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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2025-5808
January 14, 2025

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 12142. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 12142, as found by the hearing officer, are as follows:[1]

> Prior to her dismissal, Grievant was a Probation Officer for the Department of Juvenile Justice. Grievant had been employed by the Agency for approximately 18 years. The Agency's Exhibits included documentation showing that Grievant had an active Group II written notice of disciplinary action.
>
> The Employee Work Profile for Grievant's position set forth Essential Duties, including the following:
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> > • Public-facing position that requires in-person, face-to-face work with the public involving the screening and processing of domestic and delinquent intake complaints.
> > • Requires in-person work with juveniles and their families, both in the office and within the community, to include interviewing for social history court reports; application of screening and assessment tools; evaluative decision making, court report writing, case plan development, community probation and parole supervision, counseling and use of cognitive-behavioral interventions, crisis intervention; court coverage and presentations; service referrals, and case management.

[1] Decision of Hearing Officer, Case No. 12142 ("Hearing Decision"), Dec. 13, 2024, at 2-5 (footnotes omitted).

- Requires in-person home visits, facility visits, school visits, worksite visits, administration of on-site drug testing; and participation in collaborative/multidisciplinary staff meetings.
- Requires periodic 24-hour on-call intake work, including after-hours (5:00 p.m. to 8:00 a.m.) and weekend duties. After-hour intake work may require office visits to assist law enforcement with intake processes.

Grievant was expected to report to the office for work by 8:00 a.m. each workday.

On April 29, 2024, Grievant sent a text message to her Supervisor at 6:57 a.m. to request to take leave and report to work by 9:00 a.m. Grievant's Supervisor replied to Grievant's text with an indication that she "liked" the text.

On April 30, 2024, at approximately 7:53 a.m., Grievant sent a text message to her Supervisor to inform her that she "hit a patch of traffic" and "should be there in 10 or 15 minutes." Grievant's Supervisor replied to Grievant's text with an indication that she "liked" the text.

On May 1, 2024, Grievant contacted her Supervisor to advise her that she would need to take an hour of leave due to a sinus issue and that she would not arrive to work until 9:00 a.m. At approximately 9:08 a.m., Grievant contacted her Supervisor to advise her that she was going to stop by the School on a work-related matter before reporting to the office.

Grievant did not go to the School before reporting to the office.

Grievant was expected to attend a virtual probation officer meeting that began at 9:30 a.m. on May 1, 2024. Grievant was late to join the meeting.

Following the meeting, Grievant's Supervisor reported to Unit Director that she was concerned about Grievant's behavior during the meeting. Unit Director was in the office and went to see Grievant, so that he could observe her behavior. Unit Director found Grievant in the kitchen where she was using the microwave. Unit Director described exchanging pleasantries with Grievant. Unit Director left the kitchen briefly and then doubled-back and upon re-entering the kitchen asked Grievant if she had seen an email that he had sent to her earlier that morning regarding a meeting. Unit Director described Grievant as seeming confused as she tried to respond to him. Unit Director described Grievant as "not presenting her best self." Grievant testified that it took her a moment to try to determine which email Unit Director was referencing because of multiple emails that had been exchanged to try to schedule two meetings that same week.

At some point during the morning, Supervisor contacted an administrator at the School to determine whether Grievant had visited the School consistent with Grievant's text to Supervisor that morning. At 10:34 a.m., the School administrator sent an email to Supervisor confirming their conversation and his observation that no Unit employees had visited the School as of 10:33 a.m. on May 1, 2024.

Following his conversation with Grievant, Unit Director participated in a conference call with the Agency's drug testing coordinator and Grievant's Supervisor to discuss the observations made by Supervisor and Unit Director. Unit Director testified that based on that discussion, the decision was made to send Grievant for drug and alcohol testing.

Unit Director completed the referral form for the testing and made the determination that the testing should be observed, meaning that Grievant should be observed when she provided her urine sample for the drug testing.

Between approximately 10:45 a.m. and 11:00 a.m., Unit Director instructed Acting Office Services Supervisor to take Grievant to the Contract Lab for alcohol and drug testing.

The Contract Lab provided the Agency with documentation showing that the Contract Lab administered a breathalyzer test for alcohol to Grievant on May 1, 2024. The results were positive for alcohol. The first test was identified as a screening test which was performed at approximately 1:20 p.m. The first test indicated a result of 0.063 grams of alcohol per 210 liters of breath. The Contract Lab then performed a second, confirmation test at approximately 1:38 p.m. The second test indicated a result of 0.053 grams of alcohol per 210 liters of breath.

A breathalyzer test result of 0.063 grams of alcohol per 210 liters of breath indicates a blood alcohol concentration of 0.063 percent. A breathalyzer test result of 0.053 grams of alcohol per 210 liters of breath indicates a blood alcohol concentration of 0.053 percent.

There was no evidence that Grievant provided the Agency with any documentation from a medical practitioner regarding her positive test results on the breathalyzer tests pursuant to the Agency's Administrative Procedure for Employee Drug and Alcohol Testing.

On May 20, 2024, the agency issued a Group III Written Notice of disciplinary action with termination for violating policies related to alcohol use.[2] The grievant timely grieved the agency's action and a hearing was held on October 10, 2024.[3] In a decision dated December 13, 2024, the hearing officer found that the agency had met its burden of proof that the grievant engaged in the

[2] Agency Exs. at 51-53; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.

behavior and that the behavior constituted misconduct.[4] However, they did not find that the agency's issuance of a Group III Written Notice was consistent with law and policy and reduced the Written Notice to a Group II.[5] Because the grievant already had an active Group II on file (issued in December 2023) to be accumulated with this Group II, the hearing officer upheld the termination.[6] The hearing officer further found that no mitigating circumstances existed to further reduce the disciplinary action.[7] 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 . . . ."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] 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"[11] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[12] 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.[13] 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.[14] 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 primarily contests the basis for the December 2023 Group II already on file, maintaining that the disciplinary action was intertwined

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[4] *Id*. at 10-13.
[5] *Id.* at 13-14.
[6] *Id*. at 14; *see* DHRM Policy 1.60, *Standards of Conduct*, at 11 (stating that the accumulation of two Group II Written Notices may result in termination).
[7] *Id*. at 14-15.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] Va. Code § 2.2-3005.1(C).
[12] *Grievance Procedure Manual* § 5.9.
[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] *Grievance Procedure Manual* § 5.8.

with a chain of alleged harassment and discrimination. The grievant also requested in her appeal that the agency provide "correspondence from October 2023 until May 21 [], regarding previous grievances," as well as copies of her evaluation.

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 III Written Notice, that this behavior constituted misconduct, and that the reduced discipline of a Group II with termination was consistent with law and policy. The hearing officer determined that "[t]he preponderance of the evidence showed that Grievant violated the Agency's Administrative Procedure when a breathalyzer test result showed that, while on duty, Grievant had a blood alcohol concentration of 0.053 percent which is above the level allowed by Agency policy."[15] Regarding the decision to reduce the discipline to a Group II level, the hearing officer found that, while the relevant agency policy includes language with respect to drug use being a terminable offense, the same policy has no similar language with respect to testing positive for the presence of alcohol.[16] Further, the hearing officer noted that agency did not offer any supporting evidence to show that the grievant's misconduct rose to a Group III level.[17] Based on these findings, the hearing officer concluded that reducing the disciplinary action to a Group II Written Notice was proper.[18] Evidence in the record supports these determinations by the hearing officer,[19] and it does not appear that the grievant disputes these findings on appeal. Accordingly, EDR finds no error in the hearing officer's findings.

Rather than contesting the basis for the Written Notice at issue, the grievant contests the basis for the active Group II that was issued in December 2023.[20] She appears to imply that the hearing officer failed to consider evidence of prohibited conduct such as harassment and discrimination that led to the December 2023 Written Notice. To support these claims, the grievant requested on appeal that the agency provide evidence of correspondence between the grievant and the agency regarding her previous grievances filed in relation to the alleged misconduct by the agency. In response to the agency's argument that the requested documents would not be relevant and should have been requested prior to the hearing decision, the grievant asserted that the documents would show how the grievant was continuously attempting to respond to the agency's alleged prohibited conduct, but that the agency would discourage the filing of her previous three grievances.

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."[21] 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

[15] Hearing Decision at 13.
[16] *Id*. at 14.
[17] *Id*.
[18] *Id*.
[19] *See, e.g.*, Agency Exs. at 7-8, 29-33.
[20] *See id*. at 74-76.
[21] *Grievance Procedure Manual* § 5.8(2).

responsible for receiving evidence presented by the parties for admission into the record.[22] To the extent the grievant alleges that the hearing officer did not properly consider any evidence presented at hearing about her claims of harassment and discrimination, 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 hearing officer's consideration of the record evidence was unreasonable or otherwise in error with respect to the grievance procedure.

Further, because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[23] 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.[24] 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.[25]

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 assertions about the agency's alleged misconduct since 2023, well in advance of the hearing, and no information has been provided to EDR about any contents of the mentioned agency correspondence 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, even if the grievant were to have valid documentation to dispute its issuance, the 30-day window to contest the December 2023 Written Notice has lapsed.[26] Consequently, EDR has no basis to find that this new documentation should be provided by the agency and admitted into the record for the hearing officer's reconsideration of this matter.

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.[27] Within

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[22] *See Rules for Conduct Grievance Hearings* § II.
[23] *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).
[24] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).
[25] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[26] *E.g.*, *Grievance Procedure Manual* §§ 2.2, 2.4.
[27] *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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

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