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ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2020-4976
September 17, 2019

The grievant has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11348. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11348, as found by the hearing officer, are as follows:[2]

> The Department of Social Services [the "agency"] employed Grievant as an Administrative Assistant Senior. She had been employed by the Agency for approximately two years. No prior active disciplinary action was introduced during the hearing.
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> Grievant and Ms. C sat in adjoining office cubes. If Grievant and Ms. C stood up, they could speak over the wall to their office cubes.
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> On February 14, 2019, Grievant approached Ms. C at her desk at approximately 10 a.m. Grievant said, "Can I ask you a question?" As Ms. C was about to say "Yes", Grievant wrote on a note pad, "Do you like [Mr. K's first name]?" Ms. C said, "He is fine with me. I do not have problems with anyone in the office." Grievant erased her writing on the paper and said, "He has one more time." Ms. C asked, "One more time for what?" Grievant did not answer. Ms. C said that if something was going on with Mr. K, Grievant should speak with a supervisor. Grievant said, "I'm from New Jersey and will handle it the way we do it there." Ms.

[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. 11348 ("Hearing Decision"), August 12, 2019, at 2-3.

> C interpreted Grievant's statement as suggesting Grievant would do something violent. Ms. C asked Grievant what she meant. Grievant replied, "Take it to the streets." Ms. C interpreted Grievant's comment to mean she intended to physically harm Mr. K. Ms. C said "Don't take it into your own hands; speak with a supervisor." Ms. C interpreted Grievant's behavior as a credible threat of harm to Mr. K. Grievant was angry as she spoke about Mr. K.
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> At approximately 1 p.m., Grievant returned to Ms. C and showed Ms. C a message Grievant had written on a sticky note. The message said, "[Mr. K's first name] is going to get his ass beat." Grievant said, "He has one more time." Ms. C asked, "What is he doing to you?" Grievant responded, "He is doing something." Ms. C told Grievant to talk to her supervisor. Grievant asked Ms. C if Grievant said something to Mr. K outside of the building would she get in trouble. Ms. C said not to do anything on her own but to talk to a supervisor. Grievant asked Ms. C if Grievant walked beside Mr. K to the bus stop but not touch him while cursing him out, would she get in trouble. Ms. C told Grievant that was verbal assault. Grievant asked was verbal assault a "real thing". Ms. C said it was. Grievant said she was glad Ms. C told her that.
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> Ms. C later contacted the Supervisor. Ms. C felt that if she did not contact the Supervisor and Grievant harmed Mr. K without Ms. C saying anything, it would be on her conscience.

On March 14, 2019, the agency issued to the grievant a Group III Written Notice with termination for making threats,[3] citing statements the grievant allegedly made on February 14, 2019, and on January 3, 2019. The Written Notice concluded that mitigating circumstances such as the grievant's years of service, work performance and contributions, and response to the allegations were "insufficient to change the level of the offense."[4] The grievant timely grieved this disciplinary action, and a hearing was held on July 22, 2019.[5] In a decision dated August 12, 2019, the hearing officer determined that the Group III Written Notice with termination must be upheld because the agency's evidence regarding the alleged threats was credible.[6] The hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.[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

[3] *Id.* at 1; Agency Ex. 1 at 1-2.
[4] Agency Ex. 1 at 2.
[5] Hearing Decision at 1.
[6] *Id.* at 3-4.
[7] *Id.* at 4.

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 a party; the sole remedy is that the hearing officer correct the 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.

Misconduct: Threatening Statements

In her request for administrative review, the grievant argues that the only direct evidence offered to establish that she made threatening statements was testimony from a single witness. She claims that the agency should have verified this witness's account through an investigation including interviews with other potential witnesses. The grievant further contends that the hearing officer erred in finding that this single witness was more credible than herself.

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] 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 a substantial part of the behavior charged on the Group III Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy.[15] Specifically, the hearing officer found that the grievant angrily stated to her coworker Ms. C that Mr. K, another agency employee, "has one more time" before she would "take it to the streets" the way "we do it" in New Jersey. The hearing officer found that, later the same day, the grievant wrote a note to Ms. C that Mr. K "is going to get his ass beat" and again said he "has one more time." The hearing officer determined that it was reasonable for Ms. C to interpret such statements as threats of physical harm, noting that DHRM Policy 1.60, *Standards of Conduct*, identifies "threatening others" as a Group III offense.[16]

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[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); 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] Hearing Decision at 3.
[16] *Id.*

On review of the hearing record, EDR finds evidence to support the hearing officer's conclusion that the grievant said to Ms. C that another employee had "one more time" before he was "going to get his ass beat." Ms. C testified that, on February 14, 2019, the grievant approached her desk in the morning, seeming upset.[17] The grievant said in reference to Mr. K, "he has one more time," though she did not elaborate.[18] Ms. C testified that she advised the grievant to bring any problems to a supervisor, but the grievant replied that she preferred to handle it the way they do in New Jersey, where she is from.[19] Ms. C asked what the grievant meant; the grievant answered that she meant "take it to the streets."[20] Ms. C further testified that, in the afternoon the same day, the grievant wrote on a sticky note that Mr. K was "going to get his ass beat."[21] The grievant's apparent anger at the time made Ms. C think the grievant may follow through on this threat, so she reported the grievant's statements.[22]

The grievant herself testified that she never made any such statements.[23] However, the hearing officer was not compelled to accept her testimony over that of Ms. C. Given that the grievant had the opportunity to call and question witnesses at the hearing, it is not clear how further initial fact-finding by the agency would have altered the hearing officer's determination as to whether the grievant in fact made the statements at issue.[24] Even if the hearing officer had accepted as true the grievant's speculation that Ms. C was jealous of the grievant's professional credentials,[25] he was nevertheless entitled to credit her testimony as to whether the grievant made the threatening statements at issue on February 14, 2019. Further, while the grievant argues that the agency produced no motive for her to threaten Mr. K, the agency's evidence demonstrated that the grievant received counseling on or about February 14, 2019 relating to how she submitted information to Mr. K's section.[26] Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.[27]

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[17] Hearing Recording at 11:35-14:05 (Ms. C's testimony).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 14:15-16:15 (Ms. C's testimony).
[22] *Id.*; *see* Agency Ex. 8.
[23] *Id.* at 4:14:20-4:15:05 (Grievant's testimony).
[24] The grievant also appears to argue that her credibility would have been supported had Mr. K been available as a witness, but she identifies no facts to which he might have testified that would be probative as to whether the grievant made threatening statements about him to Ms. C. Mr. K was not a witness to the statements and, therefore, could not offer testimony as to whether such statements were made.
[25] *See* Hearing Recording at 4:34:15-4:35:30 (Grievant's testimony).
[26] *See id.* at 44:45-45:25 (Grievant's supervisor's testimony).
[27] *See*, *e.g.*, EDR Ruling No. 2014-3884.

EDR also finds support for the hearing officer's determination that the grievant's behavior constituted misconduct. As the hearing officer noted, DHRM Policy 1.60 lists "threatening others" as an example of an offense that would merit a Written Notice at the Group III level.[28] Under Policy 1.60, the first occurrence of a Group III offense "normally should warrant termination."[29] Accordingly, the hearing officer appropriately determined that the agency's disciplinary action was consistent with law and policy and warranted under all the facts and circumstances. 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.

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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[28] DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[29] *Id.* § B(2)(c).
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).