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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5054
March 9, 2020

The Department of Behavioral Health and Developmental Services (the "agency") 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 11442. For the reasons set forth below, EDR remands the hearing officer's decision for further consideration.

FACTS

The relevant facts in Case Number 11442, as found by the hearing officer, are as follows:[2]

> On August 8, 2019 the grievant was working at an agency facility in his capacity as a Nursing Supervisor. Employee A [EA] reported to another male Registered Nurse on August 11 that the grievant made unwelcome sexual advances toward her on August 8. According to EA, while on duty the grievant and EA went to a patient clothing room. Employee A reported that the grievant asked if he could "just grab her butt once." After she refused, according to EA he continued to try to grab her to hug her and grab her butt.
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> Employee A made this report to that male nurse during a conversation with him. As part of the conversation he was coaching her about establishing boundaries when interacting with certain patients. He became concerned when she made the comment to the effect that "some employees need to learn about boundaries." She described to him the incident in the clothing room, expressing that she "had to fight him off." She showed him a conversation on Facebook Messenger between her and the grievant.

[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. 11442 ("Hearing Decision"), January 28, 2020, at 2-3.

> These messages were exchanged subsequent to the grievant and EA being in the clothing room together. The exact amount of time that passed between the visit to the clothing room and the messages is unclear. The first message from the grievant to EA stated, "I don't mean to be a pervert but you looks very hot in them blue scrubs I love it." The grievant testified that prior to that message he had discussed with EA a set of blue scrubs that he felt were somewhat provocative to male patients in a certain unit.
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> Fifty-four minutes after that first Facebook message, Employee A messaged him back inquiring about the name of a local store from which she was ordering pizza for the employees, for which the grievant had agreed to pay. Forty-nine minutes later, Employee A messaged the grievant that she had placed the order at the store. She indicated that she needed to finish with a patient before going to pick up the pizza. The grievant responded "okay besides you looking to hot for me to ride with you lol." Employee A replied, "you right about that" and added an emoji at the end of the message. From the document submitted in evidence it is unclear whether the emoji is a smiling, laughing face or a crying face. At 6:37 p.m. Employee A messaged the grievant "where ya at I'm on 6 come get a slice."
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> After the reports made by Employee A on August 11, a formal investigation was commenced by the Agency. Four additional employees were interviewed, and written statements obtained from EA, the male nurse, and two other employees. The investigation did not include an interview with or statement from the co-worker named by EA as an individual to whom she spoke on the date of and after the clothing room visit.

On September 5, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with termination.[3] Citing DHRM Policy 2.35, *Civility in the Workplace*, and an agency policy related to sexual harassment, the Written Notice charged the grievant with making unwelcome sexual advances toward another employee by "trying to grab her" in the patient clothing room and by sending her inappropriate messages via social media.[4] The grievant timely grieved his termination, and a hearing was held on January 13, 2020.[5] In a decision dated January 28, 2020, the hearing officer determined that the agency had met its burden to prove that the grievant had sent the social media messages, but not that he had inappropriately tried to grab Employee A in the patient clothing room.[6] Finding that the messages on their own constituted "moderate flirtation" of limited impact, the hearing officer reduced the Written Notice to the Group I level.[7]

The agency now appeals the hearing decision to EDR.

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[3] Agency Ex. A.
[4] *Id.* at 1.
[5] Hearing Decision at 1.
[6] *Id.* at 1, 6-7.
[7] *Id.* at 7-8.

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."[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 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 its request for administrative review, the agency challenges the hearing decision on multiple grounds. The agency asserts that the hearing officer improperly excluded Employee A's testimony, drew an unwarranted adverse inference against the agency, unduly credited the grievant's opinion of Employee A's motivations, ignored aggravating factors, and exceeded his mitigation authority.

Stricken Testimony

By statute, hearing officers have the power and duty to "[r]eceive probative evidence," to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations," and to "[t]ake other actions as necessary or specified in the grievance procedure."[11] Accordingly, the *Rules for Conducting Grievance Hearings* permit hearing officers to "exclude evidence" for "just cause."[12] At the hearing in this matter, over the grievant's objection, the hearing officer initially granted the agency's request to have Employee A testify by telephone rather than in person.[13] After the agency's direct examination, the grievant began his cross-examination and asked Employee A whether she lied about her accusations against him.[14] At that point, a person later revealed to be Employee A's boyfriend interjected on the phone line.[15] The grievant moved to strike Employee A's testimony; the hearing officer granted the grievant's request and permitted no further examination of Employee A.[16] In its request for administrative review, the agency contends that it was an error to strike Employee A's testimony.[17]

We agree. As the hearing officer noted during the hearing, striking Employee A's testimony was an "extreme" step,[18] and EDR is unable to identify circumstances in the record

[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[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] Va. Code §§ 2.2-3005(5), (7).
[12] *Rules for Conducting Grievance Hearings*§ IV(D).
[13] Hearing Recording at 1:18:35-1:21:35.
[14] *Id.* at 1:45:40-1:45:50.
[15] *Id.* at 1:45:50-1:49:05.
[16] *Id.*
[17] Request for Administrative Review at 2-3.
[18] Hearing Recording at 1:45:50-1:49:05.

that would justify the remedy of excluding the agency's only eyewitness to alleged serious misconduct. First, the hearing officer did not find, and the record does not suggest, that the boyfriend's presence or interjection was the result of wrongdoing by either the agency or its witness. There is no indication whether Employee A was ever instructed to ensure that she was alone while giving telephonic testimony, and no one confirmed during her testimony whether that was the case. While the hearing officer was appropriately mindful of the grievant's right to closed hearing proceedings, Employee A would have been free in any event to disclose the substance of her testimony (and the questions she was asked) to her boyfriend following the conclusion of the hearing. Thus, the record does not indicate that she knew she should not testify in the presence of her boyfriend. Under these circumstances, it is unclear why the hearing officer determined that Employee A would not be able to credibly confirm under oath that her boyfriend had departed and that no other person could hear the proceedings. Without more, then, the boyfriend's brief interruption of the grievant's cross-examination did not constitute just cause to strike the witness testimony in its entirety.

Accordingly, the hearing decision must be remanded to the hearing officer to ascertain whether Employee A is available for further testimony and, if so, to offer the grievant the opportunity to cross-examine the witness. In the hearing officer's discretion, Employee A's testimony may begin again with direct examination by the agency or, in the alternative, resume from her earlier testimony at the hearing with further cross-examination by the grievant (and appropriate opportunities for redirect and re-cross). Should the agency again request to restrict Employee A's availability to a telephonic appearance only, EDR perceives no existing basis to deny such a request unless reasonable efforts to assure compliance with the closed hearing proceedings prove to be inadequate.

Evidence of Misconduct

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[20] 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.[21] 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.[22] 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.

[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] *Grievance Procedure Manual* § 5.8.

Here, the hearing officer concluded that the agency had not proven by a preponderance of the evidence that the grievant had made unwanted physical contact with the grievant. In the absence of her testimony, the hearing officer considered Employee A's written statements describing such unwanted contact and the accounts of other agency employees to whom she reported her complaints. He considered the agency's investigation report, which he noted did not include an interview with the employee to whom Employee A said she first reported the unwanted contact.[23] He considered the grievant's testimony, including about events that the grievant believed motivated Employee A to wrongly accuse him of sexual harassment. He considered the social media communications between the grievant and Employee A, noting that they were not consistent with a claim that Employee A was "extremely upset" with the grievant after the alleged incident in the patient clothing room.[24]

The agency challenges the hearing officer's consideration of evidence as to the alleged physical contact.[25] Primarily, the agency contends that the hearing officer improperly drew an adverse inference against it.[26] Noting that no explanation was present in the record for not interviewing the first coworker to whom Employee A allegedly reported the assault, the hearing officer drew an adverse inference against the agency; *i.e.*, "that any statement from that employee would have not been favorable to the agency."[27]

The *Rules for Conducting Grievance Hearings* provide for the authority to "draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or [EDR] has ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process."[28] Adverse inferences are a potential sanction for misconduct by a party (or its advocate), to be imposed "commensurate with the conduct necessitating the sanction" and the extent to which it materially prejudices the opposing party's case or otherwise disrupts the integrity of the hearing process.[29] Here, EDR identifies no failure on the agency's part to comply with an order of the hearing officer, or with the grievance procedure more generally, such that an adverse inference could be warranted under the *Rules*.[30] While a hearing

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[23] Hearing Decision at 6. It is unclear whether or how the report related to Employee A's allegations of unwelcome physical contact. The subject of the report was listed as: "if there were any complaints concerning inappropriate interactions between staff and [the grievant]." Agency Ex. D, at 1. Neither Employee A nor the grievant were listed among the individuals interviewed, and no written conclusions appear to have been included. *See id.* In testimony, the corporate compliance officer who prepared the report was unable to recall whether Employee A made specific allegations related to the grievant "grabbing" her. Hearing Recording at 8:48-12:30.

[24] Hearing Decision at 5-6.

[25] Request for Administrative Review at 3-6. Among the agency's challenges is the hearing officer's consideration of "speculation" by the grievant about Employee A's motives to falsely accuse him. *Id.* at 5-6. In the event that the parties have a further opportunity to elicit testimony from Employee A, any such testimony about her motivations may be weighed appropriately against the grievant's speculation.

[26] Request for Administrative Review at 3-4.

[27] Hearing Decision at 6.

[28] *Rules for Conducting Grievance Hearings* § V(B).

[29] *Id.* § III(E).

[30] EDR has consistently rejected the appropriateness of adverse inferences against a party that has complied with all orders from the hearing officer. *See, e.g.*, EDR Ruling No. 2017-4408; EDR Ruling No. 2016-4345; EDR Ruling No. 2015-4012.

officer could reasonably determine the appropriate weight to be given to evidence of an investigation if it omitted key inquiries, such omissions *in and of themselves* would not amount to misconduct with respect to the hearing process. In this case, moreover, the omission of the coworker does not necessarily undermine the integrity of the investigation because that coworker reportedly was not available for interview.[31] Thus, although the hearing officer had discretion to determine the probative weight of the investigation evidence, the record does not provide a basis to weigh the investigative omission *against* the agency's other evidence that unwanted physical contact occurred.

Therefore, upon remand, the hearing officer must reconsider whether the agency has met its burden to prove that the grievant made unwelcome physical contact with Employee A, as charged on the Group III Written Notice. The reconsideration shall account for any new testimony by Employee A[32] and shall not draw any adverse inference from the record consistent with this ruling. Finally, to the extent the original analysis did not do so, on reconsideration the hearing officer should address the probative value of the grievant's social media messages to Employee A as evidence that the grievant did in fact touch her inappropriately.[33]

Level of Discipline

The agency also contends that the hearing officer improperly reduced the Group III Written Notice issued to the grievant to a Group I.[34] The hearing officer based this decision in part on his finding that the agency had not proven the more serious aspect of the charged misconduct, *i.e.*, unwanted physical contact.[35] The hearing officer further noted a "prior relationship" between Employee A and the grievant and her invitation, subsequent to the alleged assault, for him to come and eat pizza she had purchased for staff.[36] Finding it unclear how unwelcome or upsetting the grievant's inappropriate social media messages were to Employee A,

[31] In its request for administrative review, the agency has represented that the coworker, a temporary worker, was not employed by the agency at the time of the investigation. Request for Administrative Review at 3-4. The question of this worker's omission from the investigation did not arise during the hearing.

[32] The agency has also objected to the hearing officer's consideration of "speculation" by the grievant as to Employee A's potential motives to falsely accuse him of sexual assault. *See* Request for Administrative Review at 4-5. EDR anticipates that, in the event the parties obtain new testimony from Employee A, any of her testimony that relates to her potential motivations to lie would be considered by the hearing officer and appropriately weighed against the grievant's assessment.

[33] While the hearing officer explicitly considered the messages in determining the seriousness of the grievant's misconduct, *see* Hearing Decision at 6-7, the decision was silent as to whether the grievant's multiple comments that Employee A looked "hot" tended to support the claim that he touched her inappropriately. EDR does not find that the hearing officer's silence on this question indicates a failure to properly consider it in the first instance, and we express no opinion on the probative value of the evidence in this regard. We simply accept the agency's argument that the messages, if determined relevant to the allegation of unwanted touching, should be considered with respect to the agency's burden of proof. *See* Request for Administrative Review at 6.

[34] Request for Administrative Review at 5-6.

[35] Hearing Decision at 7-8.

[36] *See id.* at 8. EDR is unable to discern from the hearing officer's finding of facts the nature of the "prior relationship" considered in the decision.

the hearing officer concluded that the messages were serious enough to merit only a Group I Written Notice.[37]

In its request for administrative review, the agency contends that the hearing officer erred in not considering the grievant's prior active Group I Written Notice for a different inappropriate interaction with another female employee. Under DHRM Policy 1.60, Group II offenses include "acts of misconduct of a . . . repeat nature."[38] Further, "absent mitigating circumstances, a repeat of the *same, active* Group I Offense should result in the issuance of a Group II Offense notice."[39] Even if the *same* offense is not repeated, "[u]nder certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense."[40] While mere silence as to particular evidence generally does not necessarily indicate a basis for remand, the hearing decision in this case acknowledges that, where the hearing officer does not sustain all charges, the disciplinary action may be reduced only to the maximum reasonable level under law and policy.[41] Yet the hearing decision does not explain why an elevated offense level would not be reasonable or consistent with policy in light of the grievant's prior Group I Written Notice, cited as an aggravating factor on the Written Notice issued in this case.[42]

As additional policy guidance on remand, EDR notes that, for disciplinary purposes, the seriousness of violating DHRM Policy 2.35 is a question not only of the harassed employee's reaction to the conduct but also of the impact on broader agency operations. For example, interactions of a sexual or otherwise inappropriate nature – especially if initiated by a supervisory employee – can impair managerial authority and/or lead other employees to believe that the agency tolerates unprofessional conduct that is detrimental to their work environment. Per policy, a disciplinary action under DHRM Policy 2.35 could be a Group I, II, or III offense, depending on the seriousness of the conduct.[43] Thus, upon reconsideration, in determining what level of written discipline would be warranted by law and policy in this case, the hearing officer should evaluate any record evidence regarding the impact of the misconduct on the broader work environment, giving due deference to the agency's judgment in that regard and to its discretion in preventing inappropriate conduct in its affairs and operations.[44]

CONCLUSION AND APPEAL RIGHTS

For the reasons explained above, the hearing decision must be remanded for reconsideration by the hearing officer. On remand, the hearing officer is instructed to ascertain whether Employee A is available for further testimony and, if so, to re-open the evidentiary record and make arrangements for such testimony as desired by the parties. The hearing officer is further instructed to reconsider whether the agency met its burden to prove that the grievant

[37] Hearing Decision at 8.
[38] DHRM Policy 1.60, *Standards of Conduct*, at 8.
[39] *Id.* (emphasis in original).
[40] *Id.*
[41] Hearing Decision at 7.
[42] Agency Ex. 1, at 1. The agency did not enter the prior written discipline itself into evidence.
[43] DHRM Policy 1.60, *Standards of Conduct*, Att. A, at 2.
[44] *Rules for Conducting Grievance Hearings* § VI(A); *see* Va. Code § 2.2-3004(B).

"tried to grab" Employee A on August 8, 2019, and, in any event, whether its disciplinary action was consistent with law and policy. Upon reconsideration, the hearing officer shall determine the appropriate weight to assign to all relevant evidence as discussed herein and shall uphold any warranted discipline at the maximum reasonable level.

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.[45] 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.[46] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[47]

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[45] *Grievance Procedure Manual* § 7.2(d).
[46] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[47] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).