

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11066; Ruling Date: December 21, 2017; Ruling No. 2018-4640; Agency: Virginia Department of Transportation; 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 Virginia Department of Transportation
Ruling Number 2018-4640
December 21, 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 11066. 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 11066 are as follows:¹

The Virginia Department of Transportation employed Grievant as a Crew Leader Inmate. He had been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for driving a VDOT van to a local correctional institution, pick up inmates, and take the inmates to work on highways at various locations near the institution. Grievant was responsible for searching the van before he drove the van into the DOC institution. If it was dark outside, Grievant was expected to use a flash light to search the van. Grievant knew that DOC employees would search the van at the institution in the morning before inmates entered the van.

On January 19, 2017, Grievant drove the VDOT van to the local DOC institution. Once the van was on DOC property, DOC K9 officers searched the van and discovered contraband. Four cell phones and chewing tobacco were found in the front cab of the van where the driver sat. They belonged to Grievant. In the back of the van where inmates sat were found sexually explicit magazines, money, sand paper, cigarette lighters, petroleum jelly, tobacco, and toilet paper used to wrap tobacco to form cigarettes. Inmates had hidden the contraband in the van the night before.

¹ Decision of Hearing Officer, Case No. 11066 (“Hearing Decision”), October 19, 2017 at 2-3.

During the Agency's investigation, Grievant presented a picture to the Agency showing a corrections officer sitting in a chair holding a shotgun and handgun and the corrections officer was asleep. Grievant took the picture in October 2016 but did not disclose the picture to the Agency until February 2017.

The Agency demoted Grievant but not as part of the disciplinary action. His pay was not reduced.

The grievant timely grieved the disciplinary action and a hearing was held on October 2, 2017.² On October 19, 2017, the hearing officer issued a decision upholding the disciplinary action.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's request for administrative review essentially challenges 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 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

² *Id.* at 1.

³ *Id.* at 4.

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).

⁷ *Grievance Procedure Manual* § 5.9.

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

⁹ *Grievance Procedure Manual* § 5.8.

the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this instance, the grievant essentially argues that the agency did not prove by a preponderance of the evidence that the disciplinary action was warranted and appropriate given the circumstances of his case. In support of this assertion, he argues that several key witnesses did not testify truthfully at the hearing and that he carried out his duties to the best of his ability. Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings in this matter. The hearing officer found that a Group II Written Notice was appropriate in this instance because the grievant's failure to report a sleeping correctional officer "undermined [the agency's] ability to manage a matter of public safety."¹⁰ The agency's human resources manager testified that the grievant's actions constituted a Group II offense because he withheld important safety information from the agency, therefore rendering him a safety risk.¹¹ Further, the grievant did not dispute that he failed to report the sleeping correctional officer to the agency. 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. EEDR has reviewed the record in its entirety and finds that there is evidence in the record to support the hearing officer's determination that the agency met its burden of proof to show that the disciplinary action issued to the grievant was proper.

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.¹² In his hearing decision, the hearing officer found that the agency presented sufficient evidence to support the issuance of a Group II offense for the grievant's conduct as alleged by the agency.¹³ 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, we decline to disturb the decision on this basis.

Mitigation

The grievant's request for administrative review also asserts that the hearing officer did not properly consider potential mitigating factors in this case, essentially arguing that the agency did not apply disciplinary action to him consistent with other similarly situated employees. The grievant asserts that other employees have also witnessed officers asleep and have not been given disciplinary action for failing to report such an occurrence. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EEDR]."¹⁴ The *Rules for*

¹⁰ Hearing Decision at 3.

¹¹ Hearing Record at 01:31:26 through 01:32:30.

¹² See, e.g., EDR Ruling Nos. 2013-3390, 2013-3402.

¹³ Hearing Decision at 4.

¹⁴ Va. Code § 2.2-3005(C)(6).

Conducting Grievance Hearings (the “Rules”) provide that “a hearing officer is not a ‘super-personnel officer’” and that “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”¹⁵ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

(i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency’s discipline was consistent with law and policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁶

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.¹⁷ A hearing officer “will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”¹⁸ EEDR has thoroughly reviewed the record in this instance and notes that the grievant did present testimony that could potentially support his argument regarding inconsistency of discipline.¹⁹ However, even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, we are unable to find that the hearing officer’s determination regarding mitigation was in any way unreasonable or not based on the actual evidence in the record. As outlined above, the facts upon which the hearing officer relied support the finding that a Group II Written Notice was appropriate in this instance and did not exceed the limits of reasonableness. As such, EEDR will not disturb the hearing officer’s decision, as we are unable to find that the hearing officer abused his discretion here in applying the “exceeds the limits of reasonableness” standard.

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

¹⁵ *Rules for Conducting Grievance Hearings* § VI(A).

¹⁶ *Id.* § VI(B).

¹⁷ Hearing Decision at 4.

¹⁸ See *Rules* at VI(B)(1) note 22 citing to *Davis v. Department of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981). See also *Mings v. Department of Justice*, 813 F.2d 384, 390 (Fed. Cir. 1987) (The MSPB “will not disturb a choice of penalty within the agency’s discretion unless the severity of the agency’s action appears totally unwarranted in light of all factors.”)

¹⁹ See Hearing Record at 2:44:50 through 02:45:11.

review have been decided.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



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²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).