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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5702
June 7, 2024

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 12061. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 12061, as found by the hearing officer, are as follows:[1]

> In February of 2023 Grievant, who was assigned to the treatment team [with the Department of Corrections ("the agency")], had an encounter with an Inmate. Shortly after this incident Grievant had an accident and was out on leave. When Grievant returned in August of 2023 he was given a Notice of Need to Improve based on the February event, and Grievant was advised he would be placed in a different location and assigned another job. This was due to concerns about his ability to work well in the treatment team capacity. At this point Grievant only had a Need to Improve Notice. Grievant had no loss of rank or pay. The matters which led to Grievant's Group I discipline arose from Grievant's reaction to the reassignment position. Had Grievant not reacted in the manner that he did, no Group discipline action was anticipated.
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> When told by his Major of the job reassignment, Grievant was reported to have been loud and exhibited unprofessional behavior. That evening Grievant called the Major at his home stating his displeasure and feeling of unfairness that the Major had reassigned him. Additionally, he attempted to "blackmail" the Major into rescinding the job change. Grievant stated the Major had previously made statements that officers could "whip an Inmate's ass" and Grievant had two (2) other Witnesses to prove it although Grievant did not want to have to bring it up. The Major suggested that matter could be discussed at the upcoming meeting two

[1] Decision of Hearing Officer, Case No. 12061 ("Hearing Decision"), Apr. 11, 2024, at 2-3 (internal footnotes and citations omitted).

days later. It should be noted that this issue was not included in the Written Notice and therefore has no bearing on the Group I discipline.

At the next meeting Grievant was reported to be exhibiting similar unprofessional, rude, and loud behavior.

On September 15, 2023, the agency issued to the grievant a Group I Written Notice citing a violation of DHRM Policy 2.35, *Civility in the Workplace*.[2] The grievant timely grieved this disciplinary action, and a hearing occurred on March 12, 2024.[3] In a decision dated April 11, 2024, the hearing officer upheld the agency's disciplinary action on grounds that the evidence showed the grievant engaged in "unwelcome verbal conduct."[4] The grievant now seeks administrative review of the hearing decision by 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 his request for administrative review, the grievant maintains that the agency's disciplinary action was retaliatory and that the hearing officer failed to appropriately consider his evidence as to this claim. In addition to asserting that the hearing officer's analysis was biased in favor of the agency, the grievant objects to the hearing officer's procedural method of admitting the parties' exhibits into evidence and her exclusion of certain proffered exhibits from the evidentiary record.

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

[2] Agency Ex. 1 at 1; *see* Hearing Decision at 1.
[3] *See* 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.

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 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 her decision, the hearing officer credited evidence that the grievant, upon learning of his reassignment, exhibited inappropriate and/or unprofessional behavior such as using profanity and kicking a chair.[12] The hearing officer additionally credited evidence that, in a subsequent pre-disciplinary meeting with management, he exhibited more unprofessional behavior such as interrupting, raising his voice, and generally demonstrating hostility.[13] The hearing officer concluded that the "tone of all evidence was that Grievant had certainly overreacted to his job reassignment"[14] in the two meetings such that he was "disruptive and unprofessional."[15] This conduct, the hearing officer found, violated several agency policy requirements regarding workplace civility and appropriate dispute resolution.[16]

The grievant challenges the hearing officer's conclusions on grounds that testimony was inconsistent as to the grievant's conduct during the meetings. The grievant further argues that, if the grievant's conduct had occurred as alleged, agency management would have captured body-worn camera footage of the incident. However, there is evidence in the record to support the hearing officer's determinations, including direct testimony from other employees who were present at the meetings.[17] Moreover, regarding the absence of camera footage, the hearing officer specifically addressed this argument and did not find that the absence of video evidence undermined the credible testimony of multiple witnesses at the hearing.[18] Where testimony is not entirely consistent, which is common in grievance hearings, 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.

The grievant further argues that the agency's discipline was retaliatory and that the hearing officer improperly prevented him from making this argument. EDR has long analyzed retaliation

[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] *See, e.g.*, Agency Exs. 5, 8.
[13] *See, e.g.*, Agency Exs. at 3, 12.
[14] Hearing Decision at 3.
[15] *Id.* at 4.
[16] *Id.*
[17] *See, e.g.*, Hearing Recording at 37:50-44:43 (Sergeant's testimony); 1:16:10-1:17:40 (Unit Manager's testimony); 2:10:00-2:25:00 (Assistant Warden's testimony); 2:34:00-2:35:30 (Major's testimony).
[18] Hearing Decision at 4.

claims under a burden-shifting framework that requires a grievant to demonstrate by a preponderance of the evidence that an agency's actions were a pretext for retaliation.[19] As retaliation is an affirmative defense, the grievant carries the ultimate burden to establish the claim of retaliation.[20]

As discussed above, the record contains evidence to support the hearing officer's conclusion that the grievant engaged in misconduct – that is, the agency proved a non-retaliatory business reason for issuing a Group I Written Notice to the grievant. Therefore, to prevail on his retaliation claim, the grievant would have needed to prove that the agency's stated reason was a mere pretext for retaliation. We interpret the hearing decision to find that the evidence did not support such a claim, and our review of the record reveals no information that would have required the hearing officer to reach a different result. Although the grievant implies that the hearing officer "verbally disrupted" his arguments regarding retaliation, our review of the proceedings does not indicate that the hearing officer improperly hindered the grievant's arguments at any time during the parties' respective presentations or prevented the grievant from testifying on this topic. Accordingly, we cannot find that the hearing officer's conclusions on the merits lack record support, and we will not disturb the decision on those grounds.

That said, the grievant argues that the hearing officer improperly excluded from her consideration documentary evidence that would have supported his retaliation claim. That argument is addressed below.

Admission/Exclusion of Proffered Evidence

In his request for administrative review, the grievant objects to the exclusion of some of his proffered evidence on grounds that the hearing officer "mandated each piece of evidence be accompanied by relevant testimony" and "refused to accept the grievant's remaining documents/evidence" at the conclusion of the hearing. Our review of the proceedings indicates

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[19] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017); *see generally Rules for Conducting Grievance Hearings* § VI(B)(1). Federal courts have found it appropriate to apply the same burden-shifting framework to retaliation asserted specifically under Virginia's Fraud and Abuse Whistle Blower Protection Act. *Carmack v. Virginia*, Case No. 1:18-cv-31, 2019 U.S. Dist. LEXIS 148046, at *52-54 (W.D. Va. Aug. 29, 2019), *aff'd*, 837 F. App'x 178, 183 (4th Cir. Dec. 4, 2020) ("Given the amenability of the [Act] to the application of the *McDonnell Douglas* framework, the regularity with which courts apply this framework in assessing the causation element in cases involving state whistleblower statutes and/or provisions, and finding no reason to depart from this approach, the court will apply this framework in the present matter.").

[20] *Rules for Conducting Grievance Hearings* § VI(B)(1). The grievant appears to assert retaliation both as a general affirmative defense and as a more specific claim under the Fraud and Abuse Whistle-Blower Protection Act. *See* Va. Code §§ 2.2-3009 through -3014. Under that statute, a "whistle blower" is "an employee who witnesses or has evidence of wrongdoing or abuse and who makes . . . a good faith report of . . . the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority." *Id.* § 2.2-3010. However, the hearing officer did not find that the grievant made a good faith report of wrongdoing. To the contrary, she specifically found that the grievant accused his own manager of wrongdoing in an attempt to have that person change his mind about reassigning the grievant. Hearing Decision at 2. Because EDR is unable to identify evidence in the record to support the grievant's claim of good-faith reporting, and the grievant identifies none in his appeal, we will not disturb the hearing decision on grounds related to the whistle-blower statute.

that after closing arguments, the grievant's advocate requested to "enter the remainder of my exhibits [into] the grievance record." The hearing officer responded: "No. You put evidence in at the time there's testimony." The grievant's advocate clarified: "But with the remainder, are you saying it can't go into the grievance record?" The hearing officer answered: "No, it can't because it was not entered in the hearing."[21]

Under the *Rules for Conducting Grievance Hearings*, hearing officers "must establish an informal, non-judicial hearing environment that is conducive to a free exchange of information and the development of the facts."[22] Although "liberal admission" is the general standard, a hearing officer "may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, repetitive, not timely exchanged consistent with the hearing officer's orders, or otherwise for just cause."[23] As a procedural matter, hearing officers are also responsible for, among other things, "marking the exhibits received into evidence and proffers not admitted, and making them a part of the grievance record."[24]

To the extent that the hearing officer in this case enforced a general rule of admitting documents only if proffered in the course of witness testimony, this practice would not appear to be consistent with the general rule of liberal admission during an informal proceeding. Even if the purpose of this approach presumably is to establish the relevance of each admitted document, it effectively treats all proffered documents as not relevant in the absence of a testimonial foundation. If anything, liberal admission would support the opposite presumption – that documents proffered by a party are likely to be probative as to a position that party wishes to assert with respect to the grievance issues. In addition, where a party does not bear the burden of proof and may not otherwise plan to present testimony, conditioning the admission of exhibits on testimony may unduly influence that party's presentation of their case.

As further guidance, EDR would observe that, although not required, a standard practice in grievance hearings is to admit all of a party's proffered exhibits into the record at once (usually at the conclusion of the party's case), with an opportunity for the opposing party to object to any proffers therein. Assuming that the parties have exchanged their proffers in advance, they generally would have had sufficient time to review the opposing proffer for any potential objections to address at the hearing. This approach also allows for a party's own exhibit pagination and labeling to remain consistent as part of the record, for ease of reference both during the hearing and on appeal.

In this case, EDR identifies nothing in the record that might have supported excluding the grievant's proffered exhibits at the end of the hearing out of hand. The hearing officer appears to have taken the position that the evidentiary record was closed at the time the grievant requested to enter his evidence, as the parties had apparently rested their respective cases. However, the request immediately followed closing statements and was made on the record. Under those circumstances, it is not clear whether the evidentiary record was indeed formally closed, and therefore a liberal

[21] Hearing Recording at 3:48:53-3:49:24.
[22] *Rules for Conducting Grievance Hearings* § IV(C).
[23] *Id.* § IV(D).
[24] *Id.* § II.

admission standard would support admitting the grievant's evidence, or at least considering doing so, while the parties were still present at the hearing site.

Nevertheless, we conclude that the hearing officer's exclusion of the grievant's evidence was a harmless error. EDR has thoroughly reviewed the documents the grievant submitted to the hearing officer and to the agency prior to the hearing, which should have reflected his anticipated exhibits. We find no documents therein that could be construed as inconsistent with the hearing officer's findings on the material issues, as described above, and the grievant identifies no particular documents that might have supported his claim that he would not have received discipline but for the agency's intent to retaliate against him. Accordingly, EDR will not disturb the hearing decision 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.[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]

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[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).