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**ADMINISTRATIVE REVIEW**

In the matter of the Virginia Department of Transportation  
Ruling Number 2020-4968  
August 19, 2019

The Virginia Department of Transportation (the “agency”) has requested that the Office of Employment Dispute Resolution<sup>1</sup> (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11351. For the reasons set forth below, EDR remands the case to the hearing officer.

FACTS

The grievance in this case concerns a Group III Written Notice issued to the grievant with a five workday suspension.<sup>2</sup> Upon a timely filed grievance, a hearing was held on July 2, 2019.<sup>3</sup> In a decision dated July 22, 2019, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the conduct charged on the Written Notice and that the grievant’s behavior constituted misconduct at the level of a Group III offense.<sup>4</sup> The facts underlying the misconduct charged on the Written Notice are not at issue in this appeal. However, the grievant’s suspension was addressed in the decision based on the following relevant facts as found by the hearing officer:

For the pay period February 25, 2019 through March 9, 2019, Grievant paid \$145 for the employee portion of his health insurance. For the pay period March 10, 2019 through March 24, 2019, Grievant paid \$145 for the employee portion of his health insurance. For the pay period March 25, 2019 through April 9, 2019, Grievant paid \$145 for the employee portion of his health insurance. For the pay period April 10, 2019 through April 24, 2019, Grievant paid \$145 for the employee portion of his health insurance.

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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. 11351 (“Hearing Decision”), July 22, 2019, at 1 (footnote omitted).

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

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

Grievant's five workday suspension started on March 1, 2019. The Agency improperly cancelled Grievant's health insurance. On February 28, 2019, the HR Consultant received notification of Grievant's Leave Without Pay suspension from the HR Supervisor. The HR Consultant processed the transaction in PMIS on March 1, 2019. This generated a health benefits termination date of March 31, 2019 in the Benefits Eligibility System. The HR Consultant did not process Grievant's return to work on March 8, 2019 in PMIS due to an oversight.

Grievant went to his pharmacy to obtain his prescription medication. He could not get his prescribed medication because the Agency had cancelled his health insurance. Grievant's health insurance card would not work. Grievant told an employee of the pharmacy that he needed his medication. The employee said there was nothing that could be done. Grievant's son was also on his health insurance. His son called Grievant and said the same thing had happened to the son.

On April 5, 2019, Grievant contacted the Benefits Administrator and explained he was trying to obtain a prescription and the pharmacist stated that Grievant no longer had healthcare coverage.

The Benefits Administrator contacted the HR Consultant to obtain information about the transaction the HR Consultant entered on March 1, 2019. The Benefits Administrator processed the return to work and reestablished Grievant's health benefits. Grievant's file did not show a lapse in coverage.<sup>5</sup>

The hearing officer determined that the grievant's suspension was improper as a result of the loss of health benefits.<sup>6</sup> Accordingly, although the Group III Written Notice was upheld, the five workday suspension was rescinded and the agency was ordered to provide back pay and back benefits.<sup>7</sup> 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."<sup>8</sup> If the hearing 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.<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 EEDR conduct this administrative review for appropriate application of policy.

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<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 5-6.

<sup>7</sup> *Id.* at 6.

<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).

### *Disciplinary Suspension*

In this case, the hearing officer found that the grievant had engaged in the behavior charged on the Written Notice and that his behavior constituted misconduct warranting disciplinary action at the Group III level. Accordingly, a five workday suspension is appropriate under DHRM Policy 1.60, *Standards of Conduct*.<sup>11</sup> The hearing officer's determination that the suspension was improper is not consistent with state policy and must be reversed. The hearing officer is directed to revise the decision to reflect that the five workday suspension is upheld.

While the hearing officer determined that the handling of the grievant's health benefits was improper, this was not a basis to rescind the five workday suspension. There was no violation of the *Standards of Conduct* policy that led to the five workday suspension such that it should be considered invalid. To the extent the agency did not properly implement the suspension such that the grievant experienced a lapse in his health benefits, then the remedy available to the hearing officer would be to address the benefits issue directly.

### *Health Benefits*

The hearing officer determined that the agency improperly suspended the grievant's health benefits as a result of the five workday suspension. In this regard, the hearing officer's finding is correct. The grievant's health benefits should not have been suspended.<sup>12</sup> The grievant is rightly entitled to have any denied benefits restored. As discussed further below, the agency had already taken steps to restore those benefits. Thus, the hearing officer's findings regarding the impact and appropriate remedy on this issue are not supported by the record or the grievance procedure.

The grievant testified that both he and his son were unable to obtain prescriptions due to the system showing his insurance was not active.<sup>13</sup> One of the grievant's exhibits details the agency's response to the health benefits matter.<sup>14</sup> In short, due to an action automatically generated by the benefits system and an agency "oversight," the grievant's health benefits were terminated on March 31, 2019.<sup>15</sup> The grievant made the agency aware of the matter on April 5, 2019.<sup>16</sup> Once the error was brought to its attention, the agency corrected the problem to reinstate the grievant's health insurance that same day, confirmed that there would be no lapse in

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<sup>11</sup> DHRM Policy 1.60, *Standards of Conduct* § B(2)(c) (authorizing an unpaid suspension of up to 30 workdays for a Group III offense).

<sup>12</sup> 1 VAC § 55-20-410(A); DHRM Policy 1.60, *Standards of Conduct* § D(2)(d).

<sup>13</sup> Hearing Recording at 2:45:45 – 2:46:48 (grievant's testimony)..

<sup>14</sup> Grievant's Ex. 9. During the hearing, the hearing officer also questioned a representative of the agency present at the hearing about the health benefits matter. *Id.* at 2:50:10 – 2:54:02. It does not appear that the agency's representative was under oath or a testifying witness during this exchange, so EDR is unable to consider this information as record evidence.

<sup>15</sup> Grievant's Ex. 9; Hearing Decision at 3-4. The grievant and his advocate stated that his health benefits were suspended for a month. Hearing Recording at 2:52:55 – 2:53:00. Neither the exhibit nor the hearing officer's factual findings support that contention. *See* Grievant's Ex. 9; Hearing Decision at 3. There is no evidence in the record that the grievant was unable to access his health benefits during March 2019.

<sup>16</sup> Grievant's Ex. 9; Hearing Decision at 3.

coverage, and informed the grievant that the pharmacy should see the correction in the system within 24 hours.<sup>17</sup>

The hearing officer found that “[t]he Agency’s improper behavior regarding Grievant’s health insurance placed Grievant’s health at risk because he was at risk of being refused health services.”<sup>18</sup> Even if the grievant were at risk of being refused health services, there is no remedy available under the grievance procedure in this situation other than retroactively restoring the benefits, which has occurred. The hearing record includes no evidence of any other tangible harm to the grievant as a result of the health benefits issue. Had the grievant presented evidence of a monetary loss as a result of the agency’s improper cancellation of his health benefits, for example, the hearing officer could have addressed the appropriate remedy to correct that loss. There was no evidence of such an impact here. Further, the agency’s prompt action would have meant that the grievant could have returned the next day to obtain the prescriptions under his health insurance. It is not clear that any remedy should be available here when there is no evidence of harm. To the extent the grievant experienced intangible harm, it is not remediable under the circumstances presented in this case.

Further, the record may be understandably incomplete because the hearing officer expressed during the hearing that he did not have the authority to address the matter of the grievant’s health benefits.<sup>19</sup> Thus, presumably, the grievant presented little further evidence on the issue, and the agency presented no evidence, rebuttal or otherwise. There is insufficient record evidence to support the hearing officer’s findings about the need for a health benefits remedy. Indeed, it appears that any relief the hearing officer could award in this instance had already been directed by the agency before the hearing took place. Accordingly, there is no basis to find that there is any further relief under the grievance procedure on the matter of the grievant’s health benefits.

### CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for revisions consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer’s second reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original or first reconsidered decision).<sup>20</sup> Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.<sup>21</sup>

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.<sup>22</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

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<sup>17</sup> Grievant’s Ex. 9.

<sup>18</sup> Hearing Decision at 5.

<sup>19</sup> Hearing Recording at 2:56:05 – 2:57:18.

<sup>20</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>21</sup> See *Grievance Procedure Manual* § 7.2.

<sup>22</sup> *Id.* § 7.2(d).

arose.<sup>23</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>24</sup>



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<sup>23</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>24</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).