

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11202; Ruling Date: September 6, 2018; Ruling No. 2019-4761; Agency: Department of Juvenile Justice; 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 Juvenile Justice
Ruling Number 2019-4761
September 4, 2018

The Department of Juvenile Justice (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 11202. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The facts in Case Number 11202, as found by the hearing officer, are incorporated by reference.¹ On February 8, 2018, the grievant was issued a Group II Written Notice for failure to follow a supervisor’s instructions and insubordination.² The grievant timely grieved the disciplinary action and a hearing was held on June 1, 2018.³ In a decision dated June 29, 2018, the hearing officer concluded that the agency had not presented sufficient evidence to support the Written Notice.⁴ 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.”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 The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

¹ Decision of Hearing Officer, Case No. 11202 (“Hearing Decision”), June 29, 2018, at 2-8.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 9-11.

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

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

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

In the hearing decision, the hearing officer determined that the disciplinary action was not warranted or appropriate and rescinded the Written Notice accordingly.⁸ She found that the grievant had been given an assignment to complete a chart detailing the organization of employees in his unit and that he failed to complete the chart by the deadline.⁹ However, the hearing officer also determined that the grievant's actions did not constitute misconduct based upon several factors.¹⁰ The hearing decision states that the grievant "did not ignore the instructions . . . [,] [but] was ill for some period of time, and he was working nights and weekends to complete his work. . . . [H]e followed his supervisor's instructions to prepare the charts, but turned them in late."¹¹ The hearing officer also notes that the grievant's supervisor refused to meet with him during this time without a third party present.¹² Further, with respect to the allegation of insubordination and failure to follow instructions regarding the transfer of a subordinate employee, the hearing officer found that the grievant "never moved the employee," nor did he "deliberately disregard [] the instructions of [his supervisor]," thus, he did not engage in the described misconduct.¹³

Hearing 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.

Hearing Officer's Findings Regarding the Completion of Chart(s)

The agency's request for administrative review challenges the hearing officer's determination that the grievant's failure to complete the organizational chart requested by his supervisor did not constitute misconduct. It argues that the hearing officer improperly read an "intent" to disregard instructions as a necessary element of the offense of failure to follow

⁸ Hearing Decision at 9-11.

⁹ *Id.* at 10-11.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 10.

¹³ *Id.*

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.

instructions. Further, the agency asserts that the hearing officer should have considered whether any of the grievant's conduct could have constituted a lesser offense under DHRM Policy 1.60, *Standards of Conduct*.

In this case, the grievant's supervisor testified that, during a meeting, she instructed the grievant to create a chart so that she could understand the organization of positions within the unit.¹⁸ The grievant indicated that he could have this task completed by January 19, 2018; however, not having received the charts by that date, the grievant's supervisor emailed the grievant and extended this deadline to January 22, 2018.¹⁹ Nevertheless, she had not received the charts by this date, and had not been contacted by the grievant to request any further extensions.²⁰ To this, the grievant did not deny failing to complete the charts by January 22, 2018, but indicated that he did not understand the importance of the assignment and its deadline for completion, as he chose the deadline date himself.²¹ In the hearing decision, the hearing officer found that the grievant had engaged in the described behavior, "in that the charts were not completed in the time frame requested" by his supervisor.²² However, she then found that such behavior did not constitute misconduct because the grievant "did not ignore the instructions of [his supervisor] . . . [,] had employees assisting in completing the charts . . . [but] was ill for some period of time, and [] was working nights and weekends to complete his work."²³ The hearing officer also noted that, "[d]uring this time, [the grievant's supervisor] refused to meet with [him] without a third party present" and that he did follow the instructions to prepare the charts, but turned them in late.²⁴

EEDR has thoroughly reviewed the hearing record and the agency's request for administrative review. Based on this review, there is no reasonably supported basis in the record for the hearing officer's determination that the grievant's failure to complete the charts was not misconduct. The hearing officer's determination is, therefore, an abuse of discretion. However, as a matter of the grievance procedure, EEDR finds that the factors cited by the hearing officer in rendering her determination are more properly considered as those that would potentially mitigate a disciplinary action, using the framework set forth in the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* (the "Rules"). As such, we will review the hearing officer's determination as an issue of mitigation.

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 [EEDR]."²⁵ 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

¹⁸ Hearing Decision at 3-5; Hearing Recording at Track 1, 39:39-41:02.

¹⁹ Hearing Decision at 4; Hearing Recording at Track 1, 41:17-43:12.

²⁰ Hearing Recording at Track 1, 43:16-43:30.

²¹ *Id.* at Track 5, 2:08:07-2:10:05.

²² Hearing Decision at 10.

²³ *Id.*

²⁴ *Id.*

²⁵ Va. Code § 2.2-3005(C)(6).

policy.”²⁶ 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.²⁷

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 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.²⁸ EEDR will review a hearing officer’s mitigation determination for abuse of discretion,²⁹ and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard. The *Rules* require that a hearing officer “must give due weight to the agency’s discretion in managing and maintaining employee discipline” and recognize that her function is only to “assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness.”³⁰

Based on a review of the hearing record, EEDR cannot find that the hearing officer has adhered to the requirements of the grievance procedure and the *Rules* in her analysis of the misconduct here. The hearing officer relies on the following factors: 1) the grievant did not ignore the instruction, 2) the grievant was ill “for some period of time”, 3) the grievant was working nights and weekends, 4) the grievant’s supervisor refused to meet with the grievant without a third party present, and 5) the grievant’s supervisor failed to request mediation from EEDR. As articulated in the hearing decision, it is unclear how any of these factors, whether individually or in combination, placed the agency’s decision to issue a Group II Written Notice outside the “tolerable limits of reasonableness” in this case. Whether the grievant ignored the instruction has no relevance; he was given an assignment and failed to complete it adequately in

²⁶ *Rules for Conducting Grievance Hearings* § VI(A).

²⁷ *Id.* § VI(B)(1).

²⁸ 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).

²⁹ “‘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.*

³⁰ *Rules for Conducting Grievance Hearings* § VI(B)(2).

the given timeframe, as the hearing officer found. If the grievant's health or hours of work played a factor, the hearing officer has described no factual findings that support such a conclusion. The grievant's supervisor's refusal to meet with the grievant or to request mediation are hardly relevant, as there is nothing in the record to demonstrate why such steps were necessary for the grievant's completion of the charts or that he was somehow prevented from doing so by the supervisor's actions. As a result, EEDR concludes that the hearing officer's cited rationale for rescinding the disciplinary action on this issue of failure to complete the charts is an abuse of her discretion and does not adhere to the "exceeds the limits of reasonableness" standard. Accordingly, the hearing decision must be remanded for further consideration and discussion of her conclusions consistent with the requirements of the grievance procedure as stated in this ruling.

To the extent that the agency argues that the hearing officer should have also considered whether the grievant's behavior as charged on the Written Notice could have constituted a lesser offense, EEDR notes that nothing in the *Grievance Procedure Manual*, nor the *Rules for Conducting Grievance Hearings*, requires that a hearing officer do so. Nevertheless, because the case is being remanded for further consideration, EEDR deems it appropriate in this instance that the hearing officer consider and address whether the grievant's conduct was unsatisfactory performance under DHRM Policy 1.60, *Standards of Conduct*, that might justify disciplinary action at a level other than a Group II.

Hearing Officer's Findings Regarding the Employee Reassignment

The agency challenges the hearing officer's findings of fact regarding the proposed reassignment of Employee R. The agency contends that the hearing officer's determination that the grievant did not engage in the conduct as charged was in error, and asserts that his actions as noted on the Written Notice did constitute failure to follow his supervisor's instructions. The agency also challenges whether the hearing officer applied the proper standard of review with respect to its allegation of insubordination against the grievant, asserting that the grievant's behavior was insubordinate toward his supervisor even if the hearing officer determined that he did not fail to follow her instructions.

The hearing decision states that the grievant, in his role as CSU Director, was working to develop a new position for another probation officer in the Supervised Release Program ("SRP"), and had determined that Employee R would be a good fit for the new position.³¹ However, after Employee R initiated a grievance to challenge the grievant's decision,³² the grievant's supervisor sent him an email on January 24, 2018 directing "do not continue with moving this employee."³³ The grievant testified, however, that his supervisor never came to discuss the situation with him in person, and that he understood her email to mean that he should continue developing the

³¹ Hearing Decision at 5.

³² Agency Exhibit 19.

³³ Agency Exhibit 9 at 2.

position but to wait on moving the employee until a new job description had been completed.³⁴ The grievant never actually moved Employee R into the SRP position.³⁵

The hearing officer considered the testimony of the grievant alongside that of the other witnesses and has made factual findings that the record evidence does not support that the grievant engaged in any misconduct for the above actions as charged in the Written Notice. 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.³⁶ As to the question of failure to follow a supervisor's instructions, EEDR must acknowledge that the hearing officer's findings are based upon evidence in the record and the material issues of the case. As such, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. However, the hearing officer has not explained her analysis regarding the charge of "insubordination," and, as such, it is appropriate to consider whether the evidence regarding the employee reassignment could also support the agency's allegation of insubordination.

There is evidence in the record that could potentially support a finding that the grievant was insubordinate. In addition to the conduct described above, after having been told not to reassign Employee R, the grievant stated his intention directly to his supervisor to "follow through" with the reassignment.³⁷ Indeed, the entirety of the January 24, 2018 e-mail chain on this issue could have potentially warranted a finding of insubordination given the challenging nature of the grievant's comments questioning the supervisor's authority and decisions, though it is unclear if that was presented at the hearing as the basis for the disciplinary charge. In addition, the agency cites, in the Written Notice, the grievant's e-mail to members of the judiciary on January 25, 2018,³⁸ one day after the directive not to continue with the move, that "we are working to move [Employee R] into the SRP position. He's reluctant. We're going to work through it one way or the other."³⁹ Given that the agency seems to have specifically relied on this evidence in issuing the Written Notice, it follows that the hearing officer must address it on the question of whether the grievant has been insubordinate with respect to the supervisor's directives not to move Employee R. As such, this matter is remanded for additional consideration and findings on the charge of insubordination.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for further consideration and revisions consistent with this ruling. The hearing officer is directed to issue a remand decision **within 15 calendar days** of the date of this ruling.

³⁴ Hearing Recording at Track 5, 2:11:46-2:14:50.

³⁵ Hearing Decision at 8.


³⁷ Agency Exhibit 9 at 7.

³⁸ Agency Exhibit 2 at 3.

³⁹ Agency Exhibit 10 at 1.

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 decision (i.e., any matters not previously part of the original or first reconsidered decision).⁴⁰ Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.⁴¹

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.⁴² 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.⁴³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁴



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⁴⁰ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

⁴¹ See *Grievance Procedure Manual* § 7.2.

⁴² *Id.* § 7.2(d).

⁴³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁴ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).