Issue: Administrative Review of Hearing Officer's Decision in Case No. 2018-4738; Ruling Date: June 28, 2018; Ruling No. 2018-4738; 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 Virginia Department of Corrections
Ruling Number 2018-4738
June 28, 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 11192. 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 11192 are as follows:[1]

> The Department of Corrections employed Grievant as a Re-Entry Counselor at one of its facilities. No evidence of prior active disciplinary action.
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> The Agency uses VACORIS as its database to record information regarding inmates including their locations and status. Grievant had a unique login and identification enabling her to access VACORIS. She was only authorized to access VACORIS to accomplish work-related tasks.
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> Grievant worked at Facility 1. Ms. D worked as a Counselor at Facility 2. The Inmate was held at Facility 2. He was never an inmate at Facility 1. Ms. D fraternized with the Inmate and was removed from employment. The Inmate was transferred from Facility 2 to Facility 3.
>
> Grievant and Ms. D were friends.
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> On October 15, 2017 at 9:16 p.m., Counselor D sent Grievant a text message:
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> [Inmate's number] take this with u [this] morning and tell me if he is still in [general population] at [Facility 3].
>
> Grievant replied:

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[1] Decision of Hearing Officer, Case No. 11192 ("Hearing Decision"), May 18, 2018, at 2-3 (citations omitted).

> Got it
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> On October 16, 2017 at 7:08 a.m., Ms. D sent Grievant a text:
>
> Good morning don't forget
>
> On October 16, 2017 at 5:18 p.m., Grievant logged into the VACORIS to access[] information relating to the Inmate. She reviewed an electronic page in VACORIS entitled "Housing Assignment" for the Inmate. Grievant was able to determine the Inmate's location and status at Facility 3.
>
> Grievant spoke with Ms. D by telephone. During that telephone conversation, it is likely that Grievant informed Ms. D of the information she learned about the Inmate by accessing VACORIS.[2]

On March 13, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for computer/internet misuse and fraternization.[3] The grievant timely grieved her termination from employment and a hearing was held on May 8, 2018.[4] On May 18, 2018, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.[5] 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 . . . ."[6] 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.[7]

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 he 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"[8] and to determine the grievance

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[2] Grievant argued that the Agency did not establish the contents of her conversation with Ms. D and, thus, could not conclude that Grievant and Ms. D discussed the Inmate. Grievant did not testify during the hearing and did not present any evidence to show that the Agency's conclusion was in error. It is reasonable to conclude that Grievant informed Ms. D of Grievant's findings about the Inmate.

[3] Hearing Decision at 1.

[4] *Id.*

[5] *Id.* at 1, 4.

[6] Va. Code §§ 2.2-1202.1(2), (3), (5).

[7] *See Grievance Procedure Manual* § 6.4(3).

[8] Va. Code § 2.2-3005.1(C).

based "on the material issues and grounds in the record for those findings."[9] 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.[10] 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.[11] 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 this instance, the grievant argues that the agency did not prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In support of this assertion, she argues that the agency's evidence was circumstantial and denies that she had knowledge of, or involvement with, Ms. D's relationship with an offender. She disputes the hearing officer's finding that she provided Ms. D with any information regarding this offender and alleges that the disciplinary action was taken in retaliation for a grievance she had previously initiated.

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 findings that the grievant engaged in the behavior described in the March 13, 2018 Written Notice and that the behavior constituted misconduct.[12] Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Here, the agency investigator testified that a series of text messages were found on the phone of former agency employee Ms. D, requesting the grievant to check on the location of an offender, and the grievant replied, "Got it."[13] Further, the agency provided evidence from its database showing that on October 16, 2017, the grievant utilized the agency's database to conduct an inquiry in an attempt to ascertain the offender's location.[14] The hearing officer considered this evidence, and in the absence of testimony from the grievant,[15] he concluded that the grievant "determined the location and status of the Inmate by accessing the Agency's data . . . . She was not authorized to obtain this information . . . [and] accessed the information at the request of a former employee who fraternized with the Inmate. Grievant's actions were contrary to policy . . . [and] served as a breach of security by providing information that would otherwise be confidential to a former employee who was acting in

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[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 3-4.
[13] Hearing Record 21:33 – 25:37, *see also* Agency Exhibit 7 at 95.
[14] Agency Exhibit 2 at 27, Agency Exhibit 7 at 83, 99.
[15] Hearing Decision at 4.

furtherance of her improper relationship with an offender."[16] Further, the hearing officer addressed the grievant's argument that the agency retaliated against her but found that "[n]o credible evidence was presented to support this assertion."[17] 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, EEDR declines to disturb the decision on this basis.

Admission of Exhibits

The grievant's request for administrative review also asserts that the hearing officer erred by allowing two of the agency's exhibits into evidence, which she argues were not exchanged in accordance with the hearing officer's order. Upon her objection at the hearing to these exhibits, the hearing officer heard argument from each side regarding the submission of the documents at issue.[18] The hearing officer ultimately determined that he would admit the exhibits into evidence because they were provided to the grievant prior to the deadline for the parties to exchange copies of their exhibits, though they were received separately from the rest of the agency's exhibits.[19]

Receiving probative evidence is squarely within the purview of the hearing officer.[20] Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.[21] To this end, the hearing officer has the authority to require the parties to exchange a list of witnesses and documents.[22] An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.[23] In this instance, a review of the record indicates that there was no dispute that the grievant did receive the proposed exhibits prior to the deadline established by the hearing officer.[24] Thus, we cannot conclude that the hearing officer exceeded his authority in admitting the exhibits into evidence.

Alleged Bias of Hearing Officer

The grievant further alleges, in effect, that the hearing officer demonstrated bias against the grievant during a pre-hearing conference call. She alleges that the advocate for the agency "was allowed to make rude comments and [he and the hearing officer] carried on the conversation without [her] input." The grievant also cites the hearing officer's admission of exhibits, which has already been addressed above.

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[16] *Id.* at 3.
[17] *Id.* at 4.
[18] *See* Hearing Recording at 1:55 - 3:23.
[19] *Id*.
[20] Va. Code § 2.2-3005(C).
[21] *Grievance Procedure Manual* § 5.7; *see also* Va. Code § 2.2-3005.
[22] *Grievance Procedure Manual* § 5.7(2).
[23] *See*, *e.g.*, EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.
[24] *See* Hearing Recording at 3:01-3:23.

The *Rules for Conducting Grievance Hearings* ("*Rules*") state that hearings must be conducted in an "orderly, fair, and equitable fashion."[25] Further, the *Grievance Procedure Manual* states that "Parties and party advocates shall treat all participants in the grievance process in a civil and courteous manner and with respect at all times and in all communications."[26] Allowing a party's representative to be disruptive could create an appearance of unfairness and partiality on the part of the hearing officer. Here, EEDR has thoroughly reviewed the record and finds no evidence that the hearing officer or the agency's representative acted improperly. While hearing officers are cautioned to prevent parties and representatives from engaging in conduct that may violate the Code of Civility as set forth by the *Grievance Procedure Manual*, EEDR cannot, in this case, disturb the hearing officer's decision based on the grievant's allegation.

The *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.[27]

The applicable standard regarding EEDR's requirements of a voluntary disqualification is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.[28] 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.'"[29] EEDR 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.[30]

The moving party has the burden of proving the hearing officer's bias or prejudice.[31] In this case, the evidence presented by the grievant is insufficient to establish bias or any other basis for disqualification. Further, EEDR's review of the hearing record did not indicate any bias or prejudice on the part of the hearing officer. Accordingly, EEDR will not disturb the hearing decision on this basis.

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[25] *Rules* § IV(C).
[26] *Grievance Procedure Manual* § 1.9.
[27] *Id.* § 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."
[28] 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.
[29] 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.").
[30] *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.
[31] *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

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.[32] 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.[33] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[34]

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[32] *Grievance Procedure Manual* § 7.2(d).
[33] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[34] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).