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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Transportation
Ruling Number 2020-5045
February 25, 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 11416. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11416, as found by the hearing officer, are as follows:²

Grievant, a 40-year veteran at [the Virginia Department of Transportation (“the agency”)] was moved on July 25, 2019 to a new location retaining his superintendent position but with a new crew. Grievant was not happy about the move. Some members of the crew were unhappy their previous superintendent had been replaced.

On the first day at the new location Grievant had conversation with various employees. The employees alleged Grievant made remarks to them. The remarks were in four categories:

1. Grievant stated he wanted to “burn down the Residency Office”.
2. Grievant made comments about an employee who had left VDOT.
3. Grievant stated he wanted to “hook a chain to certain persons and drag them out of their office and down the street”.
4. Grievant told employees he had been sent to “get the ball rolling” and “get more work out of them”.

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. 11416 (“Hearing Decision”), January 16, 2020, at 2-4 (footnotes omitted).

The Agency relied on the statements of the four (4) witnesses. The witnesses will be identified as [Witness 1], [Witness 2], [Witness 3], and [Witness 4]. [Witness 3] and [Witness 4] reported to [Witness 2], and [Witness 2] reported to [Witness 1] in the chain of authority. [Witness 1] and [Witness 2] while standing together were approached by [Witness 3] and [Witness 4]. [Witness 3] and [Witness 4] reported statements made to them by Grievant. These statements were reported by [Witness 2] and [Witness 1] to their superior. All four (4) Witnesses were interviewed individually which resulted in written statements. The same four (4) Witnesses testified at hearing. The statements of [Witness 3] and [Witness 4] were fairly consistent. Whether [Witness 1] and [Witness 2] reported what they were told or what they actually heard was less clear.

In their interviews, [Witness 4] and [Witness 3] told [Witness 1] and [Witness 2] that Grievant had started a general conversation with them. The conversation evolved into a conversation about a previous employee with Grievant making several remarks about the employee saying: He was bi-polar, not on time for work, flipped a picnic table and so forth. Grievant then said he would like to chain up Residency Management and drag them out of the building down the road. Grievant finally said he had been sent to the location to get the crew to do good work. No mention was made about burning down a building.

[Witness 2] said he witnessed Grievant talking about a previous employee and Grievant told [Witness 2] he was at the new location “to get the ball rolling”. [Witness 2] also stated Grievant had made comments about another employee’s “fling” and “burning down a building”. [Witness 1] stated he heard Grievant talk to [Witness 2] about another employee and Grievant’s reason for being at the new location. [Witness 1] did not confirm the “burning” or “fling” statements.

The person [(“the Person”)] to whom [Witness 2] and [Witness 1] reported, put the matter under investigation. In questioning the Witnesses, [the Person] felt the employees were concerned and felt threatened by Grievant’s remarks. The employees were offended that they were told they needed someone to get more work out of them. They felt the discussion about another employee was unnecessary and caused them to be uncomfortable.

[The Person] stated at Hearing that his reason for relocating Grievant was to be in a position to better monitor his behavior as Grievant had, in the last 3 years, received previous disciplines. [The Person] submitted evidence of a counseling memo in March of 2016, a Group I in September of 2018, a verbal counseling in April of 2019, and a Group II dated July 18, 2019 for an incident in May of 2019.

[The Person] found the Witness’s statements to be credible. He sent a letter to Grievant on July 26, 2019 stating he was under investigation. An investigative summary was generated on July 29, 2019. A letter sent on August 2, 2019 of intent

to impose disciplinary action. Grievant responded to this letter on August 4, 2019. [The Person] sent a letter and Written Notice with Group III termination on August 15, 2019.

Grievant's representative called seven (7) Witnesses to attest to Grievant's good character and work ethic. All Witnesses unanimously stated Grievant had never been rude or threatening to them. One witness stated he heard [Witness 2] say he did not want Grievant to be his superintendent. None of these Witnesses were present at the work location on the day of this incident, and none were in Grievant's crew. Grievant presented evidence of his recent awards for exemplary service. Grievant denied he made any of the alleged statements. Grievant stated he had only 14 more months of a 40-year career until retirement.

On August 15, 2019, the agency issued to the grievant a Group III Written Notice with termination for making threats in violation of DHRM Policy 1.60 and DHRM Policy 2.35 as well as agency policies.³ The Written Notice cited comments the grievant allegedly made in the workplace that included "false remarks to subordinates that undermined team cohesion and staff morale, spreading gossip and sharing confidential personnel information about an employee with . . . subordinate employees, and making multiple comments threatening to physically harm specific [agency] members of management, as well as threatening damage to agency property multiple times."⁴ The Written Notice acknowledged the grievant's account of the events and his length of service as mitigating factors, but also cited the grievant's prior formal discipline and the severity of the allegations to conclude that a Group III Written Notice with termination was appropriate.⁵ In a decision dated January 16, 2020, the hearing officer determined that the grievant had violated the specified policies and that these "actions were significant enough to warrant a Group III discipline under DHRM Policy 1.60."⁶ The hearing officer also deferred to the agency's consideration of mitigating and aggravating factors as consistent with law and policy.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 a party; the sole remedy is that the hearing officer correct the

³ Agency Ex. 9, at 1.

⁴ *Id.*

⁵ *Id.* at 2.

⁶ Hearing Decision at 5.

⁷ *Id.*

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

noncompliance.⁹ The Director of DHRM also has the sole authority to make a final 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.

In his request for administrative review, the grievant contends that “the hearing officer either misheard or failed to consider critical evidence.”¹¹ The grievant argues that the hearing decision “fails to reflect” testimony that the employees who reported the grievant’s prohibited statements had wanted a different individual to be their supervisor, rather than the grievant.¹² The grievant further asserts that the hearing officer failed to consider a recent letter from the Governor commending the grievant for his length of service.¹³

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁴ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁵ 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.¹⁶ 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.¹⁷ 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 hearing officer made appropriate factual determinations that the grievant engaged in a substantial part of the behavior charged on the Group III Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy. Specifically, the hearing officer found that “there was enough consistency [among the witnesses’ accounts] for the Agency to believe four . . . people coming forward with essentially the same facts could be a true scenario,” *i.e.*, that the grievant had “made statements about another employee” that were “unprofessional,” including a “comment about chaining up persons and dragging them.”¹⁸

On review of the hearing record, EDR finds evidence to support the hearing officer’s conclusion that the grievant made unprofessional comments about other employees, including reference to chaining managers to a vehicle and dragging them. Witness 2 testified that, during the time-period at issue, he heard the grievant comment about pulling three individuals from

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Request for Administrative Review, at 1.

¹² *Id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ Va. Code § 2.2-3005.1(C).

¹⁵ *Grievance Procedure Manual* § 5.9.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁷ *Grievance Procedure Manual* § 5.8.

¹⁸ Hearing Decision at 4-5.

upper management down the road with his truck; he also heard the grievant discuss the disciplinary records of other employees.¹⁹ Witness 1 testified that he heard the grievant say he would “like to take a chain and throw it around [the managers] and drag them . . . behind a pickup.”²⁰ Witness 3 testified that he heard the grievant make comments about wanting to tie up three managers and drag them down the road and about the basis for disciplining another employee.²¹ Witness 4 testified that he heard the grievant say that he would like to “throw a chain around” members of management and “drag them down the road.”²²

The grievant appears to argue that these witnesses had a motive to lie and that this motive should have rendered their accounts of the grievant’s conduct not credible. To the extent that the hearing decision did not expressly address evidence supporting this theory, the grievance procedure imposes no requirement for a hearing officer to specifically discuss the testimony of each witness at a hearing. Thus, mere silence as to particular testimony or other evidence does not necessarily constitute a basis for remand. EDR finds no basis to infer that the hearing officer failed to consider testimony by any witness. Ultimately, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.²³

In addition, it appears that both the agency and the hearing officer specifically considered the grievant’s 40 years of state service in their respective decisions, even if neither ultimately considered this mitigating factor as dispositive. The Group III Written Notice issued to the grievant specifically cites his length of service as a mitigating factor considered by the agency.²⁴ The hearing decision, which described the grievant at the outset as “a 40-year veteran” of the agency,²⁵ reasoned that the grievant’s “regrettable” disciplinary dismissal after “such a long service record” was nevertheless appropriate based on two additional active written notices that the grievant had recently received.²⁶ Therefore, EDR finds no basis to conclude that the hearing officer failed to consider the grievant’s length of service as a mitigating factor.

Because the hearing officer’s findings in this case are based upon evidence in the record and the material issues of the case, EDR declines to disturb the decision.

¹⁹ Hearing Recording at 57:30-58:10, 59:40-1:00:10, 1:09:10-1:10:45 (Witness 2’s testimony).

²⁰ *Id.* at 1:19:10-1:19:53 (Witness 1’s testimony).

²¹ *Id.* at 1:43:35-1:44:35 (Witness 3’s testimony).

²² *Id.* at 1:58:40-1:59:55 (Witness 4’s testimony).

²³ *See, e.g.*, EDR Ruling No. 2020-4976.

²⁴ Agency Ex. 9, at 2; *see also* Hearing Recording at 27:10-27:55 (Investigator’s testimony).

²⁵ Hearing Decision at 2.

²⁶ *Id.* at 5.

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.²⁷ 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.²⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁹



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²⁷ *Grievance Procedure Manual* § 7.2(d).

²⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).