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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2024-5719  
June 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 12100. For the reasons set forth below, EDR will not disturb the hearing decision.

**FACTS**

The relevant facts in Case Number 12100, as found by the hearing officer, are as follows:<sup>1</sup>

Grievant is a Licensed Practical Nurse working for a Department of Juvenile Justice Facility. No evidence of prior disciplinary action was introduced during the hearing.

On January 17, 2024, Agency Human Resources staff scheduled a meeting with the Facility's medical staff. The meeting was scheduled to start at 1:00 pm (13:00:00). The meeting was held in a small room with limited chairs available in the room. Some meeting attendees had to bring chairs into the room in order to be able to sit during the meeting. The meeting room also had an operating security camera that captured a video and audio recording of the meeting.

The meeting began at approximately 13:03:20. HR Director started the meeting by introducing the Human Resources staff in the room. HR Director stated that the purpose of the meeting was to provide workplace civility training and that the meeting had been scheduled to allow time for questions and "open discussion." HR Director then turned the meeting over to the Presenter who began her presentation.

Grievant entered the meeting at approximately 13:07:20. Grievant had to roll a chair into the room in order to be able to sit during the meeting. Other meeting

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<sup>1</sup> Decision of Hearing Officer, Case No. 12100 ("Hearing Decision"), May 22, 2024, at 2-5.

attendees turned away from the presentation and looked at Grievant when she entered the room. Presenter continued with her presentation of information.

By approximately 13:11:00, Presenter was presenting information regarding discriminatory harassment. At approximately 13:11:07, Grievant interrupted Presenter's presentation with an audible "Hmmp." Grievant's interruption caused other meeting attendees to turn away from the presentation and look at Grievant. Grievant's interruption also caused Presenter to stop her presentation to ask if anyone had any questions. Grievant responded "I'm going through all of that right now." Presenter responded, "That's not good" to which Grievant replied "It's not." Presenter then continued with her presentation.

At approximately 13:11:42, Witness 2 was sitting next to Grievant commented "mmhmm" to Grievant. HR Director then asked if there was a question and Witness 2 indicated that she did not have a question at that time.

At approximately 13:32:22, Presenter was presenting information about retaliation and Grievant could be heard to say "mmhmm ... yeah." This interruption caused other meeting attendees to briefly turn away from the presentation to look at Grievant. Grievant then started to make gestures while Presenter was providing information about retaliation. Grievant at one point raised her arms in a shrug and then shook her head in the negative. As Presenter discussed an example of when a schedule change might rise to the level of retaliation, Grievant again gestured by raising her arms in a shrug type movement.

By approximately 13:45:00, Presenter had finished with her portion of the meeting, meeting attendees had been provided with handouts, asked to confirm that they had indicated their attendance on the meeting sign-in sheet, and asked to sign a form acknowledging receipt of the Civility in the Workplace training.

HR Director then stood before the group and indicated that she wanted to follow up and respond to questions that had come up during the training and while she and other HR staff had circulated handouts to the group. HR Director then proceeded to provide additional information and clarification to the meeting attendees on a few topics.

HR Director described that the grievance process sets forth specific deadlines for responses. At approximately 13:59:55, Grievant raised her hand and when HR Director called on her, Grievant asked "My grievance took from September all the way to this month, why was that?" HR Director responded that she did not know about Grievant's grievance and someone (it is unclear who) asked Grievant "was there an investigation" to which Grievant replied "yes, and I know you signed off on the investigation, so I was just asking how long until the investigation gets started." Grievant had pointed in the direction of HR Director as she said, "I know you signed off on the investigation." HR Director responded, "If

I signed off on the investigation it should have already started, but I would have to check with Investigations.” Grievant replied “Hmm ... ok.” HR Director then generally described that the investigations team may be short-staffed and the investigators have to prioritize the investigations that relate to residents.

Grievant then stated, “can I ask, because it’s on-going harassment with on-going retaliation so do I have to wait for the investigation to start for that to stop? ... it’s continuing.” HR Director responded that “so yours ... (inaudible)... we’ll have to talk offline, not in a group setting.” Grievant responded by stating “ok, but I just wanted to talk in front of people who have witnessed it [be]cause it was like oh we don’t believe you because you are the only one. That is what was told to me.”

HR Director then stated, “So [Grievant] has said she has been harassed and discriminated against ... so you are the witnesses, that is what she is saying and so in that instance we actually sent out a survey to the nursing staff and nobody responded.” Various meeting attendees then indicated to HR Director that they did not receive such a survey. HR Director told the group that she could resend the survey to the nursing staff and also indicated that they could distribute a paper copy of the survey to the nursing staff.

Grievant then stated, “Yeah because the retaliation toward me is trickling on the other nurses and that is making my work environment hostile.” HR Director replied to Grievant and stated, “That is not retaliation.” To which Grievant replied “It is if it is affecting all of the nurses coming from something I said – if I say one thing and then you go and take it from everybody, you’re just trying to retaliate against everybody, so it won’t look like you’re just targeting me.” HR Director asked Grievant “was it a business need?” Grievant responded that it was not a business need. HR Director followed up by asking how Grievant knew there was not a business need. Grievant responded “[Be]cause it wasn’t changed in like 20, 30 years so why would they all of a sudden change it when I just complained about it.” HR Director then stated, “Understand that business need is based on where we are today so a lot of things that we have, or we do, or we’ve done from 15 years ago is not relevant today.” Grievant then asserted that the medical unit was different from other units in the Facility because nothing in medical had changed and medical had not been re-organized like the rest of the Facility. HR Director appeared to disagree with Grievant’s characterization of a supervisor’s role as temporary and then HR Director again told Grievant “so yours is very specific and I don’t think it is appropriate to be discussed ...” Grievant interrupted to say, “I just decided to discuss it in front of people that witnessed it.” HR Director continued by stating “But, hear me out, I don’t think it is appropriate and you’re making a lot of allegations and a lot of it is not true.” To which Grievant responded “It’s fact and it got to an investigation, so I was able to back it up.” HR Director stated, “I’ll leave it alone” and again stated “I’ll talk to you off-line.” At that point in the meeting, another meeting attendee asked a question about staffing levels.

By approximately 14:11:00, HR Director was responding to questions she had received regarding the Agency's time and leave management system. During a pause, Grievant stated "well sometimes our time sheets don't get approved ... I'm still waiting on time sheets to get approved from November and now it's January." HR Director responded to Grievant and stated "That's not true...it's not true because all time sheets are approved. We completed an audit of all time in Cardinal and got that cleaned up before ... I think [Employee T] brought that at the beginning of November for time approved after...(inaudible) ... because we had to send out a message saying that we were not ...umm ...." Grievant then interrupted HR Director and stated, "I was getting emails ... me and [Employee D] were getting emails about time being approved for November... about time being approved in December ... and ... January and so was [Employee D]." HR Director responded to Grievant that "[Employee D] wouldn't have gotten it, but ...um ..." Grievant then stated, "I have the emails and it was sent to me and [Employee D] ... (inaudible)." HR Director replied again and stated, "She's not getting them right now." The discussion between Grievant and HR Director then ended when another employee stated that "I have a question that some other staff were asking ...

At approximately 14:13:38 pm, Grievant put on her coat and pulled the hood of her coat up over her head.

At approximately 14:18:44, Grievant looked at her watch and then stood up and exited the meeting room. Grievant took her chair with her when she exited the meeting room.

Grievant was out of the office on leave from January 18, 2024, until January 24, 2024.

At approximately 8:44 pm on January 18, 2024, an Agency deputy director issued a "Notification of Intent to Issue Disciplinary Action" to Grievant related to her behavior during the meeting on January 17, 2024. The Notification of Intent to Issue Disciplinary Action provided Grievant until 5:00 pm, Monday, January 22, 2024, to provide a written response and noted that a meeting to discuss the incident had been scheduled for Wednesday, January 24, 2024, at 10:00 am.

Grievant received the email containing the Notification of Intent to Issue Disciplinary Action on January 20, 2024, but Grievant did not respond to the Notification or ask for an extension to respond because, according to Grievant she was on leave at the time and does not work when she is on leave.

On January 24, 2024 the agency issued a Group I Written Notice of disciplinary action for disruptive behavior and violating DHRM Policy 1.60, Standards of Conduct, and violating DHRM

Policy 2.35, Civility in the Workplace.<sup>2</sup> The grievant timely grieved the agency's action and a hearing was held on May 9, 2024.<sup>3</sup> In a decision dated May 22, 2024, the hearing officer found that the agency had met its burden of proof to support the issuance of a Group I Written Notice, and upheld the disciplinary action.<sup>4</sup> 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 . . ."<sup>5</sup> 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.<sup>6</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>7</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>8</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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 her request for administrative review, the grievant maintains that the hearing officer did not review all relevant evidence regarding her previous grievance and challenges the hearing officer's conclusion that the disciplinary action was not retaliatory. Specifically, the grievant appears to suggest that she was entitled to address her grievance concerns during the meeting and that she was not more disruptive than other meeting participants, yet was singled out for disciplinary action.

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<sup>2</sup> Agency Exs. at 1-3; *see* Hearing Decision at 1.

<sup>3</sup> *See* Hearing Decision at 1.

<sup>4</sup> *Id.* at 8, 10.

<sup>5</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>6</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>11</sup> *Grievance Procedure Manual* § 5.8.

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 in the Group I Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy. The hearing officer determined that the grievant's "continued efforts to make the group meeting about her and her own grievances," in conjunction with the "argumentative nature" of her comments, constitutes "disruptive, rude, disrespectful and unprofessional" behavior.<sup>12</sup> The hearing officer described in detail how the grievant's audible interjections, such as "Hmmp" and "mmhmm... yeah," disrupted the meeting and caused other attendees to focus on the grievant rather than the presenter.<sup>13</sup> Additionally, the hearing officer found that the grievant's continued questions regarding her individual investigation, after being advised by the HR Director to pose those questions in a more appropriate forum outside of the group meeting, demonstrated the disruptive nature of her actions.<sup>14</sup> Based on these findings, the hearing officer concluded that the grievant should have recognized that her argumentative line of questioning was inappropriate in this setting.<sup>15</sup> Evidence in the record supports the hearing officer's determinations that the grievant's actions, including making disruptive gestures and continually interrupting the presenter, resulted in the focus of the meeting shifting to the grievant's individual concerns rather than the meeting at large.<sup>16</sup> Accordingly, EDR finds no error in the hearing officer's finding that the agency provided sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior in violation of DHRM Policy 1.60, *Standards of Conduct*, and DHRM Policy 2.35, *Civility in the Workplace*.

Nevertheless, the grievant contends that the hearing officer failed to review all relevant evidence regarding her previous grievance and that the hearing officer wrongly concluded that the disciplinary action was not retaliatory in nature. She appears to imply that the hearing officer failed to solicit relevant information about these issues. In disciplinary actions, "the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline."<sup>17</sup> Therefore, it was the grievant's responsibility to present any evidence that she believed would support her defense against discipline. The hearing officer, by contrast, is responsible for receiving evidence presented by the parties for admission into the record.<sup>18</sup>

The grievant's theory of retaliation appears to be premised on her assertion that the primary purpose of the agency's meeting was to grant relief that the grievant had requested in a prior grievance, and therefore the grievant was entitled to discuss that grievance at the meeting. However, the hearing officer does not appear to have been persuaded by this argument, finding instead that the grievant "should have known . . . that continuing to pursue her questioning" was

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<sup>12</sup> Hearing Decision at 8.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Agency Ex. Video Clip at 13:11:07-13:11:22; see also *id.* at 13:33:00-13:34:00; see also *id.* at 14:01:00-14:01:38; see also *id.* at 14:04:09-14:06:25; see also *id.* at 14:13:38-14:13:49.

<sup>17</sup> *Grievance Procedure Manual* § 5.8(2).

<sup>18</sup> See *Rules for Conduct Grievance Hearings* § II.

inappropriate regardless of her understanding of the “round-table discussion” after the HR Director advised that these questions should be discussed “off-line.”<sup>19</sup> Thus, the hearing officer found that the “the Agency had non-retaliatory business reasons for the disciplinary action taken against Grievant.”<sup>20</sup> The grievant’s contention that the hearing officer did not adequately consider her previous grievance is unfounded; the hearing officer refers to this previous grievance multiple times throughout her ruling.<sup>21</sup>

As part of her request for administrative review, the grievant also submitted additional documentation regarding her prior grievances from September 7, 2023, and November 19, 2023. The grievant maintains that the supervisors from these past grievances are the retaliatory forces behind the Group I Written Notice challenged in her current grievance.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is “newly discovered evidence.”<sup>22</sup> Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.<sup>23</sup> However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.<sup>24</sup>

Having reviewed the grievant’s administrative review request, EDR finds that she has not provided a basis to accept additional evidence under this standard. The grievant has been aware of her prior grievances since 2023, and no information has been provided to EDR about any contents of these files that would have been relevant or material to the hearing officer’s determinations in this case, much less that the outcome would have been different. Additionally, the evidence the grievant presented in her administrative review request contains nothing that would be likely to produce a new outcome if the case were retried. Consequently, EDR has no basis to find that this new documentation should be admitted into the record for the hearing officer’s reconsideration of this matter. Apart from these grievances, the grievant has not identified in her appeal any record evidence that she claims the hearing officer failed to consider. Therefore, we cannot find that the

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<sup>19</sup> Hearing Decision at 7.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *See id.* at 3-4, 7-10.

<sup>22</sup> *Cf. Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff’d en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); *see* EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

<sup>23</sup> *See Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

<sup>24</sup> *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

hearing officer's consideration of the evidence was unreasonable or otherwise in error with respect to the grievance procedure.

### 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.<sup>25</sup> 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.<sup>26</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>27</sup>

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<sup>25</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>26</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>27</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).