80, *Workplace Violence*, and remanded the case to the hearing officer for reconsideration.[5] More specifically, EEDR noted that

> [a]gencies must assess the totality of the circumstances when determining whether an employee has made a threat, and an employee may engage in workplace violence without explicitly threatening bodily harm to another person. For example, veiled threats or other statements that could be interpreted or understood as threatening, either by the target of the statement and/or by other individuals, may constitute workplace violence. This may be the case regardless of whether the employee intends the statement as a threat. In determining whether an

[1] *See* Decision of Hearing Officer, Case No. 11096/11097 ("Hearing Decision"), November 22, 2017.
[2] *Id.* at 1, 3-4. The grievant was also issued a Group II Written Notice for another instance of alleged misconduct. *Id.* at 1. The Group II Written Notice was rescinded by the hearing officer and that decision has not been challenged by the agency. Accordingly, that issue will not be discussed in this ruling.
[3] Hearing Decision at 3-5.
[4] *See* EEDR Ruling No. 2018-4654.
[5] *Id.*

> employee's statement was threatening, agencies should consider the context of the statement and other surrounding circumstances, such as, for example, the employee's tone of voice and other behavior when making the statement, the employee's past conduct in the workplace, explanations or other clarification provided by the employee about nature of the statement, and any subjective fear of harm experienced by the target of the statement and/or other individuals. In short, if the agency makes a reasonable interpretation of the totality of the conduct as a threat, veiled or otherwise, it would meet the definition of "threatening behavior" prohibited by the policy. Accordingly, on remand, the appropriate consideration by the hearing officer is whether the agency's interpretation of the grievant's conduct as a threat was reasonable.[6]

In EEDR Ruling Number 2018-4654, the hearing officer was directed to "reassess the evidence in the record in light of the policy guidance set forth in this ruling and determine whether the totality of the evidence in the record supports a conclusion that the grievant's statement was properly considered in violation of the workplace violence policy such that the issuance of a Group III Written Notice was justified."[7]

The hearing officer issued a reconsideration decision on March 2, 2018.[8] In the reconsideration decision, the hearing officer provided the following additional discussion of the evidence in the record:

> The Agency issued Grievant a Group III Written Notice because Grievant "communicated a threat to [the] Assistant Principal … [that] if you think today was bad, wait until tomorrow."
>
> The Agency's interpretation of Grievant's conduct as a threat was not reasonable. The totality of the circumstances of this case do not provide a reason for disciplinary action.
>
> The Agency relied on the Supervisor's account of her conversation with Grievant and her reaction to that conversation. Grievant sat down and began telling the Supervisor he planned to go to the doctor to get a note to be taken out of work. The Supervisor reminded Grievant of the paperwork that he needed to complete before he left. She added some additional tasks. She began composing an email to Grievant as she spoke to him. Grievant became irritated while discussing the list. Grievant mentioned he intended to go to the doctor. The Supervisor cautioned Grievant to be mindful of what he does because he may want to return to State employment one day. Grievant said he had no intentions of returning and if she "thought what was going on is bad, then wait to see what is coming down the line." The context of the discussion was about additional work duties for Grievant to perform. This is consistent with Grievant's assertion that his comment was about his "office was in a shambles, I had tool inventory to do, the

[6] *Id.*
[7] *Id.*
[8] *See* Reconsideration of Decision of Hearing Officer, Case No. 11096/11097 ("Reconsideration Decision"), March 2, 2018, at 1.

monthly register, updates to make sure all the student files were accurate ….” In her written statement, the Supervisor admitted, “I did not know how to interpret [Grievant’s] statement.”

Grievant’s words did not constitute threatening behavior. His words did not cause a reasonable fear of injury to the Supervisor. The Supervisor’s opinion that Grievant intended to harm her was unreasonable speculation by the Supervisor and cannot form a basis for disciplinary action.

The Written Notice asserts that Grievant said to the Supervisor, “if you think today was bad, wait until tomorrow.” “Today” would have been June 7, 2017. The Florida shooting occurred on June 5, 2017 when a disgruntled former employee killed five employees before killing himself. This suggests Grievant’s comment was about his workload as he claimed and not the Florida shooting.

Grievant was prohibited from entering the Facility on June 8, 2017. After attempting to go to his desk and being denied admission to the Facility, Grievant met with the Human Resource Officer. She asked him if he had referenced the “Florida incident” because she wanted to clarify what he had said earlier. Grievant said, “I said to them that when you mess with someone’s job, something could happen like the incident in Florida, but I had 19 years and would not do anything like that.” He then told her the Agency could search his vehicle because he did not have any weapons.

The Agency relied on Grievant’s conversation with the Human Resource Officer to show that he referred to the Florida shooting when threatening the Supervisor. The Supervisor did not hear Grievant refer to the Florida shooting. The Agency did not present testimony from a person who heard Grievant’s comment when he made it. Thus, there is no way to establish the context or tone of his comment about the Florida shooting. The only evidence of Grievant’s statement about the Florida shooting comes from Grievant. Grievant said he “would not do anything like that.” The Agency seems to ignore this part of his statement, but doing so would be an arbitrary decision. Grievant’s statement about the Florida shooting as recounted by Grievant does not form a basis for disciplinary action.

The Agency elected not to take disciplinary action against Grievant for another comment he allegedly made about a shooting. On June 7, 2017, the Regional Principal presented Grievant with a Notice of Improvement Needed. Grievant told the Regional Principal, “this is why things like Columbine happen.” “Columbine” is a common reference to shooting massacre at a high school. When asked why she took no action regarding Grievant’s comment, the Regional Principal stated, “I did not give it a whole lot of energy because he said stuff like that all the time.” She said she was not afraid and did not think Grievant would do anything like that. The Agency cannot “bootstrap” this evidence to justify disciplinary action regarding Grievant’s comment to the Supervisor. The Agency did not discipline Grievant for this “Columbine” comment and did not place Grievant on notice that it considered that comment to be part of the disciplinary

> action relating to the Supervisor. In addition, the Hearing Officer is not convinced Grievant made the comment.

In the reconsideration decision, the hearing officer again determined that the agency had not presented sufficient evidence to show that the grievant had engaged in workplace violence as charged on the Written Notice, and rescinded the disciplinary action.[9] The agency now appeals the reconsideration decision to EEDR.

DISCUSSION

By statute, EEDR 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."[10] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[11]

In its request for administrative review, the agency essentially asserts that the hearing officer's findings of fact as set forth in the reconsideration decision, based on the weight and credibility that he accorded to the testimony at the hearing, are not supported by the evidence. More specifically, the agency argues that the hearing officer did not fully consider the context of the grievant's statement, including the Supervisor's subjective perception of the statement as a threat, the grievant's subsequent conversation with the Human Resource Officer, his alleged reference to the Florida shooting, and his history of previous behavior that led the agency to determine the statement was a threat.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

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[9] *Id.* at 3.
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

The agency argues that the hearing officer did not properly consider the Supervisor's subjective fear of harm when the grievant made the statement. In the reconsideration decision, the hearing officer stated that "[t]he Supervisor's opinion that Grievant intended to harm her was unreasonable speculation by the Supervisor and cannot form a basis for disciplinary action."[16] EEDR cannot determine how the hearing officer arrived at the conclusion that the Supervisor's perception constituted "unreasonable speculation." For example, at the hearing, the Supervisor testified that she felt harassed and intimidated by the grievant and experienced emotional distress as a result of the grievant's statement.[17] This evidence is not directly addressed in the reconsideration decision. The hearing officer must address the Supervisor's testimony on this issue, as well as any other relevant evidence about the Supervisor's perception of the statement, as part of totality of the circumstances the agency considered in determining that the grievant's statement was a threat.

The agency further contends that the hearing officer did not properly consider the evidence in the record about the grievant's reference to the Florida shooting as part of the context in which he made the statement. The hearing officer found that "[t]he Florida shooting occurred on June 5, 2017 when a disgruntled former employee killed five employees before killing himself."[18] The grievant allegedly threatened the Supervisor on June 7, 2017.[19] The hearing officer determined that this "suggest[ed] Grievant's comment was about his workload as he claimed and not the Florida shooting."[20] The hearing officer's conclusion on this issue is confusing, as the timeline of events alone would not be a sufficient basis for determining the grievant's intent when making the statement or referring to the Florida shooting. The hearing officer must clarify this discussion to indicate the impact of any reference the grievant made to the Florida shooting.

With regard to the grievant's alleged reference to the Florida shooting itself, the evidence in the record is conflicting. The Supervisor testified that the grievant did not talk to her about the Florida shooting.[21] The Human Resource Officer testified that, on the following day, the grievant said he had mentioned the Florida shooting to the Supervisor.[22] The Human Resource Officer explained that the grievant told the Supervisor "when you mess with someone's job, something will happen just like what happened in Florida." The Human Resource Officer further testified that the grievant told her he "wouldn't do anything" like that and offered to let the agency search his vehicle for weapons.[23] The grievant himself testified that he talked about the Florida shooting with the Supervisor because it was a topic in the news, but that he did not consider the statement to be a threat.[24] The hearing officer must fully discuss and bring coherence to these inconsistencies in the record with regard to the grievant's reference to the Florida shooting. In doing so, the hearing officer should make findings about the credibility of the witnesses who testified about this issue if such findings are a basis for his factual determinations. The hearing

[16] Reconsideration Decision at 2.
[17] Hearing Recording at 1:13:38-1:15:35 (testimony of Supervisor).
[18] Reconsideration Decision at 2.
[19] *See id*.
[20] *Id.*
[21] Hearing Recording at 1:04:45-1:05:09 (testimony of Supervisor).
[22] *Id.* at 1:58:06-1:59:39 (testimony of Human Resource Officer).
[23] *See id.*
[24] *Id.* at 4:36:31-46, 4:37:52-4:39:54 (testimony of grievant).

officer must clearly articulate what a preponderance of the record evidence supports regarding the reference to the Florida shooting.

The hearing officer additionally appears to rely on the grievant's clarification that "he 'would not do anything like'" the Florida shooting as a basis for his conclusion that the disciplinary action was not warranted.[25] For example, the hearing officer noted that "[t]he Agency seem[ed] to ignore this part of [the grievant's] statement, but doing so would be an arbitrary decision."[26] This portion of the grievant's statement to the Human Resource Officer was not included on the Written Notice, and the Human Resource Officer was unable to identify who made that decision.[27] While this piece of evidence could be relevant to an assessment of the totality of the circumstances in determining whether the grievant's statement was a threat, it is not dispositive to the question of whether the statement was, indeed, a threat.[28] Accordingly, the hearing officer must discuss this aspect of the grievant's statement more fully as part of the totality of the circumstances in this case.

Finally, the agency claims that the hearing officer erred in failing to consider the grievant's past conduct in the workplace as part of the totality of the circumstances that led the agency to consider the grievant's statement as a threat. In the reconsideration decision, the hearing officer noted that "[t]he Agency elected not to take disciplinary action against Grievant for another comment he allegedly made about a shooting. On June 7, 2017, the Regional Principal presented Grievant with a Notice of Improvement Needed. Grievant told the Regional Principal, 'this is why things like Columbine happen.' 'Columbine' is a common reference to shooting massacre at a high school."[29] The grievant allegedly made the comment about Columbine on June 7, 2017 – the same date he is alleged to have threatened the Supervisor. It is unclear whether this exchange was part of the same incident for which the grievant was disciplined or a separate incident, or whether the Regional Principal's testimony on this point is even credible. In addition, the Supervisor testified about other situations where the grievant was allegedly upset, cursing, and otherwise inappropriate.[30]

The hearing officer is correct that the grievant was not disciplined for referring to Columbine or for other past behavior. Such conduct could, however, be relevant in assessing the totality of the circumstances that led the agency to determine the grievant had threatened the Supervisor. For example, a history of other inappropriate workplace behavior may demonstrate that the agency had a valid basis to consider the grievant's statement as a threat. The hearing officer must discuss the grievant's alleged comment about Columbine (if the credible record evidence supports that it was made) in more detail and clarify when the comment was made, its context, and its impact on the agency's assessment of the grievant's statement. The hearing officer must also address other instances of allegedly inappropriate behavior on which the agency relied at the hearing to show that the grievant's statement should be deemed a threat. This consideration should, as with the other issues discussed above, include findings regarding the credibility of the witnesses who testified about these matters.

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[25] *See* Reconsideration Decision at 2-3.
[26] *Id.* at 3.
[27] *See id.*; Hearing Recording at 2:15:08-2:15:42 (testimony of Human Resource Officer).
[28] For example, an agency could appropriately consider an employee's unambiguously threatening statement as a threat even if it is followed by some kind of qualifying language like, "but I would never do that."
[29] Reconsideration Decision at 3.
[30] *E.g.*, Hearing Recording at 16:01-21:43 (testimony of Supervisor).

In its request for administrative review, the agency discusses its duty to protect employees, offenders, and others "by taking all potentially threatening statements seriously and properly weighing the magnitude and context of threats." In making such assessments, the agency argues that it "considers relevant factors" to determine the best course of action in a particular situation, and that agency management "arrived at the reasonable conclusion that the Grievant's statements constituted workplace violence" here. EEDR agrees that this is the proper analysis to be conducted when determining whether a threat has been made and the agency's submission points to relevant and compelling factors for such an analysis. In this case, however, the evidence in the record showing the manner in which this analysis occurred is limited at best. As discussed more fully above, the testimony of the agency's witnesses is often confusing and unclear with regard to the grievant's actual behavior, the order in which events occurred, and the significance of those events to agency management. In addition, many of the agency's written statements and other documents conflict with the witness testimony. In cases involving discipline, the burden is on the agency to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy.[31] The outcome of this case in light of these factors will necessarily depend on the hearing officer's assessment of the evidence presented by the parties, including the credibility of the witnesses who testified at the hearing and the corresponding weight he gives to their testimony. It is not clear from EEDR's review of the reconsideration decision that the hearing officer fully considered all of the evidence in the record on the particular issues discussed above in concluding that the discipline should be rescinded. For these reasons, the reconsideration decision must be remanded to the hearing officer.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration of the evidence in the record to the extent discussed above. Once the hearing officer issues his second reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).[32] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[33]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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[31] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[32] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[33] *See Grievance Procedure Manual* § 7.2.
[34] *Id.* § 7.2(d).
[35] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).