

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11145; Ruling  
Date: October 26, 2018; Ruling No. 2019-4781; Agency: Virginia Department of  
Health; 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 Health  
Ruling Number 2019-4781  
October 26, 2018

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 11145. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

The facts in Case Number 11145, as found by the hearing officer, are incorporated by reference.<sup>1</sup> On November 2, 2017, the grievant was issued a Group III Written Notice, with termination, for alleged falsification of records, violation of the Health Insurance Portability and Accountability Act (“HIPAA”), and failure to follow the agency’s policies on the use of social media and confidentiality.<sup>2</sup> The grievant timely grieved the disciplinary action and a hearing was held on March 19, 2018.<sup>3</sup> In a decision dated September 4, 2018, the hearing officer concluded that the agency presented sufficient evidence to support the Written Notice as to the violations of agency policies on confidentiality and social media use, but found the evidence did not support the falsification charge.<sup>4</sup> The grievant’s termination was also upheld.<sup>5</sup> 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 . . . .”<sup>6</sup> 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.<sup>7</sup> The Director of DHRM also has the sole authority to make a final determination on whether the

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<sup>1</sup> Decision of Hearing Officer, Case No. 11145 (“Hearing Decision”), September 4, 2018, at 2-3.

<sup>2</sup> *See id.* at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

hearing decision comports with policy.<sup>8</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

#### *Supported Grounds for Termination*

The grievant argues that the hearing decision fails to address whether the Group III Written Notice should be upheld based solely upon the violation of the agency's policies on confidentiality and the use of social media, given that the hearing officer found that the agency had not carried its burden of proof as to the falsification of mileage records. While the hearing officer did not address this question specifically, EEDR finds that this is harmless error, if error at all. The allegations upheld by the hearing officer, discussed as factual matters more fully below, are properly considered Group III violations under the DHRM *Standards of Conduct* policy and, accordingly, properly support termination on their own. As such, EEDR finds no basis to disturb the hearing decision as to this argument presented by the grievant.

#### *Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. The grievant argues that her actions did not constitute misconduct because she had permission to utilize social media in the manner in which she did. In short, she asserts that the agency did not bear its burden of proof to show that the disciplinary action at issue was warranted and appropriate under the circumstances.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>9</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. EEDR has thoroughly reviewed the testimony at hearing

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<sup>8</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>9</sup> Va. Code § 2.2-3005.1(C).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>12</sup> *Grievance Procedure Manual* § 5.8.

and the facts in the record, and finds that there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the November 2, 2017 Group III Written Notice and that the behavior constituted misconduct.<sup>13</sup> The hearing officer's determinations were based in part on the grievant's own admissions about her use of a personal social media account "to reach out to clients with communicable diseases and using the social medium to identify potential at-risk persons who may have had contact with the clients."<sup>14</sup> The agency's representative from human resources testified that the grievant "went beyond" permissible use as an outreach tool and shared client information on the social media site.<sup>15</sup> The Health District Director testified that the grievant's actions in so doing concerned him greatly because if a client is identifiable on the grievant's social media page, then HIPAA has been violated.<sup>16</sup> After considering this evidence, the hearing officer found that the agency's issuance of a Group III Written Notice, with termination, was warranted and appropriate.<sup>17</sup>

In her request for administrative review, the grievant argues that she was granted permission by agency management to utilize social media in the furtherance of her job duties. The grievant states in her request that she created an account solely for work purposes, and asserts that she produced evidence that she had asked her supervisor for guidance on utilizing social media to contact hard to reach clients.<sup>18</sup> However, the agency produced evidence that, in addition to creating the social media account for work, the grievant also became "friends" with clients on her personal social media page.<sup>19</sup> The Health District Director also testified that there was a distinction between using social media to "identify" clients versus "interact" with clients, and accepting clients as friends on a personal social media page, as the grievant did, was not permissible.<sup>20</sup> 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. 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.

### *Failure to Mitigate*

The grievant challenges the hearing officer's decision not to mitigate the Group III Written Notice with termination. She argues that termination was not an appropriate penalty based upon a number of circumstances in addition to those considered by the agency. She asserts that no client of the agency suffered harm as the result of her actions, and that she had no reason to know her actions constituted misconduct. Thus, she argues that the agency's decision not to mitigate the disciplinary action exceeded the limits of reasonableness.

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<sup>13</sup> Hearing Decision at 4.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Hearing Record Track 1 at 01:28:22 – 01:32:24.

<sup>16</sup> Hearing Record Track 2 at 05:47 – 06:07.

<sup>17</sup> Hearing Decision at 4.

<sup>18</sup> *See, e.g.*, Grievant Exhibit 1 at 1-2.

<sup>19</sup> Agency Exhibit 5 at 5-30.

<sup>20</sup> Hearing Record Track 1 at 27:47 – 32:34.

Under 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].”<sup>21</sup> The *Rules for Conducting Grievance Hearings* (“*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.”<sup>22</sup> 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.<sup>23</sup>

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.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management’s discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.<sup>24</sup> EEDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>25</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.<sup>26</sup>

Even considering all of the arguments advanced by the grievant in her request for administrative review as ones that could reasonably support mitigating the discipline issued, EEDR is unable to find that the hearing officer’s determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. 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

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<sup>21</sup> Va. Code § 2.2-3005(C)(6).

<sup>22</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>23</sup> *Id.* § VI(B)(1).

<sup>24</sup> The Merit Systems Protection Board’s approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>25</sup> “‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion.” Black’s Law Dictionary 10 (6th ed. 1990). “It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts.” *Id.*

<sup>26</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

limits of reasonableness.<sup>27</sup> Though the hearing officer did not refer to every piece of evidence presented by the grievant and offered as to mitigation, he noted the mitigating factors considered by the agency and concluded that termination was appropriate due to the severity of the violations.<sup>28</sup> Because the hearing officer's conclusion is based upon record evidence, EEDR will not disturb the hearing officer's decision on this basis.

#### 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.<sup>29</sup> 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.<sup>30</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>31</sup>



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<sup>27</sup> EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

<sup>28</sup> Hearing Decision at 3-4.

<sup>29</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>30</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>31</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).