

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11077; Ruling
Date: October 27, 2017; Ruling No. 2018-4633; Agency: Department of Motor
Vehicles; 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 Motor Vehicles
Ruling Number 2018-4633
October 27, 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 11077. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11077, as found by the hearing officer, are as follows:¹

The Department of Motor Vehicles employed Grievant as a Customer Service representative at one of its facilities. He began working for the Agency on March 10, 2013. Grievant had prior active disciplinary action. He received a Group II Written Notice with a three day work suspension on February 24, 2016 for leaving work without permission. Grievant received a Group II Written Notice with suspension on July 12, 2016 for leaving work without permission.

On March 27, 2017, Grievant was given an “Attendance Memo” regarding his tardiness. He was advised:

You are receiving this memo to be aware of the seriousness of this matter. Immediate improvement and compliance with your assigned work schedule is expected. Any future tardiness and absenteeism will result in further disciplinary actions.

On June 12, 2017, Grievant received an Interim Evaluation advising him, “[Grievant] needs to focus on his excessive tardiness to work and returning from lunch periods.”

On June 2, 2017, Grievant was one hour and fifteen minutes late because he overslept. On June 8, 2017, Grievant was seven minutes late to work. On June 9, 2017, Grievant was one hour and forty-five minutes late. On June 16, 2017, Grievant was twelve minutes late to address an issue with his son’s medication.

¹ Decision of Hearing Officer, Case No. 11077 (“Hearing Decision”), October 17, 2017, at 2-3 (citations omitted).

On June 26, 2017, Grievant was eight minutes late. On June 17, 2017, Grievant was thirty minutes late preparing for his son's graduation and addressing his son's cough and fever. On July 5, 2017, Grievant was eighteen minutes late because he lost his phone and had no alarm.

On July 26, 2017, the grievant was issued a Group II Written Notice for unsatisfactory attendance and tardiness and terminated based on his accumulation of disciplinary action.² The grievant timely grieved the disciplinary action³ and a hearing was held on September 29, 2017.⁴ In a decision dated October 17, 2017, the hearing officer determined that the agency had not presented sufficient evidence to support the issuance of a Group II Written Notice.⁵ The hearing officer reduced the discipline to a Group I Written Notice based on the evidence in the record regarding the grievant's unsatisfactory attendance and tardiness.⁶ The hearing officer upheld the grievant's termination based on his accumulation of disciplinary action.⁷ 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."⁸ 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.⁹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁰ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Inconsistency with State Policy

In his request for administrative review, the grievant appears to argue that he should have been reinstated because the hearing officer reduced the disciplinary action from a Group II Written Notice to a Group I Written Notice. In the hearing decision, the hearing officer stated that "[a]n employee who receives disciplinary action while having two prior Group II Written Notices may be removed from employment," and upheld the grievant's termination on that basis.¹¹ DHRM Policy 1.60, *Standards of Conduct*, provides that

[a]n employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstances should be

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.* at 3-4.

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Hearing Decision at 3-4.

notified that any subsequent Written Notice for any level offense during the active life of the Written Notice may result in termination.¹²

In this case, the grievant had two active Group II Written Notices on file,¹³ which would normally support termination.¹⁴ As a result, the issuance of the Written Notice at issue in this case during the active life of the previous Group II Written Notices was sufficient to justify the grievant's termination, regardless of the level of offense. Accordingly, the hearing officer's decision to uphold the grievant's termination was consistent with the provisions DHRM Policy 1.60, *Standards of Conduct*.

Hearing Officer's Consideration of the Evidence

In his request for administrative review, the grievant further appears to argue 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. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁵ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁶ 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.¹⁷ 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.¹⁸ 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 assessed the evidence and concluded that the agency had demonstrated the grievant "was advised of the importance being on time to work and being at work during his work hours," but "continued to have unsatisfactory attendance and tardiness."¹⁹ As a result, the hearing officer concluded that the grievant had engaged in misconduct warranting the issuance of a Group I Written Notice.²⁰ The grievant asserts in his request for administrative review that he "never left any of the [agency] buildings without permission" and was not charged with doing so.²¹

¹² DHRM Policy 1.60, *Standards of Conduct*, § B(3)(c).

¹³ Agency Exhibit 9.

¹⁴ DHRM Policy 1.60, *Standards of Conduct*, § B(2)(b).

¹⁵ Va. Code § 2.2-3005.1(C).

¹⁶ *Grievance Procedure Manual* § 5.9.

¹⁷ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁸ *Grievance Procedure Manual* § 5.8.

¹⁹ Hearing Decision at 3.

²⁰ *Id.*

²¹ Leaving the work site without permission was a charge in a prior February 24, 2016 Written Notice, as noted in the hearing decision, *id.* at 1, and was not part of the Written Notice at issue in this case.

EEDR has thoroughly reviewed the hearing record and finds that there is evidence to support the hearing officer's determination that the grievant's attendance and tardiness were unsatisfactory. For example, the agency presented evidence at the hearing to show that the grievant was late to work on numerous occasions between April and July 2017.²² Although the grievant disputed some of these instances of tardiness,²³ weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. 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.²⁴ While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that the decision was based on anything other than the actual evidence in the record. 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 decision on this basis.

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.²⁵ 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.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷



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

²² *E.g.*, Agency Exhibit 5.

²³ *See, e.g.*, Agency Exhibit 6.

²⁴ *See, e.g.*, EDR Ruling No. 2014-3884.

²⁵ *Grievance Procedure Manual* § 7.2(d).

²⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁷ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).