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ADMINISTRATIVE REVIEW

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2020-5003
November 20, 2019

The Department of Game and Inland Fisheries ("the agency") 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 11384. For the reasons set forth below, EDR remands the matter to the hearing officer.

FACTS

The relevant facts in Case Number 11384, as found by the hearing officer, are as follows:[2]

> The Department of Game and Inland Fisheries employed Grievant as a Director of Capital Finance. He had been employed by the Agency for approximately 29 years. Grievant did not hold an executive level position within the Agency. No evidence of prior active disciplinary action was introduced during the hearing.
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> The purpose of his position was:
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> to coordinate and administratively support all aspects of the Capital Outlay Program, developed capital budgets, and ensures compliance with State, federal and agency policies and procedures. Provides technical leadership and supports project managers and others in accomplishing project objectives. Procures and manages professional consultant services.
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> The Agency conceded it was unable to show Grievant falsified documents.

[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. 11384 ("Hearing Decision"), October 7, 2019, at 2-4 (footnotes omitted).

The Agency provided Grievant with a laptop computer. Grievant had a unique login identification and password enabling him to gain access to the Agency's online databases and electronic communication system and the internet. The Agency provided Grievant with an email address containing the Agency's initials. Grievant used his Agency provided email address to send and receive emails from family members and friends.

Grievant was not authorized to telework. He took his laptop home but it is unclear whether he performed any work duties with the laptop while at home.

The Agency received an anonymous note alleging Grievant fraudulently misused agency resources. The Agency began an investigation including reviewing Grievant's computer and Internet usage.

Mr. D was a vendor of the Agency. He had been a friend of Grievant's for decades. Mr. D was a term contractor. His status was reviewed every five years by a committee that did not include Grievant. Grievant was not able to influence or award any contracts to Mr. D. Grievant's behavior did not create a conflict of interest on behalf of the Agency with respect to Mr. D.

Mr. Du owned a real estate agency. Grievant and Mr. Du were friends. Grievant's behavior with Mr. Du did not create a conflict of interest on behalf of the Agency with respect to Mr. Du.

In January 2018, Grievant called Mr. D and told him not to send emails "with nude women in them or inappropriate" and "we need to cut down on the jokes." Mr. D disregarded Grievant's request and continued to send emails containing offensive content intended to be "jokes."

Grievant downloaded onto his computer some of the videos sent to him. He sometimes did so because he could not open them up so he downloaded them to his computer and then open the videos.

From March 1, 2018 through May 15, 2018, Grievant worked an average of 29 hours each week. He exchanged over 300 emails using the Agency-issued computer and email address. He received 102 personal emails from Mr. D. He received 100 personal emails from his Wife. Grievant sent approximately 13 emails to his Wife.

Grievant received or sent approximately six personal emails per day during the ten week period. Grievant testified that he was on the receiving end of approximately 74 percent of all the personal emails.

Grievant had over 250 non-work related photographs on his computer. Most of those pictures were of family members.

> Grievant received emails that contained jokes, videos, etc. that could be considered offensive to others with regard to the content related to gender, religion, or political affiliation. The Agency considered content and attachments to the emails to be offensive and unacceptable behavior in the workplace.
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> Grievant allowed a Family Member to use his Agency-issued laptop to download a song containing offensive language. An African American singer used the N-word (ending in "as") approximately nine times. The singer said "f—k" approximately ten times and also said "bi—hes". The Agency considered these words to be offensive and unacceptable.
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> The Agency did not allege any of the pictures or videos contained sexually explicit content contrary to State Statute. Grievant testified none of the videos were pornographic.
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> Grievant was not offended by the "jokes". No one complained to him or to anyone else about receiving personal emails with "jokes" from him.
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> Grievant's work performance was not affected by the amount of time he devoted to sending, receiving, and viewing personal emails and videos. He otherwise performed his work duties as expected by the Agency. Grievant testified that he always got his work done.

On April 29, 2019, the agency issued to the grievant a Group III Written Notice with removal for Abuse of State Time; Violation of Policy 2.35, *Civility in the Workplace*; Unauthorized Use of State Property or Records; Computer/Internet Misuse; and Falsifying Records.[3] The grievant timely grieved this disciplinary action, and a hearing was held on September 17, 2019.[4] In a decision dated October 7, 2019, the hearing officer determined that the agency had not presented sufficient evidence to support discipline as a Group III Written Notice and, consequently, reduced the disciplinary action to a Group II, reinstating the grievant with back pay and back benefits.[5]

The agency has asked EDR to administratively review the hearing decision.

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."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in

[3] *Id.* at 1; Agency Ex. 1.
[4] Hearing Decision at 1.
[5] *Id.* at 10.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency has disputed the hearing decision and hearing officer's assessments on many grounds. While the content of the hearing officer's descriptions and analyses of various individual behaviors presents much material for potential review, based on the discussion below, EDR need not address each individual analysis or conduct. Rather, consistent with the agency's disciplinary action, EDR finds that the grievant's misconduct is properly assessed collectively. Therefore, the bases of appeal that are actually necessary for proper adjudication of this case are the only ones addressed herein.[9]

Policy Interpretation

The outcome of the hearing decision in this case is largely driven by an underlying interpretation of policy by the hearing officer: whether the grievant's conduct should be reviewed as individual acts or collectively. The agency took the approach that it would consider the grievant's conduct collectively, resulting in a single disciplinary action.[10] The hearing officer has determined that the *Standards of Conduct* policy does not authorize this approach. However, the hearing officer is incorrect in his interpretation. While the grievant's behavior *could* be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency's approach here.[11] The resulting charges in the disciplinary action at issue in this case are all reasonably viewed as a course of behavior by the grievant in his use of state e-mail and an agency-assigned computer, and not a collection of unrelated, distinct issues of misconduct. Accordingly, the hearing decision is inconsistent with policy.[12]

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[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] For example, the agency contends the hearing officer should have accepted into evidence a Group I Written Notice previously issued to the grievant for use of obscene language in the workplace. On review, EDR cannot find that the Written Notice lacked relevance such that it should have been excluded. *Compare* Agency Ex. 1 (disciplining the grievant for "obscene" content on his state-issued computer) *with* Agency Ex. 99 (disciplining the grievant for "obscene" language). Nevertheless, consideration of this exhibit would appear to have virtually no impact on the outcome of this matter; thus, remand is not warranted for this issue.
[10] Agency Ex. 1.
[11] The hearing officer cites to no provision of the *Standards of Conduct* policy that prohibits consideration of an employee's conduct collectively in the situation arising in this case. The points that were used to support the hearing officer's analysis, *see* Hearing Decision at 6, are not consistent with DHRM's interpretation of the policy.
[12] The grievant cites to a 2006 hearing decision and DHRM policy review to support the position that misconduct cannot be considered collectively. *See* Decision of Hearing Officer, Case No. 8233, Jan. 23, 2006; DHRM Policy Review, Case No. 8233, Dec. 1, 2006. The facts of the 2006 case, however, are different than those at issue here and, as such, the holding is not instructive. Further, the *Standards of Conduct* policy was amended in 2008 and 2011 to incorporate language (cited below) allowing agencies to elevate offenses based on the particular facts of the case that, for example, exceed agency norms. To the extent that our findings in this case are inconsistent with the 2006 case, this ruling represents DHRM's current interpretation of policy.

In this case, the primary charge ultimately at issue is the agency's determination that the grievant had, between March 1, 2018 and May 15, 2018, "received personal emails that contained jokes, videos, etc. that may be considered offensive to others with regard to content related to sex, religion, or political affiliation and forward[ed] more than one of these personal emails to individuals that you have conducted business with on behalf of DGIF."[13] The grievant also "allowed a Family Member to use his Agency-issued laptop to download a song containing offensive language."[14] The hearing officer has found that the grievant "violated DHRM Policy 1.75 for several reasons including that he downloaded and transmitted obscene messages and information."[15] The song and the specific videos discussed in the hearing decision were found to be "not appropriate" for the state workplace.[16] Yet, because the hearing officer only considered each e-mail, video, or file individually, he failed to defer to the agency's choice to view the grievant's misconduct collectively for disciplinary purposes. The grievant's conduct in this regard is defined by its totality: the combination of all the emails, videos, files, etc. stored in his email account and computer.[17] Many of the emails and videos are truly shocking to be seen within a state email account or computer, and the sheer number of them arising over a very limited period of time makes the grievant's conduct particularly flagrant and incompatible with state employment.[18]

A violation of a written policy is normally a Group II violation. The hearing officer clearly found that the grievant violated state policy. As provided in the *Standards of Conduct*, however:

> Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms.[19]

Therefore, while the grievant's violation of written policy is normally a Group II offense, the *Standards of Conduct* policy permits an agency to consider the unique circumstances of a particular case and elevate a disciplinary action when, for example, the misconduct and/or its consequences substantially exceeded agency norms. The hearing officer's application of the facts to the policy in this regard is where he errs. The agency considered the totality of the grievant's conduct to determine that his behavior implicated this section of the policy, justifying elevation to a Group III.

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[13] Agency Ex. 1 at 3.
[14] Hearing Decision at 4; *see also* Agency Ex. 1.
[15] Hearing Decision at 6.
[16] Hearing Decision at 6-8.
[17] The agency's witnesses explained the agency's rationale in issuing a single Group III Written Notice for the combined conduct. Hearing Recording at 2:25:45 - 2:28:03 (testimony of acting agency head); 3:31:30 – 3:34:40 (testimony of Human Resource Director).
[18] As cited in the agency's due process notice, DHRM Policy 1.60, *Standards of Conduct*, provides that all state employees conduct themselves "with the highest degree of public trust." This directive and the other statements in the policy are not aspirational goals, but are "intended to illustrate the minimum expectations for acceptable workplace conduct and performance." DHRM Policy 1.60, *Standards of Conduct*, at 2. Thus, an agency may properly hold employees accountable for violating these Standards of Conduct, as the agency did in this case.
[19] *Id.* at 8

Notwithstanding the hearing officer's ultimate conclusion, his findings in this case are consistent with the agency's choice of outcome: the grievant should have been terminated from employment. The hearing officer states as much, finding explicitly that the agency could have issued at least five separate Group II Written Notices, only two of which would be necessary to support termination.[20] Under the hearing officer's interpretation, an agency would be compelled to issue a multitude of Written Notices in a situation such as this one. As the agency argues, it could have issued disciplinary actions for each email, video, or file that violated policy. DHRM does not interpret the *Standards of Conduct* to be so rigid as to prevent an agency, given the appropriate circumstances, from treating a course of similar or connected behavior collectively for purposes of disciplinary action. For example, an employee who is disciplined for engaging in workplace harassment will not usually be disciplined for each individual incident of harassing behavior, any one of which could amount to a finding of misconduct. Rather, the employee would be disciplined for the ongoing course of harassing conduct as a whole, which amounts to many different actions or inactions over time. The facts of this case exemplify the type of conduct that forms a basis for termination by its collective nature. Further, where the hearing officer has found that the grievant has engaged in ongoing conduct that warranted termination, such a result (termination) cannot be said to be inconsistent with the facts or the policy.[21]

The agency asserts that the hearing officer largely dismissed content simply sent to the grievant but which he did not forward or otherwise save. In the decision, the hearing officer stated that the "[g]rievant was not responsible for the content of the emails or attached videos sent to him."[22] While it is true that an employee cannot have absolute control over what others send over email, what the grievant does with offensive content after receiving it is very relevant to the misconduct alleged in this case. While forwarding or saving that content could violate policy, DHRM Policy 1.75 also makes it clear that "storing" such content is prohibited.[23] Therefore, the agency can properly find the grievant to have violated the policy's prohibitions on "storing" inappropriate content.[24]

The determination as to whether a Written Notice was issued at the appropriate level is a mixed question of fact and policy.[25] Based on the discussion above, the proper application of policy to the facts found by the hearing officer is that the agency's issuance of a Group III Written Notice with termination was consistent with policy. It is the entirety of the content identified by the agency, not just one video or one email message, that would be considered collectively to support the Group III in this matter for a severe violation of policy. Therefore, EDR remands the matter to

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[20] Hearing Decision at 6-8.
[21] *See Rules for Conducting Grievance Hearings* § VI(B)(1) ("[I]f the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld," absent evidence of mitigation).
[22] Hearing Decision at 9.
[23] There could be a number of appropriate responses by an employee who receives inappropriate and/or offensive content electronically, including deleting it, notifying supervision or IT staff, and/or taking steps to prevent further receipt from the source. Essentially taking no such steps and keeping the content within your system and account would be consistent with "storing" the material.
[24] The grievant admitted during his testimony that he should not have stored the emails or videos. Hearing Recording at 4:46:52 – 4:47:10.
[25] *See* EDR Ruling No. 2018-4620.

the hearing officer with the directive to uphold the Group III Written Notice and the termination as consistent with policy.

Evidence of DHRM's Policy Interpretation

The agency cites to an email received from a DHRM management consultant on April 18, 2019, indicating that DHRM approved of the disciplinary action that the agency eventually issued, the choice to issue a single Group III, and the policies cited. The agency exhibit, however, is unhelpful on this point. The exhibit does not appear to include what attachment(s) were provided to and reviewed by the DHRM management consultant.[26] The email references "a copy of the completed investigation notes," which are not a part of the exhibit.[27] It is possible that the email makes reference to the completed investigation summary, included as a separate exhibit,[28] but the significance of the cited summary is not clear. Thus, it is impossible to discern what the DHRM management consultant reviewed to determine that she thought the agency had "more than enough to justify a Group III Written Notice with termination."[29] For example, the completed investigation summary includes a number of allegations that were not included in the ultimate disciplinary action[30] or were not supported by evidence at hearing.[31] Without the underlying documentation understood or testimony from the management consultant providing the explanation, the evidence of the prior DHRM interpretation or approval is of limited value here.

Hearing Officer Misconduct

The agency further alleges that the hearing officer demonstrated bias against the agency and empathy toward the grievant in many respects. The *Rules* provide that a hearing officer is responsible for:

> [v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by [EDR] Policy No. 2.01, Hearing Officer Program Administration.[32]

The applicable standard regarding EDR's requirement of a voluntary disqualification when the hearing officer cannot guarantee a fair and impartial hearing is generally consistent with the

[26] *See* Agency Ex. 94 at 51.
[27] *Id.*
[28] Agency Ex. 4.
[29] Agency Ex. 94 at 51.
[30] *Compare* Agency Ex. 1 *with* Agency Ex. 4.
[31] Hearing Decision at 2 ("The Agency conceded it was unable to show Grievant falsified documents."). Falsification of documents is typically misconduct categorized as a Group III offense on its own. DHRM Policy 1.60, *Standards of Conduct*, Attach. A.
[32] *Id.* § II; *see also* EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

manner in which the Court of Appeals of Virginia reviews recusal cases.[33] The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"[34] EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.[35] The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.[36]

The agency first argues that the hearing officer showed "amusement" toward an image that marginalizes and stereotypes women by "smirking" at the hearing when the exhibit was reviewed. The agency's representative corroborates the agency's counsel's description by presenting a signed statement indicating that he heard the hearing officer "make an exclamation of sorts, and when I looked up he had a half smile on his face." The grievant's counsel denies that this occurred. The hearing officer denied the behavior at the hearing.[37] EDR's review of the hearing record does not demonstrate that the hearing officer made an "exclamation" at the time suggested. Obviously an audio recording would not demonstrate any visual representations of the hearing officer's face. Given the burden to establish bias or prejudice, the evidence related to an ambiguous facial expression does not meet that standard.

In addition to the above assertion, the agency argues that the hearing officer demonstrated bias by (1) ignoring emails the grievant did not forward,[38] (2) attempting to "manipulate the evidence" by urging a witness to admit that the grievant inadvertently or unintentionally downloaded videos,[39] (3) entertaining evidence about the grievant's political leanings,[40] and (4) exercising no control over the grievant's attorney's "multiple outbursts" during the hearing. EDR has thoroughly reviewed the hearing record, and finds no indication that any improper bias affected the outcome of the hearing decision. EDR therefore declines to disturb the decision on this basis.

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[33] While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

[34] Welsh v. Commonwealth, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); *see* Commonwealth v. Jackson, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

[35] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

[36] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

[37] Hearing Recording at 1:41:40 – 1:42:20. On appeal the agency also states that the hearing officer "reacted in a hostile and aggressive manner" after the agency's counsel attempted to call out the hearing officer's facial expression. The exchange was tense and emotional and the hearing officer called for an immediate break. *Id.* The situation could have been handled more appropriately. However, even if the hearing officer demonstrated an emotional response to being criticized by a hearing participant, this is not sufficient evidence to carry the agency's burden to establish bias or prejudice in this regard.

[38] This issue was addressed above.

[39] *See* Request for Administrative Review at 38.

[40] Given the nature of the evidence presented in this case, the grievant's political leanings cannot be said to be entirely irrelevant. EDR cannot find that the hearing officer accorded any such evidence more weight than was warranted by the material under consideration.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands the matter to the hearing officer with the directive to uphold the Group III Written Notice with termination as consistent with state policy. The hearing officer is directed to issue the remand decision within 10 workdays of this ruling.

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.[41] 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.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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[41] *Grievance Procedure Manual* § 7.2(d).
[42] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[43] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).