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ADMINISTRATIVE REVIEW

In the matter of the Department of State Police
Ruling Number 2021-5229
April 14, 2021

The Department of State Police (the “agency”) has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11587. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

On May 13, 2020, the grievant was removed from employment pursuant to a fitness for duty evaluation.¹ The grievant filed an expedited grievance challenging his separation from employment on May 27, 2020.² In EDR Ruling Number 2020-5117, EDR determined that the grievance qualified for hearing. The hearing in this matter occurred on November 17, 2020.³ The relevant facts in Case Number 11587, as found by the hearing officer, are incorporated into this ruling by reference.⁴ Following the hearing, the hearing officer found that the grievant’s removal based on the fitness for duty evaluation must be reversed because the agency had improperly applied DHRM Policy 4.57, *Virginia Sickness and Disability Program*.⁵ The agency 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”⁶ 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.⁷ The

¹ Decision of Hearing Officer, Case No. 11587 (“Hearing Decision”), February 23, 2021, at 1.

² *Id.*

³ *Id.*

⁴ *Id.* at 2-5.

⁵ *Id.* at 5-8.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency largely reiterates the facts that led to the grievant's fitness for duty examination and that the examination justified the grievant's removal from employment. Although the agency has not identified any specific provision of the grievance procedure, state policy, or agency policy with which the hearing decision fails to comply, it appears to argue that the grievant was solely responsible for understanding his obligations under DHRM Policy 4.57, including making a claim for short-term disability benefits prior to his removal. The agency contends that it satisfied its responsibilities by ensuring that the grievant had access to the policy when he was hired and during his employment.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁹ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁰ Further, the hearing officer reviews the facts *de novo* to determine whether the cited actions are supported by the facts, law, and policy.¹¹ 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 by a preponderance of the evidence that the agency's removal of the grievant following a fitness for duty examination was inconsistent with DHRM Policy 4.57. The hearing officer described the application of the policy to his factual findings:

An agency's obligation under DHRM Policy 4.57 is not merely to notify an employee of the existence of the policy during orientation but also to advise the employee regarding its applicability when the agency learns the employee is unable to perform his or her job duties due to a disability.

....

Grievant was entitled to disability benefits under DHRM Policy 4.57. The Agency's application of its Fitness for Duty policy deprived Grievant of his disability benefits. In other words, the Agency denied Grievant replacement income during his period of disability. This application of policy was unfair.

To meet its duty of "appropriate communication", the Agency was obligated to explain to Grievant that he had the option to apply for short-term disability under the [Virginia Sickness and Disability Program].¹²

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(C).

¹² Hearing Decision at 6-7.

The agency appears to contend that the grievant knew or should have known how to file a claim for benefits pursuant to DHRM Policy 4.57. The hearing officer assessed the evidence and found that the grievant notified his supervisor of his disability, relied on the supervisor's guidance that he should request a fitness for duty examination, and then repeatedly contacted his supervisor about his use of personal leave balances prior to his removal.¹³ The hearing officer concluded that these communications should have prompted the agency to review the nature of the grievant's absence and advise him of his option to seek short-term disability benefits.¹⁴ The agency further asserts that its human resources office could have provided guidance to the grievant. However, the hearing officer noted that "[t]he HR Manager Senior testified that she did not advise Grievant he could file a claim for disability because she did not know why he was out of work and she did not get involved in the fitness for duty program."¹⁵ To the extent the grievant sought assistance from agency management prior to his removal, the hearing officer found that the agency failed to respond in a manner that satisfied its obligations under DHRM Policy 4.57.¹⁶

Having thoroughly reviewed the hearing record in this case, EDR finds that there is evidence to support the hearing officer's conclusions. Nothing in the record suggests that the hearing officer's factual findings or application of DHRM Policy 4.57 in this case were an abuse of discretion or otherwise improper. The agency has presented no basis within EDR's authority to intervene in the outcome of this matter. Accordingly, EDR cannot substitute its own judgment for that reflected in the hearing decision.

Lastly, the agency appears to assert that the hearing officer has inappropriately determined that the grievant was entitled to disability benefits under DHRM Policy 4.57. While this finding is included in the hearing officer's discussion, the hearing officer did not order that the agency provide disability benefits as a form of relief.¹⁷ Rather, the hearing officer's statements about this issue were in the context of the policy discussion assessing the grounds for the grievant's removal. The hearing officer has not directed disability benefits to be paid to the grievant.¹⁸ Indeed, the hearing decision expressly contemplates that the grievant would apply for disability benefits upon reinstatement.¹⁹ The determination of what benefits are due to the grievant would then be determined through the Virginia Sickness and Disability Program. Accordingly, EDR has no basis to remand the matter to the hearing officer to correct the relief awarded in this case. EDR acknowledges that any benefits for which the grievant may be eligible or have available is unclear from the record.

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

¹³ *Id.* at 3-4, 6.

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 5.

¹⁶ The timeline of these events reflected in the hearing decision warrants note here. The agency was notified on May 8, 2020 (a Friday) that the grievant was unfit to return to duty. *Id.* at 4. The following Wednesday, May 13, 2020, the agency removed the grievant from employment. *Id.* The grievant applied for short-term disability on May 22, 2020. *Id.* at 5. The grievant's application was denied as he was no longer employed by the agency. *Id.*

¹⁷ Hearing Decision at 6-8.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 7.

hearing decision once all timely requests for administrative review have been decided.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²

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²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).