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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2021-5135
August 7, 2020

The grievant 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 11502/11503. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11502/11503, as found by the hearing officer, are as follows:¹

The Department of Corrections employed Grievant as an Assistant Warden at one of its facilities until he was demoted with a disciplinary pay reduction and transferred to the position of Unit Manager at another facility. He began working for the Agency in 1989. No evidence of prior active disciplinary action was introduced during the hearing.

The Counselor worked at the Facility and was within Grievant’s chain of command. Grievant knew the Counselor through the Counselor’s Aunt and considered the Counselor as a friend of the family.

In August 2019, Grievant was in his office with the Counselor, Ms. S and Ms. H. During their conversation, Grievant said words to the effect that Grievant wanted the Counselor to get up on the desk and dance without clothing for him.

The Counselor did not say anything in response to Grievant’s comment. Ms. H and Ms. S “looked at each other” in disbelief. Some of the woman laughed at Grievant’s comment.

¹ Decision of Hearing Officer, Case No. 11502/11503 (“Hearing Decision”), June 29, 2020, at 2-4.

The Counselor left Grievant's office. Grievant later told the Lieutenant of Grievant's comment. The Counselor did not file a written complaint about Grievant at the time of the incident.

The Counselor testified Grievant said, "get on top of that table and take all your g-dda-n clothes off." Ms. S testified Grievant said he had, "had a rough day and my day would be better if you climbed over this desk and take care of me." Ms. H testified she could not remember the precise wording of Grievant's comments but his comment included "something about her dancing on top of a table." Grievant may have said, "come over the table and dance for me." She heard Grievant use the word, "naked." The comment did not seem like a big deal to Ms. H.

Ms. B approached the group. It does not appear that she heard Grievant's comment to the Counselor.

On September 29, 2019, a verbal conflict arose between the Counselor and Ms. G. The Counselor believed Ms. G was falsely telling other employees that the Counselor left the scene of an automobile accident. The Counselor called Ms. G and used profanity. The Counselor was referred for disciplinary action. Grievant was involved in the due process relating to that disciplinary action. Grievant told the Counselor he was moving her to another building.

Grievant and the Counselor's Aunt knew one another because they attended the same church. On October 21, 2019, Grievant sent the Aunt a text message asking her to call him. She called him as requested. Grievant told the Aunt that the Counselor was being referred for disciplinary action for using profanity but it probably would not go anywhere. Grievant told the Aunt that the Counselor was a "da-n good employee" who "just ran her mouth." Grievant told the Aunt he had considered mediation between the Counselor and another employee.

Grievant also sent the Aunt text messages on October 21, 2019. In one message, Grievant wrote:

I'm sorry to bring this to you but I am so disappointed in the behavior of [Counselor] and how she is handling her discipline for cursing out staff. She's not speaking and blaming me for the corrective action ... after I bent backwards to get her hired ... she's something and I see why no one would take her ... I hired her because ya'll asked me.

The Counselor did not give Grievant permission to speak with the Aunt about her pending disciplinary action. The Counselor learned of Grievant's comments to the Aunt when the Aunt sent the Counselor a text message asking Grievant to call the Aunt. When the Aunt spoke with the Counselor, the Aunt told the Counselor the details of Grievant's discussion about the Counselor's disciplinary action.

On January 10, 2020, the grievant was issued a Group II Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction for violation DHRM Policy 2.35, *Civility in the Workplace*.² The grievant was issued a second Group II Written Notice on January 10, 2020, for violating agency policy governing confidentiality of employee records.³ The grievant timely grieved both disciplinary actions and a hearing was held on June 8, 2020.⁴ In a decision dated June 29, 2020, the hearing officer determined that the agency had “presented sufficient evidence to show that Grievant violated DHRM Policy 2.35 . . . [and] to support the issuance of a Group II Written Notice for violation of policy [governing the confidentiality of employee records].”⁵ Accordingly, the hearing officer upheld the issuance of both Written Notices as well as the “Grievant’s demotion, transfer, and disciplinary pay reduction . . . based on the accumulation of disciplinary action.”⁶ The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary actions.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 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 essentially argues that the hearing officer’s findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. In support of his position, the grievant denies that he engaged in the behavior alleged in the Group II Written Notice charging him with a violation of DHRM Policy 2.35 and asserts that the witness testimony presented at the hearing contradicts the original statements provided during the agency’s EEO investigation into the sexual harassment allegations levelled against him.

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

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

³ Agency Ex. 3; *see* Hearing Decision at 1.

⁴ *See* Hearing Decision at 1.

⁵ *See id.* at 4, 6. In his request for administrative review, the grievant only refers to the Group II Written Notice issued for violation of DHRM Policy 2.35. Because he has not challenged the hearing officer’s findings and conclusions relating to the second Group II Written Notice for violating policy governing employee records confidentiality, it will not be addressed further in this ruling.

⁶ Hearing Decision at 6-7.

⁷ *Id.* at 6.

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

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.

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.

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged in the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy. As noted by the hearing officer, DHRM Policy 2.35 explicitly prohibits "workplace harassment (including sexual harassment)."¹⁵ At the hearing, the Counselor, Ms. S, and Ms. H provided corresponding accounts of the incident that are consistent with the hearing officer's description of the events that occurred in August 2019. The Counselor testified that "[the grievant] told me in so many words to take all my g-dda-n clothes off and get on this table naked."¹⁶ The agency's EEO investigation report states that the grievant told the Lieutenant that the grievant said, "Get on the table and dance for me."¹⁷ Similarly, Ms. S testified at the hearing that the grievant said "that he had a rough day and my day would be better if you climbed over this desk and take care of me."¹⁸ When interviewed as part of the EEO investigation, Ms. S reported that the grievant said, "If you climb over the table and dance for me, you would relieve my stress and take care of me."¹⁹ Finally, Ms. H testified that the grievant made a comment about "her dancing on top of a table" and that she heard the grievant use the word "naked."²⁰ During the EEO investigation, Ms. H described the grievant's statement as, "Come over the table and dance for him."²¹

The witnesses acknowledged that they were unable to recall exactly what the grievant said in August 2019, but their testimony at the hearing was broadly consistent with the account of the incident contained in the EEO investigation written report.²² Although there are minor variations in the witnesses' testimony and written statements about the grievant's conduct, they all describe the same general behavior. Significantly, the incident took place in August 2019, the witnesses were interviewed as part of the EEO investigation in November 2019, and they testified at the hearing on June 8, 2020.²³ Any apparent inconsistencies in their testimony appear to be the result of their recollection of the incident over this 10-month period, and the hearing officer did not find

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

¹⁴ *Grievance Procedure Manual* § 5.8.

¹⁵ See Agency Ex. 17, at 105; see Hearing Decision at 3.

¹⁶ Hearing Recording at 47:20 - 48:00 (Counselor's testimony); Hearing Decision at 3.

¹⁷ Agency Ex. 8, at 30. It is unclear whether the Counselor was interviewed as part of the investigation or whether the agency's investigatory conclusions were based on what the Lieutenant recalled about the Counselor's description of the incident. See *id.*

¹⁸ Hearing Recording at 1:11:10 - 1:12:20 (Ms. S's testimony); Hearing Decision at 3.

¹⁹ Agency Ex. 8, at 30; see Agency Ex. 13(d).

²⁰ Hearing Recording at 1:46:00 - 1:55:20 (Ms. H's testimony); Hearing Decision at 3.

²¹ Agency Ex. 8, at 30; see Agency Ex. 13(c).

²² See Agency Ex. 8, at 29-31; Hearing Decision at 3.

²³ See Agency Ex. 8, at 29-31; Agency Exs. 13(c), 13(d); Hearing Decision at 1.

that these slight inconsistencies were material or indicative of a lack of credibility in the witnesses' testimony. Indeed, 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.

In summary, EDR finds that the agency reasonably determined the grievant's conduct was a violation of DHRM Policy 2.35 that justified the issuance of a Group II Written Notice, and the hearing officer concluded that the evidence in the record was sufficient to support such a charge. Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb 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.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁶

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²⁴ *Grievance Procedure Manual* § 7.2(d).

²⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁶ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).