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## ADMINISTRATIVE REVIEW

In the matter of the Department of Medical Assistance Services
Ruling Numbers 2021-5199, 2021-5200
March 10, 2021

The Department of Medical Assistance Services ("the agency") and the grievant have both 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 11615. For the reasons set forth below, EDR remands the hearing decision for clarification and reconsideration.

### FACTS

The relevant facts in Case Number 11615, as found by the hearing officer, are as follows:

> Grievant was head of a small team located within [the agency's Office of Communication, Legislation & Administration ("OCLA")]. This team consisted of Grievant and six outside contractors who wrote code. All of the evidence presented in this matter indicates that Grievant has a degree in English, is not fluent in coding, has received no special training from the Agency in coding, source code, computer language and did not have security clearance to access the servers of this Agency.
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> The Agency decided that OCLA should become a part of [the agency's Information Management Division ("IMD")]. As such, at 2:12 p.m., Monday, August 3, 2020, the Director of IMD sent an email to Grievant's immediate supervisor [the Director of OCLA]. That email requested answers to 14 questions or bullet points [the "Questions"]. There was no required completion date as a part of this email. . . . [Q]uestion 8 . . . states as follows:
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> > Code Management – (a) Current applications or techniques used to manage code and version control.
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> At 2:26 p.m., Monday, August 3, 2020, [the OCLA Director] answered and said:
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> Thank you – we'll get working on answers to these questions.

There was no suggested date for completion of the answers included with this email.

At 8:43 p.m., on Monday, August 3, 2020, [the agency's Chief Financial Officer ("CFO")] sent an email to several people, including Grievant, that they were invited to a meeting from 10:00 to 10:30 a.m. on Wednesday, August 5, 2020.

At 1:33 p.m. on Friday, August 7, 2020, an email was sent by [the OCLA Director] to the person who would be taking control over Grievant's team [the agency's Lead Web Architect ("LWA")]. The purpose of the email was to indicate that Grievant was busy with an audit and the meeting would be next week. The LWA responded that would be fine.

At 9:02 p.m., Wednesday, August 12, 2020, [the agency's Director of Strategic Communications] sent an email to Grievant asking if she had answered the Questions posed in the email of August 3, 2020. Grievant responded by email at 10:51 a.m., Thursday, August 13, 2020, and stated in part as follows:

> I have not. . . . [O]ther demands . . . ha[ve] taken precedence. . . . **If someone tells us to reprioritize then that's fine, but I have not received that direction to date**. . . .

[Emphasis added in hearing decision.]

At 2:21 p.m., Friday August 14, 2020, [the IMD Director] sent an email to Grievant asking about the answers to the Questions of August 3, 2020, and stated in part as follows:

> . . . wanted to be sure you had a copy so our Questions with regard to your team can be addressed.

Again, there was no required completion date as a part of this email.

At 6:50 a.m., Monday August 17, 2020, Grievant responded to [the IMD Director]'s email stating that her team had been reduced in size, the workload had increased and that:

> . . . . I will try my best to get back to you this week. . . .

At 2:23 p.m., Tuesday, August 18, 2020, the Senior Account manager for the outside company that provided the six independent outside non-employee contractors sent an email to Grievant stating in part as follows:

> [G]iven the limited hours (some may not make it to 8/31) is the plan to extend and add hours or once hours exhaust we should plan on disengaging?

At 3:32 p.m., Wednesday, August 19, 2020, Grievant forwarded this email to [the OCLA Director]. . . .

At 7:09 p.m., Wednesday August 19, 2020, [the OCLA Director] sent an email to [the IMD Director] stating in part as follows:

> [W]anted you to be aware that the days (hours) for our web development team are winding down as we approach the end of August. . . . [I]n addition to . . . website changes, we have new developments for . . .
> 1. Appeals
> 2. Member Advisory Committee (MAC)
> 3. High Needs Supports
> 4. CARES Act
> . . . . We are also responding to the Internal Audit requests . . . . [W]e have achieved the conditions of a "perfect storm." I wanted to send up this RED FLAG as a warning of possible wreck in the near future.
> . . .

* * *

At 10:22 a.m., Thursday, August 20, 2020, the LWA sent an email to [the IMD Director] regarding a meeting he had with Grievant on Wednesday, August 19, 2020. Part of the purpose of that meeting was to discuss answers to the Questions. This email states in part:

> I reiterated to [the grievant] that we needed the answers to the questions . . . . She gave no definitive answer as to when she would supply this information . . . .

Later in this email, the LWA stated in part:

> It left me with a level of distrust that moving forward would . . . make managing the website . . . more than a difficult challenge. . . . We do not really know what the infrastructure is like, what work is being carried out or what we have to support and what resource we would need to support it.

In this meeting, the LWA did not impose a hard deadline for the Questions to be answered. . . .

> At 10:47 a.m., Monday, August 24, 2020, [the CFO] wrote to one of the original authors of the Questions and asked if he had received answers. [The CFO] received a response at 10:50 a.m., Monday, August 24, 2020, indicating that he had not received any answers and that he would set up a meeting between [the CFO] and the website development team "this week based on your availability."[1]

The hearing officer found the following facts regarding the scheduling of this meeting and the grievant's involvement:

> On Monday, August 24, 2020, Grievant received an email invitation to a meeting that was to take place on Friday, August 28, 2020 from 11:00 a.m. to noon. The purpose of the meeting was:
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> > . . . to go over [the Questions] we sent a while back. Please also invite all of your developers to the meeting. . . .
>
> Within an hour, Grievant accepted the meeting invite.
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> On Friday, August 28, 2020, at 10:38 a.m., Grievant sent an email to the [CFO] who was the leader of this meeting indicating as follows:
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> > I have a medical/family emergency and will not be able to attend the meeting. Can you please reschedule this meeting for next week?
>
> At 11:08 a.m., [the CFO] responded by email to Grievant, stating in part:
>
> > I am sorry to hear about your medical/family emergency. We have cancelled today's meeting and will instead meet on Monday.
> >
> > **If you are not available on Monday,** we will still need to meet with your team.
> >
> > Please provide me the emails, names, and contact numbers for each of the six contractors so that I can include them in the meeting. . . .
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> [Emphasis added in hearing decision.]
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> At 9:28 a.m., Monday, August 31, 2020, Grievant sent to [the CFO] an email stating in part:
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> > I'm sick and out today. The team will attend the 1 p.m. call.

[1] Decision of Hearing Officer, Case No. 11615 ("Hearing Decision"), January 6, 2021, at 5-7 (citations omitted).

> . . . [The CFO] testified . . . and indicated by words and demeanor that he was less than pleased that Grievant did not attend the first meeting. On Tuesday, August 25, 2020, he sent an email to Grievant and stated in part:
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> > Please advise your team that attendance at this meeting by all the contracting staff is **mandatory**.
>
> [Emphasis in original.]
>
> * * *
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> . . . . Grievant did not attend either of [the August 28 or August 31] meetings. The first because of a medical/family emergency and the second because she was sick. At 10:50 a.m. Tuesday, September 1, 2020, Grievant sent [the IMD Director] and [OCLA Director] an email stating that her doctor has recommended that she not return to work until September 8, 2020. This was not challenged by the Agency and thus she was on sick leave for what happened next.
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> . . . [T]he Agency lost control of its website on or about September 1, 2020. . . . The website is the outward facing manner in which the Agency speaks to and with the public. At 10:08 a.m., Tuesday, September 1, 2020, [the IMD Director] sent an email to Grievant and again asked if the Questions had been answered. He also expresse[d] chagrin that the outside contractors, whose contract ended on August 31, 2020, and whose access had been blocked to the Agency computer systems, would . . . not want to help the Agency in finding its source code. A blizzard of emails ensued at this point asking Grievant where the source code was and, at 8:50 a.m., Tuesday, September 1, 2020, while on sick leave, she emailed [the IMD Director] that the source code was on the Agency/[Virginia Information Technology Agency] servers.
>
> Apparently, this was the location of what [the IMD Director], in his testimony, called executable code. It was not the source code that the Agency was desperately looking to find. It turns out that the source code was on a site known as Github.
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> Grievant provided a password for this site that was incorrect, in that a letter either needed to be capitalized or not. . . . It appears that the source code was in hand by either late September 2, 2020, or early September 3, 2020.[2]

On September 15, 2020, the agency issued to the grievant a Group III Written Notice citing failure to follow instructions, disruptive behavior, insubordination, and interference with state operations.[3] The grievant timely grieved these actions, and a hearing was held on December 17,

[2] *Id.* at 3-4, 7-8 (citations omitted).
[3] *See id.* at 1.

2020.[4] In a decision dated January 6, 2021, the hearing officer determined that the grievant did not commit misconduct by "refus[ing] to attend the meetings of August 28 and 31."[5] He further found that the agency was "phenomenally negligent" in relying solely on the grievant – a "relatively low-level . . . English major with no apparent technical training" – to manage the source code for its website.[6] However, the hearing officer sustained the grievant's misconduct of "failure to answer the Questions in a timely manner and failure to know exactly what and where the source code was," though he concluded that these failures did not warrant termination.[7] Ultimately, the hearing officer reduced the agency's disciplinary action to a Group II Written Notice with a 30-day suspension,[8] but found no reason to mitigate the discipline.[9]

Both parties have requested that EDR administratively review the hearing officer's decision.

## 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."[10] 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 a party; the sole remedy is that the hearing officer correct the noncompliance.[11] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[12] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency raises numerous objections to the hearing decision. On the merits, the agency argues that the hearing officer failed to consider the agency's crucial charge that the grievant "refused to assist management in the transition of the Agency's website."[13] In support of that charge, the agency maintains that the grievant was "evasive, vague, and insubordinate" during the transfer of her work to a new department.[14] The alleged insubordination included not attending, and not having her contractors attend, the CFO's meeting[15] and not disclosing to management how to access the source code for the agency

[4] *Id.* at 1.
[5] *Id.* at 9.
[6] *Id.* at 8, 9.
[7] *Id.* at 10.
[8] *Id.*
[9] *Id.* at 11.
[10] Va. Code §§ 2.2-1202.1(2), (3), (5).
[11] *See Grievance Procedure Manual* § 6.4(3).
[12] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[13] Agency's Request for Administrative Review at 1-2.
[14] *Id.* at 7.
[15] *Id.* at 8.

website.[16] The agency asserts that the grievant's withholding of information was intentional and, as such, merited termination.[17]

In addition, the agency contends that certain conduct by the hearing officer indicates that he was and is unable to consider the evidence in this case objectively.[18] First, the agency claims that the hearing officer's written analysis exhibited bias against it, improperly intruding into the agency's authority to manage its operations and affairs, by which it asserts that it assigned the grievant the "sole responsibility to oversee [control of the website], maintain it, and operate it."[19] In support, the agency notes that the hearing officer chose to include in his decision several highly critical appraisals of the agency's management.[20] The agency argues that the hearing officer further exhibited bias against the agency by dismissing and/or minimizing evidence about the disruption caused by the agency's website problems.[21] Finally, the agency accuses the hearing officer of multiple other allegedly adverse biases: sexism,[22] religious bias,[23] and retaliation for declining the hearing officer's suggestion for the parties to settle the case.[24]

For her part, the grievant also raises several objections. She claims that the combination of penalties ordered by the hearing officer – a Group II Written Notice with 30-day suspension – has no basis in DHRM Policy 1.60, *Standards of Conduct*, which defines disciplinary standards for state employment.[25] The grievant also claims that her lack of knowledge about the agency's source code is not misconduct, much less a Group II offense.[26] She points out that other employees should have known more about the agency's source code, as the hearing officer found, and yet these employees allegedly did not receive formal discipline.[27] In addition, the grievant argues that the hearing officer erred to the extent that he upheld discipline based on the grievant's work performance during her approved medical leave.[28] Finally, the grievant contends that the hearing officer should have found that she substantially prevailed on the merits of her grievance such that attorneys' fees would be merited.[29]

EDR further acknowledges accusations against both parties' advocates related to the grievance procedure's civility requirement.[30] This ruling will address those allegations as well.

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[16] *Id.* at 12.
[17] *See id.* at 9, 12, 19.
[18] *See id.* at 13, 20-26.
[19] *Id.* at 7, 13-18.
[20] *See id.* at 13-16.
[21] *Id.* at 16.
[22] *Id.* at 13-14, 18-19.
[23] *Id.* at 23-26.
[24] *Id.*
[25] Grievant's Request for Administrative Review at 3; *See* DHRM Policy 1.60, *Standards of Conduct*.
[26] Grievant's Request for Administrative Review at 2-3.
[27] *Id.* at 3.
[28] *Id.* at 4.
[29] *Id.*
[30] *Grievance Procedure Manual* § 1.9.

*Disciplinary Actions Upheld*

Based on the sustained offenses of "failure to answer the Questions in a timely manner and failure to know exactly what and where the source code was," the hearing officer reduced the agency's disciplinary actions from a Group III Written Notice with termination to a Group II Written Notice with 30 days' suspension.[31] In their submissions, both parties argue that this combination of discipline has no basis in applicable policy under the circumstances.[32]

DHRM Policy 1.60, *Standards of Conduct*, provides that a Group II Written Notice is appropriate for "acts of misconduct of a more serious and/or repeat nature . . . that significantly impact business operations and/or constitute a neglect of duty, insubordination, the abuse of state resources, [or] violations of policies, procedures, or laws."[33] The sole suspension option provided for a first offense at this level is "[s]uspension of up to 10 workdays."[34] Although termination due to multiple accumulated Group II Written Notices may be mitigated to a 30-day suspension, here the hearing officer reduced the discipline based on offenses proven by the agency, not based on mitigation.[35] Accordingly, it does not appear that the combination of disciplinary actions upheld by the hearing officer is consistent with Policy 1.60, and remand is necessary to allow the hearing officer to reconsider what permissible disciplinary action(s) may be warranted and appropriate, in light of the additional issues considered in this ruling.[36]

*Misconduct Findings*

Agency's Objections

The Group III Written Notice in this case charged the grievant with failure to follow instructions, disruptive behavior, insubordination, and interference with state operations.[37] Specifically, the Written Notice alleged that the grievant "failed to comply with multiple requests" for the source code for the agency's website and "refused to attend mandatory meetings . . . to complete the transfer of the [agency's] website accountability from [OCLA] to [IMD]."[38] The Written Notice further explained that:

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[31] Hearing Decision at 10.
[32] Grievant's Request for Administrative Review at 3; Agency's Request for Administrative Review at 5. In its request, the agency argues that the hearing officer erred in reducing the level of its formal discipline from a Group III to a Group II. In support, the agency points to a past decision by the hearing officer upholding a Group II Written Notice for conduct that the agency views as much less egregious than the charged misconduct in this case. *See* Agency Request for Administrative Review at 17-18. EDR notes that, while hearing officers are bound to support the consistent application of policies including discipline within a single agency, EDR has observed that disciplinary actions are not necessarily comparable across agencies. *See* EDR Ruling No. 2021-5194.
[33] DHRM Policy 1.60, *Standards of Conduct*, at 8.
[34] *Id.* at 9.
[35] *See* Hearing Decision at 11.
[36] *See Rules for Conducting Grievance Hearings* § VI(B)(4).
[37] *See* Agency Ex. 2.
[38] *Id.*

> [a]fter she was notified . . . that her unit was transferring [to IMD], [the grievant] directed her team not to provide responses to 15 simple questions . . . related to the web's maintenance and operation. . . .
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> . . . . During the week of August 31 through September 4, 2020, [the grievant] repeatedly asserted that the web page source code was located on the agency's own servers, and that she had previously provided its location to [IMD]. Only after engaging the Office of the Attorney General and [its former contractor] did [the agency] learn that the source code was not located on any of the agency or Commonwealth's servers, but rather on a cloud-based server "GitHub" that is not approved by the Virginia Information Technology Agency. Given that [the grievant] managed the day-to-day operations of this team for over three years, she either knew or should have known that the source code was not in the location she provided to [the agency].[39]

Based on these descriptions, the hearing officer interpreted the Written Notice to charge that the grievant's specific misconduct was in failing to provide the source codes upon request, refusing to attend meetings scheduled for August 28 and 31, and refusing to assist management in the transition of the Agency's website.[40] The agency does not appear to take issue with this interpretation of its charges, but instead objects that the hearing officer failed to make findings as to the grievant's broader refusal to cooperate in the transition of her team.[41] The agency appears to argue that this alleged refusal to cooperate included not only meetings missed in late August and information not disclosed thereafter, but also the grievant's management of her team's work *throughout* August and her alleged reticence and evasion during a meeting with the LWA.[42] The agency maintains the evidence supported its charges of misconduct in this regard.

Upon a thorough review of the Written Notice and the record as a whole, EDR is unable to determine that the hearing officer has explicitly addressed the agency's charge that the grievant refused to cooperate in the transition of her team throughout August. As such, the matter will be remanded for the hearing officer to consider this charge and the grievant's alleged misconduct thereunder. In doing so, EDR recognizes that the hearing officer has already addressed some of the grievant's misconduct throughout August. Ultimately, the hearing officer found that the grievant's "failure to answer the Questions in a timely manner and failure to know exactly what and where the source code was" constituted misconduct meriting discipline.[43] Although the hearing officer did not sustain the charge that the grievant refused to attend mandatory meetings,[44] he concluded that "even though there never was a firm deadline for the Questions to be answered, there was a clear escalation of the importance of the answers as more and more managers sought

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[39] *Id.*
[40] Hearing Decision at 2-3.
[41] Agency's Request for Administrative Review at 2, 6.
[42] *See id.*
[43] Hearing Decision at 10.
[44] *Id.* at 3-4, 9. To the extent the agency challenges this specific finding, EDR has thoroughly reviewed the record and finds no basis to disturb the hearing officer's conclusions in this regard.

the answers."[45] The hearing officer further reasoned that the grievant "managed her small team for several years and it is incumbent on a manager to have at least some working knowledge of what her team did and how they did it," in this case including an understanding of "what source code encompassed."[46] Thus, while the hearing officer's findings do sustain more generalized failures on the grievant's part, the decision must be clarified to address whether the record supports the "failure to assist in the transition" portion of the Written Notice and the hearing officer's findings of fact as to the grievant's alleged misconduct under that charge.

However, the hearing decision does directly find that the agency did not meet its burden to establish by a preponderance of evidence other instances of alleged misconduct by the grievant. As there is evidence in the record to support the hearing officer's reasoning about these matters, EDR is unable to overrule these factual determinations. For example, the hearing officer included the following details in his finding of facts, based on the evidence:

- The grievant communicated to management that she would ask the web developers to answer the Questions if instructed to prioritize that task above others. Yet no manager ever set a deadline to revise priorities for the grievant's team.[47]
- When the developers' employer inquired in mid-August whether the agency would renew their contract, the grievant escalated that inquiry to higher management the next day.[48]
- During August, the OCLA Director made IMD personnel including the IMD Director aware that the website team was strained by upcoming deadlines, that the developers' contract was about to expire, and that the totality of website-related issues threatened to overwhelm.[49]

Despite these circumstances, the hearing officer observed, agency management allowed the website transition to "drift until the very end of August."[50] The decision thus makes clear that the hearing officer was not persuaded that the grievant's conduct was the primary cause of the agency's website problems or that her conduct was intentionally adverse to the agency.

The agency disagrees, maintaining that "[i]t was *Grievant's sole* responsibility to oversee [the website], maintain it, operate it."[51] But the hearing officer unquestionably concluded that it was not plausible, based on the evidence presented at hearing, that the grievant bore these responsibilities alone.[52] For example, he found that the grievant "has a degree in English, is not fluent in coding, has received no special training from the Agency in coding, source code, computer language and did not have security clearance to access the servers of this Agency."[53] Evidence in the record supports this conclusion. The grievant's Employee Work Profile ("EWP")

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[45] *Id.* at 8.
[46] *Id.*
[47] *Id.* at 5-7; *see* Agency Ex. 17.
[48] Hearing Decision at 6; *see* Agency Ex. 21.
[49] Hearing Decision at 5-6; *see* Agency Ex. 23.
[50] Hearing Decision at 9.
[51] Agency's Request for Administrative Review at 7.
[52] Hearing Decision at 8-9.
[53] *Id.* at 5.

classifies her as a Public Relations and Marketing Specialist IV, with the working title of Digital Communications Content Manager, within the Office of Communication, Legislation, and Administration.[54] The EWP summarizes her position as "responsible for creating, improving and maintaining content on the primary agency website."[55] These duties include "posting content . . . to enhance and promote internal communications," "sharing content with social media and digital engagement platforms to increase brand awareness," and "perform[ing] marketing planning and execution."[56] As her job title indicates, the vast majority of the grievant's listed responsibilities involve creating and developing communications content for public relations purposes. No supervisory responsibilities referenced by the EWP appear to relate to the technical maintenance of the website or to managing outside web developers. At the hearing, the grievant described her work for the agency as follows:

> I worked with [the OCLA Director] to redesign and redevelop the [agency's] public website, which was really out of date. . . . So we developed that with the support of executive leadership and deployed it in June 2018. Then we maintained it; we built a series of web applications. I was primarily the liaison between the business side and the technical team. I took requirements; I did a lot of paperwork. I didn't do any coding. I simply relayed information.[57]

The grievant further testified that, during most of this period, a project manager had handled the technical management of the web development team's work, but in June 2020 the agency eliminated the project manager position for budgetary reasons.[58] In light of the record evidence, EDR cannot say that the hearing officer was required to find that technical maintenance of the agency's website was the sole responsibility of the grievant.[59]

Nevertheless, citing testimony by the LWA, the agency argues that it lost the ability to control its website because the grievant was "noncommunicative when specifically asked about the source code" and then intentionally "play[ed] cat and mouse with the information" that the IMD Director requested on September 1.[60] However, while the hearing officer sustained the specific misconduct of "failure to answer the Questions in a timely manner and failure to know exactly what and where the source code was," he did not find that these failures were intentional misconduct by the grievant, who testified that she did not know when her team was to be

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[54] Agency Ex. 7.
[55] *Id.* at 3.
[56] *Id.* at 3-4.
[57] Hearing Recording at 38:50-40:20 (Grievant's testimony).
[58] *Id.* at 7:24:45-7:25:40 (Grievant's testimony).
[59] The hearing officer concluded that, regardless of what the grievant knew or did not know, sound management would have required other individuals such as the OCLA Director and the IMD Director to have "known the where and the how of source code or, at a minimum, [they] should have known the secure place within the Agency that it was located." Hearing Decision at 9. The agency argues that this observation impermissibly intrudes into the agency's authority and discretion to manage the means, methods, and personnel by which it carries out its operations. Although the hearing officer's comments undeniably – and perhaps overzealously – criticized the agency's management of its website during the period in question, his observations ultimately do not direct the agency's management, but instead illustrate why he found it implausible that the grievant, as a public relations employee, would in fact bear sole responsibility for the technical aspects of the agency's website.
[60] *See* Agency's Request for Administrative Review at 7, 10.

transferred to IMD and that she thought she had been forthcoming about what was asked of her.[61] Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.[62]

As this matter is being remanded for further consideration on the "failure to assist in the transition" charge, the hearing officer is also directed to address the appropriate level of discipline following further consideration of that issue. In doing so, the hearing officer must make specific findings why the charges of misconduct supported by the record warrant the level of discipline ultimately sustained, to include, for example, findings as to the nature of the grievant's misconduct and its impact on agency operations.[63]

Grievant's Objections

The grievant objects that the record does not support the offenses sustained by the hearing officer.[64] In particular, she contends that her lack of knowledge about the agency's source code is not misconduct under DHRM Policy 1.60, *Standards of Conduct*. In general, an employee's lack of knowledge can potentially be subject to disciplinary action under Policy 1.60 if having such knowledge is required for the competent and satisfactory performance of their job duties.

Here, the hearing officer concluded that discipline was appropriate for the grievant's "failure to know exactly what and where source code was."[65] He found that she was the "head of a small team" of contractors who "wrote code" for the agency's website.[66] The hearing officer further found that the source code the agency sought from the grievant was "equivalent to the crown jewels of the Agency website," and as such the grievant "should have known" what and where the source code was as "part of her job."[67]

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[61] *See*, *e.g.*, Hearing Recording at 8:09:05-8:11:15.
[62] *See*, *e.g.*, EDR Ruling No. 2020-4976.
[63] *See*, *e.g.*, DHRM Policy 1.60, *Standards of Conduct*, Attach. A.
[64] In her request for review, the grievant also argues that the agency's disciplinary actions against her were inconsistent with a lack of discipline against other employees and that, to the extent misconduct was sustained during days she was on approved leave, she could not have committed misconduct and was protected by the Family Medical Leave Act. Grievant's Request for Review at 3-4. EDR notes that the grievant bore the burden to prove asserted defenses that other similarly situated employees received more lenient or no disciplinary action, and that she was protected by leave entitlements. *See Rules for Conducting Grievance Hearings* § IV(B). Upon a thorough review of the record, EDR perceives nothing to suggest that the hearing officer erred in his consideration of these defenses.
[65] Hearing Decision at 10.
[66] *Id.* at 5.
[67] *Id.* at 8.

However, the hearing officer's findings of fact are notably sparse as to the grievant's specific job responsibilities and the knowledge those duties required her to have. The hearing officer found that the web developers were contractors; *i.e.* they were the employees of a third party providing services that the agency had chosen to outsource.[68] Thus, a general finding that the grievant was the contractors' "manager" or the "head" of their team leaves important questions unresolved about the actual scope of the grievant's duly assigned oversight of these outsourced services.

This clarification is important to support the hearing officer's ultimate finding of misconduct: that the grievant lacked knowledge that she was responsible for knowing as part of her job. The hearing officer found that the grievant was required to have "at least some working knowledge of what her team did and how they did it," and that "it is highly doubtful that she knew what source code encompassed."[69] The hearing officer further found that the grievant initially told the IMD Director that the source code he sought was on the agency's "servers," which she was not authorized to access, but in fact the code on the servers was called "executable code."[70] The "source code was on a site known as Github."[71]

The hearing officer's findings suggest that he attributed the grievant's faulty response to a lack of understanding of "source code." However, EDR is unable to determine with clarity whether the grievant's sustained offense in this regard was (1) not knowing what source code was in general; (2) not knowing how "source code" differs from "executable code"; and/or (3) not knowing that only executable code was on the agency's servers, while the source code actually needed was on GitHub. Moreover, the connection of each of these possibilities to the grievant's job duties is not obvious on administrative review, due to the conflicting evidence about the grievant's actual role. Without further clarification on this point, EDR cannot properly evaluate the grievant's claim that her lack of knowledge did not constitute misconduct.

Accordingly, in addition to reconsidering the "failure to assist in the transition" charge and the appropriate level of discipline upon remand as described above, the hearing officer should articulate more specific findings as to whether the evidence demonstrated that the grievant lacked knowledge that was required by her position. In particular, the hearing officer should make findings as to the grievant's job and oversight duties, what those duties required her to know about the agency's source code (and, if applicable, executable code), and whether the evidence tended to show that she lacked such required knowledge to an extent that constituted misconduct. As always, the hearing decision must identify the grounds in the record that support these findings.[72]

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[68] *See* Hearing Decision at 6.
[69] *Id.* at 8.
[70] Hearing Decision at 7-8.
[71] *Id.* at 8. The hearing officer found that, "[w]hile no concise definition of source code was proffered by either the Agency or Grievant, a generic definition would be 'any collection of code written using human readable programming language, usually in plain text. The source code of a program is specially designed to facilitate the work of the computer programmers, who specify the actions to be performed by a computer by writing source code. The source code is often transformed into binary code that can be executed by the computer." *Id.* at 4-5.
[72] *Rules for Conducting Grievance Hearings* § V(C). Because this ruling orders the hearing officer to issue additional findings as to the grievant's misconduct and appropriate discipline, EDR concludes that the parties' arguments as to attorneys' fees are premature, and we decline to address them at this time.

*Hearing Officer Bias*

The agency contends that the hearing officer is unfit to consider this matter further due to his lack of impartiality and bias against the agency.[73] These charges appear to arise primarily from the hearing officer's decision to exclude evidence regarding the impact that the inability to control its website had on the agency,[74] and on the hearing officer's criticisms of agency management in his decision.[75]

The agency asserts that "[a] key element to the agency's case is the extreme and overwhelming impact Grievant's misconduct had on the agency's operations."[76] The hearing officer found that "the Agency essentially came to a near stop for two to three days in September, 2020 as it dealt with this issue of lack of source code."[77] While the agency argues that this description fails to capture the disruption it experienced, it is not clear how more detailed findings would have affected the hearing officer's consideration of this matter. As discussed above, the hearing officer did not conclude that the evidence presented at hearing established that the grievant was solely responsible for the operation of the agency's website or that she intentionally withheld information, and he specifically found that higher-level managers bore at least some responsibility for the website disruption. Because the hearing officer did not attribute such disruption primarily to the grievant's conduct, EDR cannot say that he erred in limiting evidence on this point or in his ultimate findings as expressed in the hearing decision. Similarly, the agency takes issue with the hearing officer's limitation on evidence that the agency filed a report of theft against the grievant in connection with the events underlying her dismissal.[78] It appears that the hearing officer did not find this evidence persuasive on the issues of whether the grievant committed misconduct and, if so, whether the agency's disciplinary action was warranted and appropriate. Nothing in the record suggests that this determination was unreasonable or driven by an improper bias against the agency.

In addition, the agency contends that the hearing officer's consideration of this matter demonstrated sex-based biases adverse to the agency. First, the agency asserts that the hearing officer's description of the grievant's role as a "low-level" manager "smacks of sexism."[79] However, throughout the proceedings the agency's position has appeared to be that the grievant reported to the LWA, who reported to the IMD Director, who reported to the CFO, who reported to the agency head. Although the hearing officer made no specific findings on the grievant's reporting chain, his characterization of the grievant's managerial level appears to be consistent with both parties' arguments and evidence.

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[73] For example, the agency asserts that the hearing officer "had to strain to achieve his goal of reducing the discipline" and "committed hearing officer misconduct" by failing to acknowledge how the agency's website issues affected its operations. Agency's Request for Administrative Review at 8, 11.
[74] *Id.* at 16-18.
[75] *See id.* at 12-14.
[76] *Id.* at 16.
[77] Hearing Decision at 8.
[78] *See* Agency's Request for Administrative Review at 18-20.
[79] *Id.* at 14; *see* Hearing Decision at 8.

Second, the agency takes issue with the hearing officer's observation that, [d]uring the matter before me, Agency counsel vented much spleen over . . . theft by the grievant."[80] The agency suggests that the hearing officer would not use such phrasing in reference to a male advocate.[81] Although EDR finds nothing to suggest that the hearing officer's assessments were influenced by the gender of the advocates, the agency's objections to the hearing officer's phrasing with respect to its positions are well taken. In addition to observing in his written decision that the agency's advocate "vented much spleen," the hearing officer also characterized the agency's position as to the grievant's theft as "an insult to red herrings."[82] EDR recognizes and supports hearing officers' broad discretion to explain the reasoning behind their findings, including findings that a particular argument is not persuasive. However, in this and most other cases, we discourage characterizations that denigrate parties' positions, which can create the appearance of partiality while adding no value to the hearing decision. That said, the hearing officer's observations, even if overly dismissive of the agency's argument, are in line with his broader findings of fact and conclusions of policy that the agency's predicament in early September 2020 was not primarily the result of misconduct by the grievant. As discussed above, these findings are supported by evidence in the record and not indicative of bias, whether on the basis of sex or otherwise.

Finally, the agency argues that the hearing officer sent an email to the parties following the hearing that showed bias and/or was otherwise improper. It appears that, on December 22, 2020, the hearing officer contacted the parties to advise them that, although their cases were "passionately presented and well argued," both had "some rather large holes" and, thus, the hearing officer predicted that "in all likelihood, I will not be able to arrive at a decision [that] fully pleases either of you."[83] Accordingly, the hearing officer suggested a settlement whereby the agency would withdraw its disciplinary action and the grievant would resign. The hearing officer emphasized that "[t]his is a suggestion only," advising that any party not amenable to this solution could "simply . . . not respond and I will treat not hearing from you as your not wishing to accept such a compromise."[84] Contained within the hearing officer's email signature was the following quotation attributed to a religious text: "Be completely humble and gentle; be patient, bearing with another in love."[85]

The agency contends that this email was "a failed attempt to extort the parties to settle."[86] It also asserts that the hearing officer's email signature contained "religious instructions" suggesting a bias toward the grievant and toward settlement, in violation of the Establishment Clause of the First Amendment to the U.S. Constitution.[87]

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[80] Hearing Decision at 10.
[81] Agency's Request for Administrative Review at 19.
[82] Hearing Decision at 10.
[83] Agency's Request for Administrative Review at 21.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 26.

Upon review of the email as presented in the agency's filing, EDR finds no suggestion of extortion or "threat," as the agency asserts. Rather, it appears that the hearing officer felt the parties might both benefit from his prediction that neither would be happy with a written decision (as opposed to an outcome where one party prevailed and the other did not). Both parties' requests for administrative review suggest that the hearing officer's prediction was accurate. EDR supports numerous methods of dispute resolution and does not discourage a hearing officer from serving the same mission, provided that their conduct does not interfere with fair and impartial administration of the hearing process under the *Rules for Conducting Grievance Hearings* and the grievance procedure generally.[88] Here, it is unclear how the hearing officer's suggestion of a particular settlement indicated bias on his part or prejudiced his findings as to either party.

As to the hearing officer's email signature exhorting humility and patience, EDR does not read this quotation to constitute "religious instructions" to the parties or to indicate a bias in favor of the grievant or in favor of settlement generally. The mere attribution of this secular message to a religious source, without more, does not in itself suggest a constitutional violation.[89]

In sum, while the agency insists that the hearing officer "knew" the agency's position was "the right one,"[90] nothing in the record or the hearing decision suggests that its conclusions are based on anything other than the hearing officer's reasoned and objective consideration of the evidence in the record.[91]

*Civility in the Grievance Process*

Finally, EDR notes accusations by both parties that the other's submissions as to administrative review exceeded the bounds of civility. Specifically, the agency's request for review compared the grievant's alleged conduct to the invasion of the U.S. Capitol on January 6, 2021.[92] In response, the grievant asserted that the agency "is acting like a Karen," explaining that "Karen" is "a pejorative slang term for an obnoxious, angry, [and] entitled . . . middle-aged white woman who uses her privilege to get her way . . . ."[93]

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[88] The agency references a previous instance in which the hearing officer exceeded his authority by attempting to enforce a settlement agreement between the parties to a grievance. Agency's Request for Administrative Review at 26. However, in that case, the hearing officer issued a written decision finding that the agency had carried its burden to support the discipline imposed, with no mitigating factors. EDR remanded the matter on grounds that the hearing officer could not enforce settlement terms *concurrent with* his finding that the agency had prevailed on the merits. EDR Ruling No. 2014-3769.

[89] *See generally* Van Orden v. Perry, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.").

[90] Agency's Request for Administrative Review at 23.

[91] For all the reasons explained herein, EDR rejects the agency's contention that the hearing officer "failed at his job as a hearing officer in this case," and we perceive nothing to suggest that the hearing officer will "retaliate against [the agency] and make further rulings to punish the agency." Agency's Request for Administrative Review at 25. While the agency clearly does not agree with the hearing officer's consideration of the evidence in this matter, we cannot find that the hearing officer's findings adverse to the agency, supported by evidence in the record, constitute an improper bias against it, let alone a likelihood of future retaliation. Accordingly, EDR will remand this matter to the hearing officer for further consideration consistent with all of the requirements of the grievance procedure.

[92] Agency's Request for Administrative Review at 7, 11.

[93] Grievant's Rebuttal at 5.

The grievance procedure requires all parties and advocates to "treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications. Parties and advocates shall not engage in conduct that offends the dignity and decorum of grievance proceedings . . . ."[94] With respect to filings specifically directed to EDR for resolution, we observe generally that the rhetoric therein may well fall short of the grievance procedure's civility standard if it appears significantly more likely to inflame than to persuade.

For example, on the record presented, comparison of the grievant to the Capitol attackers does not meaningfully enhance the agency's already thorough arguments. Likewise, it is unclear how the "pejorative" term used in the grievant's rebuttal should have assisted EDR's analysis of the issues presented for review. Further, while the grievant's advocate denies that this term referenced the agency's advocate, we conclude that such an interpretation was not only plausible but reasonably foreseeable under the circumstances. As this matter continues upon remand, we strongly encourage both parties and their advocates to advance their positions consistent with the requirements of civility and respect for all participants. To the extent that any participant fails to meet this standard going forward, either party may request that EDR address the issue as a matter of compliance with the grievance procedure.[95]

## CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision making additional findings of fact and conclusions of policy as to whether the grievant refused to assist in the transition of her team, whether the grievant lacked specific knowledge that was required by her job, and what level of discipline may be upheld consistent with law and policy as to all the sustained charges.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.[96] 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.[97] 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.[98] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[99]

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[94] *Grievance Procedure Manual* § 1.9.
[95] The agency's advocate has requested that EDR sanction the grievant's advocate for his written submission. The Code of Virginia does not grant EDR the authority to award monetary sanctions against a grievance participant in this regard.
[96] *See Grievance Procedure Manual* § 7.2.
[97] *Id.* § 7.2(d).
[98] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[99] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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