



EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5132
August 6, 2020

The Department of Corrections (the “agency”) has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11448. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11448, as found by the hearing officer, are as follows:¹

The [agency] employs Grievant as an Ombudsman Services Manager. She has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Supervisor began supervising Grievant in March 2019 as the result of an Agency reorganization.

On March 19, 2019, Grievant sent an email to staff with a copy to the Supervisor regarding signing a logbook. The Supervisor sent Grievant an email stating, in part:

In the future, let’s discuss these before you send them out. *** I need to be part of the conversation before something changing a current practice or procedure is formally put to paper and sent out.

The Agency wanted to hire an Ombudsman position that would report directly to Grievant. Grievant was the “hiring manager.” The Agency expected there to be two rounds of interviews before a candidate was selected.

¹ Decision of Hearing Officer, Case No. 11448 (“Hearing Decision”), June 23, 2020, at 2-3 (citations omitted).

Grievant had been involved in hiring employees on several prior occasions. Without knowing the Supervisor wanted to be closely involved in the hiring process, Grievant followed the practice that she had followed previously. An HR employee, Ms. C, screened the 13 applicants for the position and told Grievant she could send Grievant “either 5 or 13 applicants.” Grievant selected five candidates for the first interview. She scheduled the interviews for August 19, 2019. The Supervisor sent Grievant an email on August 14, 2019 indicating:

I don’t know what needs to be done to halt this process but you’ll need to call the 5 back to cancel the interviews on the 19th. Additionally, please let [name] know we will be submitting replacement questions. Thereafter, we will decide who we will interview, who will be on the interview panel, when the interviews will be conducted, and where. These types of things must be approved by me before you move forward on them. We can discuss further tomorrow, if need be.

On August 20, 2019, Grievant sent the Supervisor an email with the names of 13 candidates to be interviewed by a panel of three employees. Grievant was not on the first panel.

Grievant attempted to speak with the Supervisor “as to the direction for the interviews schedule[d] for August, 2019 and thirteen (13) applicant’s notification.” Because she could not reach the Supervisor by telephone, she sent him an email asking him to call her. The Supervisor responded, “Let’s just interview all at 30 minutes each. Make sure everyone can interview on the 27th and then please let HR know.”

Eleven questions were listed for the Regional Ombudsman position. Grievant took five of the eleven questions to be used in the first round of interviews. She added a sixth question, “Do you have any questions for the panel?”

Grievant used five remaining questions for the second round of questions. She added, “Do you have any questions for the panel?” She omitted the question, “What do you hope to accomplish your first 90 days in this position?”

On September 12, 2019, the agency issued to the grievant a Group II Written Notice for failure to follow instructions.² Specifically, the grievant’s supervisor explained, despite earlier counseling of the grievant not to act “unilaterally on behalf of the unit” before getting approval, she “acted unilaterally in her selection, notification, and scheduling of staff interviews” to fill a position in their unit and in the “drafting and submitting of interview questions not approved” by the unit.³ The supervisor also explained that the grievant had unilaterally omitted approximately half of the questions the supervisor had generated for the first interview round.⁴ The grievant timely

² Agency Ex. 1; *see* Hearing Decision at 1.

³ Agency Ex. 1(a).

⁴ *Id.*

grieved the disciplinary action, and a hearing was held on June 3, 2020.⁵ In a decision dated June 23, 2020, the hearing officer concluded that the Group II Written Notice was not supported by the evidence.⁶ The hearing officer reasoned that instructions to communicate better with the supervisor “would be aspirational in nature and not provide Grievant with adequate guidance as to how she was expected to comply.”⁷ The hearing officer also found “no evidence that the Supervisor told Grievant he was to be consulted regarding the hiring prior to Grievant following her customary practice,” “no evidence Grievant altered the eleven questions” provided by the supervisor, and insufficient evidence to “establish that Grievant was instructed to ask all 11 questions during the first round of interviews.”⁸ Accordingly, the hearing officer rescinded the Group II Written Notice.⁹ 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”¹⁰ 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 noncompliance.¹¹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹² The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that it presented sufficient evidence that the grievant failed to follow clear instructions that she received. The agency also asserts that the grievant’s failure to follow instructions as to the hiring process at issue reflected a broader “defiance and irritation” with the need to seek her supervisor’s approval before acting, and that this tone was evident at the hearing.¹³

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁴ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁵ 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.¹⁶ 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

⁵ See Hearing Decision at 1.

⁶ *Id.* at 4-5.

⁷ *Id.* at 4.

⁸ *Id.* at 4-5 (emphasis in original).

⁹ *Id.* at 5.

¹⁰ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹¹ See *Grievance Procedure Manual* § 6.4(3).

¹² Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹³ Request for Administrative Review at 3.

¹⁴ Va. Code § 2.2-3005.1(C).

¹⁵ *Grievance Procedure Manual* § 5.9.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B).

circumstances.¹⁷ 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.

In his decision, the hearing officer concluded that, to prove that an employee failed to follow instructions, "an agency should show that a clear and detailed instruction describing a task to be performed" was given to the employee.¹⁸ As to the hiring process at issue in this case, the hearing officer found that the grievant was the "hiring manager" and "had been involved in hiring employees on several prior occasions."¹⁹ Accordingly, "[w]ithout knowing the Supervisor wanted to be closely involved in the hiring process, Grievant followed the practice that she had followed previously."²⁰ The hearing officer determined that the supervisor's earlier message to "communicate issues affecting [the unit] before they are acted upon" was not a sufficiently clear instruction to be the foundation of the Group II Written Notice in this case.²¹ Further, the hearing officer determined that there was insufficient evidence that the grievant received instructions to involve the supervisor in offering the first round of interviews or for the grievant to arrange for all 11 questions to be asked during the first round of interviews.²²

A thorough review of the record offers support for these conclusions. While the agency presented some evidence that the supervisor had previously counseled the grievant to seek approval for actions affecting the unit, EDR cannot say that the hearing officer erred in concluding that such general feedback did not lay a sufficient foundation to support the Group II Written Notice issued in this case as to the grievant's handling of the hiring process. The agency did not present additional more specific evidence tending to show that the grievant should have known how much to involve her supervisor in the initial interview process for a position that would report to the grievant.²³ Thus, the hearing officer did not find that the evidence showed "that it was clearly communicated that Grievant was to collaborate with [her supervisor] before making any decisions regarding the hiring,"²⁴ as the agency argues on appeal, and EDR's review of the record does not contradict his conclusion. Further, email exchanges offered by the agency suggest that, after learning that her supervisor intended to be directly involved with the process, the grievant sought clarification of her role as "hiring manager."²⁵ She testified that she never received such clarification.²⁶ The grievant further testified that she did not understand that all 11 questions were to be asked of candidates in the first round of 30-minute interviews, rather than across the two rounds planned.²⁷

¹⁷ *Grievance Procedure Manual* § 5.8.

¹⁸ Hearing Decision at 3.

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 3.

²¹ *Id.* at 4; *see* Agency Ex. 1(a).

²² Hearing Decision at 4-5.

²³ At the hearing, the agency represented that the supervisor was unavailable and, thus, it did not present testimony from him. *See* Hearing Recording at 14:10-14:55.

²⁴ Request for Administrative Review at 3.

²⁵ *See* Agency Ex. 1(c), at 19.

²⁶ Hearing Recording at 2:18:40-2:18:55 (Grievant's testimony).

²⁷ *Id.* at 1:31:07-1:32:55, 2:17:40-2:18:30. The hearing officer found that the grievant did ultimately omit one of the 11 questions and added a prompt to allow the candidates to ask questions of the interview panel, but he concluded that the evidence did not show that these actions by the grievant violated agency policy. Hearing Decision at 3, 5. To the

The agency disagrees, pointing to the supervisor's account of events as attached to the Group II Written Notice and his view expressed therein that his expectations to vet the grievant's actions had been made clear.²⁸ Further, the head of the grievant's and supervisor's unit testified that he was present in meetings where the supervisor instructed the grievant "to speak with her supervisor before making and/or acting on any decisions on behalf of the department."²⁹ However, even accepting as true that the grievant had been previously counseled to seek the supervisor's approval before acting on behalf of the unit, the agency did not present additional evidence as to the substance of hiring-process discussions with the grievant. In the absence of such evidence, the hearing officer could reasonably conclude that failure to follow instructions, as an offense meriting a Group II Written Notice under DHRM Policy 1.60, *Standards of Conduct*, requires more specific instructions to be disregarded by the employee.³⁰ Here, the hearing officer found that the agency did not prove that the grievant received instructions as to the hiring process that should reasonably have made her aware of the expectations she failed to meet.³¹ Nothing in the record suggests that the hearing officer's determinations in this regard were an abuse of discretion or otherwise improper, and under such circumstances EDR cannot substitute its own judgment for that reflected in the hearing 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.³² 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.³³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁴

Christopher M. Grab
Director
Office of Employment Dispute Resolution

extent that the agency maintains that the grievant's actions did in fact violate its policies or procedures, EDR finds no basis in the record to disturb the hearing officer's findings on this point.

²⁸ See Agency Ex. 1(a).

²⁹ Request for Administrative Review at 2; see, e.g., Hearing Recording at 15:40-19:10 (Unit Head's testimony).

³⁰ DHRM Policy 1.60, *Standards of Conduct*, Att. A; see DHRM Policy 1.60, *Standards of Conduct* at 8 (providing that Group II offenses "include acts of misconduct of a more serious and/or repeat nature").

³¹ While the agency appears to argue that the hearing officer did not "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances," Request for Administrative Review at 4, the hearing officer's reasoning was not based on potential mitigating circumstances. Rather, the hearing officer concluded that the agency had not met its burden of proof to sustain its disciplinary action for misconduct consistent with law and policy. See Hearing Decision at 5 ("Insufficient evidence was presented to show that Grievant failed to follow a supervisor's instruction.").

³² *Grievance Procedure Manual* § 7.2(d).

³³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).