Issue: Administrative Review of Hearing Officer's Decision in Case No. 10884; Ruling Date: January 17, 2017; Ruling No. 2017-4459; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2017-4459
January 17, 2017

The grievant has requested that the Office of Employment Dispute Resolution[1] ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10884. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10884, as found by the hearing officer, are as follows:[2]

> The Virginia Department of Corrections employed Grievant as a Lieutenant in one of its Units. She began working for the Agency in 2009. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant served as the Unit's primary point of contact. She received incident reports from external sources and analyzed them to determine how to respond. She was responsible for classifying and disseminating information concerning threats to the safety and security of the Department of Corrections and the community at large. Grievant's usual work shift was from 6 p.m. until 6 a.m.
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> The Agency has Post Orders providing employees with guidance regarding how to perform the duties of the posts to which they were assigned. The Agency required employees to review their post orders and sign a Post Order Review Log showing they had reviewed and understood the Post Order. An employee's supervisor was supposed to meet with the employee to address the employee's questions. The employee certification read:
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> I CERTIFY THAT I HAVE READ, DISCUSSED WITH MY SUPERVISOR AND UNDERSTAND THE POST ORDERS

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.
[2] Decision of Hearing Officer, Case No. 10884 ("Hearing Decision"), November 30, 2016, at 2-4 (citations omitted).

INDICATED ABOVE PRIOR TO SIGNING BELOW AND ASSUMING THE DUTIES OF THIS POST.

The Agency revised its post order for Grievant's post. Grievant was supposed to have signed the Post Order Review Log on or about July 1, 2016. She did not sign the log because she had questions about the Post Order and wanted to discuss her concerns with the Supervisor. On August 8, 2016, the Supervisor sent Grievant and the other lieutenants an email stating, "please sign your post orders on your next assigned shift." Grievant did not sign the Post Order Review Log because she had unanswered questions. Grievant signed the Post Order on September 6, 2016.

The Sex Offender Specialist worked in the Locality.

The Offender was a sex offender required to wear an ankle bracelet with a global positioning monitor so that his position could be tracked at all times. He had been released from an institution into the Locality and was required to wear the ankle GPS monitor as a condition of his release from the institution. Shortly after 7 p.m. on September 1, 2016, the Offender cut off his GPS tracking monitor which sent a signal to the local agency. The Sex Offender Specialist went to the last location of the Offender and confirmed that he was not there and had cut off his ankle bracelet. The Sex Offender Specialist told others in her office about the incident and a probation warrant was issued for the Offender. The Sex Offender Specialist asked her supervisor if it was a matter that needed to be reported. The supervisor said to call the Unit.

At approximately 11 p.m., the Sex Offender Specialist called the Unit. Grievant answered the call. The Sex Offender Specialist told Grievant that she was calling from the Locality and needed guidance on whether an issue she had required notification of the Unit and filing of a serious incident report. The Sex Offender Specialist told Grievant that the Offender was required to wear a GPS brace. She told Grievant that she could not find the Offender and he had cut off is ankle brace. The Grievant asked the Sex Offender Specialist for the VACORIS number. The Sex Offender Specialist said she did not bring her computer home and could not identify the number. Grievant said that was "ok" because Grievant could look up the number. Grievant told the Sex Offender Specialist that she did not believe the incident fell under a Class I or II incident, but that she would inquire further.

Upon receiving the report from the Sex Offender Specialist, Grievant looked up the Offender's VACORIS number and confirmed that he was a sex offender. She completed an incident report for the Unit but took no action to report the incident to anyone else in the Department. Grievant did not seek clarification from the Supervisor or Unit Head regarding whether the incident was a Class I incident.

> At 5:10 a.m. on September 2, 2016, Lieutenant S reported to work and relieved Grievant from her post. Lieutenant S reviewed the "call in sheet" relating to the Offender. Lieutenant S recognized that the incident was one that needed to be reported to Agency managers. Lieutenant S called the Sex Offender Specialist to obtain additional information. The incident was then reported to other Agency managers in the Unit and outside of the Unit.
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> The Offender was captured only a short time before the hearing date.

On or about September 23, 2016, the grievant was issued 1) a Group I Written Notice for unsatisfactory performance, 2) a Group II Written Notice for failure to follow instructions and/or policy, unauthorized use of state property or records, and computer/internet misuse, and 3) a Group III Written Notice for failing to report to agency management that the Offender had absconded when she was contacted by the Sex Offender Specialist.[3] In conjunction with the Group III Written Notice, the grievant was terminated from employment with the agency.[4] The grievant filed a grievance to challenge the disciplinary actions[5] and a hearing was held on November 10, 2016.[6] In a decision dated November 30, 2016, the hearing officer determined that the agency had not presented sufficient evidence to show that the grievant's work performance was unsatisfactory or that she had engaged in computer or internet misuse and rescinded the Group I and Group II Written Notices.[7] The hearing officer further concluded that the grievant's failure to report that the Offender had absconded constituted a failure to follow policy, normally a Group II offense, and that her actions "undermined the Unit's purpose" due to the severity of the incident, thereby justifying the issuance of a Group III Written Notice, and upheld the grievant's termination.[8] The grievant now appeals the hearing 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."[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 either party; the sole remedy is that the hearing officer correct the noncompliance.[10]

Inconsistency with State and/or Agency Policy

In her request for administrative review, the grievant asserts that the hearing decision is inconsistent with state and/or agency policy. Specifically, the grievant alleges the hearing officer

[3] Agency Exhibits 1, 2, 3.
[4] Agency Exhibit 3.
[5] Agency Exhibit 4; *see* Hearing Decision at 1.
[6] *See* Hearing Decision at 1.
[7] *Id.* at 4-5.
[8] *Id.* at 5-6.
[9] Va. Code §§ 2.2-1202.1(2), (3), (5).
[10] *See Grievance Procedure Manual* § 6.4(3).

erred in finding that elevation to a Group III offense was appropriate in this case and that his decision to uphold the Group III Written Notice and the grievant's termination are inconsistent with policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[11] The grievant has requested such a review. Accordingly, pursuant to the *Grievance Procedure Manual*, the grievant's policy claims will be addressed in a separate policy review.

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant asserts that the hearing officer's findings of fact are inconsistent with the evidence in the record because the incident, as it was reported to her by the Sex Offender Specialist, "did not warrant an immediate Class I classification." The grievant further argues the hearing officer "erred by dismissing [her] contention that her termination was a retaliatory act . . . ." Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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 the hearing decision, the hearing officer assessed the evidence about the incident and concluded that the "Grievant received a call from a local Sex Offender Specialist informing Grievant that an Offender had cut off his ankle bracelet" and absconded, that the "Grievant did not realize that the incident constituted a Class I incident," and that she "was obligated immediately to report the incident to Regional staff and other employees outside of the Unit."[16] While the hearing officer stated that this misconduct would ordinarily warrant a Group II Written Notice for failing to follow the agency's reporting policy, he further determined that "[a] primary purpose of the Unit was to receive information about incidents, analyze that information, and determine whether to inform Agency managers of that information," and that the "Grievant's failure to report a Class I incident undermined the Unit's purpose," thereby justifying elevation to a Group III offense in this case.[17] In her request for administrative review, the grievant claims

[11] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.
[16] Hearing Decision at 6.
[17] *Id.*

that the incident was ultimately reported by Lieutenant S as a Class IIA incident, not a Class I incident, and that the grievant did not receive appropriate "training that would [have] provide[d] her with the knowledge and expertise to determine" that the incident should have been reported.

Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer's conclusions about the classification of the incident and the grievant's failure to report the incident as required under agency policy. For example, the agency presented evidence to show that Class I incidents include "[a]bsconding or attempting to abscond from a Community Corrections facility or Probation and Parole absconders suspected of a violent criminal offense(s)."[18] While the grievant contends in her request for administrative review that the incident was actually reported as a Class IIA incident, EDR has identified no evidence in the record to suggest that this was the case.[19] Hearing officers must base their decisions on the evidence admitted into the hearing record.[20] At the hearing, the Unit Head testified that a probation and parole area is considered a Community Corrections facility under policy, and that the situation as it was reported to the grievant was a Class I incident that should have been reported immediately.[21] Lieutenant S and the Supervisor also testified that, in their judgment, the incident should have been reported immediately because it was a Class I incident.[22] Lieutenant S further described the report she made to agency management, stating that she reported the incident as both absconding and a newsworthy event.[23] EDR finds no basis to disturb the hearing officer's conclusion that the incident was considered a Class I incident under agency policy, or that the grievant should have made an immediate report to agency management after she was contacted by the Sex Offender Specialist.[24]

With regard to the grievant's assertion that she did not receive training and, thus, did not know the incident should have been reported, the evidence in the record indicates that the grievant and other employees of the Unit had been notified to contact the Supervisor and other members of agency management if they had questions about how an incident should be reported.[25] The grievant did not contact anyone to discuss the incident until Lieutenant S reported to work the following morning, several hours after she was contacted by the Sex Offender Specialist.[26] 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. EDR finds no basis to disturb the hearing officer's conclusion that the evidence in the

[18] Agency Exhibit 11 at 5-6.
[19] To the extent the grievant's claims on this point may be construed as a request to reopen the hearing record for consideration of newly discovered evidence, she has provided no information to support a contention that this information should be considered newly discovered under the standard applied by EDR. *See, e.g.*, EDR Ruling Number 2015-4132 (citing Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989)).
[20] *Grievance Procedure Manual* § 5.9; *see Rules for Conducting Grievance Hearings* § V(C).
[21] Hearing Recording at 34:29-36:30, 53:19-53:43 (testimony of Unit Head).
[22] *Id.* at 2:35:09-2:35:28 (testimony of Lieutenant S), 2:59:24-3:01:12 (testimony of Supervisor).
[23] *Id.* at 2:38:35-2:40:50, 2:42:17-2:42:27 (testimony of Lieutenant S).
[24] *See* Hearing Decision at 5-6.
[25] Hearing Recording at 38:53-39:15 (testimony of Unit Head), 3:01:13-3:02:20 (testimony of Supervisor); Agency Exhibit 12 at 2; Agency Exhibit 13 at 2.
[26] *E.g.*, Agency Exhibits 21, 22.

record was sufficient to demonstrate that the grievant engaged in behavior that justified the issuance of a Group III Written Notice in this case.

The grievant further argues that the hearing officer erred in finding that the disciplinary action did not have a retaliatory motive. The grievant's retaliation claim is based on her filing an EEOC complaint about a coworker and/or her past grievance activity relating to "necessary accommodations to allow her to pursue a college degree . . . ." In the hearing decision, the hearing officer discussed the grievant's argument that she "worked in a hostile work environment and [] had to file an EEOC complaint regarding another employee" and found that "the Agency acted appropriately" to resolve the grievant's complaint.[27] The hearing officer clearly considered the grievant's allegation of retaliation, finding that the agency's decision to "mov[e] the other employee to another shift" was appropriate and the disciplinary action was not issued "as a form of retaliation or for any other improper purpose."[28] Furthermore, EDR's review of the hearing record indicates that there is little to no evidence presented about her previous grievance activity or other actions allegedly taken against her based on her request for scheduling accommodations to obtain a college degree that would have supported her claim of retaliation.[29] As discussed above, there is evidence in the record to support the hearing officer's conclusion that the grievant failed to report the incident properly according to agency policy.[30] It is squarely within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented, and EDR finds not basis to disturb the hearing officer's findings in relation to the grievant's claim of retaliation.

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the nature of the incident or the manner in which it should have been reported was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case 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. Accordingly EDR declines to disturb the hearing decision on the bases raised by the grievant in her request for administrative review.

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

[27] Hearing Decision at 7; *see* Grievant's Exhibit 4.
[28] Hearing Decision at 7.
[29] While the grievant alleged in her dismissal grievance that she had previously filed two grievances relating to requested modifications to her schedule in order to attend college classes, *see* Agency Exhibit 4 at 4, the grievances themselves were not admitted into the record and EDR has not identified other evidence or argument the hearing officer could have considered in relation to the grievant's contention on administrative review that she was disciplined as a form of retaliation for her past grievance activity.
[30] *See supra* notes 16-24 and accompanying text.

final hearing decision once all timely requests for administrative review have been decided.[31] 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.[32] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[33]

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