

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11133, 11153;  
Ruling Date: July 27, 2018; Ruling No. 2018-4750; Agency: Virginia Employment  
Commission; 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 Employment Commission  
Ruling Number 2018-4750  
July 27, 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 Numbers 11133/11153. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

On October 25, 2017, the grievant was issued a Group II Written Notice of disciplinary action, with suspension, for failure to follow a supervisor’s instructions.<sup>1</sup> On December 1, 2017, the grievant was removed from employment for failure to meet performance expectations following a three-month re-evaluation.<sup>2</sup> The grievant timely grieved both actions, and a hearing to address both matters was held on February 23, 2018.<sup>3</sup> On June 14, 2018, the hearing officer issued a decision upholding both the disciplinary action and the grievant’s termination for poor performance.<sup>4</sup> The hearing officer’s factual findings are hereby incorporated by reference.<sup>5</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>6</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>7</sup>

*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

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<sup>1</sup> Decision of Hearing Officer, Case Nos. 11133/11153 (“Hearing Decision”), June 14, 2018, at 1; *see also* Agency Exhibit 1.

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

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

<sup>4</sup> *Id.* at 1, 9.

<sup>5</sup> *Id.* at 2-6.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

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”<sup>8</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>9</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>10</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>11</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 this instance, the grievant essentially argues that the agency did not prove by a preponderance of the evidence that the disciplinary action and her termination were warranted and appropriate given the circumstances of her case. In support of this assertion, she asserts that prior supervisors all rated her as “Contributor” or higher on her evaluations, that her current supervisor did not allow her to carry out work expectations according to her own suggestions, and that her supervisors’ expectations of her and guidelines for completing tasks frequently changed. 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. In his hearing decision, the hearing officer found the testimony of the grievant’s supervisor and other agency witnesses to be credible and held that the agency “presented sufficient evidence to support the issuance of a Group II Written Notice. . . [and] complied with DHRM Policy 1.40 to remove Grievant from employment follow[ing] an unsatisfactory three-month re-evaluation.”<sup>12</sup>

EEDR has reviewed the record, and cannot find that the hearing officer’s determination regarding both of these issues was without basis in the record. For instance, the grievant’s manager testified to the fact that the grievant was presented with the October 25, 2017 Written Notice because she was given clear instructions, which she failed to follow, and did not complete any work toward the assignment.<sup>13</sup> He also testified that when questioned, the grievant “pushed back,” stating that she “did not see the value” in completing the assigned tasks and felt it was a waste of her time.<sup>14</sup> Further, the Director of the agency’s information technology department testified that the grievant was not meeting the core responsibilities contained within her Employee Work Profile, therefore, she was provided with a notice of “Improvement Needed” form, as well as an interim evaluation form where she received a “below contributor” rating in

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<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>11</sup> *Grievance Procedure Manual* § 5.8.

<sup>12</sup> Hearing Decision at 6, 8.

<sup>13</sup> Hearing Recording at 17:10 – 18:30.

<sup>14</sup> *Id.* at 19:12 – 19:42.

four out of five areas in August 2018.<sup>15</sup> Both forms noted the grievant's refusal to accept certain tasks that were assigned to her, and noted that she needs to "[a]ccept and complete assigned tasks" as well as complete work in a "timely fashion."<sup>16</sup> However, the Director testified that the grievant's performance continued to be deficient with respect to her failure to follow the instructions of her supervisor, culminating in her termination.<sup>17</sup>

While the grievant may disagree with both supervisors' assessments of her performance, 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>18</sup> Because the hearing officer's findings in this instance 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.

### *Mitigation*

The grievant also argues that the disciplinary action should have been mitigated, arguing that similarly situated employees have not been disciplined for failing to complete work according to a supervisor's instruction. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management . . . ."<sup>19</sup> The *Rules for Conducting Grievance Hearings* (the "Rules") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>20</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>21</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems

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<sup>15</sup> *Id.* at 01:27:03 – 01:28:40; see Agency Exhibit 10 at 101-102.

<sup>16</sup> Agency Exhibit 10 at 101-102.

<sup>17</sup> Hearing Recording at 01:28:59 – 01:29:39.

<sup>18</sup> See, e.g., EDR Ruling No. 2012-3186.

<sup>19</sup> Va. Code § 2.2-3005(C)(6).

<sup>20</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>21</sup> *Id.* § VI(B)(1).

Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.<sup>22</sup> EEDR will review a hearing officer's mitigation determination for abuse of discretion,<sup>23</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the evidence in the record. The hearing officer noted that the grievant "failed to present credible evidence to show the similar behavior of other employees and that Agency managers disciplined those employees differently."<sup>24</sup> There is nothing to indicate that the hearing officer's decision not to mitigate on this basis was contrary to the evidence in the record or constitutes an abuse of discretion. Accordingly, EEDR will not disturb the hearing officer's mitigation decision on this basis.

### 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>25</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>26</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>27</sup>



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<sup>22</sup> The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>23</sup> "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

<sup>24</sup> Hearing Decision at 9.

<sup>25</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>26</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>27</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).