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ADMINISTRATIVE REVIEW

In the matter of the Department of State Police
Ruling Number 2021-5190
January 15, 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 11556. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

On March 16, 2020, Grievant was removed from employment pursuant to a fitness for duty evaluation.¹ On or about March 24, 2020, the grievant filed an expedited grievance challenging his separation from employment. In EDR Ruling Number 2020-5095, EDR determined that the grievance qualified for hearing. The hearing in this matter occurred on September 28, 2020.² The relevant facts in Case Number 11556, as found by the hearing officer, are incorporated by reference.³ Following the hearing, the hearing officer found that the grievant’s removal based on the fitness for duty evaluation must be reversed for multiple reasons.⁴ 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”⁵ 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.⁶ The Director of DHRM also has the sole authority to make a final determination on whether the hearing

¹ Decision of Hearing Officer, Case No. 11556 (“Hearing Decision”), Dec. 4, 2020, at 1.

² *Id.*

³ *Id.* at 2-6.

⁴ *Id.* at 7-11.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

decision comports with policy.⁷ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency has not presented any provision of the grievance procedure and/or state or agency policy with which the hearing decision fails to comply. Instead, the agency reiterates the facts that led to its decision to require the grievant to undergo a fitness for duty examination and that the fitness for duty evaluation justified the grievant's removal from employment. For the reasons described in the hearing decision, the hearing officer determined by a preponderance of the evidence that the agency's fitness for duty examination did not support the grievant's removal. Thus, the agency's challenge to the decision appears to challenge the hearing officer's factual findings.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁸ and to determine the grievance based "on the material issues and the grounds in the record for those findings."⁹ Further, the hearing officer reviews the facts *de novo* to determine whether the cited actions are supported by the facts, law, and policy.¹⁰ 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.

EDR has thoroughly reviewed the hearing record in this case and finds that the record evidence can be found to support the hearing officer's conclusions. Indeed, nothing in the agency's ruling request challenges any of the hearing officer's specific findings, except the determination that the removal was not warranted. Nothing in the record suggests that the hearing officer's determinations in this regard were an abuse of discretion or otherwise improper, and under such circumstances EDR cannot substitute its own judgment for that reflected in the hearing decision.

The agency was understandably concerned with the grievant's performance and behavior that reasonably led to the fitness for duty evaluation. The agency may very well have had sufficient grounds to terminate the grievant's employment based on his behavior and/or performance through appropriate disciplinary action(s) under the *Standards of Conduct* policy.¹¹ However, the agency removed the grievant based upon the grievant's fitness for duty and the agency's "reasonable belief that [the grievant] has a medical condition that impairs his ability to perform his essential job functions and poses a direct safety threat."¹² The hearing officer determined that the evidence did not support a finding that the grievant could not perform the essential functions of his job¹³ and no evidence has been presented, based on EDR's review, as to any issue of the grievant being a "direct safety threat."¹⁴ Therefore, the agency has presented no basis within EDR's authority to intervene in the outcome of this case.

⁷ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(C).

¹¹ DHRM Policy 1.60.

¹² Agency Administrative Review Request at 3.

¹³ Hearing Decision at 7-11.

¹⁴ *See, e.g., Agency Exs. 22c, 22f.*

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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷

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¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).