

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11231; Ruling No. 2019-4772; Ruling Date: September 7, 2018; Agency: Department of Corrections; 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 Department of Corrections
Ruling Number 2019-4772
September 7, 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 11231. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11231, as found by the hearing officer, are as follows:¹

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On November 12, 2017, Officer S was working in the control booth. She asked to be relieved so she could go to the restroom. Grievant went to the control booth. He began making sexual comments to Officer S. Grievant said, “Damn, [Officer S] you got a fat ass. I haven’t had a [race] girl in a long time.” The front of Grievant’s pants bulged because he had an erection. Grievant asked Officer S if she wanted to touch him. She said “no.” As she left the control booth, Grievant swiped his fingers across the outside of the crotch of her pants. Officer S delayed returning to the control booth because she did not want to see Grievant. She wanted to avoid working with Grievant in the future.

Officer S told a sergeant about the incident and the sergeant told her to inform Lieutenant W. The Agency conducted an investigation. During the investigation, the Investigator believed Officer S’s allegations.

On May 16, 2018, the grievant was issued a Group III Written Notice for workplace harassment and terminated from employment with the agency.² The grievant timely grieved the disciplinary action and a hearing was held on August 13, 2018.³ In a decision dated August 17, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show

¹ Decision of Hearing Officer, Case No. 11231 (“Hearing Decision”), Aug. 17, 2018, at 2.

² *Id.* at 1.

³ *Id.*

the grievant's actions constituted workplace harassment and upheld the issuance of the Written Notice and the grievant's termination.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

Hearing Officer's Consideration of Evidence

In his request for administrative review, the grievant essentially argues 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. More specifically, the grievant contends that the testimony of Officer S was false and that the agency's investigator “did not provide proof in his report” that the incident occurred as Officer S alleged. The grievant further argues that the investigator and the warden gave conflicting testimony regarding video footage of the incident, and that this detail demonstrates there were “inconsistencies in every aspect of this investigation.”

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰ 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 the hearing decision, the hearing officer concluded that the “Grievant engaged in sexual harassment of Officer S” because “[h]e made unwelcome sexual comments and touching,” and that “[h]is behavior was severe because he touched the crotch of Officer S's

⁴ *Id.* at 3-5.

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

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

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

pants.”¹¹ Based on this conduct, the hearing officer determined that the grievant “created an offensive workplace for Officer S because she did not want to continue working with” him.¹² The hearing officer further discussed the grievant’s arguments regarding the credibility of Officer S, noting that “only Officer S testified and, thus, [he] could not determine the credibility of Grievant’s denial.”¹³ The hearing officer acknowledged that “[s]everal portions of Officer S’s testimony lacked credibility,” but stated that he “could not conclude that all of her testimony lacked credibility” and that he did “not have a basis to disregard” her account of the incident “based on credible testimony from Grievant.”¹⁴

EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer’s determination that the grievant engaged in sexual harassment that created a hostile work environment for Officer S. For example, Officer S testified at the hearing that the grievant made unwelcome sexual comments to her and touched her, consistent with the hearing officer’s factual findings.¹⁵ The agency’s investigator testified that he interviewed Officer S and believed her description of the incident,¹⁶ and a copy of his report containing Officer S’s written account of the grievant’s behavior was admitted into the hearing record.¹⁷ The grievant himself did not testify at the hearing and, as the hearing officer correctly noted, there is no firsthand record evidence of the incident other than Officer S’s testimony. 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. 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.¹⁸

EEDR further finds that the grievant’s claim regarding the video footage of the incident is not a basis for remand in this case. A copy of the recording itself was not admitted into the hearing record; however, the investigator stated at the hearing that he watched the agency’s video recording from the time the incident occurred, but nothing of evidentiary value had been captured due to shadows and darkness in the area.¹⁹ When questioned by the hearing officer, the warden explained that he had reviewed the recording, that the camera was not positioned to cover the control booth area where the incident occurred, and that the grievant’s behavior was not captured on the recording.²⁰ The warden and the investigator appear to have testified consistently with one another that the recording did not prove or disprove Officer S’s allegations. In addition, EEDR notes that the hearing officer did not discuss the witnesses’ testimony about the recording in his decision. There is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties at a hearing

¹¹ Hearing Decision at 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Hearing Recording at 5:25-8:30 (testimony of Officer S).

¹⁶ *Id.* at 45:31-46:07, 48:06-48:17, 54:53-55:11 (testimony of Witness W).

¹⁷ Agency Exhibit 6.

¹⁸ *See, e.g.*, EDR Ruling No. 2014-3884.

¹⁹ Hearing Recording at 56:53-58:21 (testimony of Witness W).

²⁰ *Id.* at 1:55:51-1:58:40 (testimony of Witness B).

and, as discussed above, it is within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented. Here, it would appear the hearing officer did not recount the witnesses' testimony about the content of the recording because he did not find it relevant to the question of whether the grievant engaged in the misconduct charged on the Written Notice.²¹

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 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 hearing decision.

Newly Discovered Evidence

In addition, the grievant submitted a supplement to his request for administrative review, in which he appears to offer newly discovered evidence for EEDR's consideration. 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.²² 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. The grievant presented no argument about newly discovered evidence in his original, timely request for administrative review, and EEDR received the grievant's supplemental briefing after the fifteen calendar-day deadline for administrative review of the reconsideration decision had expired. Accordingly, EEDR finds that the grievant's claim regarding newly discovered evidence is untimely, and it 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 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.²³ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

²¹ At the conclusion of the hearing, the hearing officer asked the agency to provide him and the grievant with a copy of the video recording. Hearing Recording at 1:55:25-1:55:51, 1:58:41-1:58:55. However, it appears the agency was unable to retrieve the recording. *See id.* at 1:55:25-1:55:51 The hearing officer apparently chose to issue the decision without discussing the recording, thus demonstrating that he determined any evidence contained therein was not material to the outcome of the case. EEDR has not reviewed anything to show that the hearing officer's assessment of the record evidence about the video footage was improper or constitutes an abuse of discretion.

²² *Grievance Procedure Manual* § 7.2(a).

²³ *Id.* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).