

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11125; Ruling  
Date: May 18, 2018; Ruling No. 2018-4700; Agency: Department of Corrections;  
Outcome: AHO's decision affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2018-4700  
May 18, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11125. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11125 are as follows:<sup>1</sup>

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities. Grievant had been employed by the Agency for approximately 20 years. She received an Exceeds Contributor rating on a recent performance evaluation. Grievant was a loyal employee who worked well for the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

Approximately 95% of the offenders leaving the Facility immediately entered probationary status.

The Probationer was incarcerated at the Facility where Grievant worked. Grievant knew the Probationer. He was released from the Facility, but remains on active probation until May 2, 2019. The Probationer lived within a 45 minute drive of Grievant’s location. The Probationer had a Facebook account.

Grievant had a Facebook account. Grievant’s 18 year old Daughter set up the Facebook account for Grievant. Grievant’s Facebook account was “public” meaning that people who were not Grievant’s “friends” could see the contents of Grievant’s Facebook account.

Grievant had approximately 599 “Friends” through her Facebook account. Grievant and her family own and operate a farm. They bought, sold, and traded

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<sup>1</sup> Decision of Hearing Officer, Case No. 11125 (“Hearing Decision”), March 16, 2018, at 2-3 (citations omitted).

items for their business as well as livestock using Grievant's Facebook account. Approximately 75 percent of those friends related to Grievant's business and were not close personal friends.

Grievant had internet access at her home. She had a computer in her home and could access Facebook from her computer. Grievant usually accessed her Facebook account using her cell phone rather than her computer.

Grievant gave her Daughter permission to access Grievant's Facebook account. The Daughter sometimes used Grievant's cell phone to access Grievant's Facebook account. She has accepted friend requests made to Grievant's account. Grievant's husband and adult son also were able to access Grievant's Facebook account.

Grievant's Daughter had her own Facebook account. She had approximately two thousand Facebook friends. She sometimes received friend requests as a group. She sometimes accepted them all at once or accepted them after reviewing each one. She accepted friend requests even if she did not know the person making the request. The Daughter had a personal relationship with only a small portion of her Facebook friends.

During the course of an investigation into another matter, the Agency learned on September 11, 2017 that Grievant had a Facebook account and was "friends" with the Probationer.

On August 9, 2017, the Probationer wrote on his Facebook account:

Passed my urine screen this morning so getting back to work Monday with [Company], a place I can honestly grow and probably work there for the next 20 years.

Approximately 42 people including Grievant responded to the Probationer's post by indicating that they "liked" his post. Three people responded by indicating that they "loved" his post.

During the Agency's investigation, Grievant admitted that she knew the Probationer had been an offender at the Facility but she was not aware that he was still on probation.

Rather than interfering with the Agency's investigation, Grievant continued to show the Probationer as a Facebook friend until she obtained permission from the Agency to remove him.

There is no reason to believe Grievant had any additional contact with the Probationer other than through her Facebook account.

On October 10, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.<sup>2</sup> The grievant timely grieved her termination from employment and a hearing was held on January 23, 2018.<sup>3</sup> On March 16, 2018, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.<sup>4</sup> The grievant has now requested administrative review of the hearing officer's decision.

### DISCUSSION

By statute, EEDR 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>5</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>6</sup>

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

The grievant's request for administrative review challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. She challenges whether a shared Facebook account linking to a probationer “through a ‘Friend’ status and a single ‘liking’ of [that person's] post” is sufficient evidence to show fraternization under the agency's policies. Essentially, she asserts that the agency did not bear its burden of proof to show that the disciplinary action at issue was warranted and appropriate under the circumstances.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>7</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>8</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>9</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>10</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

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<sup>2</sup> Hearing Decision at 1.

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

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

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

<sup>6</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>10</sup> *Grievance Procedure Manual* § 5.8.

based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. EEDR has thoroughly reviewed the testimony at hearing and the facts in the record, and finds that there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the October 10, 2017 Written Notice and that the behavior constituted misconduct.<sup>11</sup> It was not disputed that the grievant's Facebook page showed her as "friends" with the probationer, as well as "liking" a post he made.<sup>12</sup> However, the agency's investigator noted in his interview of the grievant that she was unable to say whether she or her daughter had taken these actions.<sup>13</sup> The agency's investigator testified that such associations with probationers are prohibited under agency policy because probationers are still under the agency's custody and control during their period of probation.<sup>14</sup> The hearing officer found that by

linking her Facebook account with the Probationer's Facebook account and by liking one of his posts, Grievant associated with the Probationer. Her communication was not related to the Agency's business or her duties at the Facility. It was a non-professional communication. The Agency has established that Grievant fraternized with the Probationer thereby justifying the issuance of a Group III Written Notice.<sup>15</sup>

Further, the hearing officer stated that while the grievant argued that it was equally likely that her daughter may have accepted the probationer's friend request and liked his post, she was unable to provide proof that her daughter had in fact done so.<sup>16</sup> Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EEDR 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.

### *Inconsistency with State Policy*

In her request for administrative review, the grievant argues that the hearing officer's decision is inconsistent with the agency's policy prohibiting "fraternization." Essentially, this claim involves a mixed question of fact and policy in that the grievant is claiming that the hearing officer's conclusion that she violated agency policy is not supported by evidence in the record. Specifically, the grievant asserts that the term "fraternization" as set forth in agency

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<sup>11</sup> Hearing Decision at 6.

<sup>12</sup> See Hearing Decision at 2-3, 5; Agency Exhibit 5.

<sup>13</sup> Agency Exhibit 5.

<sup>14</sup> Hearing Record at 17:10 – 18:16.

<sup>15</sup> Hearing Decision at 5.

<sup>16</sup> *Id.* The hearing officer correctly noted that the grievant carries the burden to prove an affirmative defense to the disciplinary action. See *Rules for Conducting Grievance Hearings* § VI(B)(1).

policy does not include “an employee’s unintentionally and unknowingly allowing her family-shared, on-line, Face Book account to link. . . to a prohibited person’s account or to “Like” a prohibited person’s post.”

The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>17</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.<sup>18</sup> However, as discussed more fully above, the grievant’s arguments more properly challenge the hearing officer’s factual findings, which EEDR will not disturb. The hearing officer has appropriately applied his factual findings to the relevant policy language to determine that the agency’s fraternization policy was violated. Accordingly, there is no basis to conclude that the hearing decision is inconsistent with policy.

### 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>19</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>20</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>21</sup>



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<sup>17</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>18</sup> See *Grievance Procedure* § 7.2(a).

<sup>19</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>20</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>21</sup> *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).