

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10908; Ruling
Date: February 14, 2017; Ruling No. 2017-4490; Agency: Old Dominion University;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

ADMINISTRATIVE REVIEW

In the matter of Old Dominion University
Ruling Number 2017-4490
February 14, 2017

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 10908. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10908, as found by the hearing officer, are as follows:²

Old Dominion University employed Grievant as a Housekeeper. She had been employed by the Agency for approximately 15 years.

Grievant had prior active disciplinary action. On June 17, 2013, Grievant received a Group III Written Notice with a five work day suspension because she was found in a room with the lights off, wrapped in a blanket, and with a space heater turned on. Following that incident, the Supervisor and Manager instructed Grievant that she could not have a space heater with her. Grievant understood the instruction.

The Agency’s fire regulations prohibit use of space heaters by employees in the Agency’s buildings.

On September 14, 2016, Grievant took a break in a lab/office. The room was cold to her and she used a space heater and blanket to keep warm. When confronted with her action on September 14, 2016, Grievant stated she had been going into the room when no one was using it and that “[o]ne day it was so cold in there that I asked [another person] if I could use her heater and was going to return it the next day.”

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. 10908 (“Hearing Decision”), January 12, 2017, at 2.

On or about October 17, 2016, the grievant was issued a Group II Written Notice for failure to follow instructions and terminated from employment due to her accumulation of discipline.³ The grievant filed a grievance to challenge the disciplinary action⁴ and a hearing was held on January 11, 2017.⁵ In a decision dated January 12, 2017, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant failed to follow her supervisor's instructions and upheld the issuance of the Written Notice.⁶ 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.”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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁸

In her request for administrative review, the grievant appears to assert that (1) the hearing officer erred in upholding the issuance of the Written Notice because “the statements on the [W]ritten [N]otice are not inclusive of actual events” and (2) the hearing officer improperly considered evidence about past disciplinary action issued to her. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ 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.¹¹ 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.¹² 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 and concluded that the “Grievant was instructed not to use a space heater in the building” by her Supervisor, that she subsequently “borrowed a space heater and used it while she was taking a break,” and that this

³ Agency Exhibit 1.

⁴ Agency Exhibit 4; *see* Hearing Decision at 1.

⁵ *See* Hearing Decision at 1.

⁶ *Id.* at 1, 3-4.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

action constituted a failure to follow instructions warranting the issuance of the Group II Written Notice.¹³ Having reviewed the hearing record, EDR finds that there is evidence in the record to support the hearing officer's conclusions about the instruction given to the grievant and the grievant's failure to comply with that instruction. At the hearing, for example, the Supervisor testified that she had previously directed the grievant not to use a space heater because of safety concerns, and that the grievant admitted she was using a space heater on September 14 during the incident that prompted the issuance of the Group II Written Notice.¹⁴ The grievant also testified that she was instructed not to use a space heater but had subsequently done so.¹⁵ 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.¹⁶ Accordingly, EDR finds no basis to disturb the hearing officer's conclusion that the evidence in the record was sufficient to demonstrate that the grievant engaged in behavior that justified the issuance of the Group II Written Notice in this case.

The grievant further claims that the hearing officer improperly considered her disciplinary history in upholding the Written Notice and her termination. Specifically, she asserts that the agency did not issue discipline consistent with the "order of offenses" under DHRM Policy 1.60, *Standards of Conduct* (the "*Standards of Conduct*") because she received a Group III Written Notice with a five-workday suspension in 2013, prior to the issuance of the Group II Written Notice at issue in this case. This argument is unpersuasive, and EDR has not identified any evidence in the record to suggest such a requirement under policy. At the hearing, the agency presented a copy of the Group III Written Notice issued to the grievant on June 17, 2013, which was active until June 17, 2017.¹⁷ The *Standards of Conduct* states the issuance of a single Group III Written Notice "normally should result in termination unless there are mitigating circumstances."¹⁸ The *Standards of Conduct* further provides that, when an employee has received "a Written Notice that would normally warrant termination" and "is not terminated due to mitigating circumstances, . . . any subsequent Written Notice for any level offense during the active life of the Written Notice may result in termination."¹⁹ The evidence in the record shows that the Group III Written Notice was active on September 14, 2016 and that the grievant failed to follow the Supervisor's instruction not to use a space heater on that date.²⁰ The *Standards of Conduct* expressly permits termination in that situation upon the issuance of any level of Written Notice.²¹ Accordingly, EDR finds no reason to disturb the hearing officer's decision to uphold either the Group II Written Notice or the grievant's termination.

While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that his consideration of the evidence regarding the instruction given to the grievant by the Supervisor, or her failure to follow that instruction, was in any way unreasonable or not

¹³ Hearing Decision at 3.

¹⁴ Hearing Recording at 5:42-6:07, 9:52-10:38 (testimony of Supervisor).

¹⁵ *Id.* at 9:30-9:52 (testimony of Supervisor), 33:55-34:06 (testimony of grievant).

¹⁶ *See, e.g.*, EDR Ruling No. 2012-3186.

¹⁷ Agency Exhibit 2.

¹⁸ DHRM Policy 1.60, *Standards of Conduct*, § B(2)(c).

¹⁹ *Id.* § B(3)(c).

²⁰ Agency Exhibit 2; Hearing Recording at 5:42-6:07, 9:30-10:38 (testimony of Supervisor).

²¹ DHRM Policy 1.60, *Standards of Conduct*, §§ B(2)(c), B(3)(c).

based on the actual evidence in the record. 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. The hearing officer's findings are based upon evidence in the record and the material issues of the case, and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EDR declines to disturb the 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.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴



Christopher M. Grab
Director
Office of Employment Dispute Resolution

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).