

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11059; Ruling
Date: November 7, 2017; Ruling No. 2018-4622; 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 2018-4622
November 7, 2017

The grievant 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 11059. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The relevant facts as set forth in Case Number 11059 are as follows:¹

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency since 2006. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received annual training regarding identifying offenders who were members of gangs. The online training module did not provide information discussing and showing gang hand signs.

Some inmates are members of gangs. They pose a security risk within the Department’s institutions. The Agency identifies gang members and monitors their activities. One of those gangs is the bloods. Blood gang members can be identified by the red color of their clothing and hand signs.

Mr. T posted pictures on a social media website. He included pictures showing his affiliation with the bloods gang. He posted pictures of himself wearing red shirts and red hats. He posted a picture with a gray background and the word “blood” written in red. He posted a picture with a red background and showing the word “blood.” It also contained an image of two hands placed together with fingers positioned to spell out “blood.” One picture showed Mr. T with two other men. Mr. T was holding his hand with the tip of his index finger touching the tip of his thumb and his remaining three fingers extended. Mr. T’s hand sign meant he was “throwing” a “b” for bloods.

¹ Decision of Hearing Officer, Case No. 11059 (“Hearing Decision”), September 14, 2017, at 2-3.

Grievant met Mr. T in 2010. They did not marry but had a son. Grievant named her son Kar—r with a name typically spelled Car—r. They did not live together but Mr. T visited his son daily.

Grievant and Mr. T were “friends” on their social media websites. This meant that they could see each other’s posts and view their pictures.

Grievant posted on her social media webpage two pictures of her with Mr. T. In one of the pictures, Mr. T had his body behind Grievant’s body with his chin on Grievant’s left shoulder. His left arm is extended and wrapped around Grievant. He is showing a hand sign which consists of the tip of his index finger touching the tip of his thumb and his three remaining fingers extended. He is “throwing” a “b” for bloods.

Once the Agency learned of the pictures on Grievant’s social media website, the Agency began an investigation. The Agency concluded it could not continue to employ Grievant because of the heightened risk she posed by associating with someone who may be a gang member.

Grievant is not a member of a gang. She did not “throw” any gang hand signs.

The grievant timely grieved her termination from employment and a hearing was held on September 13, 2017.² On September 14, 2017, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.³ The grievant has now requested administrative review of the hearing officer’s 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”⁴ 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 a party; the sole remedy is that the action be correctly taken.⁵

Hearing Officer’s Consideration of the Evidence

The grievant argues in her request for administrative review that the agency did not meet its burden of proof to show that she violated agency policy 135.3, essentially challenging the hearing officer’s findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the

² *Id.* at 1.

³ *Id.* at 1, 3-5.

⁴ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁵ See *Grievance Procedure Manual* § 6.4(3).

⁶ Va. Code § 2.2-3005.1(C).

grievance based “on the material issues and grounds in the record for those findings.”⁷ Further, in cases involving discipline, the hearing officer reviews the evidence *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.⁸ 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.⁹ 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 this instance, the grievant asserts that the agency did not prove, by a preponderance of the evidence, that her termination was warranted and appropriate given the circumstances of her case. In support of this assertion, she disputes the hearing officer’s finding that the agency presented evidence sufficient to show that Mr. T either is a gang member or associates with a particular gang.¹⁰ She points out that Mr. T testified he was not a member of any gang, and argues that the hearing officer misinterpreted the agency’s evidence.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where, as here, 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. Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer’s findings that the grievant engaged in the behavior described in the June 2, 2017 Written Notice and that the behavior constituted misconduct.¹¹ The agency’s investigating officer testified that Mr. T demonstrated all of the “key indicators” of being a gang member.¹² In his decision, the hearing officer noted that the pictures of Mr. T “contain the word ‘blood’ and show hand signs associated with the bloods gangs,” and concluded “there [was] sufficient evidence to show that Mr. T is a member of or closely identifies with the bloods.” Because 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. Accordingly, EEDR declines to disturb the decision on this basis.

Admission of Exhibits

In addition, the grievant asserts that the hearing officer erred by allowing into the record rebuttal evidence presented by the agency, but not included in the original exhibit book exchanged between the parties. Receiving probative evidence is squarely within the purview of the hearing officer.¹³ Under the *Grievance Procedure Manual*, a hearing officer has the

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ See Hearing Decision at 4.

¹¹ See *id.* at 4-5.

¹² Hearing Recording 34:46-35:04.

¹³ Va. Code § 2.2-3005(C).

authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.¹⁴ An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.¹⁵ In this instance, the hearing officer was presented with testimony regarding certain pictures posted to a social media account, and the agency later sought to introduce the photos themselves as rebuttal evidence.¹⁶ The hearing officer determined that this evidence was relevant and decided to admit the photographs.¹⁷ Under the *Rules for Conducting Grievance Hearings* (the “Rules”), most probative evidence should be admitted.¹⁸ Further, a review of the record indicates that the grievant had the opportunity to cross-examine the agency witness regarding this evidence. Thus, we cannot conclude that the hearing officer exceeded his authority in admitting the exhibits into evidence in this case.

Alleged Bias of Hearing Officer

The grievant further alleges, in effect, that the hearing officer demonstrated bias against the grievant by allegedly speaking to the agency’s representative and investigator after the hearing concluded. The *Rules* provide that a hearing officer is responsible for:

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in “Recusal,” § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EEDR Policy No. 2.01, Hearing Officer Program Administration.¹⁹

The grievant has not identified any applicable rules or requirements to support her position that the hearing officer demonstrated bias against her, nor are we aware of any. The applicable standard regarding EEDR’s requirement of a voluntary disqualification when the hearing officer “cannot guarantee a fair and impartial hearing,” is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.²⁰ The Court of Appeals has indicated that “whether a trial judge should recuse himself or herself is measured by whether he or she harbors ‘such bias or prejudice as would deny the defendant a fair trial.’”²¹ EEDR finds the Court of Appeals’ standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has

¹⁴ *Grievance Procedure Manual* § 5.7; see also Va. Code § 2.2-3005.

¹⁵ See, e.g., EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.

¹⁶ See Hearing Recording at 22:45-25:56, 1:32:11-1:37:45.

¹⁷ *Id.* at 1:36:23-1:37:37.

¹⁸ *Rules for Conducting Grievance Hearings* § IV(D).

¹⁹ *Id.* § II. See also EEDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if “a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself.”

²⁰ While not always dispositive for purposes of the grievance procedure, EEDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

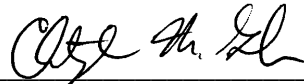
²¹ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); see *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) (“In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.”).

harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.²² The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.²³

In this particular case, there is no such evidence. The mere fact that a hearing officer had a brief opportunity to engage in communication after or during a break in the hearing does not mean that anything improper occurred. The grievant has not provided any evidence sufficient to suggest that inappropriate *ex parte* conversations took place. Further, even had such a communication occurred, that would not in and of itself demonstrate bias or prejudice warranting a remedy.²⁴ EEDR has thoroughly reviewed the hearing record, and finds no indication that any improper influence or conversations affected the outcome of the hearing decision. EEDR therefore declines to disturb the decision on this basis.²⁵

CONCLUSION AND APPEAL RIGHTS

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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸



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²² *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

²³ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

²⁴ EDR Ruling No. 2014-3820.

²⁵ To the extent this ruling does not address any specific issue raised in the grievant'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 remand is warranted in this case.

²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).