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ADMINISTRATIVE REVIEW

In the matter of the Virginia Community College System
Ruling Number 2020-4967
August 19, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)¹ administratively review the hearing officer’s decision in Case Number 11359. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11359, as found by the hearing officer, are as follows:²

The Community College employed Grievant as a Lab Instructor at one of its facilities. He began working full time for the Agency on August 10, 2013.

When Grievant was hired, he was responsible for assisting with developmental math students without being required to be proficient in calculus. The Agency changed the requirement for Grievant to be proficient in calculus as it began offering college level calculus courses to engineering students.

Thirty-five percent of Grievant’s job duties were with respect to the Core Responsibility:

Tutor students in college level math courses especially MTH 151, 152, 163, 166, 173, 174, and 271. Counsel students regarding prerequisites, contentment and sequencing of math courses at [College] and the math placement test.

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. 11359 (“Hearing Decision”), July 29, 2019, at 2-3 (citations omitted).

Courses 173 and 174 were calculus courses.

In February 2018, all of the lab staff were required to complete a calculus assessment in order to verify that their math skills were meeting expectations. On February 13, 2018, Grievant did not complete the final five of the 15 problems in the calculus exam and did not achieve the minimum passing score of 75%. On March 8, 2018, Grievant received a Group I Written Notice. It included a requirement that he take another calculus exam by May 18, 2018.

On May 18, 2018, Grievant took a second calculus exam. He scored 69.5% instead of the required 75%. On June 26, 2018, Grievant received a Group II Written Notice. The Agency determined it would give Grievant another opportunity to pass the exam before October 1, 2018.

On September 27, 2018 Grievant took a third calculus exam. He scored 64.5% instead of the required 75%. On November 27, 2018, Grievant received a Group II Written Notice for failing to meet the developmental expectation of a Trainer/Instructor I in the Math Lab.

On February 19, 2019, Grievant took a fourth calculus exam. He scored 65% instead of the required 75%. On March 25, 2019, Grievant received a Group II Written Notice with removal. Grievant filed a grievance which is now before the Hearing Officer.

On March 25, 2019, the grievant was issued a Group II Written Notice with removal for failing to meet the developmental expectations of his position.³ The grievant timely grieved the disciplinary action and a hearing was held on July 9, 2019.⁴ In a decision dated July 29, 2019, the hearing officer determined that the evidence presented by the agency demonstrated that the grievant was unable to perform an essential function of his position.⁵ Accordingly, the hearing officer determined that the appropriate way to address this issue was removal under Section H of DHRM Policy 1.60, *Standards of Conduct*, rather than the issuance of a disciplinary action.⁶ Thus, the hearing officer rescinded the Written Notice, but upheld the grievant's termination.⁷ 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”⁸ 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

³ *Id.* at 1.

⁴ *See id.*

⁵ *Id.* at 4.

⁶ *See id.* This determination has not been appealed by either party.

⁷ *Id.* at 4-5.

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

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

In his request for administrative review, the grievant appears to challenge the hearing officer's decision based on an argument that the agency's witnesses lacked integrity and that he was unable to challenge their integrity at the hearing. EDR has thoroughly reviewed the hearing record and determined that nothing prevented the grievant from presenting evidence or cross-examining the agency's witnesses as to their integrity and/or credibility. Further, nothing in the grievant's request for administrative review provides any indication as to what basis there was to challenge the witnesses' integrity or credibility. As such, the grievant's request for administrative review presents no basis for remand.

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

Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer's conclusion that the grievant was unable to perform an essential function of his position and, accordingly, that his removal was warranted.¹⁵ While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and 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.¹⁶ Because the hearing officer's findings in this case are based upon evidence in the record and the

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁴ *Grievance Procedure Manual* § 5.8.

¹⁵ See Hearing Decision at 2-5.

¹⁶ See, e.g., EDR Ruling No. 2014-3884.

material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the decision on this basis.

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.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹



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¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).