



EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5257
May 27, 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 11633. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11633, as found by the hearing officer, are as follows:¹

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency on January 17, 2019.

The Agency established a front entry check point located at the beginning of the Facility’s driveway. An Agency employee used a hand-held temperature gauge to take the temperature of each employee entering the Facility grounds.

On July 8, 2020, Officer H was working at the front entry temperature check point. She was taking the temperature of employees entering the Facility grounds. She did not need or request Grievant’s assistance.

Grievant was working at the Facility’s main building. During his break, he drove his personal vehicle from the main building to the front entry check point to speak with Officer H. He spoke with Officer H for approximately 15 to 20 minutes. During his conversation, Grievant asked Officer H, “was her husband home?” He said he, “would take care of her.” Grievant asked Officer H if her husband gave her massages. Officer H said “no.” Grievant said, “terrible, you deserve to be pleased.”

¹ Decision of Hearing Officer, Case No. 11633 (“Hearing Decision”), April 23, 2021, at 2-3.

On July 9, 2020, Officer H was working at the front entry temperature check point. During Grievant's break, he drove his personal vehicle from the main building to the front entry check point to speak with Officer H. He spoke with Officer H for approximately 15 to 20 minutes. Grievant told Officer H, "We will have to do something when you get back from the academy." Grievant asked Officer H, "if she liked to use toys or if she had anything to pleasure herself with". Officer H replied she did not like to be touched.

A Human Resource employee, Ms. B, drove her vehicle to the front entry check point. Officer H whispered to Ms. B that said she wanted to talk to her. Officer H quietly told Ms. B that she was uncomfortable with Grievant and that he was talking to her in an inappropriate sexual manner. Officer H told Ms. B that this was not the first time Grievant had spoken to her in this manner. Ms. B told Officer H to report the matter to the HR Officer.

Mr. R approached the front entry check point. When Officer H approached his vehicle she mouthed "help me" because Grievant was present at the check point. As Mr. R drove away, Officer H mouthed "help me" again.

When Grievant was interviewed by the Agency Investigator, Grievant explained that he had seen inmates "study" female corrections officer[s] and felt it was his responsibility to educate female officers in training because fraternization with inmates could lead to termination.

On October 13, 2020, the agency issued to the grievant a Group III Written Notice with termination for 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 22, 2021.³ In a decision dated April 23, 2021, the hearing officer found that "the Agency [had] presented sufficient evidence to support the issuance of a Group III Written Notice," and thus its "decision to remove Grievant must be upheld."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

² Agency Ex. 1, at 1-3; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4.

⁵ *Id.*

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

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

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 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 his request for administrative review, the grievant appears to argue that the hearing officer should have rescinded the discipline because Officer H, Mr. R, and a third witness (Ms. W) did not testify at the hearing. The grievant specifically contends that there was “no excuse for [Officer H] to miss the hearing” merely because she was no longer an agency employee. The grievant’s assertions can be interpreted as an allegation that he did not receive adequate due process at the hearing because Officer H, Mr. R, and Ms. W failed to testify, and also as a claim that the weight of evidence, without their live testimony, did not support the issuance of disciplinary action.

Due Process

Prior to certain disciplinary actions, the United States Constitution generally provides, for individuals with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer’s evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.¹³ In this context, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-

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).

¹² *Grievance Procedure Manual* § 5.8.

¹³ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985); *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) (“Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person’s rights to liberty or property.”). State policy requires that

[p]rior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth’s Written Notice form instructs the individual completing the form to “[b]riefly describe the offense and give an explanation of the evidence.”

maker; an opportunity to present evidence; and the presence of counsel.¹⁴ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.¹⁵

Here, it appears that the grievant participated in a hearing before an impartial decision-maker, where he had the opportunity to present evidence relevant to the agency's accusations against him and to question all witnesses called. As a matter of the grievance procedure, EDR perceives no procedural impairment due to the grievant's inability to question Officer H, Mr. R, and Ms. W at the hearing. To support its accusations against the grievant, the agency produced as witnesses the Agency Investigator who sustained the accusation and another employee, Ms. B, to whom Officer H reported some of her concerns about the grievant. Both witnesses were subject to live cross-examination by the grievant. The agency also presented a written statement from Officer H, which she provided during the investigation of the grievant's misconduct.¹⁶

The agency's witness list, disclosed to the grievant in advance of the hearing, identified Officer H, Mr. R, and Ms. W as potential witnesses. At the hearing, the agency's advocate explained that all three witnesses were no longer agency employees, and thus the agency was unable to make them available to testify.¹⁷ Section 5.3 of the *Grievance Procedure Manual* states that "[t]he agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness." In this case, the grievant did not request orders for Officer H, Mr. R, or Ms. W to appear as witnesses, nor did he attempt to call them to testify at the hearing. Even if the grievant had requested orders for these witnesses to appear, the agency did not have control over the potential witnesses to direct their attendance at the hearing as they were no longer employees. Furthermore, the Code of Virginia does not grant hearing officers subpoena authority to compel the attendance of such non-employees.¹⁸

In his decision, the hearing officer noted that "Officer H did not testify during the hearing because she stopped working for the agency," but he nonetheless found "Officer H's written statement credible and sufficient to uphold the disciplinary action."¹⁹ Ultimately, 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 discussed further below. In this case, it appears that the grievant participated in a full and fair hearing with the opportunity to question the adverse witnesses presented by the agency to carry its burden of proof. As a result, EDR will not disturb the hearing decision based on the absence of Officer H, Mr. R, and Ms. W from the hearing.

¹⁴ *Detweiler v. Va. Dep't of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983); *see Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1284 (4th Cir. 1995) ("The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985))).

¹⁵ *See* Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

¹⁶ Agency Ex. 10, at 24-25.

¹⁷ Hearing Recording at 47:16-47:29, 1:49:38-1:49:59.

¹⁸ *See* Va. Code § 2.2-3005.

¹⁹ Hearing Decision at 4.

Weight of Evidence

In the hearing decision, the hearing officer assessed the evidence regarding the grievant's conduct toward Officer H:

Grievant engaged in sexual harassment of Officer H. Grievant created a hostile work environment for Officer H. Grievant made sexual advances towards Officer H. Officer H did not welcome Grievant's behavior and there was no reason for Grievant to believe his behavior was welcomed.²⁰

The hearing officer further considered the credibility of Officer H's written statement, as noted above, identifying several reasons why it was sufficient to uphold the disciplinary action:

First, Grievant left the main building during his break and drove to the front entry point to contact Officer H. He had no personal or business reason to spend his break at the front entry speaking with Officer H. Second, other employees testified that Officer H spoke with them about Grievant's offensive behavior. Officer H told Ms. B that Grievant made her feel uncomfortable and spoke to her in an inappropriate manner. Officer H told Mr. R to help her because of Grievant's behavior. Third, Grievant asserted he was trying to educate Officer H because he knew how inmates studied female correctional officers. Grievant's job duties did not include educating female correctional officers and his action was inappropriate.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 his behavior constituted misconduct, and that the discipline was consistent with law and policy.²² Indeed, we note that the grievant has not disputed any of the hearing officer's factual conclusions or identified any error in the hearing officer's analysis, apart from his contention that Officer H, Mr. R, and Ms. W should have testified at the hearing. Although the grievant disagrees, the hearing officer was entitled to consider Officer H's written statement, to evaluate the testimony of the agency witnesses, and to accept the agency's interpretation of these events as more persuasive. Taken together, the evidence in the record supports the hearing officer's finding that the grievant's behavior was a violation of DHRM Policy 2.35, which prohibits sexual harassment and unwelcome conduct that creates a hostile work environment.²³ In this case, the hearing officer agreed with the agency's determination that the grievant's conduct justified the issuance of a Group III Written Notice with termination.²⁴

²⁰ *Id.*

²¹ *Id.*

²² *E.g.*, Hearing Recording at 18:55-37:10 (Agency Investigator's testimony), 57:56-1:05:17 (Ms. B's testimony); Agency Ex. 5, at 5-8 (Agency Investigator's report); Agency Ex. 10, at 24-25 (Officer H's written statement); Agency Ex. 11, at 26 (Ms. B's written statement).

²³ Agency Ex. 14, at 62.

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. 14, at 60.

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 supports the version of facts adopted by the hearing officer, as is the case here.²⁵ 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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸

Christopher M. Grab
Director
Office of Employment Dispute Resolution

²⁵ See, e.g., EDR Ruling No. 2020-4976.

²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).