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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2019-4878
April 2, 2019

The Department of Juvenile Justice (the “agency”) has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11223. For the reasons set forth below, EDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11223, as found by the hearing officer, are incorporated herein by reference.² In this case, the grievant was terminated as a result of receiving seven separate Written Notices in May 2018.³ The grievant timely grieved the disciplinary actions and a hearing was held on multiple dates, concluding September 26, 2018.⁴ In a decision dated February 14, 2019, the hearing officer upheld four of the seven Written Notices and the grievant’s termination.⁵ The agency has only appealed the hearing officer’s rescission of one of the Written Notices.⁶ In that Written Notice (called the Fifth Written Notice in the hearing decision), the grievant was disciplined for transmitting a personnel record (an agency manager’s response to another employee’s grievance) to the Chief Judge.⁷ The Written Notice indicates that the grievant’s actions were contrary to state policy (DHRM Policy 6.05, *Personnel Records Disclosure*).⁸ The hearing officer found that the agency did not present

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Decision of Hearing Officer, Case No. 11223 (“Hearing Decision”), February 14, 2019, at 2-27.

³ *Id.* at 1.

⁴ *See id.*

⁵ *Id.* at 39.

⁶ EDR received no request for administrative review from the grievant. The grievant also submitted no rebuttal to the agency’s appeal.

⁷ Hearing Decision at 33.

⁸ Agency Exhibit B at 9.

sufficient evidence to support the disciplinary action.⁹ The agency now appeals that portion of 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.”¹⁰ 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.¹¹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹² The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

The agency alleges that the hearing officer’s interpretation of DHRM Policy 6.05, *Personnel Records Disclosure*, was in error. Based on the language of the policy, the hearing officer interpreted the policy’s definition of “third party” to only include individuals who request records from the agency.¹³ Because the Chief Judge, to whom the grievant provided the record, had not requested the record, the hearing officer determined that the grievant had not provided the record to a “third party”.¹⁴ While a strict interpretation of the definitional language could reach this result, doing so effectively renders the policy disconnected from its intended purpose.

Inasmuch as DHRM Policy 6.05 was written, at least in part, to ensure compliance with the Government Data Collection and Dissemination Practices Act,¹⁵ the purpose of the policy is to protect the privacy, and personal information, of data subjects.¹⁶ As applied to the personnel records listed in the policy,¹⁷ this means that such records are not to be disclosed to individuals other than the subject of the records without the consent of that person, unless otherwise authorized.¹⁸ If this policy only prevented the disclosure of an employee’s personnel records to other individuals if such individuals requested them, the policy would not protect the privacy interests of employees. Under the hearing officer’s interpretation, a supervisor could freely disclose any confidential personnel records about an employee to whomever they wished as long as that person never asked for the records specifically. The hearing officer’s interpretation of the policy is, therefore, inconsistent with DHRM’s understanding and the intent of the policy. The prohibition on disclosure of personal information to third parties is not to be predicated on the third party having requested the information.

⁹ Hearing Decision at 34-35.

¹⁰ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹¹ See *Grievance Procedure Manual* § 6.4(3).

¹² Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹³ Hearing Decision at 34. The policy explicitly defines “third parties” as “[i]ndividuals other than the subjects of the records, including other state agencies, who request information from the records maintained by agencies.” DHRM Policy 6.05, *Personnel Records Disclosure*.

¹⁴ *Id.*

¹⁵ See *id.*

¹⁶ See Va. Code § 2.2-3800.

¹⁷ See DHRM Policy 6.05, *Personnel Records Disclosure*.

¹⁸ See *id.*

To the extent the hearing officer's determination as to the Fifth Written Notice was entirely based on the finding that the Chief Judge was not a "third party" under the hearing officer's interpretation of the definitional language, that portion of the decision must be revised. Accordingly, EDR remands the case to the hearing officer for reconsideration of this matter. The hearing officer is directed to reapply the policy consistent with DHRM's interpretation above. This ruling makes no findings as to whether the grievant's conduct was nevertheless permissible under the policy on another basis or whether the Written Notice is otherwise supported by the record.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for revisions and reconsideration consistent with this ruling. Once the hearing officer issues his 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 or first reconsidered decision).¹⁹ Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁰

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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¹⁹ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²⁰ See *Grievance Procedure Manual* § 7.2.

²¹ *Id.* § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).