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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5162
October 16, 2020

The grievant 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 11536. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11536, as found by the hearing officer, are as follows:[1]

> The Department of Corrections [the "agency"] employs Grievant as a Corrections Lieutenant at one of its facilities. He has been employed by the Agency since 2007. No evidence of prior active disciplinary action was introduced during the hearing.
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> On January 10, 2020, the Secretary questioned Grievant about his absence for a supervisor's security meeting on January 6, 2020. The Secretary told Grievant he needed to provide her with a 24-hour notice before being absent in the future from such a meeting. Grievant did not report to the Secretary and she had no authority to instruct him as to when he had to give her notice of his possible absence. Grievant told the Secretary he was in the emergency room on Monday, January 6, 2020, and had called the institution on Sunday night to report that he was sick and would not be at work on the following day. The Secretary told Grievant, "You are trying to be a pain in my ass." Grievant replied, "No, but I can be a pain in your ass if you want me to." Grievant did not intend his words to be sexual innuendo. The Secretary construed Grievant's words to be sexual innuendo.
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> The Secretary had shoulder-length hair.

[1] Decision of Hearing Officer, Case No. 11536 ("Hearing Decision"), September 8, 2020, at 2-3.

> On January 14, 2020, the Secretary was leaving the compound. She was waiting for a locked door to be opened. Grievant was to the Secretary's right side and the Unit Manager was on the Secretary's left side. Grievant used his forefinger and thumb to touch the Secretary's hair. He pulled his hand in a downward motion to where her hair touched her shoulders. Grievant said, "I see you got your hair colored. It looks nice." When the door opened, the Secretary quickly exited to avoid Grievant.
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> Grievant's behavior was not welcomed by the Secretary. It made her feel uncomfortable. The Secretary felt like she was being patted "like a dog." Grievant is "very tall" and the Secretary is "very short". Their height disparity added to the Secretary's level of discomfort. Grievant made the Secretary feel so uncomfortable that she sometimes locked her office door and remained in her office to avoid encountering Grievant.

On April 21, 2020, the agency issued to the grievant a Group II Written Notice of disciplinary action with suspension for violating DHRM Policy 2.35, *Civility in the Workplace*.[2] The grievant timely grieved the Written Notice, and a hearing was held on August 17, 2020.[3] In a decision dated September 8, 2020, the hearing officer determined that the Group II Written Notice "must be upheld" on grounds that the grievant "engaged in workplace harassment" when he touched the Secretary's hair.[4] The hearing officer also found no mitigating circumstances meriting reduction of the disciplinary action.[5] 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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a 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.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record

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[2] Hearing Decision at 1. The Written Notice also cited the agency's own policy prohibiting workplace harassment. *See* Agency Ex. 1.
[3] Hearing Decision at 1.
[4] *Id.* at 3.
[5] *Id.* at 4.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005.1(C).

for those findings."[10] 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.[11] 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.[12] 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 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 finding that the instance of touching the Secretary's hair constituted workplace harassment meriting a Group II Written Notice.[13] He contends that his action was not denigrating or hostile and did not unreasonably interfere with the Secretary's work; thus, he argues this incident did not constitute harassment as defined by the applicable policies.[14]

DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment, defined as "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person . . . ."[15] Policy 2.35 also places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue.[16] In his decision, the hearing officer found that the grievant "touched the Secretary's hair without her permission," which "denigrated" her and caused her to "become upset, quickly leave the Facility, and avoid him at work."[17] This interaction, the hearing officer determined, was sufficient to support a Group II Written Notice.[18]

Evidence in the record supports the hearing officer's findings. The Secretary testified extensively about the manner in which the grievant touched her hair: "he ran his hand through the

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[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] *See* Request for Administrative Review.
[14] *Id.*
[15] Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity. However, DHRM Policy 2.35 also recognizes non-discriminatory workplace harassment. Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. *See* DHRM Policy 2.35, *Civility in the Workplace*; *Policy Guide – Civility in the Workplace: Policy 2.35 Prohibited Conduct/Behaviors.*
[16] Under Policy 2.35(D)(4), "[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."
[17] Hearing Decision at 3.
[18] *Id.*

bottom few inches of my hair . . . . It felt like I was being petted like a dog . . . . He was pulling his hand down through my hair, like stroking his hand through the strands of hair in a downward motion. . . ."[19] The Secretary also testified that this contact made her feel "extremely uncomfortable" because she was relatively new to the facility and physically much smaller than the grievant.[20] Since the incident, she testified, "he makes me really uncomfortable. I just feel like every time I come in to work, when he's working I have to lock myself in the office . . . . I'm just trying to make sure that I'm not alone in his presence."[21] In addition, the agency presented testimony that discipline at the Group II level was deemed appropriate in consideration of similar incidents involving other employees, as well as the grievant's otherwise positive work history as a mitigating factor.[22]

In upholding the disciplinary action, the hearing officer also noted that state policy recommends discipline at the Group II level for "more severe" offenses.[23] DHRM Policy 1.60, *Standards of Conduct*, and its associated guidance provide examples of Group II offenses such as a failure to follow a supervisor's instructions, violation of a safety rule, or leaving work without permission.[24] Moreover, offenses under DHRM Policy 2.35, *Civility in the Workplace*, may merit discipline at any level, "depending on the nature of the offense."[25] Whether or not the grievant in this case had a subjective intent to denigrate the Secretary, conduct prohibited by Policy 2.35 is assessed according to whether an objective "reasonable person" would have found the conduct offensive or inappropriate.[26] Here, while the grievant maintains that touching the Secretary's hair is not "denigrating" by his understanding of that term,[27] an objective, reasonable person could easily perceive a clear disregard for physical boundaries at work as denigrating, disrespectful, and/or offensive. Here, the hearing officer concluded that the agency proved the grievant's conduct met this standard for harassment. Because that conclusion is based on evidence in the record and supported by applicable policies, EDR finds no basis in the record to disturb the decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration 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.[28] Within 30 calendar days of a final hearing decision, either party may appeal the

[19] Hearing Recording 19:30-24:55 (Secretary's testimony).
[20] *Id.* at 12:50-13:40.
[21] *Id.* at 13:50- 14:24.
[22] *Id.* at 1:10:10-1:12:20 (Warden's testimony).
[23] *See* Hearing Decision at 3.
[24] DHRM Policy 1.60, *Standards of Conduct*, Att. A.
[25] *Id.* at 2; *see* DHRM Policy 2.35, *Civility in the Workplace*, at 4.
[26] *Policy Guide – Civility in the Workplace: Policy 2.35 Prohibited Conduct/Behaviors*, at 1.
[27] The grievant argues that to "denigrate" means to "criticize unfairly" or "disparage." Request for Administrative Review. EDR declines to read the anti-harassment provisions of DHRM Policy 2.35 to be limited to the grievant's proffered definition.
[28] *Grievance Procedure Manual* § 7.2(d).

final decision to the circuit court in the jurisdiction in which the grievance arose.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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