



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5621
October 11, 2023

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 on remand in Case Number 11876. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS AND PROCEDURAL HISTORY

The relevant facts in Case Number 11876, as found by the hearing officer, are incorporated by reference.¹ On July 25, 2022, the agency issued to the grievant a Group III Written Notice with transfer, demotion, and disciplinary pay reduction for falsifying records and failing to comply with a safety policy where there is a risk of harm.² The grievant timely grieved this disciplinary action, and a hearing was held on March 15, 2023.³ In a decision dated June 20, 2023, the hearing officer determined that the agency had "presented sufficient evidence to support the issuance of a Group III Written Notice."⁴ The hearing officer determined that the grievant omitted key information in an incident report and failed to follow agency safety rules in conducting a cell extraction.⁵ Moreover, the hearing officer found that the grievant presented insufficient evidence to substantiate her defenses, and that there was no basis for mitigation of the disciplinary action.⁶

The grievant appealed the hearing officer's original decision and in EDR Ruling Number 2024-5589, EDR remanded the matter to the hearing officer to address the issues of whether the agency had failed to produce information the hearing officer had ordered produced and whether any adverse inferences were appropriate under the circumstances. In a reconsideration decision, dated September 19, 2023, the hearing officer thoroughly addressed each category of documents that EDR had directed be considered on remand, finding no basis for any adverse inferences.⁷ The hearing officer concluded that "nothing in this Hearing Officer's review changes the outcome of

¹ Decision of Hearing Officer, Case No. 11876 ("Hearing Decision"), June 20, 2023, at 2-4 (footnotes renumbered).

² Agency Exs. at 3-6; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 6.

⁵ *Id.* at 5-6.

⁶ *Id.* at 6-7.

⁷ Reconsideration Decision of Hearing Officer, Case No. 11876 ("Reconsideration"), Sept. 19, 2023, at 2-16.

the grievance that the Agency discipline is upheld.”⁸ Consequently, the grievant now appeals the reconsideration decision.

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.”⁹ 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.¹⁰ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹¹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.¹²

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁴ 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.¹⁵ 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.¹⁶ 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.

The grievant challenges the hearing officer’s determinations that no adverse inferences were warranted in this case. The *Rules for Conducting Grievance Hearings* provide that hearing officers

have the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents For example, if the agency

⁸ *Id.* at 16.

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ See *Grievance Procedure Manual* § 6.4(3).

¹¹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹² The grievant’s advocate requested that this review be conducted by the DHRM Director herself. The DHRM Director has directed that this review be conducted consistent with normal practices by EDR.

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor.¹⁷

The hearing officer considered each category of documents and determined that 1) there was no indication that the agency had failed to produce records that existed,¹⁸ 2) the omission of one page of a record was an oversight and corrected on remand,¹⁹ and 3) it was unclear whether one record was produced but it was nevertheless in evidence and considered.²⁰ Therefore, the hearing officer determined that no adverse inferences were warranted.²¹ EDR has thoroughly reviewed the reconsideration decision and finds that the hearing officer's consideration of these matters was consistent with EDR's directives on remand and the grievance procedure. Thus, EDR has no basis to find that the hearing officer has failed to adhere to the grievance procedure such that further remand of the matter is warranted.

The grievant also again asserts a claim that the agency's use of an agency employee as an advocate was improper and violated certain legal provisions. This issue has been addressed by EDR already.²² There is no basis for EDR to find that the agency's advocate's role is improper.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's remand 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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁷ *Rules for Conducting Grievance Hearings* § V(B).

¹⁸ Reconsideration at 4, 9-11, 13.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 7-8.

²¹ Reconsideration at 2-16.

²² EDR Ruling No. 2024-5589. EDR's extensive analysis of the issue is also reflected in EDR Ruling Number 2023-5541 (a ruling in another grievance) and applies in this case as well.

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).