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ADMINISTRATIVE REVIEW

In the matter of Virginia Polytechnic & State University
Ruling Number 2020-5020
December 17, 2019

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11401. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11401, as found by the hearing officer, are as follows:[2]

> Virginia Tech [the "University" or the "agency"] employed Grievant as a Housekeeper. He had been employed for approximately 15 years. Grievant's work performance when he reported to work was satisfactory to the University. Grievant's attendance was not satisfactory to the University.
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> Grievant's work shift began at 5 a.m. and ended at 1:30 p.m.
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> Grievant had prior active disciplinary action. On April 13, 2018, Grievant received a Group I Written Notice for Attendance/Excessive Tardiness. On August 21, 2018, Grievant received a Group II Written Notice for failure to follow policy and/or instruction. On February 28, 2019, Grievant received a Group II Written Notice with a five workday suspension for Attendance/Excessive Tardiness.
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> As of April 11, 2019, Grievant had exhausted all of his leave balances. Grievant was aware of his obligation to report to work as scheduled.

[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. 11401 ("Hearing Decision"), November 6, 2019, at 2-3.

> On April 11, 2019, Grievant was at work and asked to leave early to attend a medical appointment. As a result he was placed on docked status for .5 hours. Grievant submitted a note from a medical provider stating, "This is to certify that [Grievant] was seen in my clinic on 4/11/2019."
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> On May 1, 2019, Grievant called at 4:08 a.m. and left a message saying he, "won't be in today should be back tomorrow.["] At 12:52 p.m., Grievant called and said that his doctor had laid him off until May 3, 2019 and said he would bring a doctor's note on Friday morning when he returned to work. Grievant was on docked status for eight hours on May 1, 2019, eight hours on May 2, 2019, and eight hours on May 3, 2019.
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> Grievant presented a note dated May 1, 2019 from a medical provider indicating that Grievant "was seen in my clinic on 5/1/19" and "He may return to work 5-3-2019."

On June 5, 2019, the grievant was issued a Group III Written Notice with removal for poor attendance/excessive tardiness.[3] The grievant timely grieved the disciplinary action and a hearing was held on October 17, 2019.[4] In a decision dated November 6, 2019, the hearing officer determined that the agency had presented evidence to support disciplinary action for poor attendance, but that a Group II Written Notice was the appropriate level of discipline based on the grievant's "repeated violation of the same offense of poor attendance," which is ordinarily a Group I offense.[5] Despite reducing the discipline to a Group II Written Notice, the hearing officer found that "the University's decision to remove Grievant must be upheld" because he had accumulated at least two active Group II Written Notices,[6] and that there were no mitigating circumstances warranting further reduction of 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 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

[3] *Id.* at 1.
[4] *See id.*
[5] *Id.* at 3.
[6] *Id.*; *see* DHRM Policy 1.60, *Standards of Conduct*, at 9 (stating that the issuance of "[a] second active Group II Notice normally should result in termination").
[7] Hearing Decision at 4.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).

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.

Alleged Witness Issues

In his request for administrative review, the grievant argues that he "should have a chance to question" the manager who issued the Written Notice. According to the grievant, the manager "was on vacation and couldn't be contacted" during the hearing. The grievant also requests an opportunity to call witnesses to testify on his behalf. Pursuant to the *Rules for Conducting Grievance Hearings*, it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.[11] If warranted by the circumstances, hearing officers have the authority to draw an adverse inference against a party if that party fails, "without just cause, . . . to make available relevant witnesses as the hearing officer . . . had ordered."[12] In this case, however, neither party requested orders compelling the attendance of witnesses at the hearing. The manager is not on the University's list of potential witnesses, and the grievant did not provide a list of further potential witnesses. Under these circumstances, it appears there was no basis for the hearing officer to draw an adverse inference against the University based on the unavailability of any witnesses.

Moreover, EDR has thoroughly reviewed the hearing record and finds nothing to suggest that the grievant was denied an opportunity to present evidence on his behalf. A review of the hearing recording indicates that the hearing officer explained the procedural process of the hearing to the grievant, specifically noting that the grievant could call witnesses to testify on his behalf and introduce exhibits.[13] There does not appear to have been any discussion on the record about the manager's alleged unavailability; indeed, the grievant did not attempt to call the manager or any other witnesses to testify, though he did explain that he had asked some witnesses to appear who were either unavailable or declined to testify.[14] While the grievant may now wish he had requested witness orders or otherwise chosen differently, these are not reasons for which EDR may order remand.[15] Accordingly, EDR declines to disturb the hearing decision on this basis.

Hearing Officer's Consideration of Evidence

In addition, the grievant appears to generally argue 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. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to determine the grievance based "on the material issues

[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] *Rules for Conducting Grievance Hearings* § III(E) ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.").
[12] *Id.* § V(B).
[13] Hearing Recording at 1:15:00-1:16:32.
[14] *Id.* at 1:15:58-1:16:18.
[15] EDR may remand a decision only where the grievant has shown that the hearing officer has failed to comply with the grievance procedure. *See Grievance Procedure Manual* § 6.4(3).
[16] Va. Code § 2.2-3005.1(C).

and the grounds in the record for those findings."[17] 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.[18] 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.[19] 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 the hearing decision, the hearing officer assessed the evidence and determined that the "Grievant showed a pattern of poor attendance by leaving work early on April 11, 2019 and failing to report to work on May 1, 2019, May 2, 2019, and May 3, 2019 as expected by the University."[20] The hearing officer further addressed the appropriate level of discipline for the grievant's misconduct as follows:

> The University has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant's behavior is a repeated violation of the same offense of poor attendance, the University may elevate the disciplinary action to a Group II Written Notice. There is no basis to elevate a Group I offense to a Group III offense based on having a repeated violation of the same offense.
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> Upon the accumulation of two or more Group II Written Notices, an agency may remove an employee. Grievant has now accumulated at least two active Group II Written Notices. Accordingly, the University's decision to remove Grievant must be upheld.[21]

Upon conducting a review of the hearing record, EDR finds that there is evidence to support the hearing officer's conclusion that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the issuance of a Group II Written Notice was consistent with law and policy. The Written Notice charged the grievant with taking excessive unscheduled absences.[22] The University presented evidence showing that the grievant left work early on April 11, 2019, and did not report to work on May 1 through 3, 2019.[23] One of the University's witnesses testified that the grievant had exhausted all of his available leave balances before April 11, 2019.[24] Under these circumstances, the University

[17] *Grievance Procedure Manual* § 5.9.
[18] *Rules for Conducting Grievance Hearings* § VI(B).
[19] *Grievance Procedure Manual* § 5.8.
[20] Hearing Decision at 3.
[21] *Id.*
[22] Agency Ex. 1.
[23] Agency Ex. 4; Agency Ex. 5 at 1, 4-5.
[24] Hearing Recording at 1:01:36-1:08:57 (testimony of Witness R).

considered the grievant's absences unauthorized.[25] The hearing officer further addressed the grievant's contention that he should have been excused from work on those days pursuant to the Family and Medical Leave Act, finding that the evidence was insufficient to demonstrate that the grievant's absences on those days would have qualified.[26] 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.[27]

Furthermore, the hearing officer's conclusion that a Group II Written Notice was the appropriate level of discipline in this case is consistent with DHRM Policy 1.60, *Standards of Conduct*. The grievant had one active Group I Written Notice and two active Group II Written Notices, all of which were issued for behavior relating to poor attendance and/or excessive tardiness.[28] DHRM Policy 1.60 provides that, in general, "a repeat of the *same*, *active* Group I Offense should result in the issuance of a Group II Offense notice."[29] In addition, an employee's accumulation of "[a] second active Group II Notice normally should result in termination."[30] The hearing officer appropriately applied these provisions of DHRM Policy 1.60 to determine that the grievant's repeated unscheduled absences here supported a Group II Written Notice with termination.

In summary, there is evidence in the record to support the hearing officer's conclusion that the grievant's absences from work on April 11, 2019 and May 1 through 3, 2019 were unauthorized, and that his conduct supported the issuance of a Group II Written Notice with termination.[31] While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. 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. 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 decision on this basis.

[25] *See* Agency Ex. 4.
[26] *Id.* at 4-5.
[27] *See, e.g.*, EDR Ruling No. 2014-3884.
[28] Agency Ex. 11.
[29] DHRM Policy 1.60, *Standards of Conduct*, at 8 (emphasis in original).
[30] *Id.* at 9.
[31] *See* Hearing Decision at 3-4.

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]

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[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).