

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11185; Ruling  
Date: June 19, 2018; Ruling No. 2018-4740; Agency: James Madison University;  
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 James Madison University  
Ruling Number 2018-4740  
June 19, 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 11185. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11185, as found by the hearing officer, are as follows:<sup>1</sup>

James Madison University employed Grievant as a Utilities Lead Worker. He had been employed by the University for approximately five and a half years. No evidence of prior active disciplinary action as introduced during the hearing.

Grievant worked in several University buildings including A1, A2, A3, Building M, Building R, and Building W. In Building A2 there were mechanical rooms including ones on the first and second floors. These mechanical rooms contained pipes, boilers, and other items. Supplies such as light bulbs and ceiling tiles and other items were also in the mechanical rooms.

The University had security cameras aimed down the hallways containing the mechanical rooms. The security cameras were motion activated.

During his shift, Grievant was supposed to complete tasks to fulfill work orders. If he completed all of his work orders or was not assigned any work orders, Grievant was supposed to perform building inspections.

Grievant worked the third shift which began at 8:30 p.m. on one day and ended at 7 a.m. on the following day. At the end of Grievant’s shift he was supposed to report the hours he worked and the location of his work throughout his shift.

On February 5, 2018, Grievant entered the mechanical room at 10:45 p.m. He remained there until 4:30 p.m. He did not perform any significant work duties while in the mechanical room. On February 9, 2018, Grievant entered the

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<sup>1</sup> Decision of Hearing Officer, Case No. 11185 (“Hearing Decision”), May 23, 2018, at 2-3 (citations omitted).

mechanical room at 12:30 a.m. He remained there until 6 a.m. He did not perform any significant work duties while in the mechanical room. On February 14, 2018, Grievant entered the mechanical room at 3:05 a.m. He remained there until 6:03 a.m. He did not perform any significant work duties while in the mechanical room. On February 16, 2018, Grievant entered the mechanical room at 1:15 a.m. He remained there until 4:35 a.m. He did not perform any significant work duties while in the mechanical room.

It would be unusual for an employee to remain in the mechanical room for more than 45 minutes. This might occur if an employee was restocking the mechanical room. Grievant was not assigned responsibility to restock any mechanical rooms on the days at issue in this grievance.

At the end of his shift, Grievant recorded how he spent his time and where he worked by entering information into a Time Card system. Grievant entered into the system that on: (1) February 8, 2018, he spent three hours in Building A2 performing general repair/building inspections, three hours in Building A1 performing general repair/building inspections, and three hours in Building M performing general repair/building inspections; (2) February 13, 2018, he spent two hours in Building A2 performing general repair/building inspections, three hours in Building A3 performing general repair/building inspections, one hour in Building W repairing a corridor trouble alarm, and one hour in Building R repairing a left main door that would not lock; and (3) February 15, 2018, he spent two hours in Building A2 performing general repair/building inspections, three hours in Building A1 performing general repair/building inspections, and three hours in Building M performing general repair/building inspections.

On February 9, 2018, Grievant changed the direction of a security camera.

On February 21, 2018, the grievant was issued three Written Notices: (1) a Group I Written Notice for abuse/misuse of state property; (2) a Group III Written Notice for abuse of state time and sleeping during work hours; and (3) a Group III Written Notice with removal for falsifying records.<sup>2</sup> The grievant timely grieved the disciplinary actions and a hearing was held on May 3, 2018.<sup>3</sup> In a decision dated May 23, 2018, the hearing officer concluded that the University had not presented sufficient evidence to show that the grievant had abused or misused state property because it “did not establish that Grievant should have known he was not supposed to change the direction of a security camera,” and rescinded the Group I Written Notice.<sup>4</sup> The hearing officer also found that the evidence was insufficient to demonstrate that the grievant was sleeping during hours, but that he had abused state time “because he did not perform his work duties while he was in the mechanical room”; however, the hearing officer noted that “abuse of state time is a Group I offense” under DHRM Policy 1.60, *Standards of Conduct*, and reduced the first Group III Written Notice to a Group I Written Notice for that reason.<sup>5</sup> Finally, the hearing officer determined that the University had presented sufficient evidence to show that the

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

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

<sup>4</sup> *Id.* at 4-5.

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

grievant falsified records and upheld the issuance of the second Group III Written Notice and the grievant's termination.<sup>6</sup> The grievant now appeals the hearing decision to EEDR.<sup>7</sup>

### 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>8</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>9</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>10</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

#### *University's Production of Documents*

In his request for administrative review, the grievant contends that the University did not comply with an order from the hearing officer to produce time records for other employees. The grievant acknowledges that he received the documents from the University, but asserts that the University should have provided the hearing officer with copies of the requested time records, as well. This argument is unpersuasive. The *Grievance Procedure Manual* provides that “[t]estimony and exhibits may be admitted into evidence and made part of the record” at a grievance hearing.<sup>11</sup> The parties are responsible for presenting any such exhibits for the hearing officer's consideration.<sup>12</sup> At the hearing, the University's advocate represented that the University had produced the requested time records to the grievant, as ordered by the hearing officer.<sup>13</sup> The hearing officer directed both parties to provide him, and each other, with their proposed exhibits and witness lists in advance of the hearing. The University did not include the time records as one of its proposed exhibits and was not otherwise obligated to provide the hearing officer with a copy of those documents. Although the grievant also did not include the time records in his proposed exhibits, the hearing officer nevertheless admitted the documents into the hearing record upon the grievant's request.<sup>14</sup> For these reasons, EEDR finds no error with regard to this issue and will not disturb the hearing decision on this basis.

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

<sup>7</sup> As neither party has challenged the hearing officer's decision to rescind the Group I Written Notice and reduce the first Group III Written Notice to a Group I Written Notice, they will not be discussed further in this ruling.

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

<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> *Grievance Procedure Manual* § 5.8.

<sup>12</sup> See *id.*; *Rules for Conducting Grievance Hearings* §§ IV(C), IV(D).

<sup>13</sup> See Hearing Recording at 3:01:02-3:02:29. While there is no written order for the production of documents, the hearing officer appears to have addressed the grievant's request for the documents during an oral pre-hearing conference call. As noted above, however, the grievant does not dispute that he received the documents from the University, and they were ultimately admitted into the hearing record.

<sup>14</sup> Hearing Recording at 3:03:13-3:03:46.

*Hearing Officer's Consideration of the Evidence*

In addition, the grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to evidence presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>15</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>16</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>17</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>18</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 and determined that, "[w]hen Grievant was in the mechanical room, he was not working," and that the grievant "falsely recorded the time he worked and his locations" on February 9, 14, and 16, 2018.<sup>19</sup> In particular, the hearing officer found that the evidence showed as follows:

On February 9, 2018, Grievant was in the mechanical room for five and a half hours. He filled out his time record showing he worked in A2 for three hours, A1 for three hours and Building M for three hours. On February 14, 2018, Grievant was in the mechanical room for three hours. He filled out his time record showing he worked two hours in A2, three hours in A3, one hour in Building W, one hour in Building R and one hour in Building M. On February 16, 201[8], Grievant was in the mechanical room for three hours and twenty minutes.<sup>20</sup>

The hearing officer further concluded that, "[a]t the time Grievant completed his time record, he knew the information he was entering was not true," and that this evidence justified the issuance of a Group III Written Notice for falsifying records.<sup>21</sup> In addition, the hearing officer considered the grievant's argument that "he was told by supervisors to write down a certain amount of time regardless of how much time he actually worked" and stated that "[i]nsufficient evidence was presented to support this assertion."<sup>22</sup>

In support of his position that the hearing officer erred in upholding the issuance of the Group III Written Notice for falsifying records, the grievant contends that he and other

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<sup>15</sup> Va. Code § 2.2-3005.1(C).

<sup>16</sup> *Grievance Procedure Manual* § 5.9.

<sup>17</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>18</sup> *Grievance Procedure Manual* § 5.8.

<sup>19</sup> Hearing Decision at 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

University employees were “allowed to use mechanical rooms to be ready for any calls,” yet no other employees were disciplined for this behavior; that “three of the agency witnesses lied in their testimony”; that “[t]he video cameras where [sic] physically turned to monitor only [him]”; that the University altered the recordings of him entering and exiting the mechanical room; and that that the discipline was issued as a form of discrimination and/or retaliation against him.

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer’s determination that the grievant falsified his time records by engaging in the above-described misconduct. At the hearing, the University presented evidence showing that the grievant was in the mechanical room for five and a half hours on February 9, 2018; for three hours on February 14, 2018; and for three hours and twenty minutes on February 16, 2018.<sup>23</sup> The University also presented the grievant’s time records for the shifts covered by those dates, which show that he reported working in Buildings A1, A2, and M for nine hours on February 9; in Buildings A2, A3, W, R, and M for eight hours on February 14; and in Buildings A1, A2, and M for eight hours on February 16.<sup>24</sup> University witnesses testified that the employees should inspect and perform maintenance for their assigned buildings when there are no other specific tasks to complete<sup>25</sup> and that there was no work-related reason for an employee to remain in the mechanical room for an extended period of time.<sup>26</sup> The grievant’s supervisor testified that he did not tell the grievant it was acceptable to wait in the mechanical room when the grievant did not have other specific assignments, that he did not instruct the grievant to record time that was not actually worked, and that all employees are expected to record their time accurately.<sup>27</sup>

The basis for the grievant’s assertion regarding allegedly untruthful testimony by University witnesses is unclear, as he does not appear to identify either the witnesses in question or the testimony that he believes to be false. To the extent the grievant’s contention amounts to a claim that he did not intentionally falsify his time records because he was following instructions from University management, EEDR finds that there is evidence to support the hearing officer’s conclusions on this issue. While the grievant testified that he was instructed to record between seven and nine hours of work per shift and that other employees also wait in the mechanical room when they do not have specific duties to perform,<sup>28</sup> there is also evidence in the record that employees were not permitted to wait in the mechanical room when they had no other specific tasks to perform, and that they were not instructed to record time other than the hours they actually worked.<sup>29</sup> Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. As a result, EEDR finds no basis to disturb the hearing officer’s conclusion that the

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<sup>23</sup> Agency Exhibit 6. The hearing officer noted that, for employees on the grievant’s shift, “[t]he date of February 8, 2018 covers Grievant’s shift which began on February 8, 2018 and ended on February 9, 2018.” Hearing Decision at 3 n.1. Similarly, the other dates referenced in the hearing decision and in this ruling refer to the date of a particular shift as beginning in the evening at the start of the grievant’s shift and ending on the following morning.

<sup>24</sup> Agency Exhibit 5 at 3-6; Agency Exhibit 1; Agency Exhibit 3; *see* Hearing Recording at 2:03:49-2:06:41 (testimony of Witness S).

<sup>25</sup> Hearing Recording at 3:11-3:53 (testimony of Witness R), 13:17-13:55 (testimony of Witness L),

<sup>26</sup> *E.g., id.* at 14:24-14:56 (testimony of Witness L), 1:57:42-1:59:03 (testimony of Witness S).

<sup>27</sup> *Id.* at 15:59-16:22, 18:42-19:07 (testimony of Witness L).

<sup>28</sup> *Id.* at 2:27:14-2:27:35, 2:31:54-2:33:12 (testimony of grievant).

<sup>29</sup> *E.g., id.* at 7:51-8:21 (testimony of Witness R), 29:01-29:56 (testimony of Witness J), 47:58-48:42 (testimony of Witness G).

evidence in the record was sufficient to demonstrate that the grievant engaged in misconduct that justified the issuance of a Group III Written Notice in this case.

In addition, a University witness testified about the camera that recorded the grievant entering and exiting the mechanical room. The witness explained that the camera was activated by motion<sup>30</sup> and that it was repositioned to face the mechanical room due to another work-related issue, not to observe the grievant.<sup>31</sup> The witness also testified that the video recording presented at the hearing had been edited to include only those time periods between when the grievant entered and exited the mechanical room.<sup>32</sup> In other words, there is evidence to show that the video recordings of the grievant were an accurate representation of the grievant's activities, and that the grievant falsified his time records by reporting that he was performing other work duties when he was actually in the mechanical room, as demonstrated by the recordings. Furthermore, it appears the University elected to present only recordings of the grievant because his was the only conduct at issue in this case and the remaining footage was not relevant. Weighing the evidence and rendering factual findings on issues of this nature is squarely within the hearing officer's authority, and 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 version of facts adopted by the hearing officer, as is the case here.<sup>33</sup>

Finally, with regard to the grievant's allegation of discrimination and/or retaliation, EEDR has not identified any evidence in the record to suggest that the grievant identified either a protected status or protected activity to support such a claim. Indeed, the grievant does not appear to have argued that discrimination and/or retaliation were the basis for the discipline prior to submitting his request for administrative review. In the absence of any record evidence to support such a claim, EEDR finds no error in the hearing decision in relation to this issue.

In summary, and although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. 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. Because the hearing officer's findings in this case 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 hearing decision on the bases raised by the grievant in his request for administrative review.

### 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

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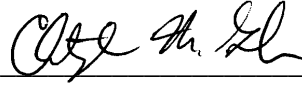
<sup>30</sup> *Id.* at 59:43-1:00:05 (testimony of Witness C).

<sup>31</sup> *Id.* at 1:01:03-1:02:33 (testimony of Witness C).

<sup>32</sup> *Id.* at 1:03:41-1:04:20 (testimony of Witness C).

<sup>33</sup> *See, e.g.*, EDR Ruling No. 2014-3884.

final hearing decision once all timely requests for administrative review have been decided.<sup>34</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>35</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>36</sup>



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Director  
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<sup>34</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>35</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>36</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).