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ADMINISTRATIVE REVIEW

In the matter of the Department of Motor Vehicles
Ruling Number 2022-5325
February 24, 2022

The Department of Motor Vehicles (the "agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11715. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

On May 6, 2021, the agency issued to the grievant a Group II Written Notice with five-workday suspension for failure to follow policy.[1] The grievant timely grieved the disciplinary action and a hearing was held on October 15, 2021.[2] The relevant facts in Case Number 11715, as found by the hearing officer, are incorporated into this ruling by reference.[3] In a decision dated November 4, 2021, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant engaged in misconduct warranting a Group II Written Notice and that there were no circumstances warranting mitigation of the discipline.[4] However, the hearing officer went on to rescind the five-workday suspension, finding that it was retaliatory because the agency "compell[ed the grievant] to choose between avoiding suspension if she waived her grievance rights and exercising her grievance rights and receiving a five workday suspension."[5] The agency now appeals the hearing 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 . . . ."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in

[1] Agency Ex. at 3-4.
[2] Decision of Hearing Officer, Case No. 11715 (Hearing Decision), Nov. 4, 2021, at 1.
[3] *Id.* at 2-4.
[4] *Id.* at 4-5.
[5] *Id.* at 5-6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

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 alleges that the hearing officer erred in finding that its imposition of a five-workday suspension accompanying the Written Notice was retaliatory, contending that its action here was "in good faith and never intended as intimidation or retaliation."[9] The agency also notes that the grievance procedure does not prohibit "bargaining over the level of discipline for established misconduct," relying upon Section 1.2 of the *Grievance Procedure Manual* as support for the practice of resolving workplace disputes informally, which it claims was the purpose of the negotiation process here.[10] The agency further argues that it gave the grievant an opportunity to consider the two options and seek guidance without forcing her into choosing to retain or waive her grievance rights.[11] Regarding the issue of retaliation, the agency states that the grievant did not engage in protected activity prior to making the choice to retain her grievance rights and receive the five-workday suspension, and "thus there could be no retaliation."[12] The agency additionally alleges that the hearing officer substituted his judgment for that of the agency in rescinding the suspension because the agency has the discretion to impose a suspension of up to 10 workdays when issuing a Group II Written Notice.[13] Finally, the agency argues that allowing the hearing officer's decision to stand will have a chilling effect on agencies' willingness to resolve employee grievances because all potential settlements may be viewed as retaliatory by hearing officers.[14]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[16] Further, the hearing officer reviews the facts *de novo* to determine whether the cited actions are supported by the facts, law, and policy.[17] 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 the hearing decision, the hearing officer found that the agency offered the grievant two options before issuing the Group II Written Notice to her:

> The Agency sent Grievant an "Options Relating to Disciplinary Action" before it issued disciplinary action as follows:

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[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 2.
[10] *Id.*
[11] *Id.* at 2-3.
[12] *Id.* at 3.
[13] *Id.* at 4.
[14] *Id.* at 4-5.
[15] Va. Code § 2.2-3005.1(C).
[16] *Grievance Procedure Manual* § 5.9.
[17] *Rules for Conducting Grievance Hearings* § VI(C).

> You have received a draft Group II Written Notice with 5 day suspension without pay for failing to follow your supervisor's instructions. However, DMV has decided to give you two options which are described below:
>
> *Option 1: The attached draft Group Written Notice with a 5 day suspension without pay will be finalized—dated and signed—and placed in your personnel file. If you accept this option, you are free to use the state's grievance procedure to challenge the Written Notice and suspension without pay.*
>
> ***OR***
>
> *Option 2: The attached Group II notice only will be issued. There will be no suspension without pay. However, if you choose option 2, you will waive your right to use the grievance procedure to challenge the written notice.*
>
> You have 2 business days to consider these two options and select one. You are encouraged to seek counsel and advice from others including, but not limited to, the Department of Human Resource Management's Office of Employment Dispute Resolution at 1-888-232-3842 for information about the grievance process and other employment related advice. You must inform me—in writing—of the option you ultimately select. This is to be accomplished by emailing your decision to [email address] your written decision must clearly state which option you have selected: Option (1) the Group II Written Notice with 5 day suspension or Option (2) the Group the Group II written notice with no suspension and, no grievance. If we hear nothing from you by the specified time indicated, the Group II Written Notice with the suspension will be finalized and issued.

Grievant elected to exercise her rights under the grievance procedure. The Agency issued the Written Notice as a Group II with a five workday suspension on May 6, 2021. If Grievant had declined to file a grievance, the Agency would have issued to her a Group II Written Notice without suspension.[18]

After finding that the issuance of the Group II Written Notice was supported by the evidence and that there were no mitigating circumstances warranting reduction of the discipline,[19] the hearing officer went on to address the agency's imposition of a five-workday suspension as follows:

> If an employee chooses not to file a grievance for fear of being suspended, that employee has not made an independent and free decision to refrain from filing a grievance. The employee has not acted voluntarily.

[18] Hearing Decision at 3-4.
[19] *Id.* at 4-5.

The Agency retaliated against Grievant by compelling her to choose between avoiding suspension if she waived her grievance rights and exercising her grievance rights and receiving a five workday suspension. In Jones v. Va. Commonwealth University, 2021 U.S. Dist. LEXIS 2530, the Court held:

> According to the Fourth Circuit, direct evidence of retaliation is "evidence that the employer 'announced, admitted, or otherwise unmistakably indicated that [the forbidden consideration] was a determining factor'" in the challenged conduct. Stover v. Lincoln Pubrg., Inc., 73 F.3d 358, [published in full-text format at 1995 U.S. App. LEXIS 37129] 1995 WL 764180, at *2 (4th Cir. 1995) (alteration in original) (quoting Cline v. Roadway Express, Inc., 689 F.2d 481, 485 (4th Cir. 1982)). The Eighth Circuit more recently stated that "[d]irect evidence of retaliation is evidence that demonstrates a specific link between a materially adverse action and the protected conduct, sufficient to support a finding by a reasonable fact finder that the harmful adverse action was in retaliation for the protected conduct." Young-Losee v. Graphic Packaging Int 'l, Inc., 631 F.3d 909, 912 (8th Cir. 2011).
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> Here, VCU made Jones choose between continuing to pursue her first EEOC charge and participating in the University's internal grievance process. The Court recognizes that VCU's enforcement of its "one or the other" policy did not preclude Jones from ever pursuing her EEOC complaint; VCU forced this choice at a time when Jones would still have time to refile her EEOC complaint after the conclusion of the internal process. [*13] But VCU's policy delayed Jones's access to her Title VII remedies, and a successful Title VII claimant can suffer tremendous harm because of a delayed remedy. Thus, the Court finds that Jones sufficiently pleads direct evidence of retaliation.

In this case, the Agency forced Grievant to choose between exercising her grievance rights or losing a week's pay. The Agency's objective was to force Grievant to refrain from challenging its disciplinary action. If she did not waive her right to file a grievance, the Agency would punish her with a five workday suspension. In other words, if Grievant chose to exercise her protected grievance rights she would suffer the materially adverse action of suspension.[20]

The agency contends that the hearing officer erred by finding that its decision to offer the grievant the choice of either waiving her grievance rights and receiving a Group II Written Notice without suspension or retaining her grievance rights and receiving a Group II Written Notice with a five-workday suspension constituted retaliation. In support of its position, the agency states that it "never issues discipline unless the discipline is fully warranted based on the totality of provable

[20] *Id.* at 5-6.

evidence" and "never issues excessive discipline."[21] As an example, the agency describes its routine practice of issuing Group II Written Notices with a five-workday suspension except in cases where the grievant agrees to waive their grievance rights in return for the agency not imposing a suspension.[22]

The agency's current practice when issuing Group II Written Notices to employees may well be uniform in its application, as the agency has alleged. However, the approach described by the agency appears to be that employees receiving Group II Written Notices will be split into two categories: those who are suspended and those who are not. The only differentiating factor in those cases appears to be whether the employee chose to file a grievance. The agency's practice can be described, generally speaking, as employees who file grievances receive a harsher punishment (suspension) than those that choose not to file grievances. Although the grievance procedure encourages parties to discuss and, ideally, resolve work-related concerns informally,[23] any such discussions must be conducted "freely" and "without retaliation."[24] In this case, the hearing officer clearly found that the agency's negotiation with the grievant was not free of retaliation and therefore rescinded the suspension. Specifically, the hearing officer found that the choice presented to the grievant had the effect of forcing her to select "between exercising her grievance rights or losing a week's pay."[25] As a result, the hearing officer determined that the agency imposed an adverse employment action—a five-workday suspension without pay—because the grievant elected to retain her grievance rights and challenge the Written Notice.[26]

The agency's arguments on administrative review identify a number of alleged errors in the hearing officer's conclusion about this matter, but the agency has not identified any evidence that the hearing officer failed to consider in making his determination that the suspension was retaliatory. For example, the agency maintains that the negotiation process was "never intended as intimidation or retaliation,"[27] noting that it offered the grievant 48 hours to seek guidance from EDR and that its decision to offer the grievant "an opportunity for the certainty of a more favorable outcome" by waiving her grievance rights "is hardly forcing an employee to give up a right."[28] The agency further challenges the hearing officer's reliance on *Jones v. Virginia Commonwealth University*[29] in finding that the suspension was retaliatory.

Jones addressed the defendant's motion to dismiss on the basis that the plaintiff had failed to state a claim of retaliation.[30] Though the agency correctly notes that *Jones* involved Title VII's anti-retaliation provision rather than the Code of Virginia's prohibition on retaliation against employees for using the grievance procedure,[31] we find no error in the hearing officer's discussion of *Jones* as analogous authority in finding that the agency's suspension was improper. Indeed, the underlying facts of *Jones* and the present case are similar. In *Jones*, the plaintiff filed a complaint

[21] Request for Administrative Review at 1.
[22] *Id.* at 1-2.
[23] Va Code. § 2.2-3000(A); *Grievance Procedure Manual* § 1.2.
[24] *Id.*
[25] Hearing Decision at 6.
[26] *Id.*
[27] Request for Administrative Review at 2.
[28] *Id.* at 3.
[29] 2021 U.S. Dist. LEXIS 2530 (E.D. Va. Jan. 6, 2021).
[30] *Id.* at *2.
[31] Request for Administrative Review at 3; *see* Va. Code § 2.2-3004(A).

through the defendant's grievance procedure after her employment was terminated.[32] She later filed a charge of discrimination with the EEOC.[33] The defendant notified Jones that its grievance policy prohibited consideration of a grievance "if there are also matters being adjudicated through 'another university, state or federal process.'"[34] Jones withdrew her EEOC charge to ensure that her grievance with the defendant would proceed.[35] The court found that "VCU made Jones choose between continuing to pursue her first EEOC charge and participating in the University's internal grievance process."[36] Even though Jones was not precluded by the defendant's policy from refiling her EEOC complaint later, the court noted that "*but for* filing her EEOC charge, VCU would have allowed Jones's grievance to proceed through the internal process," which "would have dissuaded a reasonable worker . . . from continuing to pursue her EEOC complaint."[37]

In the present case, the agency does not dispute that it offered the grievant the choice to waive her grievance rights and receive a Group II Written Notice without an unpaid suspension. If she chose to retain her grievance rights, she would also be suspended for five workdays. The hearing officer found that this choice had the effect of threatening to impose an adverse employment action (*i.e.* a one-week loss in pay) if the grievant did not waive her grievance rights. The grievant had not, at this point, engaged in protected activity because she had not yet filed a grievance, but the hearing officer found that the choice before her nonetheless left her with no option but to accept a loss in pay if she wished to retain her grievance rights and challenge the disciplinary action. Like *Jones*, the agency's policy did not necessarily "force" the grievant into a particular course of action. Notwithstanding any other efforts the agency might have made to provide the grievant with information and an opportunity to consider these options, the hearing officer found that the agency had attempted to dissuade her from retaining her grievance rights with the threat of additional punishment unless she elected to waive them. Having carefully considered the agency's arguments on this issue, we find no error in the hearing officer's analysis of the agency's offer to the grievant and the adverse action she experienced because of her choice.

The agency further asserts that the hearing officer "wrongly substituted his judgment for that of the agency" by rescinding the suspension and implying that "the normal discipline for Group II misconduct should include no suspension."[38] EDR does not interpret the decision to endorse or require such a practice. The hearing officer specifically found that the agency's action in this particular case had the effect of retaliating against the grievant for choosing to retain and exercise her grievance rights. Nothing in the decision limits agencies from considering the appropriate level of discipline or suspension to impose in a specific case, so long as the action is consistent with DHRM Policy 1.60, *Standards of Conduct*. As the agency has accurately noted, Policy 1.60 allows agencies to suspend an employee for up to 10 workdays when issuing a Group II Written Notice, based on evidence available about the alleged misconduct.[39] The hearing officer's decision does not limit or abridge that discretion.

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[32] *Jones*, 2021 U.S. Dist. LEXIS 2530, at *5.
[33] *Id.*
[34] *Id.*
[35] *Id.* at *5-6.
[36] *Id.* at *12.
[37] *Id.* at *13-14.
[38] Request for Administrative Review at 3.
[39] DHRM Policy 1.60, *Standards of Conduct*, at 8-9.

In addition to its claims regarding the hearing officer's factual determinations and application of policy in this case, the agency's request for administrative review also raises broader questions about its practice of negotiating the level of discipline imposed upon an employee in return for a waiver of their grievance rights. The agency argues that it has consistently pursued this practice for several years and sought guidance from EDR in 2016, "prior to adopting such negotiation as a regular practice."[40] According to the agency, EDR "expressed no objection to such negotiation."[41] The agency also questions whether the hearing officer's decision will discourage agencies from offering employees the option to resign in lieu of termination.[42] The agency appears to believe the decision will "effectively eliminate this common practice" because that option "would seem to be viewed as suspect."[43]

Although the agency alleges that it made EDR aware of this practice and EDR had no objection, the evidence it has offered to support this argument on administrative review does not address the factual situation presented by the case: the issuance of a Group II Written Notice with or without suspension, dependent upon the employee's decision to waive their grievance rights. The communication with EDR that the agency has presented about this issue primarily concerns offering employees the option to resign in lieu of termination, which would ordinarily prevent an employee from having access to the grievance procedure.[44] EDR has long held that an employee who voluntarily resigns in lieu of termination does not have access to the grievance procedure to challenge their separation,[45] consistent with Section 2.3 of the *Grievance Procedure Manual*. A critical factor in EDR's analysis of cases involving a resignation in lieu of termination is whether the agency "actually lacked good cause to believe that grounds for termination existed."[46] When there is evidence of some level of reasonably alleged misconduct that would support termination, an agency may appropriately offer an employee the choice of resigning in lieu of termination.[47] Nothing in the hearing officer's decision or in this ruling is meant to prevent agencies from accepting an employee's voluntary resignation in lieu of termination.

EDR has not previously addressed the negotiation practice presented by this case, where the sole distinction in the discipline imposed in return for the employee's waiver of grievance rights is an unpaid suspension. Consistent with our mission to promote diverse methods of dispute resolution, EDR generally honors agreements by parties that involve waiving grievance rights in service of resolving a conflict, provided such agreements appear to be voluntary. We note that the issue of whether an employee voluntarily agrees to certain terms is distinct from whether the agency had a retaliatory motive in offering such terms or whether the offer produces a retaliatory effect. EDR also notes that an agency's practices must be consistent with state and agency policy.

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[40] Request for Administrative Review at 1.
[41] *Id.*
[42] *Id.* at 4-5.
[43] *Id.* at 5.
[44] *Grievance Procedure Manual* § 2.3.
[45] *E.g.*, EDR Ruling No. 2021-5142.
[46] Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174-75 (4th Cir. 1988) (citations omitted).
[47] When an employee attempts to initiate a grievance following a resignation, EDR assesses whether the resignation was involuntary or the employee was otherwise constructively discharged. *See Stone*, 855 F.2d at 174 (discussing the circumstances under which a resignation may be viewed as involuntary). If the employee does not resign and chooses to accept termination, thereby retaining their access to the grievance procedure, a viable retaliation claim would entail evidence that the agency would have permitted the employee to retain their employment but for some protected activity.

Nothing in state policy or the grievance procedure directly addresses whether an agency may negotiate a reduced penalty with an employee under the circumstances presented by this case. In consultation with DHRM's Policy Administration team, DHRM interprets Policy 1.60, *Standards of Conduct*, to preclude agencies from negotiating the level of discipline imposed *in advance of issuing a Written Notice*, whether that relates to the level of offense (Group I, II, or III), suspension, or other penalty, in return for a waiver of grievance rights. Agencies must issue discipline based on the evidence about the alleged misconduct available to them at the time, after considering mitigating factors and any other relevant circumstances.[48] The grievance procedure provides a means for parties to resolve disputes regarding the issuance of discipline during the management steps. Resolution options may include an offer to reduce or rescind disciplinary action for appropriate considerations,[49] and may involve an agreement by the employee to conclude the grievance in return for the reduction or rescission of disciplinary action that the agency initially determined to be appropriate under Policy 1.60. Moreover, as discussed above, an employee may choose to resign in lieu of termination consistent with any applicable legal requirements and EDR's longstanding analysis of that issue. Though we understand the agency's concern about the impact of this case, nothing in the hearing officer's decision or this ruling abridges an agency's discretion to resolve a grievance during the management steps, including by reducing or rescinding discipline, or offer an employee the choice of resigning in lieu of termination, so long as it carries out those actions consistent with applicable policy and law.

In summary, after conducting a thorough review of the hearing record, EDR finds there is evidence to support the hearing officer's conclusions in this case. In the absence of any indication that the hearing officer failed to consider the evidence in the record on the material issues, EDR has no basis to disturb his decision. Though the agency may reasonably disagree with the hearing officer's factual conclusions, weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. 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.[50] Nothing in the record suggests that the hearing officer's factual findings or application of policy in this case abused his discretion or otherwise improper. The agency has presented no basis within EDR's authority to intervene in the outcome of this matter. Accordingly, EDR cannot substitute its own judgment for that reflected in the hearing decision.

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.[51] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

[48] Accordingly, we do not read the hearing decision to mean that "an exchange of consideration" would be suspect at any stage, as the agency has suggested. *See* Request for Administrative Review at 5. However, it may be suspect if it occurs before the agency has established the penalty most appropriate for the misconduct charged under Policy 1.60, as the hearing officer concluded was the case here. An agency should not generally hand over to an employee the choice of outcome of a disciplinary action.
[49] *Grievance Procedure Manual* §§ 3.1, 3.2, 3.3.
[50] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[51] *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.[52] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[53]

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[52] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[53] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).