

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10813; Ruling Date: September 2, 2016; Ruling No. 2017-4406; Agency: Department of Alcoholic Beverage Control; 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 Alcoholic Beverage Control  
Ruling Number 2017-4406  
September 2, 2016

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 10813. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The grievant was employed by the Department of Alcoholic Beverage Control (“agency”) as an Assistant Manager Relief Specialist.<sup>1</sup> On March 22, 2016, the grievant was issued two Group II Written Notices.<sup>2</sup> The first Group II Written Notice charged the grievant with failing to follow the agency’s procedure for cash handling and falsifying information regarding a cash discrepancy.<sup>3</sup> The grievant received the second Group II Written Notice for excessive cell phone use while on duty.<sup>4</sup> As a result of the Written Notices, the grievant was terminated from employment.<sup>5</sup> The grievant timely initiated a grievance to challenge these disciplinary actions, and a hearing was held on June 27, 2016.<sup>6</sup> In a decision dated July 17, 2016, the hearing officer upheld the disciplinary actions and termination.<sup>7</sup> The grievant has now requested administrative review of the hearing decision.

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>8</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not

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<sup>1</sup> Agency Exhibit 2 at 1.

<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 7. The grievant asserts, and the agency does not appear to dispute, that she was speaking to her daughter, who was experiencing a mental health crisis. *See, e.g., id.* at 9; Agency Exhibit 2 at 5; *see also* Decision of Hearing Officer, Case No. 10813 (“Hearing Decision”), July 17, 2016, at 4.

<sup>5</sup> Agency Exhibit 1 at 1.

<sup>6</sup> Hearing Decision at 1; Agency Exhibit 2 at 1.

<sup>7</sup> Hearing Decision at 1, 17.

<sup>8</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>9</sup>

### *Inconsistency with Agency Policy*

In her request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with agency policy. In particular, the grievant appears to argue that the agency's policy regarding cell phone use allows use during an emergency situation and does not limit such use to a particular length of time. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>10</sup> Accordingly, the grievant's policy claims will not be discussed in this ruling.

### *Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that she accorded to evidence presented and testimony given at the hearing. 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 grounds in the record for those findings."<sup>12</sup> Further, in cases involving discipline, the hearing officer reviews the evidence *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.

The grievant's request for administrative review appears to challenge the hearing officer's findings that she engaged in the charged misconduct—specifically, that she had used her cell phone inappropriately for over two hours during her work shift and had failed to comply with agency policy in verifying funds.<sup>15</sup> EDR's review of the record evidence indicates that there was sufficient evidence to support the hearing officer's findings regarding the grievant's conduct.<sup>16</sup> In particular, the record evidence shows that the grievant used her personal cell phone for an extensive period of time, failed to count out clerks in accordance with the procedures set

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<sup>9</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>10</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<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.

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

<sup>16</sup> Although the agency also charged the grievant with falsification, the hearing officer found that the evidence on this claim was insufficient. See Hearing Decision at 15. As the falsification charge was not sustained and the agency has not appealed that determination, this charge will not be addressed further in this ruling.

forth in agency policy, and failed to complete the vault count and store deposit in a manner consistent with policy.<sup>17</sup> Because 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. Accordingly, EDR declines to disturb the decision on this basis.

#### *Alleged Bias of Hearing Officer*

The grievant asserts that the hearing process was "compromised." As the specific grounds for this complaint are unclear from the administrative review request, EDR will consider the grievant's argument to be a claim of hearing officer bias.

The *Rules for Conducting Grievance Hearings* ("Rules") provide that a hearing officer is responsible for avoiding the appearance of bias and:

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.<sup>18</sup>

The applicable standard regarding EDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.<sup>19</sup> The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"<sup>20</sup> EDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.<sup>21</sup> The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.<sup>22</sup>

In this particular case, the grievant has not presented any evidence that would demonstrate bias or prejudice such as to deny a fair and impartial decision. As the grievant has failed to meet her burden, EDR will not disturb the decision of the hearing officer on this basis.

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<sup>17</sup> See, e.g., Agency Exhibit 1 at 3-6, 9-11; Agency Exhibit 6; Agency Exhibit 7 at 35-38; Agency Exhibit 9 at 11.

<sup>18</sup> *Rules for Conducting Grievance Hearings* § II. See also EDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

<sup>19</sup> While not always dispositive for purposes of the grievance procedure, EDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

<sup>20</sup> *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); see *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

<sup>21</sup> E.g., EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

<sup>22</sup> *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

*Alleged Ex Parte Communications*

The grievant asserts that, during a break, the hearing officer discussed with an agency representative the upcoming transition of the agency to an authority. The *Rules* states that “[h]earing officers should bear in mind . . . that . . . an *ex parte* conversation can be perceived as partiality, no matter how necessary and proper such communication may have been.”<sup>23</sup> As an initial matter, the discussion in question was apparently held in the presence of the grievant and her advocate, rather than outside their hearing. Further, even if the discussion is assumed to be *ex parte*, simply because the hearing officer engaged in a conversation with an agency representative during a break does not indicate that anything improper occurred. The grievant has not identified any statements in the record or presented any information that would indicate the hearing officer has acted improperly. Further, there is no indication from the record evidence and resulting hearing decision that any improper influence or conversations affected the outcome. EDR declines to disturb the decision on this basis.

*Additional Evidence*

The grievant alleges that the agency “falsified the [d]isciplinary [a]ction” by including with the “Notice of Pending Disciplinary Action” several documents the grievant claims not to have received at the time she received the Notice.<sup>24</sup> The grievant appears to argue that contrary to the agency’s representations, the agency did not provide her with these documents in connection with the Notice of Pending Disciplinary Action or her termination.<sup>25</sup> Importantly, the grievant does not assert that any failure by the agency to give her these documents at the time of the disciplinary action hindered her ability to present her case at hearing, nor does she argue that the documents contain any new or additional charges. Rather, the grievant appears to argue that the agency made misrepresentations to the hearing officer in stating that the documents were given to the grievant at the time of the disciplinary action.

Even if EDR assumes that the agency did not provide the grievant with these documents at the time it gave her the Notice of Pending Disciplinary Action, any such failure does not alter the outcome of this proceeding. The question of whether the agency timely provided these documents is immaterial to the hearing officer’s ultimate findings that the grievant engaged in the conduct charged in the Written Notices and that the disciplinary actions were warranted and appropriate under the circumstances. As the timing of the agency’s provision of these documents is irrelevant to the hearing officer’s determinations in this matter, and the grievant has not argued or demonstrated prejudice related to these additional pages, remand is not warranted on this basis.

*Evidentiary Issues*

The grievant alleges that the agency improperly failed to comply with the grievant’s request for the “entire email conversation” from two management employees.<sup>26</sup> On questioning,

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<sup>23</sup> *Rules for Conducting Grievance Hearings* § III(D).

<sup>24</sup> Hearing Decision at 1-2; Agency Exhibit 6 at 17-19. The documents in question appear to be pages summarizing the policy violations the agency considered the grievant to have made.

<sup>25</sup> Hearing Recording, Track 1, at 11:03-11:57, 13:24-15:30.

<sup>26</sup> See Agency Exhibit 6 at 16.

the agency explained that the version provided to the grievant was the only version of which it was aware.<sup>27</sup> As the grievant has not produced evidence sufficient to challenge the agency's representation that it is unaware of any other versions of the document, EDR cannot find that the hearing officer erred in failing to draw an adverse inference or otherwise sanction the agency.<sup>28</sup>

The grievant also appears to assert that the agency failed to produce a video tape for a loan incident occurring in the fall of 2015. The grievant argues that although the agency contends that she was seen on the videotape at the time of the loan, she was not in fact on duty.<sup>29</sup> To the extent the hearing officer considered the 2015 incident, it appears she did so only in regard to the grievant's admission that she failed to verify funds as required under policy on the date in question and the grievant's having been counseled regarding the proper means of verifying funds.<sup>30</sup> The hearing officer did not reach any determination regarding the grievant's involvement in the loan or her presence at the time the loan was made. As the hearing officer did not consider the loan in reaching her determinations, whether the grievant was present at the time of the loan, as apparently asserted by the agency, is irrelevant to the hearing officer's decision in this case.<sup>31</sup>

Lastly, the grievant asserts that she was not awarded "the same rights" as the agency to present evidence "on her reasoning to stay at work" or as to events "not pertaining to the day in question." Having reviewed the hearing record, EDR cannot find any portion of the hearing where the grievant was improperly prevented from providing evidence or testimony on these issues, and the grievant's ruling request provides no specific discussion as to any such exchange. Accordingly, EDR finds no basis to conclude that the hearing officer abused her discretion in allowing the parties to present evidence or otherwise acted in an unfair or inappropriate manner.

As the grievant has failed to show that the hearing officer erred with respect to these evidentiary issues, the hearing decision will not be remanded to the hearing officer for further consideration of these matters.

### *Mitigation*

The grievant's request for administrative review also arguably challenges the hearing officer's decision not to mitigate the agency's disciplinary action. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."<sup>32</sup> 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

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<sup>27</sup> Hearing Recording, Track 1, at 5:49-9:44.

<sup>28</sup> See *Grievance Procedure Manual* § 8.2; *Rules for Conducting Grievance Hearings* §§ III(E), IV(F), V(B). It is also unclear whether the grievant submitted any timely requests to the hearing officer to order the production of documents.

<sup>29</sup> See Agency Exhibit 2 at 4.

<sup>30</sup> See Hearing Decision at 7, 9; see also Agency Exhibit 2 at 4 (grievant stating that she would "take responsibility for not verifying the store funds immediately at the take over . . .")

<sup>31</sup> In addition, the grievant does not appear to have asked the hearing officer, prior to the hearing, to order the production of the videotape. As a consequence, there would be no basis for the hearing officer to draw an adverse inference or impose other sanctions.

<sup>32</sup> Va. Code § 2.2-3005(C)(6).

management that are found to be consistent with law and policy.”<sup>33</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

(i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency’s discipline was consistent with law and policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>34</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management’s discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.<sup>35</sup> EDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>36</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.<sup>37</sup>

The grievant argues that the two Group II Written Notices should be mitigated because other employees were treated more favorably after they engaged in similar conduct. While inconsistent treatment between similarly situated employees can be a basis for mitigation, in this case, there is no evidence in the hearing record to show that other managerial employees similarly failed to verify funds in accordance with policy or engaged in personal cell phone use exceeding two hours, were known by the agency to have engaged in such conduct, and received lesser punishment.

Further, to the extent that the grievant argues that her length of service with otherwise satisfactory performance should have been considered as a mitigating factor, we find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer’s decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer’s

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<sup>33</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>34</sup> *Id.* § VI(B)(1).

<sup>35</sup> The Merit Systems Protection Board’s approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>36</sup> “‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion.” Black’s Law Dictionary 10 (6th ed. 1990). “It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts.” *Id.*


<sup>37</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

finding that an agency's disciplinary action exceeded the limits of reasonableness.<sup>38</sup> The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, neither the grievant's length of service nor her otherwise satisfactory work performance is so extraordinary as to justify mitigation of the Group II Written Notice for the grievant's failure to follow verification policies.

A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"<sup>39</sup> Even considering all of the arguments advanced by the grievant in her request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision.<sup>40</sup> 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>41</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>42</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>43</sup>



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<sup>38</sup> See, e.g., EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

<sup>39</sup> EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

<sup>40</sup> To the extent this ruling does not address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that any such issue is not material, in that it has no impact on the result in this case.

<sup>41</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>42</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>43</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).