

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11174; Ruling  
Date: June 13, 2018; Ruling No. 2018-4735; Agency: Department of Taxation;  
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 Taxation  
Ruling Number 2018-4735  
June 13, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 11174. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11174, as found by the hearing officer, are as follows:<sup>1</sup>

The Virginia Department of Taxation employed Grievant as an Error Resolver. The purpose of her position was, “to analyze and resolve individual tax returns and payments.” She had been employed by the Agency for approximately ten years. The Agency removed Grievant based on a Below Contributor rating on her three-month re-evaluation.

The Agency processed approximately 500,000 error tax returns every year. If the Agency was slow in this processing, it may have to pay interest to taxpayers. As a result, the Agency values timely processing of tax returns containing errors.

Grievant had Core Responsibilities of: Depth of Knowledge, Technical Ability, and Communication.

On October 18, 2017, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

On November 1, 2017, Grievant received a Group I Written Notice for unsatisfactory performance.

On November 2, 2017, Grievant received a Three-Month Performance Improvement Plan addressing the Core Responsibilities of Technical and Communication:

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<sup>1</sup> Decision of Hearing Officer, Case No. 11174 (“Hearing Decision”), May 17, 2018, at 2-5 (citations omitted).

As a result of your overall rating of “Below Contributor” for your 2016/2017 Annual Evaluation, this Notice of Improvement Needed is being issued along with the 90 – day Improvement Plan. The contributing factors that led to this rating [are] as follows:

You have not met the production standards for the following items:

ITEM	STANDARD	YOUR AVG.
Current Year Returns	11.3 returns per hour	6.2 returns per hour
Prior Year	5 returns per hour	4.2 returns per hour
Payments	18 per hour	15.7 per hour
PSD-1	24 per hour	15.3 per hour

You have had several one-on-one trainings and were assigned two (2) less complicated error messages to assess the cause of your low production. You also have a NOIN review period from August 11 – September 22, 2017 in which a specialist sat with you for the first week and monitored you. I conducted weekly meetings with you throughout this review period to update you on your progress and offer suggestions for improvement. However, you continued to fall below production standards (as outlined above). Notification of your production averages were done weekly through emails and then reiterated in our weekly meetings.

You failed to follow procedures such as submitting time worked emails, and working returns that you have not been sufficiently trained on. This can lead to a substantial decrease in production when these procedures are not followed.

When you are notified of actions that must be taken to correct a return that has been posted incorrectly or needs adjusting, you think it is the responsibility of the Team Lead to make the corrections. You do not view this as a learning opportunity which will assist you in meeting the standards.

When you are advised to correct an account, you respond with an email of “Done”. However, when the account is reviewed to verify the corrective action, it is found that no action or the incorrect action has been taken.

Improvement Plan (What is expected, how it should be accomplished, and in what time frame):

A 90 – day Improvement Plan will be implemented from November 2, 2017 – January 30, 2018 to aid with your development in an attempt to assist you with performing at a satisfactory level. The plan and timeline is as follows:

November 2 – January 30, 2018 the following actions below will be implemented:

Specific error messages will be provided to assist in understanding the correct action to take to post payments and returns, to know how and when to perform correct posting and correct remittance, and to identify if the applied action resulted in a properly balanced tax account.

Payments from the PSD-1 spreadsheet will also be provided to strengthen your knowledge of locating work listed payments in AR by the DLN and payments from the Official Payment Credit Corporation spreadsheet.

Your posted returns will be reviewed weekly for accuracy. Any incorrect accounts will be discussed with you one-on-one at the end of each week as a learning opportunity and returned for correction.

You will be required to keep a daily tally of accounts worked in order to address any issues that may have caused you to not meet the standards from the previous day.

You will be required to provide timely leave requests. As advised before, continuous same-day leave requests can negatively impact your performance. In the instance where a same-day request for leave is needed, you are expected to provide justification for such request and obtain the approval before you depart.

You also need to be mindful that excessive time away from your desk has an impact on your overall work performance.

Failure to show significant improvement over the next 90 days could result in further action under DHRM's Policy 1.40, Performance Planning and Evaluation.

During the re-evaluation period, the Supervisor met weekly with Grievant to discuss Grievant's work process and to ask Grievant if she was experiencing any problems or had any questions. The Supervisor sent follow-up emails regarding Grievant's work performance. For example, on November 27, 2017, the Supervisor sent Grievant an email stating:

Although your email below states you could not locate your spreadsheet as of 11/22/17 @ 11:26 a.m., I reviewed the spreadsheet you just returned to me and was able to find that many of your corrections were made on this same date of 11/22/17 and prior to the submission of your email below. In reviewing your spreadsheet there are four (4) more corrections needed and there

are 3 inquiries in regards to your Overpaid TAP accounts. Please correct and send back to me by noon today – November 27, 2017.

On December 7, 2017, Grievant received a Group II Written Notice for failure to follow policy and/or instructions.

On January 26, 2018, Grievant received a Three-Month Re-Evaluation. For the Core Responsibility of Knowledge, Grievant received a Below Contributor rating. Grievant received this rating because: (1) she did not apply completely her knowledge of Virginia tax laws, rules, and regulations to resolve tax returns, (2) she did not demonstrate a working knowledge of the most common individual tax form, (3) she did not utilize available databases when reviewing accounts, (4) she did not display a working knowledge of the IRMS applications, (5) she did not apply her knowledge of accounting principles to ensure accounts were properly balanced, and (6) she did not demonstrate a good understanding of error messages and what procedures to use to resolve the error messages.

For the Core Responsibility of Technical, Grievant received a rating of Below Contributor. Grievant received the rating because: (1) when corrections were presented to Grievant to make adjustments, Grievant sometimes stated the account had been corrected when it had not been corrected, (2) Grievant did not recognize if applied action had resulted in a properly balanced tax account period, (3) Grievant did not ensure tax account periods (TAP) were being reviewed after a return was posted, (4) Grievant did not follow proper procedures utilizing the S application when reviewing expedited requests, and (5) Grievant fell below production standards with Current Year at 6.3 instead of 11.3, Prior Year at 4 instead of 5, Payments at 15.7 instead of 18 and PSD-1 at 16.4 instead of 24.

For the Core Responsibility of Communication, Grievant received a rating of Below Contributor. Grievant received this rating because: (1) when corrections were presented to Grievant she indicated it was the responsibility of the Team Lead to correct the error, (2) Grievant often ignored meeting requests, and (3) Grievant failed to notate accounts or had unclear notes.

Grievant received an overall rating of Below Contributor on her Three-Month Re-Evaluation.

Agency managers considered whether to demote Grievant to a different position, remove some of Grievant's job duties, and transfer Grievant to another position. Agency manager concluded that these options were not appropriate because Grievant's position was at the lowest level for her type of position and no other positions that would accommodate Grievant's skills were available within the Agency.

On February 1, 2018, following the three-month re-evaluation period, the agency removed the grievant from employment due to unsatisfactory work performance.<sup>2</sup> The grievant filed a grievance to challenge her removal and a hearing was held on April 27, 2018.<sup>3</sup> In a decision dated May 17, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant's work performance was unsatisfactory and upheld the agency's decision to remove her from employment.<sup>4</sup> The grievant now appeals the hearing decision to EEDR.

### 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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>6</sup>

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

In her request for administrative review, the grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. More specifically, the grievant's appeal includes allegations in which she appears to contend that: (1) the agency manipulated its reports of the grievant's work product “continuously to reduce [her] production,” and that she prepared a spreadsheet on or about July 31, 2015 that more accurately reflects her work performance; (2) the agency assigned work to her that could have been completed by others and/or work that “ha[d] no production” in an effort to rate her work performance as unsatisfactory; (3) her work performance was considered satisfactory in the past; and (4) she should have been transferred to a position with the agency that was “not in a production driven environment” instead of being terminated.

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 the grounds in the record for those findings.”<sup>8</sup> 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.<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

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<sup>2</sup> *Id.* at 1.

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

<sup>4</sup> *Id.* at 1, 5-7.

<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).

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 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.

In the hearing decision, the hearing officer assessed the evidence in the record and concluded that "the Agency's evaluation of Grievant's work performance was supported by the facts considered by the Supervisor" and was "neither arbitrary nor capricious."<sup>11</sup> The hearing officer considered the grievant's assertion that "her performance numbers were manipulated" based on "discrepancies between her actual work performance as of July 31, 2015 and the Agency's accounting of her performance," and found that the agency had investigated this issue and determined that the "Grievant's performance numbers came from an automated system used for other employees and that [her] performance numbers were not manipulated or incorrect."<sup>12</sup> The hearing officer further determined that the agency "considered alternatives to Grievant's removal," but "[n]one of those alternatives were feasible."<sup>13</sup>

EEDR has thoroughly reviewed the hearing record and finds no basis to conclude that the hearing decision is not supported by the evidence in the record. The hearing officer noted in the decision that, in cases involving an agency's evaluation of a grievant's work performance, "[t]he question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance."<sup>14</sup> In this case, the agency presented evidence to show that the three-month re-evaluation of the grievant was conducted in a manner consistent with policy and that the performance issues cited in the grievant's re-evaluation, which resulted in her removal, were reasonable and supported by the facts.<sup>15</sup> For example, an agency manager testified that the grievant's work production numbers were not manipulated on her evaluation, that the production data is generated by a computer system, and that the grievant's production numbers came from the same source that is used to evaluate other employees.<sup>16</sup> Furthermore, EEDR has not identified any evidence in the record to suggest that the agency assigned particular tasks to the grievant in an effort to artificially make her work performance unsatisfactory during the re-evaluation period. To the contrary, the Supervisor testified that the grievant's performance criteria were based on the same standards as those used for other newly-classified error resolvers.<sup>17</sup>

In addition, it does not appear that the hearing officer's assessment of the evidence regarding the grievant's prior work performance or the agency's consideration of alternatives to removal was in any way deficient or improper. The Supervisor testified that she could not speak to the grievant's past work performance or the manner in which the grievant was evaluated when

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

<sup>11</sup> Hearing Decision at 7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *E.g.*, Agency Exhibits G, I, J; Hearing Recording at 20:43-22:59, 26:52-27:10 (testimony of Supervisor).

<sup>16</sup> Hearing Recording at 1:24:17-1:25:14 (testimony of Witness T); *see* Hearing Recording at 1:51:19-1:52:12 (testimony of Witness E).


<sup>17</sup> *Id.* at 58:55-59:42 (testimony of Supervisor).

she was supervised by another employee.<sup>18</sup> Although the grievant presented prior satisfactory performance evaluations at the hearing in support of her position,<sup>19</sup> evidence that the grievant's work performance was satisfactory in the past would not, by itself, support a conclusion that the agency's assessment of her performance during the time period at issue in this case was arbitrary or capricious. With regard to the agency's consideration of alternatives to removal, agency witnesses testified that there were no lower positions into which she could have been demoted,<sup>20</sup> and EEDR has reviewed no record evidence to show that any such position(s) may have been available.

In summary, while the grievant clearly disagrees with the agency's assessment of her performance as it was presented at the hearing, such disagreement does not, in itself, render that assessment invalid. Other individuals, had they been in the hearing officer's position, may not have reached the same conclusion as the hearing officer in this case. The question to be answered, however, is not whether another person would have made the same decision as the hearing officer in any particular case, but whether that decision is based on the evidence in the record. It is within the hearing officer's authority to weigh the evidence presented by the parties and make findings of fact. EEDR 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 factual findings made by the hearing officer, as is the case here.<sup>21</sup> As discussed above, there is nothing in the hearing record or the hearing decision to indicate that the hearing officer abused his discretion in assessing the relative persuasive weight of the evidence presented by the parties. Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EEDR cannot substitute its judgment for that of the hearing office and declines to disturb the hearing decision.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR 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.<sup>22</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>23</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>24</sup>



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<sup>18</sup> Hearing Recording at 1:03:07-1:03:24 (testimony of Supervisor).

<sup>19</sup> Grievant's Exhibit 4 at 4-10.

<sup>20</sup> *E.g., id.* at 35:35-36:16 (testimony of Supervisor), 1:20:36-1:21:12 (testimony of Manager).

<sup>21</sup> *See, e.g.,* EDR Ruling No. 2014-3884.

<sup>22</sup> *Grievance Procedure Manual* § 7.2(d).

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

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