

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10809; Ruling Date: September 30, 2016; Ruling No. 2017-4408; Agency: Department of Social 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 of Social Services  
Ruling Number 2017-4408  
September 30, 2016

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 in Case Number 10809. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 10809 are as follows:<sup>1</sup>

During the time relevant to this proceeding (the "Period"), the Department of Social Services employed the Grievant as an Exception Processing Unit Manager within the Division of Child Support Enforcement ("DCSE").

In approximately 2012-13, certain issues between the Grievant and her employer began to surface.

These issues escalated when the Grievant made allegations against DSS present and past employees of age discrimination, racial discrimination, harassment and retaliation.

Management of DSS brought in an independent investigator from a different state agency to investigate the allegations of the Grievant and also allegations of a former DSS employee, TG, that she was the subject of racial discrimination, harassment and retaliation at the hands of the Grievant.

The investigator in a report dated November 14, 2014, found no basis for the Grievant's allegations and found, to the contrary, that the Grievant was "an extremely unpleasant, toxic supervisor and coworker."

The investigator interviewed "ten current DSS employees all of whom worked with or were supervised by [the G]."

The report stated that "witness after witness described unending intimidating, aggressive, mean, belittling, abusive, child-like behavior to which

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<sup>1</sup> Decision of Hearing Officer, Case No. 10809 ("Hearing Decision"), July 28, 2016 at 3-4 (citations omitted).

[the Grievant] currently subjects her subordinates and others with whom she works and to which she subjected former subordinates.”

When the Grievant read the report on December 8, 2014, the report traumatically impacted the Grievant and the Grievant suffered to such an extent that the Grievant needed to take short-term disability leave from December 8, 2014 until June 8, 2015.

In May 2015, members of the State Disbursement Unit testified during a previous grievance hearing of the Grievant, that the Grievant subjected subordinates to disruptive, bullying and intimidating behaviors.

When the Grievant returned to work on June 8, 2015, the Grievant’s supervisor (the “Supervisor”) informed the Grievant that as a temporary measure he was suspending the Grievant’s personnel management duties and that SC who had provided this function while the Grievant was out, would continue this function until a final decision was made.

The Supervisor attempted to work with the Grievant to improve her communication and interpersonal skills and her management style but the Supervisor believes that these efforts bore little if any fruit.

The antagonism between the Grievant and her co-workers continued and continues.

In November 2015, the Supervisor determined that it is in the best interests of the effective operation of the EPU and DSS that the personnel management duties of the Grievant be permanently removed and the Grievant was so informed by her Supervisor.

The Supervisor assigned additional tasks and responsibilities to the Grievant to make up for the approximately 30% of management duties which were removed.

The Grievant’s job title changed to “Project Manager & Asst.” and her pay band, salary, and other benefits have not been affected by the change in her job duties.

The primary intent of the management action taken by the Supervisor was not disciplinary but for effective operational reasons and the Supervisor provided numerous factors taken into account to substantiate his operational decision.

On or about November 16, 2015, the grievant initiated a grievance to challenge the removal of her supervisory duties. In the July 28, 2016 hearing decision, the hearing officer determined that the agency’s actions were warranted and appropriate, based upon reasonable operational needs, and therefore consistent with law and policy.<sup>2</sup> The grievant now seeks administrative review from EDR.

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<sup>2</sup> *Id.* at 4, 6.

## 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>3</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>4</sup>

### *Inconsistency with State Policy*

The grievant’s request for administrative review asserts that the hearing officer’s decision is inconsistent with DHRM Policy 1.80, *Workplace Violence*, and DHRM Policy 2.30, *Workplace Harassment*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>5</sup> Accordingly, the grievant’s policy claims will not be further discussed in this ruling.

### *Investigator’s Notes*

The grievant argues that the notes from the independent investigator brought in by the agency should have been available to her. EDR’s review of the hearing record reveals that the hearing officer did not issue an order for these notes to be produced, and such an order apparently was not requested by the grievant. The hearing officer addressed this matter during the hearing, reading from the pre-hearing Scheduling Order which informed the parties how to request an order for the production of documents.<sup>6</sup> He advised the grievant that the investigator was under no duty to bring her notes to the hearing.<sup>7</sup>

The *Rules for Conducting Grievance Hearings* allow a hearing officer to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as ordered.<sup>8</sup> A party who wishes to utilize such a document at hearing has the ability to request that the hearing officer issue an order for its production, which apparently was not done here. In the absence of such an order, an adverse inference would not be appropriate. Thus, EDR cannot remand the case to the hearing officer on this basis.<sup>9</sup>

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

The grievant’s request for administrative review challenges the hearing officer’s findings of fact in several areas based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. For example, the grievant asserts that the hearing officer’s

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

<sup>4</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>5</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>6</sup> See Hearing Recording at Track 2, 3:39:43-3:44:19.

<sup>7</sup> See *id.* at Track 2, 3:44:58-3:46:01.

<sup>8</sup> *Rules for Conducting Grievance Hearings* § V(B).

<sup>9</sup> To the extent that the grievant argues she was unable to utilize office equipment and work time to obtain relevant information from her office and work computer, as outlined here, the grievant had the ability to request an order that the agency produce documents relevant to the grievance.

finding that she had “issues . . . [with] her employer”<sup>10</sup> was erroneous, that the independent investigator’s findings were inaccurate, that the agency witnesses were not credible, and that she fully performed all of the duties of her previous position.<sup>11</sup> Thus, she argues that the agency’s actions were not warranted or appropriate under the circumstances of her case.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>12</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>13</sup> Although EDR has reviewed each of the grievant’s challenges to the hearing officer’s findings of fact, none of the arguments presented by the grievant warrant remanding the case as there is either no indication of an abuse of discretion in the hearing officer’s factual findings or, even if some of the challenged findings are reassessed in the grievant’s favor, there would be no effect on the outcome of this matter. The grievant may have legitimately raised issues regarding her perspective of the relevant facts in this case. However, where, as here, 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 supervisor testified that once he learned the extent of the complaints made by agency staff regarding the grievant, he believed that the operational effectiveness of the agency would be negatively affected should the grievant remain in a supervisory position.<sup>14</sup> Further, the agency’s former Chief Financial Officer testified that he would not recommend returning the grievant to a supervisory role, and that he believed supervising people was a challenge to the grievant that had adverse consequences to the entire work unit.<sup>15</sup> While the grievant offered testimony to rebut these assertions, after considering the evidence as presented, the hearing officer determined that the agency’s witnesses were credible<sup>16</sup> and the agency’s action of “removing the Grievant’s managerial responsibilities . . . is affirmed as warranted and appropriate under the circumstances.”<sup>17</sup>

Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer’s finding that the removal of the grievant’s personnel management duties was “warranted and appropriate under the circumstances” of this case.<sup>18</sup> It is unclear, based upon the record in this particular case, why the hearing officer found the removal of the grievant’s supervisory duties to have been done for “operational” rather than disciplinary reasons. However, the hearing officer’s finding that the actions taken by

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<sup>10</sup> Hearing Decision at 3.

<sup>11</sup> The grievant also claims that the hearing officer improperly found that the agency’s action did not constitute informal discipline because her former supervisor admitted otherwise. The grievant’s former supervisor stated that he considered a counseling memo given to the grievant to be a formal disciplinary action. *See* Hearing Recording at Track 5, 32:52-33:25. EDR’s review of the record reveals no other testimony that he considered the removal of her supervisory duties to be a form of disciplinary action.

<sup>12</sup> Va. Code § 2.2-3005.1(C).

<sup>13</sup> *Grievance Procedure Manual* § 5.9.

<sup>14</sup> *See* Hearing Recording at Track 5, 25:09-25:50.

<sup>15</sup> *See id.* at Track 4, 12:29-13:00.

<sup>16</sup> Hearing Decision at 4.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

management were “warranted and appropriate” and, essentially, done with a reasonable basis can be supported by the facts in the record, satisfying the standard of review in this case even if the hearing officer had found the actions were disciplinary.<sup>19</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, we decline to disturb the decision on this basis.

The grievant has also raised several arguments regarding the investigation conducted by the independent investigator. Notwithstanding the challenges to the quality or accuracy of this report, as outlined above, the hearing officer found that the permanent removal of the grievant’s supervisory duties was based upon the observations of agency management following the issuance of the report.<sup>20</sup> Thus, even if the hearing officer erred in his findings as to the content of the report, eliminating reliance on those findings would have no effect on the outcome of the case, as the action of removing the grievant’s supervisory duties was not solely, or even, it appears, primarily based upon this report.

To the extent that the grievant argues that the hearing officer did not address every piece of evidence that she presented, we find no basis to disturb the decision for this reason. It is squarely within the hearing officer’s discretion to determine the weight to be given to the evidence presented, and there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing or every exhibit allowed into the record. Mere silence as to a particular witness’s testimony or other piece of evidence does not constitute a basis for remand in this case.

### 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>21</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>22</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>23</sup>



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<sup>19</sup> EDR Ruling Nos. 2016-4308, 2016-4309.

<sup>20</sup> Hearing Decision at 4.

<sup>21</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>22</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>23</sup> *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).