

Issue: Second Administrative Review of Hearing Officer's Decision in Case No. 11182;  
Ruling Date: September 6, 2018; Ruling No. 2019-4769; Agency: Department of  
Corrections; Outcome: AHO's remand decision affirmed.



**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 2019-4769  
September 4, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Virginia Department of Human Resource Management administratively review the hearing officer’s reconsideration decision in Case Number 11182. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The substantive and procedural facts of this case are set forth in EEDR’s first administrative review in this matter, EEDR Ruling Number 2018-4742, and are incorporated herein by reference.<sup>1</sup> The subject of EEDR’s ruling and the reconsideration decision is a second Written Notice issued to the grievant, which charged him with workplace harassment and unethical behavior based on the content of a November 29, 2017 telephone call with the Corrections Officer.<sup>2</sup> In EEDR ruling Number 2018-4742, this Office remanded the case to the hearing officer for reconsideration of the evidence in the record regarding the application of agency policy to the misconduct charged on the second Written Notice. More specifically, EEDR directed the hearing officer to reconsider the applicability of the agency’s policy stating that employees were prohibited “from engaging in behavior that would be considered ‘unbecoming [of] an employee of the Commonwealth,’” as well as provisions of state and agency policy that prohibit workplace harassment.<sup>3</sup>

The hearing officer issued a reconsidered decision on July 31, 2018.<sup>4</sup> In the reconsidered decision, the hearing officer determined that the grievant’s telephone call to the Corrections Officer did not constitute workplace harassment in violation of state and/or agency policy because the grievant did not “denigrate[] or show[] hostility or aversion toward” the Corrections Officer, and found that his conduct was rather “a failed attempt to curry the favor of the employee.”<sup>5</sup> The hearing officer further concluded, however, that the grievant’s behavior was “clearly improper and unbecoming of an employee of the agency,” and was therefore properly considered a violation of the “general, aspirational statements” regarding employee conduct that

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<sup>1</sup> See also Decision of Hearing Officer, Case No. 11182 (“Hearing Decision”), May 25, 2018.

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

<sup>3</sup> EEDR Ruling No. 2018-4742.

<sup>4</sup> Reconsideration of Decision of Hearing Officer (“Reconsideration Decision”), Case No. 11182, July 31, 2018.

<sup>5</sup> *Id.* at 3.

are set forth in agency Operating Procedure (“OP”) 135.3, *Standards of Ethics and Conflicts of Interest*.<sup>6</sup> As a result, the hearing officer upheld the issuance of the second Written Notice, along with the accompanying disciplinary demotion and 10% salary reduction.<sup>7</sup> The grievant now appeals the reconsidered decision to EEDR.<sup>8</sup>

### 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.

#### *Hearing Officer’s Consideration of Evidence*

In his request for administrative review, the grievant argues that the hearing officer’s findings of fact, based on the weight and credibility he accorded to the testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>12</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>13</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>14</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>15</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.

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<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> As the hearing officer’s conclusions relating to the first Group II Written Notice were not timely challenged by either party when the original hearing decision was issued, that disciplinary action is no longer subject to administrative review by EEDR and will not be discussed in this ruling. See *Grievance Procedure Manual* §§ 7.2(a), 7.2(d); e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<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> Va. Code § 2.2-3005.1(C).

<sup>13</sup> *Grievance Procedure Manual* § 5.9.

<sup>14</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>15</sup> *Grievance Procedure Manual* § 5.8.

In support of his position, the grievant contends that the Corrections Officer testified untruthfully about a meeting with the Sergeant, and thus the hearing officer erred by relying on any part of the Corrections Officer's testimony in upholding the Written Notice. The grievant further asserts that he was not directed "that he could not talk [about agency] business with the officer, nor was the officer removed from under [his] supervision." In the original hearing decision, the hearing officer acknowledged that the Corrections Officer testified he met with the Sergeant to report that the grievant had shared his password on October 13, 2017, and noted that this meeting "could not have occurred on October 13 as they each testified."<sup>16</sup> The hearing officer, however, concluded that the grievant contacted the Corrections Officer on November 29, 2017 and "attempt[ed] to suborn a falsehood."<sup>17</sup> The hearing officer further determined that the grievant "encouraged [the Corrections Officer] to not disclose that the password had been given" during the call, and "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."<sup>18</sup>

EEDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and finds that there is evidence in the record to support the hearing officer's conclusion that the grievant engaged in the misconduct charged on the Written Notice, as well as the ultimate outcome of the case reflected in the reconsideration decision.<sup>19</sup> While the grievant may disagree with the hearing officer's assessment of the evidence, conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. The hearing officer clearly determined that the Corrections Officer's testimony about his conversation with the grievant was truthful, and there is nothing in the grievance procedure to prohibit a hearing officer from finding that some parts of a witness's testimony are credible, while also concluding that other portions of the witness's testimony are not credible. Indeed, weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and 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>20</sup>

In summary, and although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. Because the hearing officer's findings in this case are

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<sup>16</sup> Hearing Decision at 2, 7.

<sup>17</sup> *Id.* at 3, 6.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *E.g.*, Hearing Recording at 27:19-28:38, 31:08-34:39 (testimony of Corrections Officer), 1:45:40-1:47:25 (testimony of Witness W); Agency Exhibit 7.

<sup>20</sup> *See, e.g.*, EDR Ruling No. 2014-3884.

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, EEDR declines to disturb the decision on this basis.

### *Inconsistency with Agency Policy*

In addition, the grievant argues that the hearing officer erred in upholding the Written Notice because there was no evidence to show that his conduct fell “within any of the specifically listed categories” of prohibited behavior in OP 135.3.<sup>21</sup> In EEDR Ruling Number 2018-4742, this Office explained that although “the language in OP 135.3 setting ethical standards for employees is broad and could apply to a wide range of possible behavior,” it was nevertheless “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.’” In other words, the language in OP 135.3 stating that employees “shall conduct themselves by the highest standards of ethics so that their actions will not be construed as . . . conduct unbecoming an employee of the Commonwealth”<sup>22</sup> may be sufficient to support the issuance of disciplinary action for unethical behavior, depending on all the facts and circumstances. In this case, the hearing officer found that “[t]he conduct of the grievant was clearly improper and unbecoming of an employee of the agency” and, as discussed above, there is evidence in the record to support that determination. Accordingly, EEDR finds that the hearing officer’s conclusion that the grievant’s conduct was a violation of OP 135.3 justifying the issuance of a Group II Written Notice is consistent with agency policy, and the reconsidered decision will not be disturbed on this basis.

### *Due Process*

Finally, the grievant submitted a supplement to his request for administrative review, in which he asserts that he did not receive adequate due process for the charge of “conduct unbecoming” of an agency employee. 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.<sup>23</sup> EEDR has typically permitted an appealing party to submit additional briefing material after this deadline to supplement a timely request for administrative review. However, new matters raised after the deadline passes will not be addressed; only issues raised within the fifteen calendar days can be considered by EEDR on administrative review. EEDR specifically advised the parties of these requirements.<sup>24</sup> The grievant presented no argument about due process in his original, timely request for administrative review, and EEDR received the grievant’s supplemental briefing after the fifteen

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<sup>21</sup> The grievant further claims he was “unable to locate” EEDR Ruling Number 2018-4742 on EEDR’s website, and argues that the hearing officer should not have relied upon that ruling “due to it not existing at this time . . . .” EEDR Ruling Number 2018-4742 was EEDR’s original administrative review remanding the case to the hearing officer for reconsideration. A copy of the ruling was sent to both the grievant and his advocate by email when it was issued.

<sup>22</sup> Agency Exhibit 4 at 3.

<sup>23</sup> *Grievance Procedure Manual* § 7.2(a).

<sup>24</sup> See, e.g., EEDR Ruling No. 2018-4742.

calendar-day deadline for administrative review of the reconsideration decision had expired. [see **supplement email – 15 days expired on 8/15, received on 8/23**] Accordingly, EEDR finds that the grievant's claim regarding due process is untimely, and that argument will not be considered in this ruling.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's reconsideration 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.<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>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).