Issue: Administrative Review of Hearing Officer's Decision in Case No. 11096, 11097; Ruling Date: January 18, 2018; Ruling No. 2018-4654; 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 2018-4654
January 18, 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 decision in Case Number 11096/11097. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11096/11097, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as an instructor at one of its facilities. Grievant had been employed by the Agency for approximately 19 years.
>
> On several occasions, Grievant told the Supervisor that he intended to leave the Agency for medical reasons. Although he was reminded to file the appropriate paperwork, Grievant did not initiate the process to leave the Agency for medical reasons.
>
> On June 7, 2017 at approximately 4 p.m., Grievant entered the Supervisor's office and asked what happened with the situation regarding her key card. She said that an incident report was completed and the key card was deactivated. Grievant said, "Is that it?" The Supervisor responded "yes." 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 Supervisor asked Grievant, "What did you say?" Grievant turned around as he was walking out of the Supervisor's office and repeated his statement.

[1] Decision of Hearing Officer, Case No. 11096/11097 ("Hearing Decision"), November 22, 2017, at 2-3.

The Supervisor did not report to work on June 8, 2017. He feared Grievant intended to return to the Facility to harm her.

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 the HRO the Agency could search his vehicle because he did not have any weapons.

Mr. S worked as an HVAC teacher at the Facility. He developed a training presentation containing materials to teach inmates about the HVAC trade. He obtained permission from an Agency manager to insert pictures of women in bikinis among the presentation slides to keep inmates interested in an HVAC presentation that might otherwise be boring. Approximately 29 pictures of mostly women wearing bikinis were placed on a flash drive along with training materials relating to heating and air conditioning training in 2015. At some point, the presentation was transferred to Grievant. After Grievant's removal, a flash drive was found in Grievant's desk containing the training materials and the pictures.

The Agency also conducted a review of the websites Grievant accessed during his work hours. The Agency reviewed all of the websites viewed by Grievant from April 17, 2017 to June 7, 2017. Grievant accessed the Internet for reasons unrelated to the Agency's business.

On August 1, 2017, the grievant was issued a Group II Written Notice for computer/Internet misuse and a Group III Written Notice for workplace violence and terminated from employment with the agency.[2] The grievant timely grieved the disciplinary actions and a hearing was held on November 6, 2017.[3] In a decision dated November 22, 2017, the hearing officer concluded that the agency had not presented sufficient evidence to support the issuance of either Written Notice.[4] As a result, the hearing officer rescinded both Written Notices, ordered the grievant reinstated to his former position or an equivalent position, and directed the agency to provide the grievant with back pay, less any interim earnings.[5] The agency now appeals the hearing 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."[6] If the hearing

[2] *Id.* at 1.
[3] *See id.*
[4] *Id.* at 3-5.
[5] *Id.* at 5.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

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.[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 EEDR conduct this administrative review for appropriate application of policy.

In the hearing decision, the hearing officer assessed the evidence and determined that, while "the Supervisor believed Grievant threatened to harm her," the "subjective opinion" of the Supervisor was "not sufficient in itself to establish that Grievant threatened her."[9] The hearing officer instead stated that "[a]n objective reasonable person standard" should be applied for evaluating whether the grievant's statement constituted a threat.[10] In discussing the nature of the grievant's statement to the Supervisor, the hearing officer noted that his meaning was "unclear" and the evidence did not establish whether the grievant mentioned a workplace shooting directly to the Supervisor when he made the statement.[11] As a result, the hearing officer concluded that the grievant's "words in themselves [were] not sufficient to establish a threat" and rescinded the Group III Written Notice on that basis.[12] In its request for administrative review, the agency asserts that the grievant's conduct constituted workplace violence under state and/or agency policy, and as a result argues that the hearing officer erred in rescinding the Group III Written Notice.[13]

DHRM Policy 1.80, *Workplace Violence*, and the agency's Operating Procedure 135.5, *Workplace Violence*, both define "workplace violence" as "any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[14] Neither policy separately defines what is considered "threatening behavior" or how agencies should determine whether a threat has been made. The policies do state that conduct prohibited by the policies includes, but is not limited to, "threatening to injure an individual or to damage property" and "engaging in behavior that creates a reasonable fear of injury to another person".[15]

In this case, the hearing officer incorrectly stated that an "objective reasonable person standard" should be used to determine whether an employee has made a threat that constitutes workplace violence under state and agency policy. Agencies 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 employee's statement was threatening, agencies should consider the context of the statement and other surrounding circumstances, such as, for example,

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[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] Hearing Decision at 3.
[10] *Id.*
[11] *Id.* at 4.
[12] *Id.*
[13] As neither party has challenged the hearing officer's conclusions relating to the Group II Written Notice, it will not be discussed further in this ruling.
[14] DHRM Policy 1.80, *Workplace Violence*; Agency Exhibit 5 at 1 (emphasis added).
[15] DHRM Policy 1.80, *Workplace Violence*; Agency Exhibit 5 at 1-2.

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.[16]

The hearing officer's findings in this case indicate the agency presented additional evidence beyond the grievant's statement itself to demonstrate that the statement was appropriately considered to be a threat warranting the issuance of disciplinary action. For example, the hearing officer noted that "the Supervisor believed Grievant threatened to harm her" when he made the statement, demonstrating that she interpreted the statement as threatening.[17] Though the hearing officer found the evidence inconclusive as to whether the grievant mentioned a workplace shooting in Florida directly to the Supervisor, he did find that the grievant "admitted referring to the Florida shooting to the Human Resource Officer" on the following day when asked to explain the context of his statement, establishing that the grievant was describing an incident of workplace violence when he made the statement.[18] The hearing officer further determined that the "Grievant was sometimes emotional, annoying, and difficult for others to work with," which could be relevant to an analysis of how the Supervisor and agency management understood the grievant's statement.[19]

Although the hearing officer may be correct that it is "unclear" as to whether the grievant's words themselves communicated a direct threat, the hearing officer did not properly apply policy because he applied an "objective reasonable person standard" to determine whether the grievant's statement was a threat, and thus did not fully consider other evidence in the record relating to the context in which the statement was made and the interpretation of the statement by the Supervisor and agency management. Accordingly, the hearing officer must 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.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for further consideration of the evidence in the record relating to the applicability of state and agency policies that prohibit workplace violence. 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.,

[16] Although this analysis seems similar to a "reasonable person" standard as apparently utilized by the hearing officer in this case, there is a difference. The analysis described above would change the inquiry to whether at least one reasonable interpretation of the grievant's conduct could be as a threat, not whether it was the only or most likely or intended interpretation of the conduct under an objective standard.
[17] Hearing Decision at 3.
[18] *Id.* at 4.
[19] *Id.*

any matters not previously part of the original decision).[20] Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.[21]

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.[22] 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.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24]

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[20] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[21] *See Grievance Procedure Manual* § 7.2.
[22] *Id.* § 7.2(d).
[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[24] *Id.; see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).