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ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2023-5460
October 14, 2022

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 11842. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11842, as found by the hearing officer, are as follows:[1]

> The University of Virginia Medical Center [(the "university" or "agency")] employed Grievant as a Surgical Support Technician. He had been employed by the University since June 13, 2011.
>
> Grievant was scheduled to work but failed to report to work without excuse on May 4, 2021, June 22, 2021, July 30, 2021, August 3, 2021, September 13, 2021, December 2, 2021, January 4, 2022, and April 7, 2022. The University considered these dates to be unscheduled absences.
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> On September 14, 2021, Grievant received a Step 1 Formal Performance Improvement Counseling for accumulating five unscheduled absences.
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> On December 7, 2021, Grievant received a Step 2 Formal Performance Improvement Counseling for accumulating six unscheduled absences.
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> On January 12, 2022, Grievant received a Step 3 Formal Performance Improvement Counseling with a Performance Warning from January 12, 2022 to April 11, 2022 for accumulating seven unscheduled absences.

[1] Decision of Hearing Officer ("Hearing Decision"), Case No. 11842, September 1, 2022, at 2-3 (footnotes omitted).

> On April 18, 2022, Grievant was scheduled to report to work. He did not report to work because he had a migraine headache and was experiencing sinus discomfort due to seasonal allergies. He felt he was not able to work so he did not report for work.
>
> Grievant provided the University with his home telephone number to contact him in the event he was needed to report to work. On May 5, 2022, Grievant was "on-call" meaning he was to report to work if his attendance was needed. He was on-call from 7 p.m. until 7 a.m. the following morning. Grievant was aware he was obligated to check his voice mail system periodically while he was on-call. The Medical Center began running a sufficient number of Operating Rooms to require additional staffing. At 4 p.m., the Health Unit Coordinator called Grievant at the telephone number Grievant provided. Grievant did not answer and the employee left a message for Grievant to come to work. Grievant did not call the University or report to work. The OR Nurse also called Grievant at the telephone number Grievant wrote on his contact sheet but Grievant did not answer the telephone call. The University considered Grievant's inaction to be "No Call / No Show."

On or about May 16, 2022, the university issued to the grievant a Step 4 Formal Performance Improvement Counseling Form indicating immediate termination, based on the "No Call / No Show" absence.[2] The grievant timely grieved his termination, and a hearing was held on August 15, 2022.[3] In a decision dated September 1, 2022, the hearing officer determined that the university had "presented sufficient evidence to support its decision" to terminate the grievant's employment.[4] The hearing officer also found that the university "was authorized to consider [the grievant] ineligible for rehire."[5] Finally, the hearing officer found no mitigating circumstances to reduce the university disciplinary action.[6] The grievant 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 . . . ."[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.

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[2] *See* University Exs. 1, 2; Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 4.
[5] *Id.* at 5.
[6] *Id.*
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code §§ 2.2-1201(14), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[11] 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.[12] 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.[13] 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.

In his request for administrative review, the grievant asserts that he "was one of the OG's (old gangsters) that the manager who sat in on the entire confidential hearing was going to 'get rid of.' The four OG's he's referring to are the eldest and most experienced [surgical technicians] and all are also African American."[14] EDR interprets these arguments to challenge the hearing officer's findings regarding the grievant's discrimination defense, and to generally assert that the evidence presented to the hearing officer was affected by the presence of his manager as the university's party representative.[15]

To prevail at a hearing on a claim that the employer's disciplinary action was motivated by prohibited discrimination, a grievant must ultimately prove by a preponderance of the evidence that any nondiscriminatory business reason the employer proffers for its disciplinary action is a pretext for discrimination.[16] In his decision, the hearing officer in this case found that the grievant did not meet his burden to prove discrimination as an improper motivation for the university's disciplinary action:

> Grievant argued that the University displayed toxicity, favoritism, and engaged in racial discrimination. Grievant did not present sufficient evidence to show that these allegations related to the disciplinary actions against him. The Hearing Officer does not believe that the University took disciplinary action against Grievant out of toxicity, a hostile work environment, favoritism or racism.[17]

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 university's disciplinary documents, that this behavior constituted misconduct, and that the

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[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.
[14] Request for Administrative Review at 1. At the hearing, a witness testified that she overheard the grievant's manager make a comment "in the hallway" about "getting rid of the four OGs," who she understood to include the grievant. Hearing Recording at 1:42:50-1:45:50 (Technician's testimony).
[15] In support of his request, the grievant included two university policies addressing discrimination and retaliation, as well as anti-discrimination provisions of the Virginia Human Rights Act. *See* Va. Code § 2.2-3900.
[16] *See* Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018).
[17] Hearing Decision at 4.

discipline was consistent with law and policy. The university presented witness testimony that, on May 4, 2022, the grievant was scheduled to be on-call overnight; university staff left him a phone message to report to work due to patient volume, and he did not return the call or report to work.[18] Agency policy defined a "No Call / No Show" as an "absence from work in which the employee has failed to report to work and failed to provide notification to the supervisor, or designee, of an unscheduled absence."[19] The policy further provided that a No Call / No Show is considered "Serious Misconduct" that results in termination of employment if it occurs when formal discipline is already in place for attendance problems.[20] We note that the grievant's request for administrative review does not appear to dispute whether he engaged in the conduct charged – *i.e.* failing to call or report to work when he was called in to work during a period he was scheduled to be on call, and when disciplinary action for attendance issues was already in place.

Instead, the grievant appears to maintain that the university's choice of disciplinary action as to this conduct was motivated by discrimination. The grievant presented testimony that his manager had casually commented about "getting rid of" the grievant and three other older African American technicians.[21] While the hearing decision does not address the credibility or weight of this concerning testimony, we cannot conclude that mere silence in the hearing decision as to this evidence is a basis for remand. Even if the hearing officer had credited this testimony as true, he was nevertheless authorized to find that the grievant's failure to report to work when on call was a legitimate basis for termination under agency policies, and not a pretext for discrimination based on any protected class. 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.[22]

In addition, to the extent that the grievant argues it was improper for his manager to be present during the hearing, we identify nothing in the record to support this claim as a basis for remand. The *Rules for Conducting Grievance Hearings* confirm that the "agency may select an individual to serve in its capacity as a party."[23] Moreover, "[t]he fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify."[24] The agency's selection of the grievant's manager appears to comport with these provisions, and it does not appear that the grievant raised any specific concerns about the manager's presence to the hearing officer. Further, upon administrative review, the grievant has not articulated any specific effect that the manager's presence might have had on the presentation of evidence. Accordingly, we decline to disturb the hearing decision on these grounds.

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[18] Hearing Recording at 16:45-17:25, 48:15-48:55 (Manager's testimony); *id.* at 1:23:55-1:25:20 (Nurse's testimony) *see also* Agency Ex. 9.
[19] Agency Ex. 4A at 2.
[20] *Id.* at 5.
[21] Hearing Recording at 1:42:50-1:45:50 (Technician's testimony).
[22] *See*, *e.g.*, EDR Ruling No. 2014-3884.
[23] *Rules for Conducting Grievance Hearings* § IV(A).
[24] *Id.*

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision on the grounds cited in the grievant's request for administrative review. 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 no basis to conclude the hearing decision does not comply with the grievance procedure such that remand would be 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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).