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ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2020-5032
January 16, 2020

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 11417. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11417, as found by the hearing officer, are as follows:²

The Department of Social Services [the “agency”] employs Grievant as a Budget Manager. Grievant began reporting to the Manager in June 2016. No evidence of prior active disciplinary action was introduced during the hearing. Part of Grievant’s job duties included making sure salary increases were “in line.”

Grievant was reviewing a spreadsheet showing salary increases for approximately 193 employees. One of those employees received an additional salary increase. Grievant had questions regarding the appropriateness of this additional salary increase. She was aware of a directive that employees should not receive additional salaries until after the fiscal year.

On or about June 24, 2019, the Manager was in her office seated behind her desk. When the Manager was looking forward while seated at her desk the door to her office would be in front of her and slightly to her right. The Manager’s door was open.

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. 11417 (“Hearing Decision”), December 10, 2019, at 2-3.

Grievant came to the Manager's office. Grievant asked about the salary increase for Ms. D. Grievant asked if Ms. D's salary was correct. The Manager said, "Yes it is correct." The Manager asked Grievant to sit and to close the office door. Grievant continued to stand. The Manager got up from her seat and closed the office door. Grievant asked "Why did Ms. D get a raise?" Grievant asked, "What did she do to get a raise?; I didn't get a raise!" Grievant asked, "Does anyone know what I am doing around here?"

The Manager said, "In the essence of transparency; I will share with you and all of the salaries are 'foiable' and right now you don't have the authority to question why she got a salary increase." The Manager asked Grievant to stop raising her voice.

The Manager said, "I am sharing with you, but as Associate Director, I am not obligated to explain why someone got a raise."

Grievant continued to talk loudly. While the Manager was seated, Grievant put her hand in the Manager's face. Grievant's hand was within 18 inches of the Manager's face. Grievant's used her hand as if the hand was a mouth talking. Grievant said, "You are still talking!" Grievant said, "You went behind my back and processed the work. Who did this!" The Manager said, "Please stop."

The Manager stood up as Grievant was holding onto the office door. The Manager said, "Please let's talk about this civilly." Grievant opened the door and said to the Manager, "you went behind my back; you wait and see what I do."

The Manager said, "Please stop. Do you want to go to the division director to talk about it." Grievant said, "No". The Manager said, "What about HR?" Grievant said, "HR won't do." Grievant said, "Wait until you see what I do; you reap what you sow."

The Manager felt threatened when Grievant had her hand in the Manager's face. The Manager had to stand up in response. The Manager felt threatened by Grievant's statements suggesting consequences. The Manager thought about a recent shooting where an employee returned to his work place and killed people. The Manager reported Grievant's threat to agency managers.

On July 17, 2019, the grievant was issued a Group II Written Notice with a five-workday suspension for violation of DHRM Policy 2.35, *Civility in the Workplace*.³ The grievant timely grieved the disciplinary action and a hearing was held on November 20, 2019.⁴ In a decision dated December 10, 2019, the hearing officer determined that the agency had "presented sufficient evidence to support the issuance of a Group II Written Notice for violation of Policy

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

⁴ *See* Hearing Decision at 1.

2.35” and that the “Grievant’s five workday suspension must be upheld.”⁵ The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary action.⁶

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”⁷ 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.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing Officer’s Consideration of Evidence

In her 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. Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹¹ 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.¹² 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.¹³ 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 made the following factual findings about the grievant’s behavior:

On June 24, 2019, Grievant engaged in threatening behavior directed at the Manager. Grievant undermined the Manager’s feeling of safety in the workplace. Grievant spoke loudly to the Manager. Grievant entered the

⁵ *Id.* at 4.

⁶ *Id.* at 4-5.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

Manager's personal space by placing her hand close to the Manager's face and pretending her hand was talking. Grievant then specified uncertain consequences to the Manager such as wait and see what I do and you reap what you sow. . . .

Grievant denied making the threatening statements. She denied raising her voice. Grievant did not identify any motivation or explanation of why the Manager would create false allegations against Grievant. The Manager's testimony was credible. . . .

Grievant asserted the Manager did not actually feel threatened because the Manager was willing to meet with Grievant privately after the incident. It is not necessary for the Agency to show that Grievant intended to carry out her threat or that her threat was ongoing. The Agency established that on June 24, 2019, Grievant threatened the Manager.¹⁴

In support of her position, the grievant contends that the agency "did not prove by a preponderance of the evidence that its disciplinary action against [her] was warranted and appropriate" and that "[t]he evidence [she] presented and the testimony of [her] witnesses were not considered" or discussed in the decision. More specifically, the grievant argues that the hearing officer did not address her allegations that the disciplinary action was issued as a form of retaliation and/or bullying, and denies that she engaged in the behavior charged on the Written Notice.

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 on the Written Notice, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. As noted by the hearing officer, DHRM Policy 2.35 "strictly forbids . . . threatening or violent behavior of employees . . . in the workplace."¹⁵ At the hearing, the Manager testified consistent with the hearing officer's description of the incident on June 24, 2019.¹⁶ In particular, the Manager stated that the grievant raised her voice, put her hand in the Manager's face and made a hand motion that mimicked a mouth opening and closing, and said words to the effect of, "Wait and see what I do, you will reap what you sow."¹⁷ The Manager further testified that she felt threatened by the grievant's demeanor and that she perceived the grievant's statements as a threat.¹⁸ The grievant, on the other hand, denied engaging in the behavior or making the statements described by the Manager when she testified.¹⁹ The grievant also stated that she did not know why the Manager would make false statements about her.²⁰ 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

¹⁴ Hearing Decision at 4.

¹⁵ Agency Ex. 9, at 2; *see* Agency Ex. 10; Hearing Decision at 3-4.

¹⁶ *See* Hearing Decision at 2-3.

¹⁷ Hearing Recording at 7:22-12:57 (Manager's testimony).

¹⁸ *Id.* at 12:58-14:31 (Manager's testimony).

¹⁹ *Id.* at 2:01:44-2:02:34 (grievant's testimony).

²⁰ *Id.* at 2:23:31-2:23:42 (grievant's testimony).

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.²¹

With regard to the grievant's claim that the hearing officer did not consider her allegations of bullying and/or retaliation or the testimony of her witnesses, EDR finds no error in the decision. There is no requirement under the grievance procedure that a hearing officer specifically discuss every argument made by a party or the testimony of each witness who testifies at a hearing; thus, mere silence as to specific arguments, testimony, and/or other evidence does not necessarily constitute a basis for remand. In addition, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence presented by the parties. Here, it would appear that the hearing officer did not explicitly address these issues in the decision because he did not find them to be relevant, credible, and/or persuasive to the question of whether the grievant engaged in threatening behavior toward the Manager on June 24, 2019. Indeed, none of the grievant's witnesses testified about the incident because only the grievant and the Manager were present when it occurred. Moreover, EDR has not identified credible evidence in the record to support a conclusion that there was an improper motive for the discipline.²² Finally, the hearing officer clearly assessed the evidence presented by the parties about the incident, as discussed above, and appropriately determined that the Manager's testimony was credible and supported issuance of the Written Notice.²³

In summary, and while 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 on this basis.

Documents Issues

In addition, the grievant argues that the agency failed to provide her with documents about "prior grievances filed against" her division. The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."²⁴ Pursuant to the *Rules for Conducting Grievance Hearings*, a hearing officer may "issue an order for . . . the production of documents" upon request by a party.²⁵ In cases

²¹ See, e.g., EDR Ruling No. 2014-3884.

²² While the grievant did make this allegation in her response to the agency's due process notice and her Grievance Form A, there does not appear to be any other evidence in the record about bullying and/or retaliation in relation to the Written Notice. See Agency Ex. 2, at 4; Agency Ex. 4.

²³ See Hearing Decision at 4. The grievant also appears to claim that the agency improperly modified her job responsibilities when she returned to work after the five-workday suspension. See Agency Ex. 2, at 6. Although it is unclear whether this issue was before the hearing officer as a separate matter from the Written Notice, EDR has not reviewed any evidence to indicate that the agency's decisions regarding the grievant's job duties exceeded the scope of its discretion under policy. See Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

²⁴ Va. Code § 2.2-3003(E); see *Grievance Procedure Manual* § 8.2.

²⁵ *Rules for Conducting Grievance Hearings* § III(E).

where a party fails to produce relevant documents, a hearing officer has the authority to draw an adverse inference against that party if it is warranted by the circumstances.²⁶

In this case, there is nothing in the hearing record to show that the grievant requested an order from the hearing officer for the documents in question. In any event, the hearing officer did not issue an order for the production of any documents. It does not appear the grievant brought the matter to the hearing officer's attention either before or during the hearing. Regardless of any procedural issues relating to the grievant's alleged request for documents, EDR has not reviewed anything to indicate that the agency's failure to produce the documents, if it actually occurred as described by the grievant, impacted the outcome of the case such that the grievant suffered any material prejudice. It is not clear to EDR how evidence to demonstrate that other employees had filed grievances about events in her division, if such evidence exists, would have been relevant to contradict or disprove the allegations against her in this case – namely, the charge that she engaged in threatening behavior directed at the Manager in violation of Policy 2.35.²⁷ In the absence of evidence showing that the agency failed to comply with a directive from the hearing officer or that the grievant's ability to mount a defense to the charges against her was materially prejudiced because of the agency's alleged actions, EDR finds no error with respect to this issue and declines to disturb the decision on this basis.

The grievant also contends that the agency improperly submitted previous hearing decisions for the hearing officer's consideration, and that copies of these decisions were not provided to her in advance of the hearing. As part of its closing argument and in support of its position that the Written Notice issued to the grievant should be upheld, the agency offered two prior hearing decisions that addressed disciplinary action for threatening behavior.²⁸ These decisions are not labeled as exhibits and, thus, were not admitted into the hearing record. Nothing in the grievance procedure prohibits a hearing officer from accepting hearing decisions, EDR rulings, or other precedent from a party in support of their arguments about the desired outcome of a particular case. Although it may be a better practice for a party to include such documents with other exhibits to be admitted into the hearing record, it is not required. Most importantly for this case, EDR has not reviewed anything to suggest that the hearing officer improperly relied on information that was not in the hearing record in reaching his decision about whether the Written Notice issued to the grievant was warranted and appropriate under the circumstances. Accordingly, EDR finds no error in relation to this issue and will not disturb the decision on this basis.

Other Issues Raised by the Grievant

Finally, the grievant has submitted a supplement to her request for administrative review, in which she offers newly discovered evidence in support of her position that the Manager engaged in bullying and/or retaliation.²⁹ The *Grievance Procedure Manual* provides that

²⁶ *Id.* § V(B).

²⁷ Agency Ex. 1.

²⁸ See Hearing Recording at 2:27:09-2:27:23.


²⁹ Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence." *Cf.* *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered

“[r]equests for administrative review must be in writing and *received by* [EDR] within 15 calendar days of the date of the original hearing decision.”³⁰ EDR has typically permitted an appealing party to submit additional briefing material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the 15 calendar days can be considered by EDR on administrative review. The grievant presented no argument about newly discovered evidence in her original, timely request for administrative review, and EDR received the grievant’s additional submission after the 15-calendar-day deadline for administrative review of the hearing decision had expired. Accordingly, EDR finds that the grievant’s claim regarding newly discovered evidence is untimely, and it will not be considered in this ruling.

More importantly, the evidence in question is dated after the hearing. Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.³¹ Because the alleged newly discovered evidence did not exist at the time the hearing took place, there would be no basis for EDR to remand the hearing decision for consideration of this additional evidence, even if this aspect of the grievant’s request for administrative review were considered timely.³²

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.³³ 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.³⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁵



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evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

³⁰ *Grievance Procedure Manual* § 7.2(a) (emphasis in original).

³¹ *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

³² To the extent the grievant believes that the Manager has engaged in improper conduct directed at her since the hearing, she may file a grievance with the agency challenging the Manager’s alleged action(s). *See Grievance Procedure Manual* § 2.4. Any such grievance must comply with the access and initiation requirements of the grievance procedure. *See id.* §§ 2.3, 2.4.

³³ *Grievance Procedure Manual* § 7.2(d).

³⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁵ *Id.*; *see also* Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).