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SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of General Services
Ruling Number 2025-5750
August 20, 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 reconsideration decision in Case Number 12092-R. For the reasons set forth below, EDR declines to disturb the reconsideration decision.

FACTS

The relevant facts in Case Numbers 12092 and 12092-R, as found by the hearing officer, are incorporated by reference within this ruling.[1]

The procedural history found in EDR Ruling Nos. 2024-5728, 2024-5730 is as follows:[2]

> Pursuant to the re-evaluation and the grievant's response, the agency terminated the grievant's employment, effective February 5, 2024. The grievant timely grieved the termination and a hearing was held on May 3, 2024. In a decision dated June 12, 2024, the hearing officer determined that the agency's re-evaluation was neither arbitrary nor capricious, nor did they find that the re-evaluation or termination violated the Americans with Disabilities Act ("ADA"). Therefore, the hearing officer upheld the termination. However, the hearing officer also found that the agency terminated the grievant's employment earlier than was permitted by DHRM Policy 1.40 and ordered back pay and benefits "to the extent the Agency prematurely removed him from employment."

Both parties requested administrative review of the hearing decision. EDR considered the grievant's arguments on appeal but found no basis to remand to the hearing officer as to the grievant's claims. The agency argued that they correctly applied DHRM Policy in their decision

[1] Decision of Hearing Officer, Case No. 12092 ("Hearing Decision"), June 12, 2024, at 2-26; Reconsideration Decision of Hearing Officer, Case No. 12092-R ("Reconsideration Decision"), August 6, 2024.
[2] EDR Ruling Nos. 2024-5728, 2024-5730 at 12-13 (citations omitted).

to terminate the grievant prior to the conclusion of the 90-day reevaluation plan, and that the hearing officer erred in ordering back pay for the grievant for the time between his termination and the end of the reevaluation plan. EDR remanded the hearing decision solely with respect to this review request, finding that the agency did in fact properly adhere to DHRM Policy and ordered the hearing officer to reconsider the decision with this interpretation of policy in mind.[3] The hearing officer then issued a reconsideration decision rescinding the order of back pay based on the administrative review.[4] The grievant now appeals the reconsideration decision to EDR.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Newly Discovered Evidence

The primary basis for the grievant's appeal of the reconsideration decision is that he has obtained new evidence via his new employer that illustrates the kinds of accommodations he felt the agency should have been providing for him. Specifically, the grievant submitted documents that include screenshots and depictions of videos provided at his new employer that help explain how to carry out certain tasks. However, the evidence will not be considered for the reasons described below.

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."[8] 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.[9] However, the fact that a party discovered the

[3] *Id*. at 21-22. EDR's ruling indicated that both parties would have the opportunity to seek administrative review of any "new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision)." *Id.* The only new matter addressed in the remand decision was the issue of back pay. Thus, any additional request for administrative review would only be proper as to that issue. The grievant's current request for administrative review does not address the issue of back pay, but rather again attempts to address the topics addressed in his first request for administrative review. Nevertheless, whether couched as a request for administrative review or reconsideration, EDR will address the grievant's request in this ruling to provide further clarity.
[4] Reconsideration Decision at 2.
[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] *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).
[9] *See* Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

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.[10]

Here, the timeline of facts show that the evidence provided on appeal was not in existence at the time of the hearing. It appears that the grievant first notified EDR of his new employment on July 18, 2024, well after the date of the hearing. For that reason, the evidence of accommodations provided by the new employer cannot be considered and EDR declines to disturb the reconsideration decision on this basis.

Findings of Fact

In his recent request for administrative review, the grievant also continues to contend that the agency, the hearing officer, and EDR gave inaccurate findings with respect to his mental impairment, his requested accommodations, and the alleged bullying by his supervisor. Specifically, the grievant disputes the recent administrative review's finding that the grievant's supervisor was first notified of his impairment in May of 2022, arguing that he was first notified in February of 2022. The grievant also interprets the recent administrative review's finding as though his mental impairment was put into question. Similarly, the grievant adds that EDR did not properly consider his evidence pertaining to alleged bullying by his supervisor. The grievant also contends that EDR "minimized" his requested relief in its decision. Finally, the grievant quotes a specific portion of his previously admitted evidence that illustrates his more specific requests for accommodations from the agency and how they had not been adequately providing those requests.

As stated in the previous ruling, 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

[10] *Id.* at 771 (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[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.

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.

First, EDR will address the claims that specific findings in its recent administrative review were inaccurate. While the grievant contends that EDR was inaccurate to state that the grievant's supervisor was first notified of his impairment in May of 2022, EDR would like to clarify that the language used in its decision was that *the grievant's supervisor's testimony* suggested that he was first notified of the impairment in May of 2022.[15] In that same portion of the review, EDR affirmed that the grievant argued he first made his supervisor aware of the impairment in February of 2022.[16] Therefore, the exact month on which the supervisor was first made aware of the impairment was of factual dispute, and resolving such a dispute is an issue left solely to the discretion of the hearing officer. Since evidence and testimony supported both versions of facts, including those of the hearing officer, EDR found no reason to disturb the hearing decision on that basis. Additionally, the discrepancy of whether the grievant's supervisor was first made aware of the impairment in February or May of 2022 makes little difference to the ultimate findings of fact, as the evidence and testimony nonetheless support the notion that the supervisor immediately began consulting with the agency's Human Resources office about the accommodations process when he was first notified, well in advance of the grievant's evaluation and ultimate termination.[17]

The grievant also specifically points to the portion of the administrative review where EDR summarized the grievant's amended requested relief. EDR finds no reason to disturb the reconsideration decision on this basis. While the administrative review did not state every individual portion of the requested relief, because the result was to not disturb the hearing decision with respect to the grievant's appeal, articulating the specific parameters of each relief request would be of little to no purpose to the analysis. Furthermore, the grievant requested certain forms of relief that would not be available in the grievance procedure.[18] The summarized version of the grievant's requested relief did not have any effect on the ultimate decisions made in its review.

Finally, the grievant continues to contest the overall findings of fact and conclusions of policy regarding the grievant's mental impairment, his supervisor's alleged bullying, and the agency's provided accommodations. First, EDR reemphasizes that our previous ruling did not attempt to question the grievant's mental impairment in any way. To the contrary, EDR's analysis (and by reference the original hearing decision) assumed that the grievant does have a mental impairment and that it was properly made clear to the agency.[19] Ultimately, the main issue in the hearing decision and administrative review was whether the agency provided the accommodations that were requested by the grievant. While EDR certainly sympathizes with the grievant's frustrations, at no point did EDR attempt to question the legitimacy of the grievant's impairment.

To the extent the grievant challenges EDR and the hearing officer's findings that he did not provide sufficient evidence to suggest that his supervisor engaged in bullying, EDR likewise finds no grounds to disturb the hearing decision on this basis. The grievant specifically questions

[15] EDR Ruling Nos. 2024-5728, 2024-5730 at 18.
[16] *Id.*
[17] *Id.*
[18] *See Grievance Procedure Manual* § 5.9(b).
[19] EDR Ruling Nos. 2024-5728, 2024-5730 at 16; *see* Hearing Decision at 30.

in his recent appeal how EDR would find that his supervisor did in fact raise his voice but subsequently not find that there was evidence of bullying. However, EDR was unable to find any other evidence in the record sufficient to establish bullying as that term is defined in policy, and the agency's evidence and testimony supported the hearing officer's conclusion that all allegations of bullying were adequately addressed and ultimately unfounded.[20] Based on this one instance of the supervisor raising his voice, EDR found that there was insufficient evidence to remand the hearing officer's findings as to bullying in violation of DHRM 2.35, *Civility in the Workplace*.[21]

Finally, the grievant contends that EDR continued to inadequately consider his evidence regarding his requested accommodations. In his recent appeal, the grievant included a direct quotation from his previously proffered documentation, stating that:

> It's been a challenging process given the methodologies used by management. Management has mostly provided notes verbally, but little hard copy guidance. He mentions that I have desktop procedures, but when I suggest I may have missed something in the process of taking notes; and subsequently made errors, he fails to definitively provide notes - again; allowing me to process and make the best notes I am able - until the next time the same or a different topic is covered. This has been repeated on most processes.

However, the grievant does not state exactly which documentation he is referring to, nor was EDR aware of this particular argument at any point during its review of the evidence and testimony in issuing its original administrative review. As EDR found in its review (and in reference to the original hearing decision), the grievant's specific requests for accommodations consistently mentioned certain practices of his supervisor such as more extensive one-on-one training, specificity in instructions, and the allowance of repetition in tasks, but did not elaborate much beyond those requests.[22] While the grievant perhaps at times testified that his supervisor was not providing sufficient feedback or made it difficult to consult with him and ask questions,[23] agency testimony and evidence, specifically through the supervisor's notes throughout the reevaluation plan, support the hearing officer's findings that accommodations were sufficiently provided. The grievant also mentioned specific practices at his new employer, such as detailed video and step-by-step screenshot instructions on how to carry out tasks. However, as was discussed in the previous section of this ruling, these examples were not in existence at the time of the hearing and are inadmissible newly discovered evidence. EDR has also not seen any indication in the record where the grievant requested these specific accommodations from the agency.

As was stated in EDR's prior ruling, 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.[24] Here, the record contains evidence that supports the version of facts proffered by the agency. The hearing

[20] EDR Ruling Nos. 2024-5728, 2024-5730 at 20; *see also* Hearing Decision at 8.
[21] EDR Ruling Nos. 2024-5728, 2024-5730 at 20.
[22] *Id*. at 17-19; *See, e.g.*, Hearing Decision at 4-5, 8, 20, 26, 31-32.
[23] *See* EDR Ruling Nos. 2024-5728, 2024-5730 at 17; Hearing Decision at 31.
[24] *See, e.g.*, EDR Ruling No. 2020-4976.

officer's findings of fact based on this evidence are consistent with EDR's independent review of the record and hearing recording in issuing its prior administrative review, and accordingly, EDR has no basis to disturb the hearing officer's reconsideration decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration 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).