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ADMINISTRATIVE REVIEW

In the matter of Norfolk State University
Ruling Number 2022-5389
April 5, 2022

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11757. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11757, as found by the hearing officer, are as follows:¹

Norfolk State University [(the “university” or “agency”)] employed Grievant as an Education Specialist II. Grievant was responsible for ensuring “the integrity of the testing environment, security of testing materials and compliance with certification requirements of test vendors”

Grievant had prior active disciplinary action. On January 21, 2021, Grievant received a Group I Written Notice for excessive absences. On March 15, 2021, Grievant received a Group II Written Notice for excessive absences and failure to follow policy and/or instructions.

On August 2, 2021, the Supervisor sent Grievant an email stating, “[y]ou are also required to call your immediate supervisor, as far in advance as possible, if you are running late or have an unplanned absence, to ensure adequate staff coverage.”

Grievant was scheduled to report to work at 8 a.m. on September 23, 2021. Grievant did not arrive at work until 8:23 a.m. Grievant did not contact the Supervisor or Manager to indicate that she would be arriving late. The University considered Grievant’s behavior to be an unexcused tardy.

¹ Decision of Hearing Officer, Case No. 11757 (“Hearing Decision”), March 16, 2022, at 2-4 (citations omitted).

One of Grievant's duties involved completing an Inventory and Tracking Data sheet. The University had amended the sheet several times. Grievant preferred to use the older versions of the sheet.

On September 13, 2021, the Manager sent Grievant an email stating:

The attached worksheet was initially sent to you in an email on 8/23/2021 (see below). You are required to use the attached worksheet for updating the inventory and tracking data by close of business today. Let me know if you require my guidance on updating the worksheet.

Grievant disregarded the Manager's instruction and continued to use an outdated version of the Inventory and Tracking Data sheet.

On September 22, 2021, the Supervisor reminded Grievant to use the correct Inventory Request and Tracking Data sheet which was developed to ensure that necessary supplies were ordered for the Unit's operations. Grievant refused to use the correct form and continued to use an alternate form.

When visitors came to the Unit to complete academic testing, they were required to complete a wellness check form to disclose personal information relating to COVID19. The Manager instructed Grievant to have visitors to complete, sign, and date the forms and then submit the completed forms to the Manager for her to store in her files. The University's objective was to help with mitigation of COVID19 on campus. The University did not want any visitors to the Unit to spread COVID19 to other visitors.

On September 20, 2021, the Manager sent Grievant an email:

This counseling memorandum serves as a corrective measure regarding your continued failure to follow supervisor's directives with regard to obtaining wellness check forms from all test candidates prior to admission to the Testing Center. This is required as part of the COVID-19 mitigation strategy for Testing Services. Once again today, you failed to follow established departmental protocol for collecting the forms and submitting them to the Director of Testing Services. You were previously sent a counseling memorandum regarding this matter on 8-23-21 and follow up reminder emails on 9/8/21 and 9/17/21. Your continued failure to obtain the wellness check form prior to admitting test candidates will result in future disciplinary action.

On September 29, 2021, Grievant was told to provide the Manager with all COVID19 wellness check forms that were collected for exams administered during the week. Grievant failed to comply with this request.

On October 20, 2021, the university issued to the grievant a Group II Written Notice with termination for failure to follow instructions regarding work tasks and attendance.² The grievant timely grieved the disciplinary action and a grievance hearing occurred on February 28, 2022.³ In a decision dated March 16, 2022, the hearing officer determined that the Group II Written Notice with termination “must be upheld,” and that no mitigating circumstances existed to reduce the university’s discipline.⁴

The grievant now appeals the hearing decision to EDR.

DISCUSSION

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

In her request for administrative review, the grievant appears to challenge evidence presented by the university regarding her history of attendance and leave. She also asserts that the offense of failure to follow instructions applies only to “LAWFUL and/or reasonable instructions.” Finally, she contends that the university’s discipline was improperly motivated and did not provide opportunities to improve.

The grievant’s request for administrative review appears generally to dispute the hearing officer’s conclusion that credible evidence supported the university’s discipline. 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, 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

² University Ex. A.5-7; *See* Hearing Decision at 1.

³ Hearing Decision at 1.

⁴ *Id.* at 4-5.

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

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

⁷ Va. Code § 2.2-3006(A); *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.

disciplinary action.¹⁰ 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.¹¹ 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 decision, the hearing officer found that university management instructed the grievant "to notify her supervisor if she was going to be late"; "to use the current Inventory and Data Tracking sheet"; and "to collect wellness check forms from visitors . . . and present them to the Manager."¹² The hearing officer further concluded that the grievant failed to follow each of these instructions on various occasions during September 2021.¹³ Evidence in the record supports these conclusions as to the grievant's failure to follow instructions.¹⁴ In her request for administrative review, the grievant asserts that the university presented false or misleading information about her past leave record,¹⁵ that the instructions management gave her as to the wellness check forms were "unlawful," and that the university's disciplinary actions against the grievant were improperly motivated. However, the hearing officer expressly found that the grievant's evidence was insufficient to establish these defenses, also noting that the grievant's past discipline related to attendance was not an issue properly before the hearing officer for adjudication.¹⁶

It would appear that, upon consideration of the totality of the evidence in the record, the hearing officer found the university's witness testimony and documents credible. 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

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

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Hearing Decision at 4.

¹³ *Id.*

¹⁴ *See, e.g.,* University Exs. F.24, G.4, H.2; Hearing Recording at 14:55-17:20, 30:45-33:25, 34:10-37:30 (Director's testimony).

¹⁵ In her request for administrative review, the grievant asserts that the university's witness "committed perjury" in her testimony regarding the grievant's attendance. However, the grievant does not elaborate on which statements under oath were false, or how the alleged perjury would have impaired the hearing officer's conclusions as to the issues before him. While the presentation of false evidence is a serious allegation, EDR will not disturb the hearing decision based only on bare accusations of such misconduct.

¹⁶ Hearing Decision at 4-5; *see generally* *Rules for Conducting Grievance Hearings* § VI(B)(1) (providing that the grievant has the burden to prove their defenses). Although the grievant disputed the charges against her in a written statement submitted with her hearing exhibits, she did not offer testimony under oath and subject to cross-examination at the hearing in order to support her claims. The grievant has provided no other information for EDR's review that might explain what laws the instructions violated.

record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.¹⁷

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is insufficient record evidence to support the grievant's assertions and, accordingly, that EDR has no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

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.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

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¹⁷ See, e.g., EDR Ruling No. 2020-4976. To the extent that the grievant argues on appeal that the hearing officer should have mitigated the disciplinary actions because the university failed to implement a performance improvement plan prior to issuing its discipline, EDR notes that state policy sets forth no such requirement. See generally DHRM Policy 1.60, *Standards of Conduct*. Upon a thorough review of the record, we find no grounds to disturb the hearing officer's conclusion that no basis for mitigation existed.

¹⁸ *Grievance Procedure Manual* § 7.2(d).

¹⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).