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**ADMINISTRATIVE REVIEW**

In the matter of Department of Social Services  
Ruling Number 2025-5769  
October 31, 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 12141. For the reasons set forth below, EDR will not disturb the hearing decision.

**FACTS**

The relevant facts in Case Number 12141, as found by the hearing officer, are as follows:<sup>1</sup>

Grievant is a licensing inspector for the Agency. Grievant has been employed by the Agency as a licensing inspector for more than 23 years. Grievant is supervised by Supervisor. Supervisor reports to Associate Director. Evidence was introduced during the hearing to show that Grievant has an active Group I Written Notice of disciplinary action for failure to follow procedures relating to applications for licensure.

Witness 1 began working for the Agency on November 27, 2023. Witness 1 also is a licensing inspector for the Agency. Grievant and Witness 1 are both licensing inspectors, but they report to different supervisors. Witness 1 is supervised by Licensing Administrator. Based on the evidence presented during the hearing, it does not appear that Grievant has ever been supervised by Licensing Administrator.

In February 2024, Witness 1 had been employed by the Agency for approximately 2.5 to 3 months and had limited interactions with Grievant. Following a meeting on February 13, 2024, Grievant called Witness 1 regarding a work-related matter.

During the telephone conversation on February 13, 2024, Grievant and Witness 1 discussed cases. Grievant and Witness 1 also discussed situations when

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<sup>1</sup> Decision of Hearing Officer, Case No. 12141 ("Hearing Decision"), September 17, 2024, at 2-3 (citations omitted).

a licensing inspector may identify what they believe is a violation at a facility, but the violation ultimately may be removed from the inspection after review and discussion with a supervisor. During the conversation, Grievant told Witness 1 to “watch your back” and to be careful of Licensing Administrator. Grievant also discussed a former employee with Witness 1. In the context of the former employee’s relationship with Licensing Administrator, Grievant told Witness 1 that, “I’m from Mississippi. And when white folks talk bad about other white folks, you know that it’s bad.” Before the conversation ended, Grievant made Witness 1 aware of available job postings and offered to forward the postings to Witness 1.

Witness 1 was uncomfortable with the conversation with Grievant, so she later “confided” in Witness 2, another licensing inspector about the conversation. Witness 1 testified that she was comfortable speaking with Witness 2 because she was more experienced, knew Grievant better than Witness 1 did, and she wanted to seek her guidance about the information Grievant had shared.

Witness 2 reported to Licensing Administrator the content of the conversation that Witness 1 had described. When Witness 2 relayed her understanding of the conversation Witness 1 had described, she falsely indicated that Witness 1 had not revealed to her the name of the other participant in the conversation.

On March 15, 2024, the agency issued to the grievant a Group II Written Notice for violation of DHRM Policy 2.35, *Civility in the Workplace*.<sup>2</sup> The grievant timely grieved the disciplinary action and a hearing was held on August 20, 2024.<sup>3</sup> In a decision dated September 17, 2024, the hearing officer found that the agency “met its burden of proving that Grievant engaged in misconduct,” that the agency’s discipline “was consistent with law and policy,” and upheld the Group II Written Notice.<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.

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<sup>2</sup> Agency Exs. at 31-33; Hearing Decision at 1.

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

<sup>4</sup> *Id.* at 4-8.

<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).

In her request for administrative review, the grievant maintains that the agency had insufficient evidence to support the issuance of the Written Notice. Specifically, the grievant contends that the agency did not submit any evidence of an audio recording of the phone call between the grievant and Witness 1, that the agency did not provide any witnesses outside of Witness 1 who were a part of the phone call, and that the sole evidence of Witness 1 sharing allegations about the grievant with another colleague (Witness 2) “should not be the basis for determining that the Grievant is guilty.”<sup>8</sup> The grievant adds that the hearing officer did not properly consider her evidence and testimony during the hearing, primarily her own accounting of events surrounding the phone call in question.<sup>9</sup> Finally, the grievant alleges that the hearing officer improperly allowed agency witnesses to give testimony that was “overly prejudicial and even criminal,” about matters that were not documented in the grievant’s evaluations, and did not properly consider her objection regarding the agency witnesses’ possible ability to gather in the same room and converse prior to testifying.<sup>10</sup>

### *Sufficiency of Agency Evidence*

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>11</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>12</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>13</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>14</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.

EDR has thoroughly reviewed the hearing record and finds there is record evidence to support the hearing officer’s determination that the grievant engaged in the behavior charged on the Written Notice, that this behavior constituted misconduct, and that the discipline was consistent with law and policy. It was found by the hearing officer and supported by witness statements that the grievant’s words to Witness 1 during a phone call made Witness 1 uncomfortable, that Witness 1 confided in Witness 2 her discomfort caused by the conversation, and that Witness 2 reported

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<sup>8</sup> Request for Administrative Review at 1-2.

<sup>9</sup> *Id.* at 2-3.

<sup>10</sup> *Id.*

<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

the conduct to the agency.<sup>15</sup> Witness 1 and Witness 2 both testified at the hearing to further support these findings.<sup>16</sup>

While the grievant contends that the agency witness statements and testimonies are an insufficient amount of evidence to substantiate the Group II Written Notice, EDR does not agree. Although the agency did not provide any audio recording of the phone call, and there were no other witnesses outside of the grievant and Witness 1 who could provide a direct accounting of the phone call, such evidence is not necessary to substantiate a complaint of a *Civility in the Workplace* violation that was properly reported to the agency.<sup>17</sup> Further, the grievant has not provided any evidence of her own accounting of the phone call, outside of her response to the agency's notice of intent,<sup>18</sup> and did not testify at the hearing.<sup>19</sup> The issue at hand ultimately involves knowledge and observations of the grievant, Witness 1 (the other person involved in the phone call), and Witness 2 (the coworker to whom Witness 1 reported the grievant's behavior on the phone call). The hearing officer properly considered the testimonies and witness statements of Witness 1 and Witness 2, as well as the grievant's response to the letter of intent and arguments during hearing.<sup>20</sup> The grievant contends that the hearing officer unfairly considered Witness 1's accounting of the events in a more favorable light than the grievant's accounting, but 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, as is the case here.<sup>21</sup> Therefore, EDR finds no error in the hearing officer's finding that the agency provided sufficient evidence to support the issuance of a Group II Written Notice for violation of DHRM Policy 2.35, *Civility in the Workplace*.

The grievant also contends that the hearing officer allowed the agency witnesses to testify in a prejudicial manner and testify about alleged incidents that were not documented in the grievant's performance evaluations. In the hearing decision, the hearing officer noted that she did not consider the testimony of Witness 2 that discussed alleged past behavior by the grievant, noting that such alleged behavior was not part of the alleged misconduct at hand.<sup>22</sup> As to the "criminal" testimony alleged by the grievant, the grievant has not stated specifically which testimony to which she is referring. The grievant does note that Witness 2 provided inconsistent statements regarding whether Witness 1 identified the grievant in the conversation with Witness 2, but this inconsistency

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<sup>15</sup> Hearing Decision at 2-3; Agency Exs. at 35-37.

<sup>16</sup> See, e.g., Hearing Recording at 40:00-46:35, 1:12:00-1:13:30 (Witness 1 testimony); 3:30:30-3:32:30 (Witness 2 testimony).

<sup>17</sup> See DHRM Policy 2.35, *Civility in the Workplace*, at 3-4 (outlining the proper procedures for reporting complaints of 2.35 violations, while not providing any other requirements to substantiate such complaints).

<sup>18</sup> Grievant Ex. 2.

<sup>19</sup> While the grievant notes in her request for administrative review that the hearing officer did not consider her testimony, after a thorough review of the hearing recording, it appears that the grievant did not testify. The grievant did provide a closing statement, but this is not the same as testifying under oath, and the hearing officer clearly explained the difference to the grievant and allowed her the opportunity to testify, though she declined to do so. Hearing Recording at 4:14:15-4:15:30.

<sup>20</sup> Hearing Decision at 4-5.

<sup>21</sup> See, e.g., EDR Ruling No. 2020-4976.

<sup>22</sup> Hearing Decision at 5.

was noted in the hearing decision.<sup>23</sup> Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. The issues noted by the grievant were not significant enough for EDR to find an abuse of discretion in the hearing officer's consideration of and weight provided to the witness testimony. For these reasons, EDR declines to disturb the hearing decision on these grounds.

### *Procedural Issues*

As a final matter, the grievant contends that the hearing officer did not properly consider her objection to the agency witnesses' alleged ability to gather in the same room and potentially discuss their testimony. While witnesses discussing testimony with other witnesses could be conduct addressed by the hearing officer if appropriate,<sup>24</sup> EDR cannot find a sufficient basis to remand the hearing decision on these grounds. The grievant in her request for administrative review appears to assert that, because she was in an empty room prior to testifying, the agency witnesses were all grouped in the same room together and had the ability to openly discuss their testimonies.<sup>25</sup> However, this issue was thoroughly discussed and explained by the agency in the hearing, and the hearing officer further noted that determinations of the credibility of the witnesses is within her discretion to weigh pending her following decision.<sup>26</sup> Ultimately, after a thorough review of the record and the hearing recording, EDR cannot find sufficient evidence to suggest that the agency witnesses were improperly allowed to discuss their testimony during the hearing proceeding, or that there has been any adverse effect on the factual determinations made by the hearing officer that is outside of the hearing officer's discretion to properly weigh the credibility of witnesses. For the foregoing reasons, EDR declines to disturb the hearing decision on these grounds.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>27</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>28</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>29</sup>

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<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Rules for Conducting Grievance Hearings* § III(E).

<sup>25</sup> Request for Administrative Review at 2-3.

<sup>26</sup> Hearing Recording at 1:24:45-1:26:10, 2:02:30-2:06:00.

<sup>27</sup> *Grievance Procedure Manual* § 7.2(d); *see Grievance Procedure Manual* § 7.2(b); *see also Rules for Conducting Grievance Hearings* § IV(G) (outlining the narrow exception to prohibition of evidence after the close of the evidentiary record).

<sup>28</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>29</sup> *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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