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ADMINISTRATIVE REVIEW

In the matter of the Virginia School for the Deaf and the Blind
Ruling Number 2020-4992
October 29, 2019

The Virginia School for the Deaf and the Blind (“the School”) 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 11368. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11368, as found by the hearing officer, are as follows:²

The Virginia School for the Deaf and the Blind employs Grievant as a Student Life Coordinator. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in a large office with an attached storage room. If one entered the office through the double entry doors, he or she would see Grievant’s desk on the right and the storage room straight ahead.

Grievant received permission from her supervisor to use the storage room during her breaks to pump breast milk. Grievant placed a chair in the storage room that was approximately eight feet away from the door. She placed the chair facing the back of the storage room and away from the door. Grievant placed a cart with an extension cord outlet next to the chair. When she took a break in the storage room, she would place the pump on the cart, turn on the pump, and sit in the chair with her back to the storage room door.

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. 11368 (“Hearing Decision”), September 9, 2019, at 2-4.

On April 19, 2019, Grievant took a break from her work duties and entered the storage room. She locked the door. . . . She walked to the chair, sat and began pumping breast milk. She had the office cell phone with her in case someone called asking for assistance. She had her personal cell phone and began a conversation with her sister.

The Manager walked into the office to ask Grievant a question about a student. The Manager did not see Grievant in the office. She walked farther inside the office and close to the storage room door. She heard someone talking from inside the storage room. She stood on one of the two steps into the storage room. She was within a foot of the door and began listening to the person inside the storage room.

The Manager recognized Grievant's voice. Instead of knocking on the door to gain Grievant's attention, the Manager continued listening to Grievant's conversation. The Manager did not know Grievant was speaking to Grievant's sister. Grievant was not yelling or speaking with an unusually elevated voice, but the Manager could clearly hear most of Grievant's conversation.

Grievant spoke about Employee W and a Former Employee who left the Agency on the prior day. . . . Grievant talked about Employee W's doctor appointments stating that Employee W was never here and "how many f—king doctors can you have?" Grievant said Employee W having a possible medical issue but that Grievant did not know more and that Employee W had been out all week. After hearing this, the Manager got a pad of paper and began writing down what Grievant was saying.

Grievant said that Employee W had texted Grievant yesterday and that Employee W was at a doctor appointment in another city and said, "well I guess we've moved the doctors to [another city]." Grievant said, "I don't know how she gets away with it – maybe because she is deaf, a 'yes man'"

Grievant answered a work related call on her work cell phone and then resumed her conversation with her sister on her personal cell phone. . . .

While still talking on her cell phone, Grievant got up from her chair and opened the door to exit the storage room. The Manager was standing on the step as Grievant opened the door. The Manager startled Grievant. As the Manager looked at Grievant, Grievant told her sister that she would call her back.

The Manager told Grievant it was amazing how clearly one could hear the conversation through the door – the whole conversation. The Manager told Grievant she had never been so disappointed in Grievant and could not believe how Grievant could be so two-faced and pass on confidential information. The Manager told Grievant again she was so disappointed but also praised Grievant for her work. The Manager said she did not know who Grievant was talking to but maybe the person

was one of the “escapees from VSDB” since those were the only people who could appreciate that conversation. The Manager was referring to former employees who had “escaped” from the Agency. Grievant was offended by the Manager’s accusation since Grievant did not associate with the “escapees”.

On April 30, 2019, the agency issued to the grievant a Group II Written Notice for violating DHRM Policy 2.35, *Civility in the Workplace*, citing her statements overheard by the Manager relating to “VSDB employees and recent events of supervisor being out on medical leave, recent departure of Coordinator, and frustrated with working conditions.”³ The Written Notice stated that discipline was appropriate at the Group II level pursuant to DHRM Policy 1.60, *Standards of Conduct*.⁴ The grievant timely grieved this disciplinary action, and a hearing was held on August 20, 2019.⁵ In a decision dated September 9, 2019, the hearing officer determined that the School had “not presented sufficient evidence to show that Grievant violated DHRM Policy 2.35” and, thus, the Group II Written Notice “must be reversed.”⁶

The School has asked EDR to administratively review the hearing decision.⁷

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 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.

In its request for administrative review, the School has asserted several challenges to the hearing proceedings and decision in this case. First, the School contends that the hearing officer failed to elicit relevant testimony regarding the volume of the grievant’s phone conversation. Second, the School asserts that the hearing officer failed to adequately protect the Manager’s privacy in the hearing decision by referring to her by her title, which no other person at the School holds. Third, the School argues that the hearing officer erroneously applied DHRM Policy 2.35 to find that the grievant’s statements about Employee W were not misconduct. As a general objection,

³ *Id.* at 1; Agency Ex. 2 at 1-2.

⁴ Agency Ex. 2 at 1.

⁵ Hearing Decision at 1.

⁶ *Id.* at 5.

⁷ Although the School has indicated it is “not challenging the decision,” its Request for Administrative Review raises four objections to aspects of the hearing and resulting decision. EDR reads these objections as falling within the scope of its ordinary administrative review authority; accordingly, EDR applies its ordinary standards of review to the issues presented. *See* Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a).

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).

the School contends that these acts and omissions by the hearing officer demonstrate an improper bias against the School.

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.

Consideration of Evidence

In this case, the hearing testimony was inconsistent as to the volume of the grievant’s voice as she spoke on the phone inside the storage room.¹⁵ Without apparent objection by either party, the hearing officer took evidence in part by viewing the site and listening as the grievant entered the storage room and spoke.¹⁶ The hearing officer ultimately found that, inside the storage room during the underlying incident, the grievant “was not yelling or speaking with an unusually elevated voice.”¹⁷ Thus, he determined, “[a] person entering the office would have heard Grievant’s voice but not the details of her conversation.”¹⁸ It appears that the hearing officer determined the Manager heard and understood the grievant’s words only because she stood next to the door of the storage room to listen.¹⁹ The hearing officer concluded that, because the grievant did not make offensive statements to other employees or within reasonable earshot of them, the evidence did not show that her statements constituted misconduct under DHRM Policy 2.35.

The School objects to this conclusion primarily on grounds that the Manager “was not asked to accompany” the hearing officer, the grievant, and the agency’s advocate when they visited the location where the incident occurred.²⁰ As a result, the School argues, the Manager “was given no opportunity to confirm or dispute that the voice level [the grievant] demonstrated to [the hearing officer] was at or close to the level that [the Manager] had heard the day of the incident.”²¹ Thus,

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 Recording at 1:38:38-1:39:20 (Grievant’s testimony), 54:30-56:18 (Manager’s testimony).

¹⁶ *Id.* at 1:39:24-1:57:17.

¹⁷ Hearing Decision at 3.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 3, 5.

²⁰ Request for Administrative Review, at 1.

²¹ *Id.*

the hearing officer's determination "completely dismiss[ed her] account of the incident" as offered in testimony.²²

At a hearing, each party may be represented by an advocate who "may examine or cross-examine witnesses and present evidence."²³ Whether or not any party is so represented, a hearing officer may question witnesses and, "if essential to the resolution of a material issue in the case, request a party to provide further documentation."²⁴ However, hearing officers should "exercise this discretion sparingly" in order to "avoid appearing as an advocate for either side."²⁵ Here, the School was represented by legal counsel, who accompanied the hearing officer and the grievant to the site of the incident and had the opportunity to request the Manager's presence and/or additional testimony related to evidence taken there. Where counsel chose not to elicit additional testimony on behalf of the School, the hearing officer was not required to do so.

Even assuming that the Manager had been present and disputed the grievant's representation of her voice volume at the time, evidence in the record supports the hearing officer's finding that the grievant was "not yelling or speaking with an unusually elevated voice."²⁶ The grievant testified that she was "talking in my normal tone";²⁷ she later testified that she did not believe the voice volume that she demonstrated from inside the storage room during the hearing was audible to those outside.²⁸ Although the Manager presented testimony to the contrary,²⁹ 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. Here, EDR perceives no circumstances to suggest that the hearing officer's findings of fact in this regard were tainted by improper bias. 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.³⁰

Confidentiality

EDR publishes rulings and hearing decisions in a manner that seeks to preserve privacy.³¹ Hearing decisions "must not reference any individual or entity (other than the party agency) by name."³² However, identifying the respective roles and authority within a public entity serves the interests of both clarity and transparency. Thus, EDR's rulings and hearing decisions routinely

²² *Id.*

²³ *Rules for Conducting Grievance Hearings* § IV(A).

²⁴ *Id.* § IV(C).

²⁵ *Id.*

²⁶ Hearing Decision at 3.

²⁷ Hearing Recording at 1:38:38-1:38:55 (Grievant's testimony).

²⁸ *Id.* at 1:53:40-1:54:20 (Grievant's testimony).

²⁹ *Id.* at 49:55-50:15, 54:30-56:18 (Manager's testimony).

³⁰ *See, e.g.,* EDR Ruling No. 2020-4976; EDR Ruling No. 2014-3884.

³¹ *See Grievance Procedure Manual* § 8.1.

³² *Rules for Conducting Grievance Hearings* § V(C).

refer to agency employees by their job titles, especially when an employee is acting in her capacity as the head of a facility, *e.g.* a warden, director, or superintendent. Though cognizant of the tradeoffs between privacy and transparency, EDR disagrees with the School's contention that referring to the Manager by her job title is "no different" than publishing her name. EDR takes reasonable measures to preserve privacy but does not purport to make identification impossible for individuals exercising their public leadership roles.

Because the hearing officer's reference to certain individuals involved in this grievance by their roles within the organization was consistent with EDR's usual practices, EDR perceives no evidence that this decision was motivated by bias. However, in the interest of allaying concerns on this point, EDR has re-issued the hearing decision with a more general descriptor of the Manager's role. Accordingly, the issue is moot.

Civility Policy Discipline

DHRM Policy 2.35 prohibits workplace harassment and bullying, whether or not such conduct is legally discriminatory. Under the policy, workplace harassment is "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person" ³³ The policy and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. Such conduct may include:

- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;
- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace;
- Swearing or using obscene language or gestures toward another person;
- Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong; or
- Posting or discussing sensitive, private information about someone to others. ³⁴

To determine whether a behavior should be considered offensive or inappropriate under the policy, DHRM assesses whether an objective, reasonable person would consider the behavior offensive or inappropriate. ³⁵

Here, the School raises concerns regarding the grievant's statements about Employee W's medical absences from work. Saying Employee W is "never here," the grievant queried, "how many f—king doctors can you have?" and suggested that Employee W "gets away with it" because "she is deaf." ³⁶ The School asserts that the hearing decision "validates" these statements as

³³ DHRM Policy 2.35, *Civility in the Workplace*, at 6.

³⁴ DHRM Policy Guide – *Civility in the Workplace*, at 1-2.

³⁵ *Id.* at 1; *see Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 421 (4th Cir. 2014) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993)).

³⁶ Hearing Decision at 3.

“acceptable.”³⁷ The School also objects to the hearing decision’s reasoning that, because Employee W “voluntarily told” the grievant certain details about her medical absences, the grievant “was free to disclose whatever information she wished.”³⁸ The School is correct that the grievant’s statements, taken on their own, clearly align with several of the examples set forth in Policy 2.35’s associated guidance.

However, contrary to the School’s interpretation of the hearing decision, the hearing officer did not find that the grievant’s statements were “acceptable.” Instead, he applied the appropriate burden of proof to conclude that the School had “not presented sufficient evidence” that the grievant committed misconduct under Policy 2.35, “for several reasons.” Most, if not all, of these reasons related to the hearing officer’s conclusion that the grievant reasonably believed that no other employees could hear her statements and that, in fact, the Manager heard the statements only because she was standing directly outside the door in order to listen to the grievant’s private conversation. Given that Policy 2.35 defines workplace harassment as conduct that is “targeted or directed,”³⁹ the hearing officer appropriately considered the context of the grievant’s statements in determining whether the agency carried its burden to show that the statements constituted misconduct. Thus, while the hearing officer might, in different circumstances, appropriately apply Policy 2.35 to uphold disciplinary action based on these same statements, EDR cannot say that the hearing officer’s analysis of all of the facts and circumstances in this case lacked a basis in the evidence or was otherwise unreasonable.

Nevertheless, to avoid confusion that could arise from the hearing decision, EDR takes the opportunity to clarify certain aspects of its reasoning as to Policy 2.35. First, nothing in this ruling should be read to discourage or negate agencies’ affirmative obligations under Policy 2.35 to respond to “any prohibited conduct of which they are aware” and take steps to ensure that such conduct does not continue.⁴⁰ These obligations apply whether or not the conduct at issue is severe and/or pervasive, and whether or not it merits formal discipline. Where, as here, management discovers information that raises concerns about workplace civility but may not warrant formal discipline under the circumstances, supervisors generally can and should still take such opportunities for performance management, including discussing their concerns and explaining and/or confirming expectations, by verbal or written counseling if appropriate.⁴¹

Second, in an analysis of whether an employee has violated Policy 2.35, the employee’s specific intent will rarely be dispositive.⁴² Here, the School takes particular issue with the hearing

³⁷ Request for Administrative Review at 2.

³⁸ Hearing Decision at 5.

³⁹ DHRM Policy 2.35, *Civility in the Workplace*, at 6.

⁴⁰ Under Policy 2.35(D)(4), “[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment”

⁴¹ EDR observes that none of the conduct prohibited by Policy 2.35 is outside the scope of DHRM Policy 1.60, *Standards of Conduct*.

⁴² Prohibited conduct under Policy 2.35 generally does not depend on intent, with exceptions for bullying and cyber-bullying.

officer's finding that "[the g]rievant did not intend to denigrate or marginalize any employees" when she suggested that Employee W "gets away with" excessive absences "because she is deaf."⁴³ The School interprets the hearing officer's finding as "dismissive" of members of the deaf community and the discriminatory attitudes they face (*e.g.* that they receive undeserved benefits).⁴⁴ EDR rejects such discriminatory attitudes, regardless of the speaker's intent. However, EDR concludes that, in the context of the decision text here, the hearing officer's finding as to the grievant's intent merely emphasizes that the grievant did not intend her words to be heard by any employees; the finding does not indicate that the hearing officer weighed the grievant's intent more heavily than the effect of her words. Thus, EDR perceives no support for the contention that the hearing officer's finding shows a bias against the School or the community it serves.

Third, nothing in this ruling, or in the hearing officer's decision, should be interpreted to approve the disclosure of health-related information about other employees to third parties, even if those other employees revealed such information voluntarily to colleagues. Here, the School objects to the hearing officer's reasoning that the grievant "did not obtain [Employee W's medical] information as part of her work duties or by any unauthorized means. She was free to disclose whatever information she wished."⁴⁵ As an example of prohibited conduct, the policy guidance associated with DHRM Policy 2.35 lists "discussing sensitive, private information about someone to others."⁴⁶ To the extent that the hearing officer's determination approves such disclosures or implies that they cannot be subject to disciplinary action, it does so erroneously.

Nevertheless, any such error appears to be harmless. Based on the facts set forth in the hearing decision, the extent of the grievant's disclosures was that Employee W had "been out all week" because of a potential "medical issue" involving a doctor in another city; the grievant did not know more.⁴⁷ This scant content is not inconsistent with the hearing officer's conclusion that the evidence as a whole failed to establish that a Group II Written Notice was both warranted and appropriate under all the facts and circumstances. While the Manager was understandably disturbed by the grievant's derogatory manner in speaking about Employee W, the hearing officer's consideration of the private context of the grievant's conversation was based on record evidence, as explained above. Accordingly, EDR will not 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. While EDR acknowledges that the derogatory statements the Manager overheard put her in a difficult situation, the hearing officer's decision was supported by evidence in the record and the material facts of the case. While the School may disagree with this decision, EDR has carefully reviewed the record and can find no indication that the hearing officer failed to consider this grievance in an impartial, neutral, and fair manner with respect to all parties.

⁴³ Hearing Decision at 5.

⁴⁴ Request for Administrative Review at 2.

⁴⁵ Hearing Decision at 5.

⁴⁶ DHRM Policy Guide – Civility in the Workplace, at 2.

⁴⁷ *See* Hearing Decision at 3.

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.⁴⁸ 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.⁴⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁵⁰



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⁴⁸ *Grievance Procedure Manual* § 7.2(d).

⁴⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁵⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).