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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5094
May 21, 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 11485/11486. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11485/11486, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. She has been employed by the Agency for over two years. Except for the facts giving rise to these disciplinary actions, Grievant's work performance was satisfactory to the Agency.
>
> A condition of Grievant's employment was that she work overtime as needed by the Agency. The Agency maintained a list of employees who could be drafted to work overtime. The list was available to employees so that they could anticipate when they might be drafted. Grievant was informed on February 28, 2018 that, "Failing to work the Mandatory Draft … will be treated as a violation of Operating Procedure 135.1, Standards of Conduct."
>
> The Agency tells its employees to schedule their medical appointments on their days off so as to avoid missing work.

[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. 11485/11486 ("Hearing Decision"), April 23, 2020, at 2-4 (internal citations omitted).

July 10, 2019 was one of Grievant's rest days. She was not scheduled initially to work on that day.

In July, Grievant's name was towards the top of the Agency's draft list. On July 9, 2019, Captain C told Grievant to report to work on July 10, 2019 to participate in a facility search. Grievant did not report to work on July 10, 2019.

Grievant presented a note dated July 10, 2020 from a medical doctor stating, "Please excuse the patient on the following days due to a medical issue or office visit: 7/10/19."

On July 23, 2019, Captain C notified Grievant she was drafted to work late beyond her shift. She did not work the mandatory draft. Grievant had recently returned from vacation and was too tired to work overtime.

On September 12, 2019, Grievant told the Chief of Security that she did not report to work on July 10, 2019 because her child had a prescheduled doctor's appointment. The Chief of Security asked Grievant if she gave the Shift Commander a copy of the appointment and Grievant said "no." The Chief of Security asked Grievant to bring him a copy of the prescheduled appointment document and Grievant said "no." She told him she was not able to get the document because the doctor did not write one.

Grievant was not scheduled initially to work on September 4, 2019.

On September 2, 2019 or September 3, 2019, Lieutenant C told Grievant she was being drafted to work a shakedown at the Facility scheduled for September 4, 2019. This meant Grievant was to return to work on September 4, 2019 to participate in the shakedown procedure. Grievant told Lieutenant C she could not report to work on September 4, 2019 because she had a medical appointment. Grievant was presented with a Confidentiality Statement which Grievant refused to sign. Grievant did not contact the medical provider to determine if she could reschedule the appointment or determine if there would be an impact on her health if she rescheduled the appointment. Grievant did not report to work on September 4, 2019.

On September 5, 2019, Grievant presented to the Agency a note from her medical provider stating:

> To whom it may concern:
>
> This letter certifies that [Grievant] was seen for care in the above office on 9/4/19 and may return to work or school on 9/5/19.

On September 5, 2019, the Captain spoke to Grievant about her paperwork. Grievant said the Human Resources staff had her paperwork. The Captain advised Grievant that her paperwork had to show that her appointment was pre-scheduled prior to the report date of work. Prior to the issuance of the Group II Written Notice,

Grievant did not provide the Agency with any documents showing her appointment on September 4, 2019 was scheduled prior to September 4, 2019.

On August 13, 2019, the grievant was issued a Group II Written Notice for refusal to work overtime as required on July 10 and July 23, 2019.[3] The grievant received a second Group II Written Notice with a 40-hour suspension on November 15, 2019 for refusal to work overtime as required on September 4, 2019.[4] The grievant timely grieved the disciplinary actions and a hearing was held on April 14, 2020.[5] In a decision dated April 23, 2020, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the "Grievant was instructed to work overtime" on July 10, July 23, and September 4, 2019, and that she failed to follow those instructions,[6] thus justifying the issuance of both Group II Written Notices.[7] The hearing officer also found no mitigating circumstances warranting reduction of the disciplinary actions.[8] 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 . . . ."[9] 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.[10] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant argues that the hearing officer's "[d]ecision is inconsistent with State policy and procedures." EDR has reviewed the grievant's submission and, although she has not identified specific alleged errors in the decision, finds that the grievant's arguments are better characterized as disputes with the hearing officer's factual conclusion that she failed to work overtime as required on July 10, July 23, and September 4, 2019.[12] Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record

[3] Agency Ex. 1, at 13.
[4] *Id.* at 1.
[5] *See* Hearing Decision at 1.
[6] *Id.* at 4, 5. While the hearing officer's analysis notes that the grievant was instructed to work overtime on July 24, 2019, this appears to be a clerical error. For example, it is noted elsewhere in the decision that, "[o]n July 23, 2019, Captain C notified Grievant she was drafted to work late beyond her shift." *Id.*at 3.
[7] Hearing Decision at 4-5.
[8] *Id.* at 6.
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).
[11] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] To the extent the grievant argues that the decision was inconsistent with state and/or agency policy, EDR has not identified any argument, not otherwise addressed herein, that raises any way in which the hearing officer did not properly apply policy. Accordingly, there is no basis to conclude that the hearing decision is inconsistent with policy.
[13] Va. Code § 2.2-3005.1(C).

for those findings."[14] 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.[15] 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.[16] 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 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.

In the hearing decision, the hearing officer determined that the grievant was instructed to work overtime on July 10, July 23, and September 4, 2019 and that, without justification, she failed to do so.[17] The hearing officer specifically noted that the grievant was "advised that as a condition of employment she would be expected to work overtime as needed," that she "was notified of her obligation to work overtime" on the above dates, and that she "failed to do so."[18] The hearing officer also considered that the "Grievant was given several opportunities prior to the issuance of disciplinary action to show that her medical appointments were pre-scheduled, but she failed to produce such documentation."[19] At the hearing, the grievant "presented an email sent August 16, 2019 from the provider she visited on September 4, 2019" which "showed that Grievant's September 4, 2019 [appointment] was pre-scheduled."[20] However, the hearing officer concluded that this did not excuse the grievant's actions on September 4 because "Agency managers had repeatedly asked for such documentation" prior to issuing the November 15 Written Notice, and the grievant "offered no reason" why she was unable to give the note to the agency at that time.[21]

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. The agency's Operating Procedure 110.2, *Overtime and Schedule Adjustments*, states that "[a]ll employees are required to work overtime as needed," and further provides that "[f]ailure to work overtime as directed/instructed/needed may result in disciplinary action . . . ."[22] The agency's evidence showed that the grievant was instructed to work mandatory overtime on July 10, July 23, and September 4, 2019, that she did not report to work as required, and that she did not provide any justification for her absences on those dates before the agency decided to issue the Written Notices.[23] While the assistant warden testified that the practice at the grievant's facility is to not discipline employees who are unable to work mandatory overtime when they present

[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).
[16] *Grievance Procedure Manual* § 5.8.
[17] Hearing Decision at 4-5.
[18] *Id.* at 5.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Grievant's Ex. 1, at 44. The agency also presented documents signed by the grievant confirming she had been notified that employees must be available to work mandatory overtime as required, and could be disciplined for refusing to work overtime. Agency Ex. 1, at 25-28.
[23] *E.g.*, Hearing Recording at 38:51-50:22 (human resource officer's testimony); Agency Ex. 1, at 5-6, 8, 12, 17-19.

evidence of a pre-scheduled medical appointment,[24] the grievant did not present such evidence to the agency when she was repeatedly given opportunities to do so.[25] In particular, EDR has not identified any evidence to demonstrate that the grievant was unable to present the August 16, 2019 email showing that her September 4 medical appointment was pre-scheduled.[26] The grievant apparently chose not to provide the email despite having received it on August 16, well in advance of when she was instructed to work overtime on September 4 and when she received the second Written Notice on November 15.[27]

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.[28] Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the hearing decision on this basis.

Newly Discovered Evidence

In addition, the grievant alleges that she has identified newly discovered evidence since the hearing and requests that EDR remand the case to the hearing officer for consideration of this evidence. In particular, the grievant has provided EDR with two such documents on administrative review: (1) a faxed doctor's note dated May 5, 2020 stating that her July 10, 2019 medical appointment was pre-scheduled; and (2) an email reminder dated August 16, 2019 stating that her September 4, 2019 medical appointment was pre-scheduled.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[29] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.[30] However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the

[24] *See* Hearing Recording at 21:48-22:42 (assistant warden's testimony).
[25] *E.g.*, Hearing Recording at 38:51-49:15 (human resource officer's testimony); Agency Ex. 1, at 5-6, 8, 12, 17-19.
[26] Agency Ex. 1, at 6, 8, 18-19; *see* Grievant's Ex. 1, at 51.
[27] In one of the grievant's exhibits, she appears to note that she "always had documentation [that the September 4 appointment was pre-scheduled] but didn't have to provide it [because] it's not in policy." Grievant's Ex. 1, at 51.
[28] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[29] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).
[30] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

> evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[31]

Having reviewed the information provided by the grievant, EDR finds that she has not provided evidence to support a contention that either of the two documents should be considered newly discovered evidence under this standard. Indeed, the August 16, 2019 email is already part of the hearing record[32] and was explicitly discussed in the hearing decision.[33] To the extent the grievant disagrees with the hearing officer's assessment of the evidence on that issue, EDR declines to disturb the decision on that basis for the reasons discussed more fully above. In addition, the doctor's note dated May 5, 2020, was created after the hearing,[34] and thus did not exist at the time the hearing took place. Accordingly, there is no basis for EDR to re-open or remand the hearing for consideration of this additional evidence.

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.[35] 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.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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[31] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[32] Grievant's Ex. 1, at 51.
[33] Hearing Decision at 5.
[34] *See* Hearing Decision at 1. It is also unclear to EDR why the grievant was unable to obtain a note confirming that her July 10, 2019 appointment was pre-scheduled either before the first Group II Written Notice was issued on August 13, 2019 or before the hearing on April 14, 2020.
[35] *Grievance Procedure Manual* § 7.2(d).
[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).