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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2021-5242
May 18, 2021

The grievant 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 11619. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11619, as found by the hearing officer, are as follows:¹

The Department of Behavioral Health and Developmental Services [the “agency”] employs Grievant as an SSTT at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had an ongoing conflict with Ms. S. Ms. S and Grievant did not know each other outside of work.

On February 20, 2020, Grievant and several others were discussing census papers. Ms. S laughed. Grievant “became aggressive” towards Ms. S. Grievant said to Ms. S, “What you looking at me like that for?” Ms. S said, “What do you mean? How did I look at you?” Grievant said, “You gave me a dirty look.” Ms. S said, “I didn’t, but if you feel like I looked at you a certain way, then I’m sorry.” Grievant said, “You must not know who I am.” Ms. AS grabbed Grievant’s arm and said, “Let’s go for a walk.” Grievant said aloud, “She don’t know who she f—king with!”

On another occasion, Ms. S was directing a resident to go to his unit. The resident began yelling at Ms. S as Grievant approached. Another employee asked, “What’s going on?” Grievant interrupted and said, “Well, she’s yelling at him to go to his unit.” Ms. S tried to correct the information and said, “He was trying to go to the gym before going back to his unit.” Grievant looked at Ms. S, rolled her

¹ Decision of Hearing Officer, Case No. 11619 (“Hearing Decision”), March 24, 2021, at 2-3.

eyes, and said to Ms. S, “Girl, nobody is talking to you.” Ms. S was offended by Grievant’s comments and walked away.

On June 10, 2020, Ms. S was reporting to work and entered a door to the Facility. Grievant was behind Ms. S. Ms. S did not hold the door open for Grievant. Grievant said, “this little bi-ch” referring to Ms. S. While standing in front of Master Control, Grievant licked her lips and cracked her knuckles as she looked at Ms. S.

Grievant’s behavior so upset Ms. S that she missed days from work in order to avoid Grievant. On some occasions, Ms. S felt like resigning because of Grievant.

On July 10, 2020, the agency issued to the grievant a Group II Written Notice for unsatisfactory performance, obscene or abusive language, disruptive behavior, and violation of DHRM Policy 2.35, *Civility in the Workplace*.² The grievant timely grieved the disciplinary action and a hearing was held on March 4, 2021.³ In a decision dated March 24, 2021, the hearing officer found that the “Grievant violated DHRM Policy 2.35 by bullying Ms. S,” and thus the agency had “presented sufficient evidence to support the issuance of a Group II Written Notice.”⁴ The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.⁵ The grievant now appeals the 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 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.

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, 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.¹¹ Thus, in disciplinary actions, the hearing officer

² Agency Ex. 1, at 1; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

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

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

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(B).

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.¹² 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.

In her request for administrative review, the grievant generally disputes the hearing officer's assessment of the evidence and his conclusion that she engaged in misconduct warranting a Group II Written Notice. First, she contends that other employees who also had conflict with Ms. S had an opportunity to address the issue informally, whereas the grievant received disciplinary action. The grievant also disputes the testimony of several of the agency's witnesses, alleging that their actions contributed to the grievant's conflict with Ms. S and also failed to demonstrate that the grievant engaged in misconduct. Finally, the grievant argues that she has a medical condition that causes her to rub her hands together and lick her lips, and that she did not intend those actions to offend Ms. S.

In the hearing decision, the hearing officer assessed the evidence regarding the grievant's conduct toward Ms. S:

Grievant spoke to Ms. S in a demeaning manner. Grievant said, "You must not know who I am." Grievant said aloud, "She don't know who she f—king with!" Grievant referred to Ms. S as "Girl" and a "little [bi-ch]." Grievant intended her comments to intimidate and marginalize Ms. S. Grievant's behavior was persistent because it occurred over several days and months.¹³

The hearing officer also directly addressed many of the matters cited in the grievant's request for administrative review. Indeed, the hearing officer agreed with the grievant that not all of the agency's allegations were substantiated. For example, the hearing officer noted that "[t]he Agency presented other instances of inappropriate behavior" beyond those listed in his findings of fact that were not supported by the evidence.¹⁴ Although the hearing officer "disregarded those allegations," he still found that the evidence was sufficient to support disciplinary action against the grievant.¹⁵ The hearing officer further "assume[d that] Grievant cracked her knuckles and licked her lips because of a medical condition," as she has alleged, but determined that this did not change the outcome of the case.¹⁶

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 hearing officer recounted three primary events that he found justified discipline in this case. First, the grievant "became aggressive" toward Ms. S during a conversation in February 2020, culminating in the grievant saying, "She don't know who she f—king with!" as the grievant

¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Decision at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

was led away by a colleague.¹⁷ Second, the grievant interrupted Ms. S during a work-related conversation, saying, “Girl, nobody is talking to you.”¹⁸ Third, the grievant referred to Ms. S as “this little bi-ch” in June 2020 when Ms. S did not hold a door into the facility open for the grievant.¹⁹ At the hearing, Ms. S testified about all three of these incidents, offering testimony that was consistent with the hearing officer’s factual determinations.²⁰ The agency also presented written statements from Ms. S about all three incidents that were consistent with her testimony at the hearing and the hearing officer’s findings of fact.²¹ Ms. S further explained that she believed the grievant had belittled her in front of residents at the facility, that she felt tension when these incidents happened, and that she was frightened by the grievant’s behavior.²²

Although the grievant disagrees, the hearing officer was entitled to evaluate the testimony of the witnesses on these matters and to accept the agency’s interpretation of these events as more persuasive. Taken together, the above evidence supports the hearing officer’s finding that the grievant’s behavior was a violation of DHRM Policy 2.35, which prohibits “[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person.”²³ In this case, the hearing officer agreed with the agency’s determination that the grievant’s conduct justified the issuance of a Group II Written Notice.²⁴

To the extent the hearing officer did not directly address all of the evidence in the record about the witnesses’ testimony at the hearing, EDR cannot find that such silence creates grounds for reconsideration. There is no requirement under the grievance procedure that the hearing decision specifically address each aspect of the parties’ evidence presented at a hearing. Thus, mere silence as to particular testimony and/or other evidence does not necessarily constitute a basis for remand. EDR cannot find that there is evidence the hearing officer failed to consider on any disputed issue of material fact. For example, although the agency could have taken informal action instead of issuing a Written Notice, nothing in policy requires this approach and the hearing officer did not find that the grievant was treated differently than other similarly situated employees.²⁵

In summary, conclusions as to the credibility of witnesses 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

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 3.

²⁰ Hearing Recording at 7:54-9:00, 14:38-15:02, 21:06-21:26 (Ms. S’s testimony). Statements from other witnesses described several incidents between the grievant and Ms. S in similar terms as Ms. S’s testimony and statements, though with some differences as to specific details. Agency Ex. 1, at 13-17.

²¹ Agency Ex. 1, at 12-13.

²² Hearing Recording at 15:03-15:43, 21:30-22:17 (Ms. S’s testimony).

²³ Agency Ex. 1, at 23.

²⁴ The range of misconduct under DHRM Policy 2.35 may vary in severity and effect on the workplace; as a result, such misconduct may constitute a Group I, II, or III offense, depending on its nature. DHRM Policy 1.60, *Standards of Conduct*, Att. A; see Agency Ex. 1, at 22.

²⁵ See Hearing Decision at 4-5.

supports the version of facts adopted by the hearing officer, as is the case here.²⁶ Accordingly, EDR declines to disturb the hearing decision on these grounds.

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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²⁶ See, e.g., EDR Ruling No. 2020-4976.

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).