

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11208; Ruling
Date: July 11, 2018; Ruling No. 2018-4753; Agency: Virginia Department of
Transportation; 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 Transportation
Ruling Number 2018-4753
July 11, 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 11208. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11208, as found by the hearing officer, are as follows:¹

On December 5, 2017, the Grievant's immediate supervisor submitted a Below Contributor Performance Evaluation for the performance year of October 25, 2016 through October 24, 2017. That evaluation was approved by the next level of management on December 6, 2017. Uncontradicted testimony before me was that the Grievant received his Below Contributor rating on or about December 8, 2017. On December 15, 2017, the Performance Re-Evaluation Plan was presented to the Grievant and discussed with him.

Policy 1.40 requires that within ten days of a Below Contributor evaluation, a meeting between the employee and his supervisor must take place to develop a Performance Re-Evaluation Plan that will set forth performance measures for the following three months.

As stated above, the Grievant was notified on December 8, 2017 of his Below Contributor status and a Performance Re-Evaluation Plan was established on December 15, 2017, thereby complying with DHRM Policy 1.40.

During the course of the Performance Re-Evaluation Plan, the Grievant's supervisor met with him on numerous occasions to discuss his progress and produced written documentation of those meetings.

Pursuant to DHRM Policy 1.40, an employee on a Performance Re-Evaluation Plan must be re-evaluated within approximately two weeks prior to the end of the three-month period.

¹ Decision of Hearing Officer, Case No. 11208 (“Hearing Decision”), June 12, 2018, at 3-4 (citations omitted).

On March 7, 2018, the Grievant's supervisor met with him to discuss his progress. This meeting complied with DHRM Policy 1.40, which requires the meeting to take place approximately two weeks prior to the end of the re-evaluation time period.

Pursuant to DHRM Policy 1.40, if the employee is found to still be Below Contributor, the supervisor shall demote, re-assign or terminate the employee by the end of the re-evaluation period. The evidence that was presented before me indicated that, of the seven areas of improvement set forth in the Performance Re-Evaluation Plan, the Grievant failed to comply with two of those areas. Those two areas represented 40% of the areas for which the Grievant was responsible and needed improvement. It should be noted that, pursuant to testimony before me, during the re-evaluation period, 25% of the areas where improvement was needed had nothing actually happen that required action by the Grievant.

On March 19, 2018, following the three-month re-evaluation period, the agency removed the grievant from employment due to unsatisfactory work performance.² The grievant filed a grievance to challenge his removal and a hearing was held on June 4, 2018.³ In a decision dated June 12, 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 him from employment.⁴ 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.”⁵ 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.⁶

Issues Before the Hearing Officer

In his request for administrative review, the grievant argues that “the scope of the hearing did not allow for the proper introduction of relevant evidence documenting Commonwealth and Agency policy and procedural improprieties . . . that were used to justify” his termination. In particular, the grievant disputes his receipt of a Notice of Improvement Needed/Substandard Performance, which served as the basis for an overall rating of “Below Contributor” on his annual performance evaluation. The grievant argues that the agency's decision to terminate him was “predetermined” and that its actions prior to the implementation of the Performance Re-Evaluation Plan at issue in this case “were carefully orchestrated” to support its narrative of the grievant's unsatisfactory work performance. In the hearing decision, the hearing officer noted

² Agency Exhibit 1, Tab 2, at 1; *see* Hearing Decision at 1. The hearing decision appears to contain a clerical error, as it identifies the date of the grievant's removal as May 19, 2018. *See* Hearing Decision at 1.

³ Hearing Decision at 1.

⁴ *Id.* at 1, 3-5.

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

⁶ *See Grievance Procedure Manual* § 6.4(3).

that the grievant “passionately attempted to produce evidence and make arguments regarding the original finding of Below Contributor” on his annual performance evaluation, but found that the Performance Re-Evaluation Plan and the grievant’s removal for unsatisfactory performance were the only matters before him for adjudication.⁷

As the hearing officer correctly stated in his decision, EEDR previously issued a qualification ruling addressing the grievant’s challenge to the original “Below Contributor” rating on his performance evaluation and declining to qualify that issue for a hearing.⁸ In that qualification ruling, EEDR specifically found that a performance management document such as a Notice of Improvement Needed/Substandard Performance “is effective on the date it is issued to the employee,” and thus could properly support the grievant’s “Below Contributor” rating on his annual performance evaluation.⁹ Ultimately, EEDR found that there was “insufficient evidence to support the grievant’s assertion that his performance evaluation was without a basis in fact or resulted from anything other than management’s reasoned evaluation of his performance in relation to established performance expectations.”¹⁰ As a result, EEDR declined to qualify the grievant’s challenge to the “Below Contributor” rating on his annual performance evaluation, including his procedural arguments regarding the Notice of Improvement Needed/Substandard Performance, for an administrative hearing.¹¹

EEDR’s *Rules for Conducting Grievance Hearings* provide that “[c]hallenges to management actions or omissions that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied.”¹² In this case, the grievant filed a dismissal grievance disputing his removal from employment, which occurred after the agency determined that his work performance during the three-month re-evaluation period was unsatisfactory.¹³ While matters relating to the grievant’s annual performance evaluation may have been relevant, as background evidence, to the qualified issues of the grievant’s removal and the Performance Re-Evaluation Plan, his grievance challenging the annual performance evaluation was not qualified for a hearing, and thus the hearing officer did not have the authority to consider the substantive merits of any argument presented in that grievance or order relief for any management action(s) challenged in that grievance. The grievant’s removal and the Performance Re-Evaluation Plan were the only qualified issues in this case. Accordingly, EEDR finds no error in the hearing decision with regard to the hearing officer’s consideration of the evidence on this issue, and will not disturb the decision on this basis.

Hearing Officer’s Consideration of the Evidence

Fairly read, the grievant also asserts in his request for administrative review 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 in the record. Hearing

⁷ Hearing Decision at 4.

⁸ See *id.*; EEDR Ruling No. 2018-4691.

⁹ EEDR Ruling No. 2018-4691.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Rules for Conducting Grievance Hearings* § V(C).

¹³ See Agency Exhibit 1, Tab 1.

officers are authorized to make “findings of fact as to the material issues in the case”¹⁴ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁵ 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.¹⁶ 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.¹⁷ 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.

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. In the hearing decision, the hearing officer assessed the evidence presented by the parties and concluded that “the Agency fully complied with all of the requirements of DHRM Policy 1.40” and “properly evaluated the Grievant as Below Contributor at the end of the re-evaluation period.”¹⁸ At the hearing, the agency presented evidence to show that the Performance Re-Evaluation Plan was conducted in a manner consistent with policy and that the performance issues cited in the grievant’s re-evaluation, which resulted in his removal, were reasonable and supported by the facts.¹⁹ While the grievant clearly disagrees with the agency’s assessment of his performance as it was presented at the hearing, such disagreement does not, in itself, render that assessment invalid.

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.²⁰ 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 on this basis.

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.²¹

¹⁴ Va. Code § 2.2-3005.1(C).

¹⁵ *Grievance Procedure Manual* § 5.9.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁷ *Grievance Procedure Manual* § 5.8.

¹⁸ Hearing Decision at 4.

¹⁹ E.g., Agency Exhibit 1, Tabs 2, 12, 13; Hearing Recording at 1:00:14-1:16:19 (testimony of Witness M).

²⁰ See, e.g., EDR Ruling No. 2014-3884.

²¹ *Grievance Procedure Manual* § 7.2(d).

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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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Office of Equal Employment and Dispute Resolution

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).