

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10777; Ruling Date: August 23, 2016; Ruling No. 2017-4389; Agency: Department for Aging and Rehabilitative Services; Outcome: AHO's decision affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resources Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department for Aging and Rehabilitative Services  
Ruling Number 2017-4389  
August 23, 2016

The Department for Aging and Rehabilitative Services (the “agency”) 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 in Case Number 10777. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by the agency as an Office Services Specialist (“OSS”).<sup>1</sup> On October 22, 2015, the grievant received an annual performance evaluation with an overall performance rating of “Below Contributor.”<sup>2</sup> The grievant was placed on a three-month reevaluation plan, from October 22, 2016 to January 22, 2016.<sup>3</sup> On January 20, 2016, the grievant was removed from employment after receiving a “Below Contributor” rating at the conclusion of her performance plan.<sup>4</sup> She timely initiated a grievance challenging her dismissal.<sup>5</sup> On July 26, 2016, following a hearing, the hearing officer issued a decision finding that the agency failed to show that the grievant’s termination was appropriate and warranted.<sup>6</sup> The agency has now requested administrative review by 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>7</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 a party; the sole remedy is that the action be correctly taken.<sup>8</sup>

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<sup>1</sup> Decision of Hearing Officer, Case No. 10777 (“Hearing Decision”), July 26, 2016, at 3.

<sup>2</sup> Agency Exhibit 3.

<sup>3</sup> Agency Exhibit 4.

<sup>4</sup> Hearing Decision at 15.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.* at 15.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> *See Grievance Procedure Manual* § 6.4(3).

### *Inconsistency with State and Agency Policy*

The agency's request for administrative review argues that the hearing officer's decision is inconsistent with state and agency policy. The agency asserts that the hearing officer's conclusion that the three month reevaluation plan was defective and did not support termination is inconsistent with DHRM Policy 1.40, *Performance Planning and Management*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> Accordingly, the agency's policy claims will not be addressed in this review.

### *Relevant Time Period for Consideration*

The agency alleges that the hearing officer improperly based her decision upon findings outside of the scope of the material issue of the case, which is the three month re-evaluation period from October 22, 2015 to January 22, 2016. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>10</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>11</sup> EDR's review of the record and the hearing officer's decision in this matter shows that the hearing officer properly considered the three month review period from October 22, 2015 to January 22, 2016 and made findings of fact, explicitly included within the decision, about the grievant's performance during this time period.<sup>12</sup> While the hearing decision also includes factual findings considered by the hearing officer as background evidence in this matter, this does not lead to a conclusion that the hearing officer abused her discretion in this matter.

### *Factual Findings/Deference*

The agency's request for review also asserts that the hearing officer's decision violated the grievance procedure because she substituted her judgment for that of agency management with respect to the means, methods, and personnel by which work activities are undertaken. The *Rules for Conducting Grievance Hearings* (the "Rules") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>13</sup> Here, the agency contends that the hearing officer's conclusion that it was impossible for the grievant to perform her job improperly overruled management's discretion with respect to the assignment of the grievant's work duties.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>14</sup> and to determine the grievance based "on the material issues and grounds in the record

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<sup>9</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> See Hearing Decision at 14-15.

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

<sup>14</sup> Va. Code § 2.2-3005.1(C).

for those findings.”<sup>15</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.

Here, the agency essentially argues that the hearing officer should have given deference to the agency’s explanation of how it conducted the grievant’s performance improvement plan and should have found its explanation to be more credible than the grievant’s testimony at hearing. However, the determination of witness credibility is left entirely to the hearing officer as the finder of fact. It is the job of the hearing officer, as she expressly states she did here,<sup>16</sup> to consider the credibility of witness testimony and to weigh the evidence under the totality of the circumstances and make factual findings. EDR has reviewed the record in its entirety, and, while the agency did present evidence indicative of poor performance by the grievant,<sup>17</sup> EDR cannot find that the hearing officer’s determination that it was impossible for the grievant to perform her job adequately was without basis in the record. For instance, it was not disputed that in 2015 the grievant’s supervisor added additional duties to those already set forth in her Employee Work Profile.<sup>18</sup> The hearing officer considered the additional tasks in reaching the conclusion that the grievant’s workload had tripled since she began work at a new office.<sup>19</sup> 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>20</sup>

The agency’s request for administrative review indicates that it chose not to rebut alleged inaccuracies in the grievant’s testimony primarily because “the majority of the Grievant’s testimony was outside of the relevant time period.” The agency states that, instead, it chose to focus on the grievant’s “continued performance issues during the applicable 3 month re-evaluation period.” However, as stated above, information prior to the three month re-evaluation period may have been relevant to the overall issue of the agency’s assessment of the grievant’s performance and whether the grievant’s job was indeed impossible due to the tasks assigned or treatment of the grievant by management and staff. The agency had the opportunity at the hearing to submit this evidence in support of its position and chose not to do so. The hearing officer is limited to considering only the information in the hearing record when making her determination as to the outcome of the case.

In considering all of the evidence, the hearing officer found, in short, that the expectations laid out by the agency for the grievant in her three month performance improvement plan were unreasonable and unattainable. As noted in the hearing decision, the hearing officer found that the grievant’s workload was “contrary to other similarly situated offices . . . [and]

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<sup>15</sup> *Grievance Procedure Manual* § 5.9.

<sup>16</sup> Hearing Decision at 15.

<sup>17</sup> See Agency Exhibits 3-6, 9-11, Hearing Record Track 4 32:01 – 32:26 (testimony of Unit Supervisor).

<sup>18</sup> See Grievant’s Exhibit Page 43-44.

<sup>19</sup> See Hearing Decision at 8.

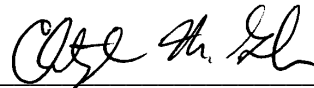
<sup>20</sup> See, e.g., EDR Ruling Nos. 2013-3390, 2013-3402, EDR Ruling No. 2012-3186.

[d]uties Grievant was required to perform were enormous.”<sup>21</sup> Moreover, the hearing officer found that the grievant was in need of “additional and adequate training . . . critical to Grievant achieving acceptable job performance,” and, although her immediate supervisor was aware of this need, the agency apparently failed to provide the grievant with training or guidance needed.<sup>22</sup> In addition, the hearing officer found that the agency “failed to identify personal learning goals and or the grievant’s Individual Roadmap to Success . . . [e]ither or both could have entailed the provision of adequate training to assist Grievant in developing.”<sup>23</sup>

Although agency determinations with regard to evaluating employee performance are due appropriate deference, this is not a case where the hearing officer has failed to give the appropriate level of deference or otherwise intruded upon the “exclusive right” of the agency to manage its affairs. Rather, under the facts, the hearing officer has essentially determined that the agency’s re-evaluation of the grievant’s performance<sup>24</sup> and her resulting termination were arbitrary and capricious. The hearing officer’s findings on that issue can lead to no other outcome regardless of the level of deference being granted.<sup>25</sup> In short, the hearing officer has not abused her discretion in making these record-supported findings, and EDR is unable to interfere in the decision on this basis.

#### CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>26</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>27</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>28</sup>



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<sup>21</sup> Hearing Decision at 16.

<sup>22</sup> *Id.*

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

<sup>24</sup> Hearing Decision at 17.

<sup>25</sup> Whether the hearing officer’s consideration of this issue is consistent with agency policy is a matter for DHRM to address. *See supra.*

<sup>26</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>27</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>28</sup> *Id.*; *see also* Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).