

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11078; Ruling
Date: December 13, 2017; Ruling No. 2018-4650; 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 2018-4650
December 13, 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 11078. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11078, as found by the hearing officer, are as follows:¹

01. Grievant has been employed approximately three and one half years by Agency at Facility, a correctional center operated by Agency. Grievant is a Manager/Supervisor at Facility.

02. Offender had been incarcerated at Facility but was released and placed under the supervision of District Probation and Parole.

03. On December 5, 2016 an anonymous complaint was received by Agency that C/O, a correctional officer at Facility, engaged in a non-professional relationship with Offender.

04. On January 19, 2017 Grievant reported to Agency that, from around August 2016 to late November 2016 C/O engaged in a non-professional relationship with Offender.

05. Special Investigations Unit initiated an investigation into the allegations of a non-professional relationship between C/O and Offender. As a part of such investigation Investigator interviewed Grievant on January 31, 2017. During her interview Grievant informed Investigator:

¹ Decision of Hearing Officer, Case No. 11078 (“Hearing Decision”), November 8, 2017, at 2-3 (citations omitted).

- a. She had a romantic relationship with C/O from December 2015 to around Thanksgiving 2016 when C/O ended the relationship. Grievant indicated she was upset and still get upset about this.
- b. Sometime in August 2016 C/O told her he ran into Offender a bank and gave Offender a ride home.
- c. Over the period of from August 2016 to Thanksgiving 2016 C/O told her he had given Offender a watch valued at \$250.00 and that he had given Offender money. She didn't know how many times or how much money C/O gave Offender.
- d. C/O and Offender, on at least one occasion, met for a meal.
- e. Offender sent some pictures to C/O's cell phone of himself.

06. At the 1/31/17 interview, Investigator asked Grievant why she didn't report matters earlier and Grievant stated she didn't want to damage the relationship that she and C/O had at the time.

07. Investigator interviewed Offender on 1/31/17. At such interview Offender stated he had seen C/O on two occasions, once while working at a restaurant where C/O was a customer and once when C/O and his family were leaving a restaurant and he and his family were entering the restaurant. Offender stated to Investigator he had not seen C/O at any other time, C/O never called him, never gave him any gifts, or gave him any rides.

08. Investigator did not interview C/O as C/O was on extended short term disability at the time of the investigation and then was on long term disability.

On May 11, 2017, the grievant was issued a Group II Written Notice for failure to follow instructions and/or policy.² The grievant timely grieved the disciplinary action and a hearing was held on October 23, 2017.³ In a decision dated November 8, 2017, the hearing officer determined that the agency had presented sufficient evidence to show the grievant failed to follow the agency's policy regarding fraternization and upheld the issuance of the Group II Written Notice.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

² See *id.* at 1.

³ See *id.*

⁴ See *id.* at 1, 3-7.

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

In her 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. 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 assessed the evidence and concluded that the agency had presented evidence to show that the C/O had engaged in prohibited fraternization with the Offender between August and November 2016, that the grievant was aware of the C/O’s fraternization when it was occurring, and that she did not report it to agency management until January 2017.¹¹ As a result, the hearing officer determined the grievant had failed to follow the agency’s Operating Procedure (“OP”) 135.2, *Rules Governing Employee Relationships with Offenders*, by not reporting the C/O’s fraternization immediately when becoming aware of it, thus justifying the issuance of a Group II Written Notice.¹² The grievant asserts in her request for administrative review that the hearing officer did not consider alleged threats made to her by the C/O, that the agency improperly presented evidence about other Written Notices that had been issued to her, and that “several things [] were left out” of the hearing decision.

Having reviewed the hearing record, EEDR finds that there is evidence to support the hearing officer’s determination that the grievant failed to follow policy. OP 135.2 states that “employees have a continuing affirmative duty to disclose to their supervisors or other

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.

¹¹ Hearing Decision at 4-5.

¹² *Id.* at 5-6.

management officials any conduct that violates this procedure or behavior that is inappropriate or compromises the safety of staff, offenders, or the community and any staff or offender boundary violations.”¹³ The agency presented evidence that the grievant was aware the C/O had engaged in fraternization with the Offender between August and November 2016, but intentionally did not report the C/O’s behavior to agency management until January 2017.¹⁴ The Investigator testified at the hearing that the grievant was required to report the C/O’s improper conduct when she first became aware of it.¹⁵ While the grievant questioned the Investigator about alleged threats made by the C/O,¹⁶ she did not testify about that topic herself. The Investigator stated that he was unaware of any such behavior in connection with his investigation of the C/O’s alleged fraternization, and there is no other evidence in the record to show that the C/O threatened the grievant.¹⁷ In addition, past disciplinary action issued to the grievant could potentially be relevant to this case, and there is nothing inherently improper about the agency’s decision to question the grievant about her disciplinary history.¹⁸ Moreover, the hearing officer does not appear to have considered any evidence in the record about the previous discipline the grievant may have received in deciding whether the Written Notice was warranted and appropriate under the circumstances, as it is not mentioned in the hearing decision.

While the grievant may disagree with the hearing officer’s decision, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.¹⁹ 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.²⁰

¹³ Agency Exhibit 4 at 5.

¹⁴ Agency Exhibit 5 at 2-3.

¹⁵ Hearing Recording at 23:24-23:38 (testimony of Investigator).

¹⁶ *Id.* at 32:25-33:25 (testimony of Investigator).

¹⁷ *E.g., id.*

¹⁸ *See id.* at 52:03-54:53 (testimony of grievant).

¹⁹ *See, e.g.,* EDR Ruling No. 2014-3884.

²⁰ In her request for administrative review, the grievant also appears to claim that the hearing officer and/or the agency’s representatives discriminated against her. EEDR has thoroughly reviewed the hearing record and identified nothing that would suggest the hearing officer demonstrated bias against the grievant, or that any agency representative or witness engaged in misconduct or improper behavior that was prejudicial to her. Further, to the extent the grievant’s claim of discrimination is part of her challenge to the Written Notice, EEDR has not identified any evidence in the hearing record relating to that issue. As a result, there does not appear to have been a sufficient factual basis for the hearing officer to conclude that discrimination may have influenced the agency’s decision to issue the Written Notice such that remanding the decision for further consideration would be warranted. As a result, EEDR has no basis to disturb the hearing decision based on these allegations.

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).