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THIRD ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5051
March 6, 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 second reconsideration decision in Case Number 11344. For the reasons set forth below, EDR will not disturb the second reconsideration decision.

The relevant facts in Case Number 11344, as found by the hearing officer, were recited in EDR’s first administrative review in this matter, and they are incorporated herein by reference.²

On March 5, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for computer/internet misuse (“Computer Misuse Written Notice”), and a separate Group III Written Notice for fraternization (“Fraternization Written Notice”).³ Following a grievance hearing, the hearing officer issued a decision upholding the Computer Misuse Written Notice at the Group II level⁴ and the Fraternization Written Notice at the Group III level.⁵

Following the grievant’s request for administrative review, EDR remanded the hearing decision for reconsideration,⁶ instructing the hearing officer to consider whether inadequate notice was a mitigating circumstance that warranted reduction of the agency’s disciplinary action as to the Computer Misuse Written Notice.⁷ On November 25, 2019, the hearing officer issued a reconsideration decision reversing the Computer Misuse Written Notice with removal.⁸ The

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 EDR Ruling No. 2020-4965, at 1-4 (citing Decision of Hearing Officer, Case No. 11344 (“Hearing Decision”), July 18, 2019, at 2-3).

³ Agency Exs. 1, 2.

⁴ Hearing Decision at 4.

⁵ *Id.* at 5-6, 7.

⁶ *See* EDR Ruling No. 2020-4965.

⁷ *Id.* at 9-10.

⁸ Reconsideration Decision of Hearing Officer, Case No. 11344-R (“Reconsideration Decision”), Nov. 25, 2019, at 2-3.

hearing officer also concluded that the agency would not have terminated the grievant based on the Fraternalization Written Notice alone.⁹ Thus, the hearing officer ordered the agency to reinstate the grievant.¹⁰

Upon the agency's request for a second administrative review, EDR issued a ruling declining to disturb the hearing officer's decision as to the Computer Misuse Written Notice, but remanded the decision for further consideration as to the Fraternalization Written Notice.¹¹ EDR concluded that, "where the agency has (1) proven the basis for its Group III Written Notice and (2) demonstrated an intent to terminate the grievant's employment (by actually doing so) and maintained this intent in its request for administrative review," EDR had no basis to infer that the agency in fact intended to depart from the usual penalty for a Group III Written Notice.¹² Thus, EDR remanded the reconsideration decision instructing the hearing officer "to issue an order upholding the grievant's termination."¹³ The hearing officer did so in a second reconsideration decision.¹⁴

The grievant has requested that EDR administratively review the second reconsideration decision. The grievant points to new findings of fact in the second reconsideration to support a contention that the "Grievant's employment was not terminated pursuant to the . . . Group III Written Notice for Fraternalization."¹⁵ The grievant argues that, based on these new findings about the warden's intent, EDR must remand this matter once again to the hearing officer with instructions to render a fourth (third reconsideration) decision. EDR declines to do so.

The *Rules for Conducting Grievance Hearings* require hearing officers to issue written decisions containing "findings of fact on material issues and the grounds in the record for those findings."¹⁶ Upon administrative review of such written decisions, EDR may order the hearing officer to "revise the decision so that it complies with written policy."¹⁷ However, the scope of such subsequent revisions is not unlimited. Here, EDR Ruling No. 2020-5027 concluded that, "[w]here a Group III Written Notice has been sustained and the agency has removed the grievant from employment, an agency cannot be required to offer additional proof of intent to terminate."¹⁸ Thus, the ruling instructed the hearing officer simply to "issue a second reconsideration decision upholding the agency's termination of the grievant's employment."¹⁹ While the ruling noticed the parties' right to request administrative review of new matters not resolved in prior decisions, the issue of the agency's intent to terminate the grievant in connection with the Group III Written Notice for Fraternalization was addressed in the first reconsideration decision and resolved by EDR Ruling No. 2020-5027, which identified no grounds for the hearing officer to reconsider the issue. Thus, EDR concludes that the new findings of fact in the second reconsideration decision are not appropriate for further review.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ See EDR Ruling No. 2020-5027.

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ See Second Reconsideration Decision of Hearing Officer, Case No. 11344-R2 ("Second Reconsideration Decision"), Jan. 27, 2020.

¹⁵ *Id.* at 1.

¹⁶ *Rules for Conducting Grievance Hearings* § V(C).

¹⁷ *Grievance Procedure Manual* § 7.2(a).

¹⁸ EDR Ruling No. 2020-5027, at 7.

¹⁹ *Id.* at 8.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's second reconsideration decision.²⁰ 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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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²⁰ See *Grievance Procedure Manual* § 7.2.

²¹ *Id.* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).