

Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 11166;  
Ruling Date: August 22, 2018; Ruling No. 2019-4765; Agency: Virginia State  
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 Virginia State University  
Ruling Number 2019-4765  
August 22, 2018

Virginia State University (the “agency” or “University”) 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 Reconsideration Decision in Case Number 11166. For the reasons set forth below, EEDR has no basis to disturb the hearing officer’s reconsideration decision.

FACTUAL BACKGROUND

The facts in Case Number 11166, as found by the hearing officer, are incorporated by reference.<sup>1</sup> On December 13, 2017, the grievant was issued a Group III Written Notice with termination.<sup>2</sup> In short, the grievant was disciplined for asking the University’s personnel “records keeper” for a copy of another employee’s counseling memo (the “personnel document”), which was then given to the grievant by the “records keeper.”<sup>3</sup> The grievant’s possession of the personnel document came to light when he presented it to a grievance step-respondent in a prior grievance. The conduct charged in the Written Notice was 1) misuse or unauthorized use of a state record and 2) abuse of authority for personal gain.<sup>4</sup>

The grievant timely grieved the disciplinary action and a hearing was held on April 18, 2018.<sup>5</sup> In a decision dated May 11, 2018, the hearing officer concluded that the agency had not presented sufficient evidence to support the Written Notice and termination.<sup>6</sup> The University appealed the hearing decision to EEDR. In EEDR Ruling Number 2018-4737 (“Prior Ruling”), this Office remanded the matter to the hearing officer for reconsideration. The hearing officer issued a Reconsideration Decision on July 16, 2018, which addressed this Office’s determinations and directives in the Prior Ruling.<sup>7</sup> The result of the Reconsideration Decision was that the hearing officer again determined that the disciplinary action was not supported by

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<sup>1</sup> Decision of Hearing Officer, Case No. 11166 (“Hearing Decision”), May 11, 2018, at 2-5. The hearing officer’s Reconsideration Decision also contains factual findings, *see infra*, which are incorporated by reference as well.

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

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

<sup>4</sup> See EEDR Ruling Number 2018-4734 for further discussion regarding the lack of information on the Written Notice form and the presumed attachment reflecting the charges.

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

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

<sup>7</sup> Reconsideration Decision of Hearing Officer, Case No. 11166 (“Reconsideration Decision”), July 16, 2018.

the record evidence.<sup>8</sup> The University has appealed to EEDR for administrative review of the Reconsideration 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>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> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>11</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

#### *Request for Documents under the Grievance Procedure*

In the Prior Ruling, the hearing officer was directed to “[r]econsider and address findings and analysis related to the document request provisions of the grievance procedure.” The University has appealed the hearing officer’s determinations in the Reconsideration Decision on this issue, arguing that the hearing officer did not adhere to EEDR’s directives. EEDR has reviewed the Reconsideration Decision and cannot find that the hearing officer has failed to follow the directives laid out in the Prior Ruling. The Reconsideration Decision reflects that the document request provisions of the grievance procedure no longer serve as the basis for the grievant’s act of obtaining the personnel document. Accordingly, EEDR has no basis to disturb the hearing officer’s decision on this point.

#### *Consideration of Grounds for Discipline*

In the Prior Ruling, this Office directed the hearing officer to “[c]onsider and address the stated grounds for the Written Notice specifically and whether the record evidence supports finding that the grievant engaged in the allegations of misconduct.” The hearing officer has done so in the Reconsideration Decision, finding that “there was no misuse or unauthorized use of the document in question,” and “[t]here clearly was no abuse of authority for personal gain . . . .”<sup>12</sup> The hearing officer additionally found “that having the document was not misuse or an unauthorized use of a State record and it surely was not an abuse of authority for personal gain.”<sup>13</sup> In summing up his factual determinations, the hearing officer states that “[t]he Agency offered not one scintilla of evidence that the document was actually used and all of their evidence supports the finding of their Investigator that it was obtained for a purpose of use for the grievance. As it turns out, it did not get used.”<sup>14</sup>

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<sup>8</sup> *Id.* at 4.

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

<sup>12</sup> Reconsideration Decision at 2, 4.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.*

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.

EEDR has thoroughly reviewed the hearing record and the University’s request for administrative review and finds that there is evidence in the record to support the hearing officer’s factual findings discussed above. For example, as the hearing officer has reiterated in the Reconsideration Decision, the internal affairs investigator testified that there was no policy or protocol regarding personnel records or access to the personnel records.<sup>19</sup> The investigator further testified that there was no evidence that the personnel document was used or that there was any intent by the Grievant to use it in any manner other than for a grievance.<sup>20</sup> The hearing officer also recounted that the Deputy Chief of Police testified that 1) he would not have had a problem giving the personnel document to the grievant had it been properly requested, 2) the problem was not that the grievant obtained the document, but how he got it, 3) he relied solely on DHRM Policy 1.60 for the grievant’s termination and relied on no other state policies, and 4) there were no policies or procedures in place at the time of the alleged offense regarding who or when or how personnel records could be accessed.<sup>21</sup> The hearing officer has made factual findings that the record evidence does not support that the grievant engaged in any misconduct as charged in the Written Notice.<sup>22</sup>

In its appeal, the University asserts that the grievant’s conduct violated a Statement of Confidentiality the grievant had signed. The University asserts that the Statement of Confidentiality “mandated that if Grievant misused another staff members [sic] records that the Grievant would be dismissed from his job.” The Statement of Confidentiality states that if the grievant is “found acting indiscreet with confidential material or not protecting the privacy of a faculty or staff member, . . . or others through [his] actions, [he] will be dismissed from [his] job immediately.”<sup>23</sup> While the Statement of Confidentiality is a part of the record, there is no

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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> Reconsideration Decision at 2.

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

<sup>21</sup> *Id.* at 3.

<sup>22</sup> Nothing in this ruling is meant to indicate that DHRM finds the grievant’s conduct regarding the personnel document appropriate or that the document was obtained, kept, or used in compliance with policy. This ruling only determines whether the hearing officer’s findings were based on the record evidence in relation to the conduct actually charged in the Written Notice.

<sup>23</sup> Agency Exhibit 5 at 2.

indication in the Written Notice that the grievant was charged with violating the Statement of Confidentiality or for “acting indiscreet with confidential material.” Therefore, it is not clear how the hearing officer should have considered the Statement of Confidentiality in assessing the grievant’s alleged misconduct charged in the Written Notice. As discussed above, the hearing officer has addressed the actual allegations in the Written Notice and made factual determinations that there was no misuse of the personnel document. Because the hearing officer’s factual determinations are based on evidence in the record, EEDR has no basis to disturb them.<sup>24</sup>

#### *Termination for Unsatisfactory Performance*

In the Prior Ruling, this Office directed the hearing officer to “[c]onsider and address whether the grievant’s conduct regarding the personnel document was unsatisfactory performance under the *Standards of Conduct* policy that might justify disciplinary action at a level other than a Group III.” The hearing officer has done so in the Reconsideration Decision by finding that “there was no evidence of unsatisfactory performance.”<sup>25</sup> The University has argued that the hearing officer has exceeded his authority in this regard. The University argues that “the Hearing Officer does not have authority to challenge the termination of Grievant based on his unsatisfactory work performance.” The University goes on to argue that the hearing officer “cannot reverse termination on unsatisfactory work performance.”

This Office’s directive in the Prior Ruling was to review the conduct the hearing officer found the grievant to have engaged in and consider whether that conduct was unsatisfactory work performance in any way. In essence, EEDR was directing the hearing officer to consider an alternative theory for the Written Notice akin to a “lesser included” offense. The hearing officer has done so and has satisfied EEDR’s directive. Because the hearing officer’s factual determinations in this regard are based on evidence in the record, or lack thereof, EEDR has no basis to disturb the hearing decision on this issue.

To the extent the University is attempting to resurrect the grievant’s termination as based on unsatisfactory work performance, that issue was addressed in the Prior Ruling. As stated in that ruling, a termination for unsatisfactory performance is not supported by the record in this case. The only action that could have permitted termination under policy in this case was the Group III Written Notice. As the hearing officer has found that the Group III was not supported by the evidence for the cited grounds in the Written Notice (misuse or improper use of state records, and/or abuse of authority for personal gain), the hearing officer was within his authority to direct that the Written Notice and accompanying termination be rescinded and the grievant be reinstated with appropriate back pay and benefits. Once the Group III Written Notice is removed, the University has no basis to terminate the grievant and, therefore, reinstatement is warranted. EEDR cannot find that the hearing officer has exceeded his authority based on any argument presented by the University in its appeal on this point.

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<sup>24</sup> The University has also asserted in its appeal that it established that the grievant engaged in misconduct by continuing to possess the record and keeping the document in a shred pile in his office. This was also not an allegation included on the Written Notice and, therefore, cannot be used at this late date to justify the disciplinary action. It also is not consistent with the Deputy Chief’s testimony that the problem with the grievant’s behavior was not that he obtained the document, but how he got it. *See* discussion *supra* p.3.

<sup>25</sup> Reconsideration Decision at 4.

*Mitigation/Disparate Treatment*

In the Prior Ruling, the hearing officer was directed to eliminate consideration of mitigation if it was an issue that need not be reached based on his other determinations. The hearing officer has done so in the Reconsideration Decision.<sup>26</sup> While the University disputes the hearing officer's short reference to disparate treatment, as indicated by the analysis in the Reconsideration Decision, the issue of disparate treatment has no material effect on the outcome of the hearing officer's decision.<sup>27</sup> Consequently, the inclusion of this brief discussion is harmless error, if any, and remand on this basis is not warranted.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, EEDR has no basis to further disturb the hearing officer's decision in this case.<sup>28</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>29</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>30</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>31</sup>



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<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> To the extent this ruling does not address any specific issue raised in the University's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that further remand is warranted in this case.

<sup>29</sup> *Grievance Procedure Manual* § 7.2(d). However, the finality of this hearing decision is potentially impacted by any consideration of a petition for attorneys' fees and issuance of an addendum by the hearing officer. *Id.* §7.2(e).

<sup>30</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>31</sup> *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).