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ADMINISTRATIVE REVIEW

In the matter of the New College Institute
Ruling Number 2024-5733
August 20, 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 Numbers 12111, 12117. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Numbers 12111, 12117, as found by the hearing officer, are as follows:[1]

> Prior to his termination the grievant was employed by the school initially in the role of an instructor and rising to that of director of certain programs. He had approximately three years of experience at the school. In the Fall of 2023 his annual evaluation was a rating of "exceeds contributor." Prior to February 29, 2024, he had received no written counselings or formal disciplines. What follows are facts relevant to each Written Notice separately.
>
> One of the duties of the grievant was to teach certain courses as assigned by the administration of the school. He was scheduled to teach a class on January 24. The grievant had previously scheduled a medical appointment for that same date, intending to be off work for the entire day.
>
> On January 20, the grievant spoke to the Executive Director of the school and apprised him of the conflicting medical appointment. The director did not give the grievant approval not to teach the class on January 24. The policy of the school was for an employee to request time off from his direct supervisor. The Executive Director was not the direct supervisor of the grievant. The grievant believed that his working on the weekend preceding January 24 and a holiday entitled him to use "flex time" to have the day off. The grievant made no attempt to obtain approval of

[1] Decision of Hearing Officer, Case Nos. 12111, 12117 ("Hearing Decision"), June 13, 2024, at 2-4.

the day off on January 24 from his direct supervisor. The grievant did not teach the class on January 24 as scheduled.

The Governor of Virgina visited the school on January 26. He requested the school prepare a six-year business plan, to be considered as part of its request for continued funding. The school promised a prompt turnaround of the request considering the ongoing budget negotiations in the General Assembly.

The Deputy Director for the school began working on the business plan. She spoke with the grievant on February 2. She explained to him the information on a specific program she needed from him to be included in the plan. She made the grievant aware of the short timeline on which the school was working. By email message on February 4, the grievant provided some information to the Deputy Director. She responded about 75 minutes later, asking about additional information she wanted to include in the proposal. He said he would review what she requested. Having received no complete response from the grievant on the morning of February 5, the Deputy Director emailed him to remind him of the information she was requesting. The grievant was unclear why what he had previously submitted was not sufficient and called the Deputy Director twice, both times being unsuccessful in reaching her. He received no follow-up from her until 4:06 p.m. At 5:40 p.m. the grievant responded by email that the director should "go with what she has." The response from the grievant did not meet the needs of the director.

The grievant oversaw providing training for a certain project. The training was to be provided to an entity that the school considered to be an important customer. On February 6, the entity asked the grievant for available dates in March for the training. The grievant responded on February 8, suggesting a date of March 11. The grievant had previously been instructed not to schedule classes during the period covered by March 11 due to upcoming repairs and renovations at the school. Upon being reminded of the unavailability of space for the training the grievant notified the customer on February 12 that it needed to make other arrangements. He named other individuals to whom he had reached out who could be able to help the entity.

The grievant was working in his office at the school on the afternoon of February 15. On the same hallway another staff member and two high school interns had been attempting repairs on a remote-control robot owned by the school. They began testing the robot in the hallway outside the office of the grievant, which was adjacent to where the repairs were being attempted. The grievant was bothered by the noise made by the robot. He exited his office and found the robot to be in the hallway between his office and that of the other staff member. The grievant kicked the robot out of the way and went to the adjoining office to complain about the noise. The robot did not block his path; waiting a few seconds would have allowed the robot to continue on a path that did not impede the grievant.

> On January 28, a meeting was being held to discuss an audit of a program in which the grievant was substantially involved. The meeting was a hybrid one, with multiple individuals being physically present in a conference room and two administrators participating by Zoom. The grievant was physically present for the meeting. For the initial portion of the meeting, the grievant was largely, if not completely silent. When a subordinate coworker of the grievant attempted to provide input about the audit, the grievant took an aggressive posture and told the coworker that he had no right to provide input, not having been involved in the audit. The grievant's tone of voice was challenging and the level was high. The grievant and this coworker had an existing adversarial relationship. The grievant had been replaced as the direct supervisor of the coworker. The subordinate was the same coworker involved in the incident described as giving rise to Written Notice #4. This response by the grievant caused a substantial disruption of the meeting.

On February 29, 2024, the agency issued to the grievant three Written Notices: a Group I Written Notice for failure to report without notice, a Group I Written Notice for unsatisfactory performance, and a Group II Written Notice for failure to follow instructions.[2] On March 13, 2024, the agency issued to the grievant two additional Group I Written Notices, both for disruptive behavior, and terminated the grievant's employment.[3] The grievant timely grieved these disciplinary actions, and a hearing was held on May 22, 2024.[4] In a decision dated June 13, 2024, the hearing officer upheld the four Group I Written Notices but reduced the Group II Written Notice to a Group I.[5] The hearing officer also upheld the grievant's resulting termination.[6] The grievant now appeals the hearing 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."[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 a 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] Agency Ex. 9-11; *see* Hearing Decision at 2.
[3] Agency Ex. 16-17; *see* Hearing Decision at 2.
[4] Hearing Decision at 1.
[5] *Id.* at 4-7.
[6] *Id.* at 6-7.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Access to Email and Phone Records

One of the grievant's primary bases for appeal is that there were certain requested records that the agency did not provide. Specifically, he requested access to his work email account to gather certain copies of emails that the agency already provided. He states that he expressed his concern during the pre-hearing conference calls that this was the only way to authenticate the emails submitted by the agency. In testimony, he argued that he did not receive access to his work email and that the emails proffered by the agency looked "unusual" in the record due to technical defects relating to the grievant's supervisor's signature. He sought access to his own version of the emails from his work account to verify their authenticity.[10] Specifically, the grievant is referring to emails the agency alleges were sent to him on January 19 and February 6, 2024, regarding instructions to not schedule further trainings. He also requested access to emails from his supervisor on January 29 and 30, February 8 and 12, as well as emails from the Deputy Director on February 2 and 5, 2024.[11]

Similarly, the grievant is also reasserting his request for access to the phone records of his office phone and work cell phone, arguing that the work cell phone records provided by the Deputy Director's phone apparently did not show the seven missed calls from the grievant's office on February 5, 2024. It appears that the grievant is arguing that, contrary to the phone records proffered by the agency, he attempted to reach out to the Deputy Director on February 5 regarding the assignment she gave him, and that he never received a call back from her.[12]

The grievance statutes provide that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party."[13] EDR's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided. Further, a hearing officer has the authority to order the production of documents.[14] As long as a hearing officer's order is consistent with the document discovery provisions of the grievance procedure, the determination of what documents are ordered to be produced is within the hearing officer's discretion.[15] For example, a hearing officer has the authority to exclude irrelevant or immaterial evidence.[16] A hearing officer's decision on such a matter will be disturbed only if it appears that the hearing officer has abused their discretion or otherwise violated a grievance procedure rule.

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[10] Hearing Recording Pt. 1 at 1:24:45-1:27:50 (Supervisor Testimony); Pt. 2 at 1:18:45-1:19:45 (Grievant Testimony).
[11] The emails appear to be included in the record as Agency Exhibits 1-3, and 19.
[12] Hearing Recording Pt. 1 at 3:36:00-3:39:15 (Deputy Director Testimony); Pt. 2 at 1:02:00-1:03:10 (Grievant Testimony).
[13] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.
[14] *Rules for Conducting Grievance Hearings* § III(E).
[15] *See, e.g.*, EDR Ruling No. 2012-3053.
[16] *See* Va. Code § 2.2-3005(C)(5). Evidence is generally considered relevant when it would tend to prove or disprove a fact in issue. *See* Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 138, 413 S.E.2d 630, 636 (1992) ("We have recently defined as relevant 'every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue.'" (citation and internal quotation marks omitted)); Morris v. Commonwealth, 14 Va. App. 283, 286, 416 S.E.2d 462, 463 (1992) ("Evidence is relevant in the trial of a case if it has any tendency to establish a fact which is properly at issue." (citation omitted)).

Additionally, 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."[17] 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."[18] 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."[19]

Upon a thorough review of the record and testimony, EDR has not found a sufficient reason to remand the hearing decision on the basis of requested access to certain work emails and phone records. According to the grievant, after the agency submitted their proposed exhibits, the grievant raised his concerns over the authenticity of the emails during the pre-hearing conference calls and requested access to his own emails. The hearing officer then told him to "narrow down" the request to specific emails sought, which he apparently then did. Instead of further ruling on the scope and relevance of the grievant's request, the hearing officer overruled the agency's objections to relevance as to these emails in the pre-hearing conferences, allowing both parties to argue the relevance at the hearing.[20] The grievant argued during testimony as to why authentication was necessary, specifically arguing that the area containing the electronic signature of the supervisor and the agency's logo was "unusual" due to a technical error partially cutting off the logo, and that all other emails he received from his supervisor did not include this technical error, but the hearing officer was not persuaded.[21]

On appeal, the grievant reasserted his argument for relevance, pointing to some of his proposed exhibits that suggest what a normal signature and logo section from his supervisor would look like. Specifically, the grievant is arguing that he was never able to authenticate the emails from his supervisor on January 19 and February 6, 2024, as proffered by the agency, about instructions regarding upcoming trainings.[22] It does appear that the logo in the signature area for the January 19 email was partially cut off.[23] The grievant conversely submits an email chain from that same day from his supervisor with the logo fully intact.[24] However, while the grievant points to additional exhibits in his arguments for relevance, EDR cannot find any other argument as to why the agency's proffered emails require authentication via his own email records. More importantly, EDR has not reviewed a sufficient argument as to how the admission of these emails

[17] *Rules for Conducting Grievance Hearings* § IV(C).
[18] *Id.* § IV(D).
[19] *Id.* § II.
[20] Hearing Decision at 1.
[21] *See* Hearing Recording Pt. 1 at 1:24:45-1:27:50 (Supervisor Testimony).
[22] *See* Agency Ex. 1-2; Hearing Recording Pt. 1 at 1:22:35-1:25:15, 1:29:20-1:31:10 (Supervisor Testimony); 1:18:45-1:19:45 (Grievant Testimony). During his testimony, the grievant contended that he never received an email from his supervisor on January 19, and while he did receive an email on February 6, he contends that he did not receive the particular February 6 email that the agency included in their exhibits.
[23] Agency Ex. 1
[24] Grievant Ex. 4. The grievant's exhibits are not consistently marked in the record. EDR's reference to exhibit numbers is based on the Grievant's Exhibit List appearing in the record.

would change the outcome of the hearing decision. Even if the hearing officer found that the grievant never received his supervisor's January 19 or February 6 emails, testimony nonetheless confirms that he was instructed by his supervisor on at least one other occasion not to schedule further trainings, and the grievant confirmed during his testimony that he did receive at least one email pertaining to these instructions.[25] For these reasons, EDR finds no basis to remand in order to review emails from the grievant's work account.

Regarding the other emails that he wants considered, EDR likewise cannot find a basis for a remand decision to consider them. The grievant appears to argue in his appeal that the January 29 and 30 emails were necessary to show that he was left alone in the office the week when the Deputy Director gave him an assignment on February 2. He appears to have testified that the February 2 and 5 email chains with his Deputy Director relate to notifying her of him being sick and the specific details regarding her assignment.[26] The grievant did not seem to provide any relevant basis for consideration of the emails on February 8 and 12 from his supervisor outside of the context related to being notified to not schedule further trainings. The emails relating to COVID and being out sick, even if considered on remand, are not sufficiently related to the conduct at issue in the Written Notices regarding the grievant's failure to follow the Deputy Director's instructions. As to the February 2 and/or 5 emails, while there may be additional details as to the Deputy Director's instructions, it would likely not provide any evidence to suggest that the grievant did in fact properly follow her instructions, and nothing in the grievant's submissions indicates otherwise.

Finally, the grievant contends on appeal that his own work and office phone records regarding attempted and missed calls with the Deputy Director should be reviewed by EDR. However, even if there is legitimacy in the grievant's argument that the agency's proffered phone logs are inconsistent or incomplete, testimony and accepted emails from the Deputy Director affirm that the grievant was instructed to complete an assignment by a given day and did not follow that instruction.[27] Further, testimony and evidence affirm that the grievant and Deputy Director at least had a thorough conversation on the day the assignment was given.[28] For these reasons, EDR cannot find that admitting the grievant's own phone records would change the determinations made in the hearing decision, and will not grant a remand on this basis.

In consideration of the above sequence of events, the hearing officer appears to have provided both parties an opportunity to argue whether production of the requested documents was proper by allowing them to testify as to their relevance at the hearing. Furthermore, the grievant has not provided any explanation as to how the emails in his work account or the records from his work and cell phone would change the conclusions in the hearing decision. At the hearing, there was extensive testimony of agency witnesses as to the grievant's failure to timely complete an assignment given by the Deputy Director and follow instructions regarding the scheduling of a

[25] Hearing Recording Pt. 1 at 26:45-28:00, 2:37:10-2:38:30 (Supervisor Testimony); Pt. 2 at 1:19:45-1:20:20 (Grievant Testimony).
[26] *Id.* Pt. 1 at 3:57:40-3:58:10 (Deputy Director Testimony); Pt. 2 at 1:15:25-1:16:00 (Grievant Testimony).
[27] *See id.* Pt. 1 at 2:42:35-2:55:00 (Deputy Director Testimony); Agency Ex. 19.
[28] Agency Ex. 19, at 2; Hearing Recording Pt. 1 at 3:32:40-3:42:30 (Deputy Director Testimony); Pt. 2 at 1:15:40-1:17:00 (Grievant Testimony).

training.[29] Therefore, we cannot find the hearing officer's handling of this evidentiary issue to have been an abuse of discretion or non-compliant with the grievance procedure such that remand is warranted.

Review of Other Unadmitted Evidence

In his request for administrative review, the grievant also requests that EDR review "articles not allowed into evidence and arguments as to relevance." Specifically, the grievant lists "OSHA Complaint Response," "Training Policy," "OSHA Witness Statements," and his two supplemental documents arguing the relevance for certain proffered exhibits.

As was noted earlier, it appears that the hearing officer initially allowed for all proffered exhibits to be submitted prior to the hearing, while also allowing both parties to argue the relevancy of the exhibits during the hearing.[30] EDR therefore interprets this request as an assertion that the hearing officer did not consider this evidence in his decision. Regarding the OSHA Complaint Response and Witness Statements, nothing in testimony reflects on the relevance or context of this evidence. As to the Training Policy, the excerpts submitted by the grievant upon review appear to suggest that it is the policy governing the agency's training center, the department most relevant to the grievant's job and responsibilities. However, the grievant does not explain at any point on appeal or in testimony why the specific excerpt of the policy he is referring to is relevant. Finally, the grievant's submitted relevance arguments have been reviewed and considered by EDR in full for the purposes of understanding the grievant's argued relevance for each of the mentioned exhibits.[31]

Finally, the grievant requests additional information to be reviewed regarding other coworkers. In particular, he requests that EDR reviews copies of his colleagues' work schedules, and the Employee Work Profile, leave slips, and leave balances of one particular coworker (Coworker T). The hearing officer ruled during the hearing on multiple instances that any evidence pertaining to Coworker T is irrelevant, mostly due to not being a similarly situated employee and for some pieces of evidence taking place several months prior to the disciplinary action at hand. Specifically, the hearing officer ruled irrelevant evidence and questioning pertaining to why the grievant's supervisor removed Coworker T as one of the grievant's direct reports, the coworker's involvement in certain job duties, the coworker's history of absences and reporting absences, the coworker's education, and text exchanges between the grievant and his supervisor regarding the coworker's absences.[32]

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[29] Hearing Recording Pt. 1 at 26:45-28:00, 2:37:10-2:38:30 (Supervisor Testimony); 2:42:35-2:55:00 (Deputy Director Testimony); Pt. 2 at 1:19:45-1:20:20 (Grievant Testimony).
[30] *See* Hearing Decision at 1.
[31] These two documents, each titled "[Grievant's] Arguments Relevance Evidence List," dated May 17 and May 20, 2024, respectively, appear to be the grievant's arguments for some of his proposed exhibits that he sent to the hearing officer prior to the May 22 hearing date.
[32] Hearing Recording Pt. 1 at 58:05-58:50, 2:30:00-2:33:50 (Supervisor Testimony); Pt. 2 at 19:35-20:30, 24:40-27:50 (Coworker Testimony); 30:40-33:00 (Supervisor Testimony).

Upon review of this portion of the grievant's request, EDR finds no basis to remand the hearing decision. To begin, EDR has no basis to grant access to unadmitted evidence, such as Coworker T's work schedule, Employee Work Profile, leave slips, leave balances, or any information pertaining to his education and past disciplinary action. The hearing officer ruled that the coworker is not a similarly situated employee, and the grievant has provided no basis to suggest otherwise.

The hearing officer appears to have followed the general rule of liberal admission during an informal proceeding, allowing for all evidence in addition to any relevance-related arguments given by either party. Nonetheless, EDR has thoroughly reviewed the documents the grievant submitted to EDR upon review, and 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 the agency's discipline was excessive or unfounded. Accordingly, EDR will not disturb the hearing decision on these grounds.

Consideration of Evidence

The remaining significant portion of the grievant's request for administrative review relates to requesting EDR to review his other proffered evidence that was already considered by the hearing officer. Specifically, the grievant points to exhibits relating to: (1) text message exchanges with Coworker T; (2) the February 8, 2024 Due Process Notice sent by his supervisor; (3) text exchanges and the witness statements of another coworker in his department (Coworker K); (4) an incident report filed by the grievant on August 14, 2023; (5) a copy of his medical records dated August 17, 2023; (6) text message exchanges with another coworker (Coworker M); (7) the witness statements provided by Coworker T regarding the February 15 and/or February 28, 2024 incidents, and (8) text message exchanges with his supervisor. He also requests that EDR review the video footage pertaining to the February 15 incident.

During the hearing, the hearing officer found irrelevant the grievant's questioning related to a work-related accident that occurred on August 14, 2023, finding it irrelevant because the incident was already considered in the following November Annual Performance Evaluation.[33] For similar reasons, EDR would understand that the following incident report and supplemental medical records would be ruled irrelevant, as well, and the grievant has not explained why the incident report and medical records are relevant to the disciplinary actions at hand. The hearing officer also ruled irrelevant text conversations and potential testimony of Coworker K (their witness statement was not explicitly ruled irrelevant).[34] It is not clear from the hearing recording exactly why text exchanges and testimony of Coworker K were ruled irrelevant, but it appears to have been related to the attendance matters of Coworker T, an issue that has already been sufficiently addressed by the hearing officer as irrelevant.[35] The grievant argues in supplemental documentation that Coworker K's witness statement is relevant for being related to Coworker T's absence but does not explain why the text exchanges are relevant. For similar reasons expressed

[33] *Id*. Pt. 1 at 1:18:25-1:18:45 (Supervisor Testimony).
[34] *Id*. Pt. 2 at 51:45-52:00 (Grievant Testimony).
[35] *See id*. Pt. 1 at 58:05-58:50, 2:30:00-2:33:50 (Supervisor Testimony); Pt. 2 at 19:35-20:30, 24:40-27:50 (Coworker Testimony); 30:40-33:00 (Supervisor Testimony).

herein, EDR cannot find a sufficient basis to suggest that considering any evidence related to Coworker K would change the outcome of the hearing decision. Finally, as was mentioned previously, the hearing officer ruled irrelevant the text conversations between the grievant and the supervisor as they pertained to the absences of a non-similarly situated employee, Coworker T.[36] While the entirety of the text exchanges do not solely concern Coworker T's attendance,[37] the grievant has not alluded to why other portions of the exchanges would be relevant in order to alter the hearing decision.

The remaining identified evidence does not seem to have been ruled irrelevant by the hearing officer. First, the text conversations with Coworker T, while seemingly not explicitly ruled irrelevant in the hearing, continue to add to the context surrounding Coworker T's attendance history.[38] EDR finds nothing in the additional text conversations that would have changed the outcome of the hearing decision, nor has the grievant argued their relevance in his appeal. Further, as discussed above, the hearing officer already ruled this employee as not similarly situated. Additionally, testimony from agency witnesses indicates that the coworker properly followed all relevant agency policies.[39]

The grievant also asks EDR to review the admitted evidence of the first Due Process Notice and the text exchanges of a Coworker M. The Due Process Notice is briefly mentioned in the grievant's second relevance arguments document but does not specifically identify what about the Notice is relevant to the issued discipline, outside of saying that it coincides with the text narrative related to expectations of work differences and inequitable application of discipline. Without more explanation, EDR cannot find sufficient evidence of relevance to suggest a likely change in the outcome of the hearing decision. The grievant has also not provided any argument of relevance pertaining to the text exchanges of Coworker M.

Finally, the grievant has not provided any specific arguments as to why Coworker T's witness statements and the video footage relating to the incidents that lead to disciplinary action were inadequately considered. While the grievant argues in testimony that the witness statements suggest inconsistencies in the exact language the grievant used in the incident,[40] that has little to no bearing on the decision to issue a Group I Written Notice, as will be explained more in the following section of this ruling. Similarly, while the grievant in testimony argues that the video footage suggests that he did not actually kick the robot,[41] the grievant has not on appeal pointed to any specific portion of the video to review or to any portion of the hearing officer's interpretation of the footage, as will be discussed more thoroughly below.

While the entirety of the evidence the grievant has asked EDR to review varies on whether each exhibit was explicitly ruled relevant or irrelevant by the hearing officer, ultimately, the grievant has not provided on appeal or in testimony any sufficient argument of relevance to suggest

[36] *Id*. Pt. 2 30:40-33:00 (Supervisor Testimony).
[37] *See* Grievant Ex. 10.
[38] *See* Grievant Ex. 11.
[39] *See, e.g., id*. Pt. 1 at 2:34:40-2:35:15 (Supervisor Testimony); 5:03:15-5:03:45 (Academic Officer Testimony).
[40] *Id*. at 2:00:10-2:03:00.
[41] *Id*. at 2:05:00-2:06:00.

that any mentioned exhibit, if properly considered, would have likely led to a different outcome in the decision. This is primarily due to the majority of the mentioned evidence either relating to a coworker who is not similarly situated to the grievant, evidence relating to incidents too far removed from the relevant disciplinary action, or not providing specific relevance arguments as to certain exhibits that the hearing officer already considered. Based on the foregoing reasons, EDR declines to disturb the hearing decision on the basis of reconsidering evidence.

Findings of Misconduct

The final matter to address in the grievant's appeal is the argument that the agency misapplied DHRM Policy 2.35, *Civility in the Workplace*, and DHRM Policy 1.60, *Standards of Conduct*. While the majority of this portion of the appeal has already been sufficiently addressed in relation to the review of proffered exhibits, this portion of the discussion will specifically address the claims of the agency misapplying policy in regard to some of the issued Written Notices.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[42] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[43] 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.[44] 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.[45] 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.

<u>Group II Written Notice – Attendance</u>

In relation to the Written Notice for not properly requesting an absence, the grievant primarily argues that he was treated inconsistently compared to Coworker T, who according to the grievant has not received discipline for not properly following attendance policies. However, as has been discussed above, Coworker T was found to not be a similarly situated employee, and EDR has been presented no basis to dispute this finding by the hearing officer. More importantly, agency witnesses testified that Coworker T always properly followed attendance policies.[46] While the parties' testimonies differ, conclusions as to the credibility of witnesses and the weight of their

[42] Va. Code § 2.2-3005.1(C).
[43] *Grievance Procedure Manual* § 5.9.
[44] *Rules for Conducting Grievance Hearings* § VI(B).
[45] *Grievance Procedure Manual* § 5.8.
[46] *See* Hearing Recording Pt. 1 at 2:34:40-2:35:15 (Supervisor Testimony); 5:03:15-5:03:45 (Academic Officer Testimony).

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. For these reasons, EDR has not found a sufficient basis to remand the hearing decision regarding the discipline for not properly following the agency's attendance policy.

Group I Written Notice – Business Plan

The grievant also appears to argue that he should not have been disciplined as harshly as a Group I Written Notice regarding the business plan assignment given to him by the Deputy Director, arguing that he was not sufficiently informed on how to carry out the task and that other agency personnel should have been more involved than him. For similar reasons, EDR declines to disturb the hearing decision regarding this argument. The agency testified that instructions for an assignment were given to the grievant and that his job duties and responsibilities, combined with discussions with the Deputy Director, allowed him to sufficiently carry out the task.[47] Weighing this testimony is within the hearing officer's authority and EDR has nonetheless found no testimony or evidence to contradict these findings.

Group I Written Notices – Robot and Audit Meeting

Finally, the grievant argues that discipline in response to the February 15 and February 28, 2024 incidents were excessive and/or punitive, asserting that the witness statements and video footage suggested inconsistencies in his behavior and specific language used.

Upon review on appeal, EDR cannot dispute the hearing officer's determination that the agency properly adhered to DHRM policy in its issuance of discipline. Formal discipline at the Group I level requires meeting a relatively low bar of misconduct. As the hearing officer discussed in his decision, "Group I offenses are minor misconduct having little impact on agency operations."[48] The agency not only corroborated the incidents with multiple witness statements and video footage but also corresponded extensively with DHRM in determining what (if any) discipline should have been issued.[49] 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.[50] Here, the facts support the notion that the grievant engaged in behavior in both incidents that could reasonably rise to a Group I level offense. While one of the Written Notices was originally a Group II, the hearing officer ultimately reduced this Written Notice to a Group I, so no discussion of the requirements for a Group II level offense are necessary. The hearing officer properly exercised his discretion to weigh all of this evidence and testimony as appropriate, and did not abuse his

[47] *Id*. at 2:42:35-2:54:30 (Deputy Director Testimony).
[48] Hearing Decision at 4.
[49] Agency Ex. 22-23; *See, e.g.*, Hearing Recording Pt. 1 at 1:51:15-1:52:30, 1:56:00-1:56:30 (Supervisor Testimony); 4:29:30-4:37:00 (Deputy Director Testimony); 5:27:25-5:28:00 (Human Resources Director Testimony).
[50] *See*, *e.g.*, EDR Ruling No. 2020-4976.

discretion in determining that the agency's testimony and evidence was more credible. For these reasons, EDR declines to disturb the hearing decision on this basis.

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.[51] 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.[52] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[53]

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