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**ADMINISTRATIVE REVIEW**

In the matter of the University of Virginia Medical Center  
Ruling Number 2020-4954  
July 30, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”)<sup>1</sup> at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11339. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11339, as found by the hearing officer, are as follows:<sup>2</sup>

The University of Virginia Medical Center [the “agency”] employed Grievant as an LPN at one of its locations. She had been employed by the Agency for approximately seven years. On February 12, 2019, Grievant received a Step 1 Informal Counseling specifying her performance expectations to include “treat co-workers, patients, and their families with courtesy, respect, and consideration.”

On February 22, 2019, Grievant went to the nursing station and observed Ms. T and Ms. B. Grievant asked aloud who drew the lab for a particular patient. Ms. T said she did it and then asked “Why?” Grievant said she asked because Ms. T did not finish the lab. Ms. T said, “What do you mean?” Grievant replied that the lab orders and labels were still lying on the counter.

Several minutes later, Ms. T went to Grievant’s side of the nursing station and stood in the doorway. Ms. T told Grievant, “I know you didn’t mean it, but you were rude to me and hurt my feelings.” Grievant said aloud, “I’m tired of this

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<sup>1</sup> 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.

<sup>2</sup> Decision of Hearing Officer, Case No. 11339 (“Hearing Decision”), June 27, 2019, at 2-3 (citations omitted).

bulls—it! Something needs to be done!” Grievant got up from her chair and tossed her phone on the counter.

Manager H and the Office Coordinator were in their shared office.

Grievant went to the shared office. The office door was closed. Grievant knocked on the door and opened it. Grievant exclaimed, “Something has to be done about [Ms. T]. I’m going to slap the hell out of [Ms. T.] I’m tired of her s—t.” Grievant’s [tone] was angry. Her voice was stern. Grievant was “not in control.”

Manager H told Grievant that Grievant’s comment was inappropriate. Manager H said, “You seem angry, is there something else?” Grievant replied, “Yes, I’m angry about you writing me up two weeks ago.”

On March 7, 2019, the agency issued to the grievant a Step 4 Formal Performance Improvement Counseling Form with termination for threatening another employee with physical harm.<sup>3</sup> Citing the agency’s Policy 701, the Counseling Form specified that the grievant’s “threatening, intimidating and disruptive behavior constitute[d] gross misconduct.”<sup>4</sup> The grievant timely grieved this disciplinary action, and a hearing was held on June 7, 2019.<sup>5</sup> In a decision dated June 27, 2019, the hearing officer determined that the Step 4 discipline with termination was justified because the grievant’s “words were a threat of physical harm to an employee” in violation of Policy 701, and the agency could “form its disciplinary action based upon the ‘face value’ of the words and demeanor used by an employee to convey a threat.”<sup>6</sup> The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.<sup>7</sup>

The grievant 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.”<sup>8</sup> 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.<sup>9</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>10</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> Agency Ex. 1.

<sup>5</sup> Hearing Decision at 1.

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>9</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>10</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

*Gross Misconduct: Threatening Behavior*

In her request for administrative review, the grievant argues that her statement about slapping her coworker was not considered by anyone involved in the incident to be a “real threat” and, though inappropriate, did not warrant termination, particularly in light of her positive performance record. The grievant claims that the agency’s true motive for terminating her employment was retaliation for her previous complaints about the work performance of Ms. T, who was disproportionately favored by management.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>11</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.

Here, the hearing officer made appropriate factual determinations that the grievant engaged in the behavior charged on the Step 4 Formal Performance Improvement Counseling Form, that this behavior constituted misconduct, and that the discipline was consistent with law and policy.<sup>15</sup> Specifically, the hearing officer found that the grievant violated the section of the agency’s Policy 701 pertaining to “Gross Misconduct,” which “refers to acts or omissions having a severe or profound impact on patient care or business operations.”<sup>16</sup> As one example of gross misconduct, the policy specifies “[t]hreatening a patient, employee or visitor with physical harm.”<sup>17</sup> According to Policy 701, acts of “Gross Misconduct generally will result in termination.”<sup>18</sup>

On review of the hearing record, EDR finds evidence to support the hearing officer’s conclusion that the grievant said to her managers, “I’m going to slap the hell out of [Ms. T].”<sup>19</sup> The grievant testified that she actually said, “I would really like to slap her,” which she does not believe is reasonably considered a threat.<sup>20</sup> However, both individuals in the room at the time of the grievant’s statement (Manager H and the Office Coordinator) testified that the grievant

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<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

<sup>15</sup> Hearing Decision at 3.

<sup>16</sup> Agency Ex. 3, at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Hearing Recording 1:05:40-1:05:55 (grievant testimony); *see* Request for Administrative Review at 4.

formulated her statement as “I’m going to slap the hell out of” her.<sup>21</sup> 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. EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where, as here, the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer.<sup>22</sup>

EDR also finds evidence to support the hearing officer’s determination that the grievant’s behavior constituted gross misconduct under the agency’s Policy 701. The hearing officer reasoned that slapping another person can cause physical harm; thus, threatening to slap another employee fell within the scope of the agency’s definition of gross misconduct under Policy 701.<sup>23</sup> While the grievant argues that no one believed she would actually slap her coworker, the hearing officer appropriately reasoned that threatening behavior may constitute misconduct whether or not the specific harm threatened is in fact feared.<sup>24</sup> Further, both witnesses to the grievant’s statement testified to the effect that they were alarmed by the grievant’s demeanor as she spoke, in addition to the specific words used. Manager H testified that the grievant

was angry, her face was flushed, her eyes were stern, her voice was raised. It was felt her behavior was out of control and unprofessional. We took her tone and demeanor to be credible.<sup>25</sup>

Similarly, the Office Coordinator testified as to the grievant’s

demeanor [as] she came in; she was very angry; she had lost control with the situation that had happened, and with the current climate and the way she entered the office, I felt she was credible. You can’t take things like this lightly, knowing whether this – knowing if she were to act on her threats or not.<sup>26</sup>

Based on this testimony that the grievant appeared to have lost control over her anger and frustration,<sup>27</sup> the hearing officer determined that the agency had met its burden to prove its disciplinary action was warranted and appropriate under all the facts and circumstances. Although the grievant may disagree with the testimony of the agency’s witnesses, determinations

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<sup>21</sup> Hearing Recording 06:20-06:25 (Manager H’s testimony), 21:30-21:38 (Office Coordinator’s testimony). In their initial reports of the grievant’s threatening statement, Manager H relayed it as “I’m going to slap her” while the Office Coordinator relayed it as “I’m going to slap the hell out of” her. Agency Ex. 5 at 1-2. Although the grievant notes this inconsistency on appeal, the hearing officer’s decision does not appear to turn on the difference, *i.e.*, “slap” versus “slap the hell out of.” *See* Hearing Decision at 3 n.2.

<sup>22</sup> *See, e.g.*, EDR Ruling No. 2014-3884.

<sup>23</sup> Hearing Decision at 3.

<sup>24</sup> For example, as the agency explained on the Formal Performance Improvement Counseling Form, “this type of intimidating behavior prevents the smooth transfer of information essential to business operations.” Agency Ex. 1.

<sup>25</sup> Hearing Recording 06:25-06:36 (Manager H’s testimony).

<sup>26</sup> *Id.* at 21:55-22:30 (Office Coordinator’s testimony).

<sup>27</sup> The grievant also testified that her conduct at the time was driven by anger and frustration. *See id.* at 1:10:00-1:10:25 (grievant’s testimony).

of credibility are precisely the sort of findings reserved solely to the hearing officer. EDR finds no basis to disturb these findings.

### *Mitigation*

On appeal, the grievant argues that termination was unwarranted or should have been mitigated based on her past performance, and/or the agency's inconsistent or improperly motivated application of policy.

Although the grievant has presented multiple satisfactory annual performance reviews and reference letters from colleagues,<sup>28</sup> evidence of the grievant's positive job performance overall does not undermine the hearing officer's conclusion that, during the incident at issue, the grievant engaged in misconduct that her agency classifies as gross misconduct, which generally merits termination under its policy. To the extent that the grievant argues her past performance and professional references should have mitigated the discipline imposed, the *Rules for Conducting Grievance Hearings* require the hearing officer to give deference to the agency's consideration of such evidence, unless it exceeds the bounds of reasonableness.<sup>29</sup> Here, the grievant's positive performance history, as reflected in her exhibits, did not compel the hearing officer to find that the agency could not reasonably separate an employee who exhibited threatening behavior to coworkers.

The grievant further argues that the agency terminated her employment not for gross misconduct under Policy 701, but for the improper motive of retaliating against her when she acted as a "whistleblower" regarding another employee's poor work performance. Because the agency proved that its disciplinary action was warranted and appropriate, the grievant had the burden to demonstrate by a preponderance of the evidence that the agency's reasoning under Policy 701 was a pretext for retaliation and that her employment would not have been terminated but for her complaints about the other employee.<sup>30</sup> Although the grievant presented concerning testimony regarding management's general reputation for retaliation,<sup>31</sup> the hearing officer found that the grievant's evidence was insufficient to show that the grievant's threatening behavior in this instance would not have caused her separation if she had not previously complained about her coworker.<sup>32</sup> After thorough review of the record, including all of the grievant's hearing exhibits, EDR cannot say that the hearing officer's conclusion was inconsistent with policy or otherwise unreasonable.

Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EDR declines to disturb the decision.

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<sup>28</sup> See generally Grievant's Ex. 1.

<sup>29</sup> See *Rules for Conducting Grievance Hearings* § VI(B)(2).

<sup>30</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013).

<sup>31</sup> One of the grievant's witnesses testified that Manager H personally hand-delivered the hearing officer's order requesting that witness's appearance, emphasizing to the witness that Manager H would be sitting in the hearing room to listen to everything the witness said. See Hearing Recording at 55:00-55:25 (registered medical assistant's testimony). EDR strongly encourages the agency to take all reasonable measures to prevent intimidation of witnesses called for grievance hearings, to include establishing processes for receiving and investigating complaints.

<sup>32</sup> Hearing Decision at 4.

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.<sup>33</sup> 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.<sup>34</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>35</sup>



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<sup>33</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>34</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>35</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).