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ADMINISTRATIVE REVIEW

In the matter of Virginia Department of Transportation
Ruling Number 2020-5038
February 13, 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 11433. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

On May 8, 2019, the grievant initiated a grievance with the Virginia Department of Transportation (the “agency”), raising issues of (1) retaliation and intimidation, (2) discrimination based on disability, (3) gender inequality, and (4) veteran status.² She requested that the agency investigate her allegations, transfer her to a different division, end the retaliation against her, and ensure that she was treated with respect and civility.³ Following the management resolution steps, the agency head declined to qualify the grievance for a hearing.⁴ The grievant appealed that decision to EDR.⁵ On September 27, 2019, this Office issued EDR Ruling Number 2020-4956, which qualified the grievance for a hearing on the basis that the grievant had raised a sufficient question as to whether the agency misapplied and/or unfairly applied DHRM Policy 2.35, *Civility in the Workplace*.⁶ In particular, EDR determined that the agency’s allegations of “bullying and intimidation; discrimination on the basis of sex, disability and[/]or veteran status, and retaliation after making an allegation of sexual discrimination and/or using disability-related

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 Grievant’s Ex. 3, at 26-29; *see* EDR Ruling No. 2020-4956 at 1-2.

³ Grievant’s Ex. 3, at 29.

⁴ *See* EDR Ruling No. 2020-4956 at 2.

⁵ *See id.*

⁶ *Id.* at 1, 10.

benefits”⁷ should be addressed more thoroughly by a hearing officer.⁸ After EDR appointed a hearing officer, a hearing was held on December 3, 2019.⁹

In a decision dated December 20, 2019, the hearing officer found that there was “nothing in the evidence presented . . . that would rise to the level of a violation of Policy 2.35.”¹⁰ He determined instead that, “[w]hile there may have been an appearance of a hostile environment driven by a high expectation of efficiency, . . . there was just an appearance based on a single, unreasonable, subjective analysis.”¹¹ Finally, the hearing officer went on to state that “[t]here was no credible evidence that the Agency was[] disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, unwelcome, bullying, or intimidating toward the Grievant”¹² Based on these findings, the hearing officer concluded that the grievant had not met her burden of proof to demonstrate that the agency’s actions were a violation of DHRM Policy 2.35 and declined to order relief.¹³ The grievant now seeks administrative review from 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”¹⁴ 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.¹⁵ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁶ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Alleged Procedural Issues

In her request for administrative review, the grievant alleges that the hearing officer’s decision is not consistent with the requirements of EDR’s *Rules for Conducting Grievance Hearings*. Pursuant to the *Rules*, a hearing officer’s decision must “contain . . . clearly identified order(s) specifying whether the agency’s action has been upheld, reversed, or modified”; must be sent to the parties “with a cover letter”; and “must be provided to the grievant, the parties’ advocates, and any other individuals identified on the Form B.”¹⁷ The grievant claims that the

⁷ Decision of Hearing Officer, Case No. 11433 (“Hearing Decision”), December 20, 2019, at 4-5.

⁸ EDR Ruling No. 2020-4956 at 10.

⁹ See Hearing Decision at 1.

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁵ See *Grievance Procedure Manual* § 6.4(3).

¹⁶ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁷ *Rules for Conducting Grievance Hearings* § V(C).

decision does not contain a clear order of relief, did not have a cover letter, and was not sent to her.¹⁸

Contrary to her assertion, the hearing officer did explicitly make a determination that the grievant had not met her burden of proof to demonstrate that the agency's actions violated DHRM Policy 2.35.¹⁹ While grievances challenging the issuance of formal disciplinary action must necessarily address whether the Written Notice has been "upheld, reversed, or modified," this case did not involve discipline. The hearing officer concluded that the relief requested by the grievant was not warranted here, based on his factual findings and upon consideration of the evidence in the record.²⁰ With regard to the grievant's claims regarding the hearing officer's distribution of the decision, EDR finds that any error, if it occurred as described by the grievant, was harmless and does not warrant remand in this case. Indeed, the grievant's advocate clearly received a copy of the decision because he submitted a timely request for administrative review to EDR on the grievant's behalf. Accordingly, EDR declines to disturb the decision based on the grievant's procedural arguments.

Hearing Officer's Consideration of Evidence

In the remainder of her request for administrative review, the grievant essentially challenges the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"²¹ and to determine the grievance based "on the material issues and the grounds in the record for those findings."²² In support of her position, the grievant argues that the hearing officer did not properly consider the evidence she presented at the hearing and erred by not finding that her testimony, as well as corroborating testimony from her witnesses, was credible on the issue of whether the agency had created an objectively hostile work environment.²³ Further, the grievant alleges that the hearing officer improperly disregarded her written closing argument, which she contends would have led him to conclude that the evidence could not support any outcome other than a determination that the agency had engaged in prohibited conduct under DHRM Policy 2.35.²⁴

¹⁸ Request for Administrative Review at 1-2.

¹⁹ Hearing Decision at 12.

²⁰ Furthermore, the grievant appears to have requested, in part, that "the hearing officer order the agency to create a new civility monitoring agency using the grievant as an analyst . . ." Request for Administrative Review at 3. In grievances alleging a misapplication and/or unfair application of policy, "the hearing officer may order the agency to reapply the policy from the point at which it became tainted." *Rules for Conducting Grievance Hearings* § VI(C)(1). Nonetheless, "in cases where the hearing officer concludes that written policy requires a particular result without the exercise of agency discretion (i.e., no other outcome under policy), the hearing officer may order the agency to implement those particular policy mandates." *Id.* Even if the hearing officer had found that the agency engaged in prohibited conduct under DHRM Policy 2.35, EDR has not identified any mandate in state or agency policy that would allow him to order the agency to create a new internal division as requested by the grievant.

²¹ Va. Code § 2.2-3005.1(C).

²² *Grievance Procedure Manual* § 5.9.

²³ Request for Administrative Review at 2-3.

²⁴ *Id.*

In the hearing decision, the hearing officer made the following conclusions based on the evidence presented by the parties:

. . . I find nothing in the evidence presented to me that would rise to the level of a violation of Policy 2.35. This division of the Agency requires analysts to be able to analyze quickly, thoroughly, and without constant instruction or direction from management. The Grievant testified that she had two college degrees and that she had been at the division for approximately four years. She is clearly intelligent, well-educated, and she is not a new employee. The areas of faulty analyses that were presented to me are not overly complex and should have easily been within her ability to perform. While there may have been an appearance of a hostile environment driven by a high expectation of efficiency, at least based on the facts in front of me, I find that there was just an appearance based on a single, unreasonable, subjective analysis. I find that the Agency simply demanded that its analysts analyze without great hand-holding and do so on a timely basis. There was no credible evidence that the Agency was[] disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, unwelcome, bullying, or intimidating toward the Grievant other than the Agency's requirement that she perform her duties quickly, thoroughly and without constant hand-holding.²⁵

As the hearing officer correctly noted, “[t]he burden of proof [was] on the Grievant to show by a preponderance of the evidence that her allegations alleging that the Agency violated Policy 2.35 [were] true.”²⁶ The hearing officer clearly determined that she had not shown the agency engaged in discrimination, retaliation, or other prohibited conduct that created a hostile work environment in violation of DHRM Policy 2.35.²⁷

At the hearing, the grievant testified at length about her experiences with her current supervisor and the director,²⁸ and the hearing officer's description of her testimony and perceptions is consistent with the evidence in the record. In short, it is clear that the grievant believes she was inappropriately targeted for increased scrutiny, and that the immediate supervisor and the director have engaged in allegedly harassing behavior because of one or more protected classes to which she belongs and/or instances of protected activity in which she has engaged.²⁹ Two additional witnesses (one who formerly worked in the grievant's division and one who currently works in the grievant's division) also testified about the grievant's current supervisor, the director, and the work environment in the division. These witnesses corroborated

²⁵ Hearing Decision at 11.

²⁶ *Id.* at 6.

²⁷ *See id.* at 11-12.

²⁸ Hearing Recording at Track 1, 27:02-1:46:30 (grievant's testimony); *see* Grievant's Ex. 4, at 30-32.

²⁹ Hearing Recording at Track 1, 1:08:22-1:09:22, 1:29:50-1:32:48 (grievant's testimony); *see* Grievant's Ex. 4, at 30-32.

some of the grievant's claims about the work environment generally,³⁰ but did not have firsthand knowledge of specific incidents involving the grievant, her supervisor, and/or the director.³¹

On the other hand, both the immediate supervisor and the director testified about the grievant's work performance and the specific alleged incidents cited by the grievant in support of her claims. They described their concerns about the grievant's alleged poor work performance³² and explained that the interactions complained of by the grievant were intended to address these legitimate work-related concerns.³³ While the grievant may disagree with the hearing officer's decision, 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.³⁴ Having thoroughly reviewed the hearing record, EDR finds nothing to indicate that the hearing officer's consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record.

With regard to the grievant's claim regarding her closing argument, EDR also finds no error in the decision. When discussing procedural matters at one point during the hearing, the hearing officer explained to the parties that their closing arguments were not evidence and that he likely would not give them great weight when making his decision.³⁵ The grievance procedure provides that "[t]he responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances"³⁶ and that the hearing decision must be based on the evidence in the hearing record.³⁷ Opening and closing statements are not evidence before the hearing officer to be considered when making a decision, as they are not testimony given under oath; they are instead an opportunity for the parties to summarize the evidence and make arguments as to their respective positions. As discussed more thoroughly above, EDR's review of the hearing officer's decision indicates that it is consistent with the evidence in the record and his discretion under the grievance procedure. Whether, and to what extent, the hearing officer considered the parties' opening and closing arguments is therefore not a basis for remand in this case.

³⁰ *E.g.*, Hearing Recording at Track 1, 2:07:10-2:17:54 (Employee 1's testimony), 2:33:17-3:00:59 (Employee 2's testimony); *see* Grievant's Ex. 4, at 35-38.

³¹ *E.g.*, Hearing Recording at Track 1, 2:18:05-2:19:13 (Employee 1's testimony), 2:39:10-2:41:52, 2:46:58-2:48:39 (Employee 2's testimony).

³² *E.g.*, Hearing Recording at Track 1, 5:01:46-5:23:25 (director's testimony), Track 2, 13:02-54:02 (supervisor's testimony); *see* Grievant's Ex. 4, at 32-34.

³³ *E.g.*, Hearing Recording at Track 1, 5:26:32-5:39:15 (director's testimony), Track 2, 54:04-1:22:16 (supervisor's testimony); *see* Grievant's Ex. 4, at 32-34; Agency Exhibit 6.

³⁴ *See, e.g.*, EDR Ruling No. 2014-3884.

³⁵ Hearing Recording at Track 2, 6:51-7:25.

³⁶ *Rules for Conducting Grievance Hearings* § VI(B)(1).

³⁷ *Grievance Procedure Manual* § 5.9; *see Rules for Conducting Grievance Hearings* § V(C).

Finally, EDR notes that the grievant has legitimately raised issues regarding her perspective about the underlying circumstances in this case. The hearing officer's decision was based on his conclusion that the grievant had not shown by a preponderance of the evidence that the agency violated DHRM Policy 2.35, which does not necessarily mean that her arguments were entirely without merit. Indeed, this Office found the grievant's claims, both about the allegedly harassing behavior she experienced as well as agency management's response to her complaints about the behavior, sufficiently concerning at the qualification stage that a hearing was warranted for further exploration of the facts. Ultimately, however, the question to be addressed on administrative review is whether there are facts in the record to support the hearing officer's decision. Given that Policy 2.35 defines workplace harassment as conduct that is "targeted or directed,"³⁸ the hearing officer appropriately considered the context of the incidents described by the grievant in determining that they did not rise, either individually or collectively, to the level of prohibited conduct. While a hearing officer might, in different circumstances, appropriately find that the same or similar behavior was inconsistent with the requirements or intent of Policy 2.35, EDR cannot say that the hearing officer's analysis of all the facts and circumstances in this case lacked a basis in the evidence or was otherwise unreasonable.

Nevertheless, nothing in this ruling or the hearing officer's decision should be read to discourage or negate agencies' affirmative obligations under DHRM 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.³⁹ These obligations apply whether or not the conduct at issue is severe and/or pervasive, and whether or not it merits formal discipline. When assessing whether behavior constitutes prohibited conduct under Policy 2.35, however, an employee's subjective experience of the behavior will rarely be dispositive.⁴⁰ As discussed above, it was the grievant's burden at the hearing to present evidence demonstrating that the agency's actions were a violation of Policy 2.35, whether in the form of prohibited conduct itself or a failure to intervene after becoming aware of alleged prohibited conduct. After reviewing the grievant's arguments regarding the hearing decision, EDR must conclude that there is nothing to indicate the hearing officer abused his discretion by finding that the grievant had not met this burden; thus, remanding the case is not warranted. Because 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 and declines to disturb the decision on this basis.⁴¹

³⁸ DHRM Policy 2.35, *Civility in the Workplace*, at 6.

³⁹ 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"

⁴⁰ Guidance from DHRM specifically provides that "[a] 'reasonable person' standard is applied when assessing if behaviors should be considered offensive or inappropriate." DHRM Policy Guide – *Civility in the Workplace*, at 1.

⁴¹ The grievant further appears to argue that the decision "does not comply with law." Request for Administrative Review at 1. EDR does not have the authority to address the grievant's legal arguments, to the extent any are presented in her request for administrative review. A claim that the hearing decision is contrary to law may be raised in a legal appeal to the appropriate circuit court. *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* §

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.⁴² 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.⁴³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁴



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7.3(a). The "Conclusion and Appeal Rights" section of this ruling contains additional information about appealing to the circuit court.

⁴² *Grievance Procedure Manual* § 7.2(d).

⁴³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).