

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11069; Ruling
Date: September 19, 2018; Ruling No. 2018-4775; Outcome: AHO's Second
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 Alcoholic Beverage Control
Ruling Number 2019-4775
September 19, 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 second remand decision in Case Number 11069. 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 and second administrative reviews in this matter, EEDR Ruling Numbers 2018-4642 and 2018-4752, and are incorporated herein by reference.¹ The subject of EEDR’s previous rulings and the hearing officer’s two remand decisions is the issuance of a Group II Written Notice to the grievant for allegedly manipulating her store inventory to correct an error with a licensee order “instead of completing a return to the licensee.”² In EEDR Ruling Number 2018-4642, this Office’s first administrative review in the matter, the case was remanded to the hearing officer for reconsideration of the evidence in the record regarding the application of agency policy to the misconduct charged on the Written Notice, particularly the applicability of the agency’s policy stating that transactions must be entered into the agency’s purchase order system accurately and policy provisions regulating the return and/or correction of licensee orders.

The hearing officer reopened the hearing record to accept additional evidence from the parties and issued a first remand decision, in which she found that the grievant failed to follow agency SOP 403-0012, *Licensee Sales*, by entering an inaccurate transaction into the agency’s computer system when she corrected the licensee order, and that the grievant’s conduct justified the issuance of a Group II Written Notice.³ The hearing officer went on, however, to conclude that the totality of the circumstances warranted mitigation to a Group I Written Notice because the grievant did not have notice of the agency’s rule for correcting the particular error with the licensee order at issue in this case.⁴ In EEDR Ruling Number 2018-4752, this Office found that the hearing officer abused her discretion by mitigating the disciplinary action because the mitigating factors upon which she relied did not place the agency’s decision to issue a Group II

¹ See also Decision of Hearing Officer, Case No. 11069 (“Hearing Decision”), Oct. 18, 2017; Decision on Remand, Case No. 11069 (“First Remand Decision”), June 12, 2018.

² Agency Exhibit 1 at 3; see Hearing Decision at 3-7.

³ First Remand Decision at 10-11.

⁴ *Id.* at 14-17.

Written Notice outside the “tolerable limits of reasonableness,”⁵ and remanded the case to the hearing officer for reversal of her mitigation determination.

On August 27, 2018, the hearing officer issued a second remand decision upholding the agency’s issuance of the Group II Written Notice, based on the directive set forth by this Office in EEDR Ruling Number 2018-4752.⁶ The grievant now appeals the second remand 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.”⁷ 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.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹

In her request for administrative review, the grievant appears to largely dispute the hearing officer’s assessment of the evidence in the record, particularly the hearing officer’s conclusion that her conduct was properly considered misconduct that justified the issuance of the Group II Written Notice. This Office has clearly stated in its previous administrative reviews of this case that both parties may request administrative review of a hearing officer’s remand decision on any *new matter* addressed in the remand decision—in other words, on any matters that were not previously part of the original decision or of an earlier remand decision.¹⁰ Here, the grievant did not challenge the hearing officer’s factual conclusions in the first remand decision that she engaged in the behavior charged on the Written Notice, that her behavior constituted misconduct, and that the disciplinary action was consistent with policy and law.¹¹ EEDR Ruling Number 2018-4752 and the second remand decision only addressed the issue of mitigation. Accordingly, the hearing officer’s mitigation analysis is the only matter that remains subject to administrative review by EEDR, and is therefore the only issue that will be addressed in this ruling.

To the extent the grievant’s request for administrative review can be construed as a challenge to the hearing officer’s mitigation analysis in the second remand decision, EEDR has thoroughly reviewed the hearing record and the hearing officer’s previous decisions and finds

⁵ *Rules for Conducting Grievance Hearings* § VI(B)(2) (stating 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”).

⁶ Decision Following EEDR August 13, 2018 Ruling #2018-4752, Case No. 11069 (“Second Remand Decision”), Aug. 27, 2018, at 1-3.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ EEDR Ruling No. 2018-4642; see, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

¹¹ See First Remand Decision at 10-11, 14-15.

that there is no basis for further remand in this case. In her first remand decision, the hearing officer determined that the issuance of the Group II Written Notice was supported by the facts, policy, and law.¹² In EEDR Ruling Number 2018-4752, this Office found that the mitigating factors relied upon by the hearing officer in her first remand decision were insufficient to demonstrate that the issuance of the Group II Written Notice was outside the “tolerable limits of reasonableness” in this case.¹³ The hearing officer’s second remand decision, in which she found that there was no basis to mitigate the disciplinary action,¹⁴ is consistent with the requirements of the grievance procedure. Accordingly, EEDR will not further disturb the hearing officer’s decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer’s second remand 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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷



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

¹² First Remand Decision at 10-11, 15.

¹³ See *Rules for Conducting Grievance Hearings* § VI(B)(2).

¹⁴ Second Remand Decision at 1-3.

¹⁵ *Grievance Procedure Manual* § 7.2(d).

¹⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁷ *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).