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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia
Ruling Number 2020-5044
February 28, 2020

The grievant 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 11439. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11439, as found by the hearing officer, are as follows:²

The University of Virginia [the “university” or “agency”] employed Grievant as an Accountant in one of its Units. He was entrusted with maintaining confidential financial information. He had been employed by the University for approximately 11 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant wanted to attend a football game at College C between College C and another school. The game was sold out and Grievant would have to pay a premium to obtain a ticket to the game. He decided to contact College C and obtain media credentials which meant he would receive a free ticket to the event.

On September 2, 2019, Grievant applied to College C for media credentials for the football game between College C and another school. He used an internet-based form to falsely claim to be a reporter from UVA Today. He listed his [university] email address as part of his contact information. On

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. 11439 (“Hearing Decision”), January 15, 2020, at 2-3 (internal citations omitted).

September 8, 2019, Grievant “pitched” a story to College C that he was writing an article to compare the football programs of [the university], College C, and another school.

On September 12, 2019, Grievant sent emails to College C asking for a status update on his request for media credentials. An Assistant Athletic Director for College C contacted the Associate Vice President [“AVP”] overseeing UVA Today to inquire about Grievant’s request after finding no stories written by Grievant and learning from the [university’s] website that Grievant was an accountant. The [AVP] replied to the Assistant Athletic Director that UVA Today did not have any employees planning to attend the football game.

On September 12, 2019, the [AVP] contacted Grievant to inquire about Grievant’s request for media credentials. Grievant entered College C’s media credentialing system using his [university] computer and redacted his contact information. He entered fictitious contact information into the system. Grievant falsely responded to the [AVP] that, “I have no idea what this is about. My initial thought is a phishing scam or mistaken identity.”

On September 16, 2019, the [AVP] met with Grievant for a predetermination meeting. Grievant falsely denied requesting the credentials from College C and said that someone else must have hacked into his computer.

On September 17, 2019, Grievant sent the [AVP] an email with the subject, “I am Sorry and I was Wrong.” He apologized for not being “open and transparent.” He explained that he “made the extremely poor decision to try and secure entry to the game on [date] by entering my information into the [College C] media credential website on Monday, September 2”

On September 24, 2019, a second predetermination meeting was held. Grievant referred to his actions as “frivolous and silly.”

On October 2, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for dishonesty.³ The grievant timely grieved his termination, and a hearing was held on January 14, 2020.⁴ In a decision dated January 15, 2020, the hearing officer determined that the Group III Written Notice issued to the grievant “must be upheld” because the grievant “displayed dishonesty.”⁵ The hearing officer also found no mitigating circumstances meriting reduction of the disciplinary action.⁶

³ *Id.* at 1; University Ex. 2.

⁴ Hearing Decision at 1. The grievant did not attend the hearing. *See id.*; *see generally* Hearing Recording. The *Rules for Conducting Grievance Hearings* permit a hearing to “proceed in the absence of one of the parties,” with the hearing officer’s subsequent decision to be based “on the grievance record and the evidence presented at the hearing.” *Rules for Conducting Grievance Hearings* § IV(A); *Grievance Procedure Manual* § 5.5.

⁵ Hearing Decision at 4.

⁶ *Id.*

The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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 a 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.

In his request for administrative review, the grievant appears to argue that the university failed to exchange evidentiary information with him prior to the hearing and, thus, he “was not provided the chance to review or object to” the agency’s evidence. As to the merits of the disciplinary action, the grievant contends that (1) the university failed to prove that his conduct as charged merited a Group III Written Notice, and (2) the hearing officer failed to consider mitigating factors.

Procedural Challenges

On November 20, 2019, the hearing officer sent confirmation to both parties of the date, time, and location of the hearing. In the confirmation letter, the hearing officer also notified the parties that they were required to “exchange with each other their witness lists . . . and hard copies of all proposed exhibits on or before 5:00 p.m., January 8, 2020.”¹⁰ By letter dated January 6, 2020, the university sent to the grievant and the hearing officer a list of its planned witnesses and exhibits. The grievant suggests that he never received this information, and EDR notes that the zip code for the grievant’s address listed on the university’s letter appears to be incorrect. Therefore, EDR assumes for purposes of this ruling that the university failed to provide its witness list and proposed exhibits to the grievant prior to the hearing date.¹¹

However, there is no indication that the grievant ever notified the university or the hearing officer that he had not received the required evidentiary information from the university. During the grievance hearing process, the hearing officer has authority to hear and resolve evidentiary issues presented by the parties and is in the best position to do so when a hearing is

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

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

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

¹⁰ The letter also instructed the parties to provide the evidentiary information they exchanged to the hearing officer.

¹¹ EDR perceives no indication that the university’s apparent zip code error was intentional or made in bad faith. The grievant also maintains that the agency’s exhibits should have been submitted to him via email; however, neither any instruction from the hearing officer nor any provision of the grievance procedure required the university to send its voluminous evidence electronically, in addition to the hard copies ordered by the hearing officer. See Hearing Confirmation Letter, Nov. 20, 2019.

pending.¹² Yet the grievant did not ask the hearing officer to resolve any evidentiary issues or remedy any prejudice to him either before or at the hearing; indeed, the grievant did not attend the hearing.¹³

The hearing officer, in his discretion, allowed the hearing in this case to proceed in the grievant's absence, admitting evidence presented by the university.¹⁴ Pursuant to the *Rules for Conducting Grievance Hearings*, the evidentiary record closed at the conclusion of the hearing.¹⁵ The hearing officer then determined the issues based on the grievance record and the evidence presented at the hearing.¹⁶ Because the grievant was afforded a hearing and has not presented any cause that may have prevented him from attending and/or submitting his own evidence at or before that time, EDR rejects the grievant's contention that he "was not provided the chance to review or object to" the agency's evidence, even if he did not receive it prior to the hearing. Thus, EDR perceives no procedural grounds on which to disturb the hearing officer's decision.

Discipline Warranted and Appropriate

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁷ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁸ 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.¹⁹ Thus, in disciplinary actions, the

¹² Hearing officers have the authority to "[r]equire the parties to exchange a list of witnesses and documents," to "[r]ule on procedural requests," and to "[t]ake other actions as necessary or specified in the grievance statutes, [the *Grievance Procedure*] Manual, or the *Rules for Conducting Grievance Hearings*." *Grievance Procedure Manual* § 5.7(2), (9), (11). This authority encompasses the ability to grant certain relief in the event that the hearing officer finds that one party has been prejudiced by the other's non-compliance.

¹³ On November 6, 2019, EDR issued a compliance ruling finding that the hearing officer's order to hold the hearing on university premises raised no compliance issues, in reliance on representations from university counsel that the grievant would be permitted to attend at that location. *See* EDR Ruling No. 2020-5006. Notwithstanding EDR's ruling, the grievant maintained: "I require an email from a proper university official . . . stating that the trespass order has been revoked in full in order to attend." In response, EDR confirmed to both parties its understanding that the university's counsel spoke for the university as to hearing-related matters and, therefore, this Office found no basis for concern that the grievant would be prevented from attending his hearing on university property. In his request for administrative review, the grievant does not appear to challenge the hearing officer's decision to proceed with the hearing in the grievant's absence.

¹⁴ Hearing Recording at 00:10-00:50, 59:40-1:00:00; *see* *Grievance Procedure Manual* § 5.5. EDR has no indication that the hearing officer was aware of any reason why the grievant was not present.

¹⁵ *Rules for Conducting Grievance Hearings* § IV(G). As part of his request for administrative review, the grievant appears to seek, for the first time, additional evidence, *e.g.* his past performance evaluations. Because the evidentiary record is closed and EDR perceives no justification for the hearing officer to re-open it, EDR declines to order (or otherwise provide for) the production of evidence as it relates to the grievant's claims at this stage. The grievant has also requested a copy of the hearing recording, which this Office has sent to him. *See* *Grievance Procedure Manual* § 5.6.

¹⁶ *See* *Grievance Procedure Manual* 5.5; *Rules for Conducting Grievance Hearings* § IV(A).

¹⁷ Va. Code § 2.2-3005.1(C).

¹⁸ *Grievance Procedure Manual* § 5.9.

¹⁹ *Rules for Conducting Grievance Hearings* § VI(B).

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.²⁰ 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 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.

Here, the grievant appears to contend that he could not properly be disciplined for dishonesty; *i.e.*, contrary to the hearing officer's analysis, dishonesty was not comparable to falsification of records – an offense that would typically merit a Group III Written Notice under DHRM Policy 1.60, *Standards of Conduct*.²¹ While this analogy may not fit each and every circumstance of employee dishonesty, EDR perceives no error in its application here. As EDR has previously held,²² an employee's untruthfulness harms the employer's functions by compromising management's ability to trust the employee. In this case, the university presented evidence that the grievant used his university email account (which creates university records) to misrepresent his role at the university, for his own personal gain.²³ The university also presented testimony that the grievant's conduct "tarnished [its] name" and caused management to lose trust in him, due to his "multiple lies" and apparent failure to grasp the seriousness of his offense.²⁴ Thus, there is evidence in the record to support the hearing officer's determination that the grievant's misconduct, and the severity of its impact to the university, was analogous to falsification of records such that a Group III Written Notice was consistent with law and policy in this case.

Finally, the grievant contends that the hearing officer failed to properly consider mitigating factors, such as his ultimate apology to the university and his positive performance record. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."²⁵ The *Rules for Conducting Grievance Hearings* ("Rules") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."²⁶ More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²⁷

²⁰ *Grievance Procedure Manual* § 5.8.

²¹ See Hearing Decision at 4; DHRM Policy 1.60, Attachment A, *Examples of Offenses Grouped by Level*, at 1.

²² See EDR Ruling No. 2020-5004.

²³ See University Ex. 1, at 7; University Ex. 3; University Ex. 4, at 3.

²⁴ Hearing Recording at 53:45-55:20.

²⁵ Va. Code § 2.2-3005(C)(6).

²⁶ *Rules for Conducting Grievance Hearings* § VI(A).

²⁷ *Id.* § VI(B)(1).

In this case, as explained above, the hearing officer appropriately sustained the university's charge of dishonesty as misconduct. Thus, he appropriately deferred to the university's conclusion, in its discretion, that the grievant's apology was not sufficient to restore trust in him going forward, notwithstanding his positive performance up to that point. Indeed, even if the hearing officer himself would have found the grievant's apology sufficient for mitigation, he nevertheless lacked authority to substitute his own judgment for the university's discretion in maintaining a workforce with the highest degree of trust.²⁸ Thus, EDR cannot say that the hearing officer abused his discretion in finding that the university's Group III Written Notice with removal was within the bounds of reasonableness. As such, EDR will not disturb the hearing officer's decision on this basis.

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.²⁹ 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.³⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³¹



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²⁸ See Va. Code § 2.2-3004(B); *Rules for Conducting Grievance Hearings* § VI(B)(2).

²⁹ *Grievance Procedure Manual* § 7.2(d).

³⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³¹ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).