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ADMINISTRATIVE REVIEW

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2024-5701
May 13, 2024

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 12078. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12078, as found by the hearing officer, are as follows:¹

The grievant worked for the agency for over six years. In 2022, her position was that of recreational therapist. Her established work schedule was 7:30 AM until 4:00 PM on Monday through Friday.

In December 2023, the supervisor of the grievant received a report the grievant had been working overtime hours without prior approval. The supervisor investigated the allegation by reviewing the time records of the grievant. That investigation revealed that during the last six months of 2023 the grievant had arrived late for work on approximately forty-seven occasions. On 27 days, she left more than 10 minutes prior to the scheduled end of her workday. On eleven of the occasions when she arrived late, she worked the required number of hours. On six of the days when she clocked out early, she had arrived early enough to work the scheduled number of hours.

The grievant was issued a Group III Written Notice in April 2022 for having a fellow employee clock her in even though the grievant had not arrived for work. On December 6, 2023, she received a rating of "Contributor" on her annual evaluation.

¹ Decision of Hearing Officer, Case No. 12078 ("Hearing Decision"), Apr. 10, 2024, at 3.

On January 18, 2024, the agency issued to the grievant a Group III Written Notice with termination for attendance issues.² The grievant timely grieved the disciplinary action, and a hearing was held on April 2, 2024.³ In a decision dated April 10, 2024, the hearing officer determined that the agency presented sufficient evidence to support the disciplinary action.⁴ The grievant now appeals the 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 contends that per her testimony, she was given consent by her supervisor to vary her schedule as needed, adding that her supervisor approved her time weekly and “only said something about [her] work hours once a work altercation occurred.” Additionally, the grievant argues that per DHRM Policy 1.60, the grievant’s conduct was not an abuse of work hours. Essentially, the grievant challenges the hearing officer’s factual findings regarding conflicting testimony of whether the grievant’s behavior was approved, and whether the discipline was appropriately described as “abuse of work hours.”

Consideration of Evidence

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 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

² Agency Exs. at WN 1-18-24; *see* Hearing Decision at 2.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 4.

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.

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

¹¹ *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.

In his decision, the hearing officer found that while the grievant testified she was given consent to vary her schedule, the supervisor testified that such consent had not occurred.¹² The supervisor added that she delayed issuing formal discipline and instead provided oral counseling on multiple occasions during the last six months of 2023.¹³ The hearing officer emphasized that the grievant's defense was more "global," rather than defending any singular instance of schedule adjustments, and that her overall defense was simply that the supervisor was aware of what was going on. Ultimately, the hearing officer found the supervisor's testimony more credible, and found that the grievant did not have the proper authorization for the multiple instances of the grievant not working her required schedule.¹⁴

After a review of the record, EDR finds no basis to disturb the hearing officer's findings regarding these conflicting testimonies. The grievant did testify that she was asked by her supervisor to work outside of her regular hours "on regular occasions,"¹⁵ whereas the supervisor testified that she was "not familiar with" any instances of asking the grievant to come in early or late.¹⁶ The hearing officer ultimately found the supervisor's testimony more persuasive. The grievant also testified that her time slip was approved every pay period by her supervisor.¹⁷ However, the supervisor testified that she only consistently approved the weekly time slips that showed whether the grievant worked the required 40 hours; she did not always approve the reports that showed each individual instance of clocking in and out.¹⁸ She added that many of those specific reports were sent from the grievant directly to the timekeeper, and only upon the supervisor reviewing those records in January did she discover each instance of the grievant's schedule adjustments.¹⁹

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.²⁰ Here, the record contains evidence that supports the version of facts proffered by the agency. The hearing officer's findings of fact based on this evidence are consistent with EDR's independent review of the record and hearing recording, and accordingly

¹² Hearing Decision at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Hearing Recording at 54:15-54:45 (Grievant Testimony).

¹⁶ *Id.* at 46:20-46:40 (Supervisor Testimony).

¹⁷ *Id.* at 53:45-54:15 (Grievant Testimony).

¹⁸ *Id.* at 45:00-46:10 (Supervisor Testimony).

¹⁹ *Id.*

²⁰ *See, e.g.*, EDR Ruling No. 2020-4976.

EDR has no basis to disturb the hearing officer's finding that the grievant engaged in the misconduct found by the agency.

DHRM Policy 1.60 – Abuse of Work Hours

As a final matter, the grievant contends that her conduct does not properly fall under “abuse of work hours” as outlined by DHRM Policy 1.60. Regarding this matter, the hearing officer found that DHRM Policy 1.60 classifies tardiness or abuse of work hours as a possible Group I offense, and that an agency may consider, as an aggravating factor, the existence of prior formal discipline based on similar conduct.²¹ The hearing officer concluded that due to the prior Group III offense in 2022 being related to time and absences, in addition to the “sheer number of events presented,” a Group III Written Notice with termination was a reasonable mode of discipline by the agency.²²

Per DHRM Policy 1.60, *Standards of Conduct*, employees are expected to “[r]eport to work as scheduled and seek approval from the supervisor in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.”²³ While the grievant testified that the supervisor was aware that she came into work late and left early, as was discussed, the supervisor testified that she was not aware of or approved the grievant's behavior and the hearing officer had the appropriate discretion to find the supervisor's testimony more persuasive. The hearing officer's findings of fact based on such testimony clearly show that the grievant was not reporting to work as scheduled and did not properly seek approval from her supervisor in advance for any changes to her work schedule. It should also be noted that the January 18, 2024 Written Notice did not explicitly cite an “abuse of work hours,” but only cited a failure to follow instructions or policy.²⁴ The agency provided sufficient evidence and testimony to show that the grievant did not properly follow the agency's policy, and this misconduct is also supported by the relevant provision in DHRM Policy 1.60. For these reasons, EDR will not disturb the hearing decision on the basis of whether the grievant in fact violated DHRM policy through her instances of tardiness.

In summary, the hearing officer clearly found that, based on the evidence in the record, the agency had presented sufficient evidence to carry its burden to establish discipline at the Group III level. On appeal, the grievant has not identified any specific grounds on which the hearing officer's assessment of the evidence might have been erroneous, unreasonable, or otherwise out of compliance with the grievance procedure. Accordingly, EDR perceives no reversible error in the hearing officer's analysis of the evidence.

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.²⁵ Within

²¹ Hearing Decision at 4.

²² *Id.*

²³ DHRM Policy 1.60, *Standards of Conduct*, at 4.

²⁴ Agency Exs. at WN 1-18-24.

²⁵ *Grievance Procedure Manual* § 7.2(d).

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

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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).