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ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2022-5296
September 9, 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 11712. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11712, as found by the hearing officer, are as follows:¹

The Agency employed the Grievant as a director, a senior leadership position, reporting to the deputy commissioner. A Notice of Improvement Needed was issued to the Grievant on November 2, 2020. The notice detailed four complaints regarding the Grievant’s abrasive and unprofessional interactions with staff.

The Group II Written Notice, issued by the deputy commissioner on May 24, 2021, detailed the facts of the offense, and concluded, that on February 23, 2021, the Grievant created a toxic environment in the meeting, a violation of Policy 2.35, Civility in the Workplace.

The second Group II Written Notice, issued by the deputy commissioner on May 24, 2021, detailed the facts of the offense and concluded that ongoing conduct from August 2020 to March 2021 regarding aggressive and retaliatory behavior was a violation of Policy 2.35, Civility in the Workplace.

Termination was the discipline, based on the two Group II Written Notices.

¹ Decision of Hearing Officer, Case No. 11712 (“Hearing Decision”), Aug. 2, 2021, at 3-5 (citations omitted).

The Notice of Intent to Discipline, issued April 28, 2021, details the factual bases of the offenses. The outside investigator's report details the investigation findings of fact for both written notices.

As circumstances considered, both Group II Written Notices reflected that the factual defenses made by the Grievant during the due process meeting were insufficient to warrant reduction of the offense, noting that the Grievant was in a senior leadership position and must model professional behavior and civility in the workplace.

The Grievant's supervisor, the deputy commissioner, testified that the mission of the Agency is to serve the most vulnerable population. Grievant did not exhibit the offensive conduct before him, so his knowledge of the conduct came from other staff members, including senior staff. Aside from the behavior offenses, the Grievant was competent at his job. The deputy commissioner described the Grievant's technical ability as stellar. The deputy commissioner received complaints about the Grievant's behavior, to the point of considering discipline. The deputy commissioner hired the Grievant and wanted success.

Because of the verbal complaints, the deputy commissioner provided an interim evaluation to the Grievant, in an effort to make the Grievant successful at his job. That evaluation in October 2020 was an encouraging document, including the issue of honing his skills working with his peers. This interim evaluation was followed by the Notice of Improvement Needed in November 2020, reacting to multiple instances of abrasive communication and behavior, and directing the Grievant to be mindful of his behavior and to correct it, including a requirement to take the Civility in the Workplace Training course.

The deputy commissioner testified that he has a responsibility to respond to the complaints received, and that he ultimately elected to get an outside investigator. The investigator found that the Grievant violated Policy 1.60, for failure to demonstrate respect toward agency coworkers, supervisor, managers, and subordinates; and Policy 2.35 for pervasive and persistent behaviors that can objectively be considered "bullying" which had a negative impact or created a hostile work environment. Additionally, the investigator found heretofore unreported retaliatory behavior. During the investigation, the Grievant denied or did not recall the behavior.

Based on the staff reports and the outside investigator's findings, and considering the Grievant's response, the deputy commissioner elected to issue the two Group II Written Notices with termination.

The technology operations manager testified to the Grievant's aggressive tone and threatening statements (to remove him from work teams) and, impliedly, to fire him. Because he believed the Grievant's intentions and power, he only first reported retaliatory conduct during the formal investigation.

A systems analyst testified to participating in and witnessing a meeting on February 23, 2021, in which the Grievant was aggressive and confrontational toward the database manager who was asking for more information about a project. The Grievant, a superior, berated the database manager and insisted that the manager make a statement that he was already provided the information months earlier.

A division director and peer of the Grievant testified that her interactions with the Grievant. The director testified that the Grievant was aggressive in his behaviors and the director corroborated the Grievant's aggressive, bullying and humiliating behavior toward the database manager in the February 23, 2021, meeting.

The database manager, who reported directly to the Grievant, testified that the Grievant treated him very badly, and that his time working under the Grievant was the darkest days of his life. The manager testified that the Grievant managed by intimidation and bullying, and, because of this, the database manager started looking for another job. The manager stated that in the February 23, 2021, meeting, the Grievant repeatedly insisted that the manager state, wrongly, that the necessary documentation was already provided before addressing the manager's concerns. The manager testified that the Grievant expressed to him implied retaliatory threats that the Grievant was not afraid of human resources regarding his management actions. The manager testified that the Grievant undermined team cohesion, morale, self-worth, and productivity. Further, the Grievant created a toxic environment of bullying, demeaning, intimidating, insensitive, rude, and unprofessional behavior.

Testifying for the Grievant, a director of program operation and business manager testified that they had no negative or inappropriate experiences with the Grievant. Their testimony, however, did not refute the conduct detailed by the Agency's witnesses.

The Grievant testified that the Agency's case against him was just opinions and not facts. The Grievant challenged the Notice of Improvement Needed as without basis. The Grievant testified that he was effective at his job, and all the complaints were individuals' interpretation of events, and out of context. The Grievant asserted that the case against him was a false conspiracy of opinions and exaggeration. The Grievant denied he behaved aggressively and created a toxic environment.

On May 24, 2021, the agency issued to the grievant two Group II Written Notices, each charging violations of DHRM Policy 2.35, *Civility in the Workplace*.² The grievant was terminated based on his accumulation of discipline.³ The grievant timely grieved the disciplinary actions and a hearing was held on July 26, 2021.⁴ In a decision dated August 2, 2021, the hearing officer found

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

³ Agency Exs. 2, 3; *see* DHRM Policy 1.60, *Standards of Conduct*, at 9 (stating that the issuance of "[a] second active Group II Notice normally should result in termination").

⁴ *See* Hearing Decision at 1.

that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the misconduct charged on the Written Notices and upheld the discipline, along with the grievant's termination.⁵ The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.⁶

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”⁷ 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.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant contends that the hearing officer “did not follow or apply the appropriate standard of proof” in upholding the Group II Written Notice that charged him with engaging in “two instances of covert retaliation” against employees.¹⁰ In particular, the grievant argues that the agency “did not provide any proof that retaliation occurred” and that issuing discipline based on an “allegation alone” is inconsistent with policy.¹¹ The grievant also denies that the conduct on the Written Notices occurred as alleged and challenges the credibility of the witnesses who testified about his misconduct.¹²

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁴ 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.¹⁵ 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.¹⁶ 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

⁵ *Id.* at 1, 6-7.

⁶ *Id.* at 7-8.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Request for Administrative Review at 1; *see* Agency Ex. 3. The grievant has not challenged the other Group II Written Notice, and thus it will not be discussed in this ruling. *See* Agency Ex. 2.

¹¹ Request for Administrative Review at 1, 3, 4.

¹² *Id.* at 2-4.

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

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.

The Group II Written Notice issued to the grievant in this matter charged him with engaging in "covert retaliation" against two employees:

An employee [the "technology operations manager"] stated that you threatened to remove him from future communications to teach him a lesson, after you found out the employee brought concerns regarding your behavior to leadership. . . . [T]his employee never mentioned this to leadership for fear of your reaction.

Another employee [the "database manager"] stated that, when engaging with you, you stated that if your instructions are not followed, you remove staff, place them on a performance improvement plan, require them to check in three times a day, and write them up when they fail to report. You also indicated that there was no reason for this employee to report the incident because you were not concerned about Human Resources.¹⁷

The Written Notice explained that "[w]hether [the grievant] followed through on [the] threats is not the determining factor for violating the policy" because the employees "felt that reporting [the grievant] would bring additional wrath from [him] . . ."¹⁸ The hearing officer sustained the charges on the Written Notice, finding that "the multiple coworkers' testimony [was] credible" and "the offending conduct [was] consistent with the Grievant's pattern of behavior."¹⁹ The hearing officer further found that "[t]he testimony, manner, tone, and demeanor of the testifying witnesses sufficiently prove by a preponderance that the Grievant made the offending comments and exhibited the offending behavior, to a reasonable person standard."²⁰

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. "Retaliation" is defined in DHRM Policy 2.35 as "[o]vert or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy."²¹ The agency determined that the grievant's conduct towards the technology operations manager and the database manager constituted acts of covert retaliation that discouraged them from reporting concerns about the grievant to agency management.²² At the hearing, both the technology operations manager and the database manager testified about the grievant's behavior consistent with the charges on the Written Notice and the

¹⁷ Agency Ex. 3, at 1.

¹⁸ *Id.* at 2.

¹⁹ Hearing Decision at 7.

²⁰ *Id.*

²¹ Agency Ex. 5, at 8.

²² See Hearing Recording at Track 1, 1:14:42-1:15:12 (deputy commissioner's testimony); see Agency Ex. 1, at 20 (investigator's conclusion that the grievant "took steps to retaliate or silence" the technology operations manager and the database manager "when they challenged or reported his actions," which "can objectively be perceived as retaliation since such actions would reasonably dissuade an employee from reporting prohibited conduct in the future").

hearing officer's factual findings.²³ In addition, the technology operations manager confirmed that the grievant's behavior did, in fact, lead him to withhold disclosing these issues to management.²⁴ The database manager, meanwhile, stated that he feared the grievant would retaliate against him if he questioned the grievant about management decisions.²⁵

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 acts of retaliation against employees.²⁶ 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 and that termination was warranted based on his accumulation of two Group II Written Notices.²⁷

Nevertheless, the grievant objects that the hearing officer erred in accepting the witnesses' testimony as proof that he engaged in misconduct. For example, that grievant contends that he did not actually take action against either of the two employees in question, that his exclusion of the technology operations manager from meetings was "based on need" rather than a retaliatory motive, and that he did not make the statements to the database manager as alleged.²⁸ The grievant appears to further allege that the testimony of the technology operations manager and the database manager should not have been deemed credible because they did not report their concerns when the incidents occurred in August 2020, but instead waited to report these issues until several months later.²⁹

The hearing officer addressed the grievant's defenses at some length in the decision, noting that "[t]he Grievant's general denials of the allegations are insufficient to rebut the repeated witnesses who testified that the Grievant's conduct was reasonably offensive—rude, inappropriate, discourteous, unprofessional, and retaliatory."³⁰ Regarding the "Grievant's defense theory that all the witnesses conspired to allege bullying and retaliation," the hearing officer found no evidence of any "motivation or explanation of some animus toward the Grievant."³¹ Although the grievant may not have followed through on all of the specific alleged threats of retaliation described in the Written Notice, the grievant's conduct, as found by the hearing officer, falls under Policy 2.35. Indeed, the policy specifically prohibits "any form of retaliation" and, for example, contemplates "intimidation" within the definition of retaliation.³² Making threats to retaliate against employees

²³ E.g., Hearing Recording at Track 1, 2:18:15-2:23:56 (technology operations manager's testimony), 4:37:10-4:42:36 (database manager's testimony); see Agency Ex. 1, at 17-18 (investigator's description of the concerns reported by the technology operations manager and database manager); Agency Ex. 11, at 4 (database manager's written account of the grievant's conduct).

²⁴ Hearing Recording at Track 1, 2:29:53-2:30:12 (technology operations manager's testimony); see Agency Ex. 1, at 18 (investigator's description of how the grievant's conduct affected the technology operations manager).

²⁵ Hearing Recording at Track 1, 5:07:39-5:08:43 (database manager's testimony); see Agency Ex. 1, at 18 (investigator's description of how the grievant's conduct affected the database manager).

²⁶ Agency Ex. 5, at 3.

²⁷ 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. 5, at 5.

²⁸ Request for Administrative Review at 2-4.

²⁹ *Id.* at 2, 3.

³⁰ Hearing Decision at 7.

³¹ *Id.*

³² Agency Ex. 5, at 3, 8.

if they report concerns to management, as the agency and the hearing officer found the grievant had done in this case, clearly falls within conduct covered by the policy.

To the extent the hearing officer did not directly address all of the evidence in the record on the matters cited by the grievant in his request for administrative review, 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. Moreover, 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.³³ Accordingly, EDR declines to disturb the ruling 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.³⁴ 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.³⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁶

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³³ See, e.g., EDR Ruling No. 2020-4976.

³⁴ *Grievance Procedure Manual* § 7.2(d).

³⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁶ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).