

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11182; Ruling  
Date: July 16, 2018; Ruling No. 2018-4742; Agency: Department of Corrections:  
Outcome: Remanded to AHO.



**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 2018-4742  
July 16, 2018

The Department of Corrections (the “agency”) 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 11182. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11182, as found by the hearing officer, are as follows:<sup>1</sup>

The agency, at all relevant times, employed the grievant as a Corrections Officer holding the rank of Lieutenant. One of his job duties was to input the hours worked by offenders into a database. This responsibility was to be performed by only the grievant and one other individual. On October 13, 2017 the grievant requested a Corrections Officer working under him to assist in inputting the information. The grievant had fallen behind in this duty due to being off work previously. The database to be used was a restricted one. For anyone to assist the grievant, that person would either be required to use the grievant’s computer or to be provided with his password. The grievant provided his password to the Corrections Officer and the work was performed by him.

Later, the Corrections Officer reported to a Sergeant at the facility (also one of his superior officers) the grievant’s providing him the password. The Sergeant was able to confirm, by logging into the database, that the password provided by the Correction Officer as being that of the grievant was correct. Approximately two weeks later the Sergeant was finally able to report to the Chief of Housing that the grievant had provided the password to the Corrections Officer.

In the interim, on October 18, 2017, the Corrections Officer used the grievant’s password to send an e-mail to a Captain at the facility. The e-mail appeared to come from the grievant. It praised the Correction Officer and one other officer for their work performance. It stated that the Corrections Officer has

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<sup>1</sup> Decision of Hearing Officer, Case No. 11182 (“Hearing Decision”), May 25, 2018, at 2-3.

helped out the grievant in putting in time for workers. The e-mail stated that “these two officers need an incentive pay raise due to the help they give me and make my job so much easier.” The Captain read the e-mail and concluded without investigation that it was not from the grievant. Upon having a chance encounter with him shortly thereafter, the Captain advised him that he needed to keep an eye on his computer, that apparently someone had been using it. The grievant did not respond directly to the Captain but did change his password later that day.

After receiving the information from the Sergeant regarding the password, the Chief of Housing commenced an investigation into the matter. The Corrections Officer confirmed the information he had provided to the Sergeant and admitted that he had sent the e-mail dated October 18. In a meeting with the Chief of Housing, the grievant denied having provided the password to the Corrections Officer. That meeting occurred on November 27.

On November 29 the grievant spoke with the Corrections Officer by telephone. He asked the officer if he had been contacted by anyone regarding the password. The officer lied and replied that he had not. The grievant then encouraged him to not disclose that the password had been given. He discussed with the officer arrangements that could be facilitated by the grievant which would possibly result in the officer being promoted or otherwise advancing his career. Approximately one hour later the Corrections Officer reported the substance of the telephone call to the Chief of Housing.

The Sergeant who used the password of the grievant to log in to the protected database was given an oral counseling by the agency. The Corrections Officer who sent the e-mail was issued a Group I Written Notice.

On December 18, 2017, the grievant was issued two Group II Written Notices for failure to comply with agency policy.<sup>2</sup> The first Written Notice charged the grievant with violating the agency’s information technology policy by sharing his agency user ID and password with the Corrections Officer. The second Written Notice charged the grievant with workplace harassment and unethical behavior based on the content of his November 29, 2017 telephone call with the Corrections Officer.<sup>3</sup> The second Group II Written Notice was accompanied by a disciplinary demotion to a lower pay band and a 10% salary reduction, effective December 25, 2017.<sup>4</sup> The grievant timely grieved the disciplinary actions and a hearing was held on May 16, 2018.<sup>5</sup> In a decision dated May 25, 2018, the hearing officer found that the agency had presented sufficient evidence to show that the grievant shared his user ID and password with the Corrections Officer in violation of agency policy and upheld the issuance of the first Written Notice.<sup>6</sup> The hearing officer further determined, however, that the evidence did not show the grievant’s telephone call

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<sup>2</sup> Agency Exhibit 1; *see* Hearing Decision at 1.

<sup>3</sup> Agency Exhibit 1.

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

<sup>5</sup> Hearing Decision at 1.

<sup>6</sup> *Id.* at 4-5.

with the Corrections Officer was a violation of the agency's policies prohibiting workplace harassment and/or unethical behavior.<sup>7</sup> As a result, the hearing officer rescinded the second Group II Written Notice, ordered the grievant reinstated to his former pay band, and directed the agency to provide the grievant with back pay for the period of the disciplinary salary reduction.<sup>8</sup> The agency 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>9</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>10</sup>

#### *Grievant's Request for Administrative Review*

In response to the agency's request for administrative review, the grievant has submitted a rebuttal document that, in part, disputes the hearing officer's decision to uphold the issuance of the first Group II Written Notice. The *Grievance Procedure Manual* provides that “[r]equests for administrative review must be in writing and **received by** EEDR within 15 calendar days of the date of the original hearing decision. **Received by** means delivered to, not merely postmarked or placed in the hands of a delivery service.”<sup>11</sup> Further, the May 25, 2018 hearing decision clearly advised the parties that any request they may file for administrative review must be received by EEDR within fifteen calendar days of the date the decision was issued.<sup>12</sup> However, EEDR received the grievant's rebuttal on June 23, 2018, well beyond the fifteen calendar-day deadline, which expired on June 11, 2018.<sup>13</sup> Accordingly, the grievant's request for administrative review regarding the hearing officer's decision to uphold the first Group II Written Notice is untimely and will not be considered. To the extent the grievant's submission rebuts the agency's challenge to the hearing officer's conclusions in relation to the second Group II Written Notice, those matters are discussed more fully below.

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<sup>7</sup> *Id.* at 5-8.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>10</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>11</sup> *Id.* § 7.2(a).

<sup>12</sup> Hearing Decision at 8-9.

<sup>13</sup> The fifteenth calendar day from May 25, 2018 was Saturday, June 9, 2018. Section 7.2(a) of the *Grievance Procedure Manual* provides that, when the fifteenth calendar day “falls on a Saturday, Sunday, or legal holiday or on any day or part of a day on which the state office where the request for administrative review is to be filed is closed during normal business hours, the appeal may be filed on the next business day that is not a Saturday, Sunday, legal holiday, or day on which the state office is closed.” In this case, therefore, the filing deadline was extended to Monday, June 11, 2018.

*Agency's Request for Administrative Review*

In its request for administrative review, the agency asserts that the hearing officer erred in rescinding the Group II Written Notice for violating the agency's policies prohibiting workplace harassment and unethical conduct. The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>14</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy. As the agency alleges that both policies cited in the Written Notice supported the issuance of the disciplinary action, the hearing officer's consideration of the evidence in the record with regard to the application of those policies will be discussed in turn below.

Workplace Harassment

In the hearing decision, the hearing officer assessed the evidence and determined that the agency's Operating Procedure ("OP") 145.3, *Equal Employment Opportunity*, is intended to "implement the Federal and State prohibitions against certain types of discrimination" based on the "rights of a member of a protected group."<sup>15</sup> The hearing officer stated that the agency did not argue "that the Corrections Officer [fell] within a protected class or that the alleged harassment by the grievant was based on membership in any of those classes," and thus concluded that the evidence did not demonstrate the grievant's telephone call on November 29, 2017 was a violation of OP 145.3.<sup>16</sup> The hearing officer further noted that DHRM Policy 2.30, *Workplace Harassment*, "would have supported the issuance of this discipline," but stated that the agency did not "recite that particular policy as being the basis for the issuance of the Notice," and found that "the agency [was] limited to using the actual policies cited in the charging document."<sup>17</sup> In its request for administrative review, the agency contends that OP 145.3 prohibits all types of workplace harassment, whether based on a protected status or not.<sup>18</sup>

OP 145.3 defines "workplace harassment" as "[a]ny unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person" and either "[h]as the purpose or effect of creating an intimidating, hostile or offensive work environment"; "[h]as the purpose or effect of unreasonably interfering with an employee's work performance"; and/or "[a]ffects an employee's employment or opportunities or compensation."<sup>19</sup> The policy further states that "[w]orkplace harassment not involving protected areas is in violation of DOC

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<sup>14</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

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

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5-6. In certain circumstances, a hearing officer could properly take judicial notice of a DHRM policy to support the issuance of an agency's disciplinary action. Such a decision could, however raise questions as to whether the grievant had received adequate due process. See DHRM Policy 1.60, *Standards of Conduct*, § E. Ultimately, that issue need not be addressed in this ruling because DHRM Policy 2.30 would not appear to apply under the circumstances presented here, as discussed more fully below.

<sup>18</sup> The agency further asserts that the grievant's conduct was "analogous to a quid pro quo sexual harassment scenario" because he allegedly offered the Corrections Officer a career advancement opportunity in return for untruthful statement(s) about receiving the grievant's user ID and password. However, this argument was not raised at hearing and will not be addressed further in this ruling.

<sup>19</sup> Agency Exhibit 5 at 2.

operating procedures.”<sup>20</sup> As the hearing officer’s conclusion that the grievant did not violate OP 145.3 was based solely on a determination that the agency did not allege the grievant’s actions were based on a protected status of the Corrections Officer, the decision must be remanded for further consideration of the evidence in the record. The hearing officer must address the issue of whether the grievant’s conduct violated the provision of OP 145.3 prohibiting workplace harassment that is not based on a protected status.

Moreover, the hearing officer’s discussion of DHRM Policy 2.30, *Workplace Harassment*, is not consistent with the plain language of that policy. DHRM Policy 2.30 prohibits workplace harassment on the basis of identified protected status and classifications.<sup>21</sup> As the hearing officer found that there was no evidence to demonstrate the grievant’s actions were based on a protected status of the Corrections Officer, there is no basis to support his statement that the grievant’s conduct was a violation of DHRM Policy 2.30. Accordingly, the hearing officer must revise his discussion of this policy in his reconsidered decision.

### Unethical Conduct

With regard to the allegation that the grievant’s phone call to the Corrections Officer constituted unethical conduct, the hearing officer found that the agency’s OP 135.3, *Standards of Ethics and Conflict of Interest*, contained “aspirational language that would seem to cover the conduct of the grievant in placing the telephone call to the Corrections Officer.”<sup>22</sup> The hearing officer went on to note, however, that OP 135.3 “would also seem to cover . . . an almost unlimited number of activities.”<sup>23</sup> Turning to the specific conduct prohibited by the policy, the hearing officer determined that the “items listed . . . reflect concerns over conflicts of interest and expected standards of behavior with regard to gifts or other similar matters that could affect, or appear to affect, the conduct of an employee in the performance of his official duties.”<sup>24</sup> As a result, the hearing officer concluded that the grievant’s telephone call to the Corrections Officer did not violate OP 135.3, though he did state that he did “not condon[e the grievant’s] action in making the call and attempting to suborn a falsehood.”<sup>25</sup> In its request for administrative review, the agency argues that the standards of behavior set forth in OP 135.3 are not merely aspirational, and that the grievant’s telephone call to the Corrections Officer should properly be considered unethical conduct in violation of the policy.<sup>26</sup>

OP 135.3 provides that agency employees “shall conduct themselves by the highest standards of ethics so that their actions will not be construed as . . . conduct unbecoming an

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

<sup>21</sup> DHRM Policy 2.30, *Workplace Harassment*, § A(1).

<sup>22</sup> Hearing Decision at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The agency also presents a theory that the grievant’s telephone call should be considered a transaction in which he was attempting to obtain a personal interest, and thus constituted a conflict of interest. Not only does there appear to be no evidence in the record to support such a conclusion, but law and policy prohibiting conflicts of interest, including OP 135.3, specifically contemplate that an improper personal interest in a transaction consists of a financial benefit or liability. *See* Agency Exhibit 2.

employee of the Commonwealth.”<sup>27</sup> The policy further states that employees “shall conduct themselves and perform their duties in such a way as to set a good example for offenders,” and that “[n]o person connected with the [agency] shall use their official position to secure special privileges or advantages for themselves or others . . . .”<sup>28</sup> At the hearing, an agency manager testified that the grievant’s actions in calling the Corrections Officer were “coercive” and suggested that he was attempting to give and receive favors.<sup>29</sup> Moreover, the hearing officer explicitly found that the grievant’s purpose in making the call to the Corrections Officer was “attempting to suborn a falsehood.”<sup>30</sup>

Having reviewed the evidence in the record, EEDR is unable to determine the basis for the hearing officer’s conclusion that the grievant’s conduct is not properly considered within the standards represented by OP 135.3, particularly because the hearing officer also found that the grievant contacted the Corrections Officer for an improper purpose. The hearing officer is correct that the language in OP 135.3 setting ethical standards for employees is broad and could apply to a wide range of possible behavior. Nevertheless, it is clear that OP 135.3 is intended to not only regulate employees’ interests in financial transactions that could create a conflict of interest, but also to prohibit employees from engaging in behavior that would be considered “unbecoming [of] an employee of the Commonwealth.”<sup>31</sup>

Based on the facts as found by the hearing officer, the grievant’s conduct could arguably be considered a violation of the policy. The hearing officer seems to have determined that the grievant was attempting to induce the Corrections Officer to provide information favorable to the grievant in an agency investigation. To the extent the hearing officer finds that the record evidence supports such a factual finding, it is difficult to comprehend how such conduct would not violate the grievant’s ethical duties to the agency and the Commonwealth as expressed in OP 135.3 and the applicable *Standards of Conduct* policy. Accordingly, the decision must be remanded to the hearing officer for further consideration of the evidence in the record in light of the guidance related to OP 135.3 set forth in this ruling. More specifically, the hearing officer must assess whether the totality of the evidence in the record supports a conclusion that the grievant’s telephone call to the Corrections Officer is properly considered unethical conduct in violation of OP 135.3 such that the issuance of a Group II Written Notice was justified.

### CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for further consideration of the evidence in the record relating to the application of the agency’s policies prohibiting workplace harassment and unethical conduct. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any other *new matter* addressed in the remand

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<sup>27</sup> Agency Exhibit 4 at 3.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> Hearing Recording at 1:45:40-1:47:25 (testimony of Witness W).

<sup>30</sup> Hearing Decision at 6.

<sup>31</sup> Agency Exhibit 4 at 3.

decision (i.e., any matters not previously part of the original decision).<sup>32</sup> Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.<sup>33</sup>

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>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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Christopher M. Grab  
Director  
Office of Equal Employment and Dispute Resolution

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<sup>32</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>33</sup> See *Grievance Procedure Manual* § 7.2.

<sup>34</sup> *Id.* § 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).