

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11147; Ruling
Date: November 9, 2018; Ruling No. 2019-4785; 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 2019-4785
November 9, 2018

The Department of Corrections (the “agency”) 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 reconsideration decision in Case Number 11147. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The substantive and procedural facts of this case are set forth in EEDR’s first administrative review in this matter, EEDR Ruling Number 2019-4762, and are incorporated herein by reference.¹ The subject of EEDR’s ruling and the reconsideration decision is a Group I Written Notice issued to the grievant that charged her with violating state and agency policy “for retaliation and interference as defined by the EEOC and DOP 145.3, resulting in a hostile work environment for [Ms. M,] a subordinate employee[,] due to her placement at [the Institution] as an accommodation under the ADA.”² In EEDR Ruling Number 2019-4762, this Office remanded the case to the hearing officer for additional consideration of “the agency’s allegations of retaliation and interference,” including “whether the evidence in the record supported a conclusion that the grievant engaged in the charged misconduct.”³ In addition, EEDR ordered the hearing officer to “address his factual findings and analysis relating to the evidence about Ms. M’s internet use[,] . . . how the grievant addressed Ms. M’s handling’s of personnel records[,] and the ‘cross-training’ and/or reassignment of Ms. M to another position”⁴ EEDR also directed the hearing officer to discuss whether the evidence in the record supported a charge of unsatisfactory performance and/or disruptive behavior.⁵

The hearing officer issued a reconsideration decision on September 5, 2018.⁶ In the reconsideration decision, the hearing officer determined that the “Grievant perceived Ms. M’s work performance as unsatisfactory” and “did not take action against Ms. M for any improper reason or simply because Ms. M was placed at the Facility where Grievant was the

¹ See also Decision of Hearing Officer, Case No. 11147 (“Hearing Decision”), June 29, 2018.

² Agency Exhibit 1 at 1.

³ EEDR Ruling No. 2019-4762.

⁴ *Id.*

⁵ *Id.*

⁶ Reconsideration Decision of Hearing Officer (“Reconsideration Decision”), Case No. 11147, Sept. 5, 2018, at 1.

Superintendent.”⁷ With regard to the issue of cross-training, the hearing officer found that the “Grievant had genuine concerns about the confidentiality of human resource information,” and that those “concerns about Ms. M’s failure to secure confidential employee records were justified.”⁸ The hearing officer further stated that “Ms. M’s behavior raised a reasonable suspicion in Grievant’s mind that Ms. M may be using the Agency’s internet inappropriately” and that her “review of Ms. M’s internet use” was not “a pretext for discrimination, retaliation, or interference.”⁹ The hearing officer went on to discuss the applicable provisions of each state and agency policy listed on the Written Notice, stated that evidence did not show the grievant engaged in discrimination, retaliation, interference, or other improper conduct in violation of any listed policy, and concluded that the grievant’s actions were instead an attempt to address and/or correct Ms. M’s poor work performance.¹⁰ Based on these findings, the hearing officer again determined that the evidence in the record did not support the issuance of disciplinary action and rescinded the Group I Written Notice.¹¹ The agency now appeals the reconsideration 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.”¹² 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.¹³ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁴ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Hearing Officer’s Questioning of Ms. M

In its request for administrative review, the agency asserts that the hearing officer improperly questioned Ms. M at the hearing. To the extent such an argument is timely,¹⁵ EEDR has identified no impropriety in the hearing officer’s conduct. The *Rules for Conducting*

⁷ *Id.* at 4.

⁸ *Id.* at 4-5.

⁹ *Id.* at 6-7.

¹⁰ *Id.* at 7-12.

¹¹ *Id.* at 12.

¹² Va. Code §§ 2.2-1202.1(2), (3), (5).

¹³ See *Grievance Procedure Manual* § 6.4(3).

¹⁴ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁵ In general, parties may request administrative review of a hearing officer’s reconsidered decision on any other *new matter* addressed in the remand decision—in other words, on any matters that were not previously part of the original decision or of an earlier remand decision. See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056. As the agency admits, it did not challenge the hearing officer’s questioning of Ms. M in its request for administrative review of the original hearing decision. As a result, this issue is arguably no longer susceptible to review; nonetheless, in the interest of providing a full discussion of the issues in this case, EEDR will address the agency’s argument on this point.

Grievance Hearings (the “*Rules*”) provide that “the hearing officer may question the witnesses.”¹⁶ The *Rules* further caution, however, that the “tone of the inquiry, the construct of the question, or the frequency of questioning one party’s witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side.”¹⁷ EEDR has reviewed the record of Ms. M’s testimony and finds that the hearing officer’s questioning of Ms. M was relevant and reasonable under the circumstances.

Hearing Officer’s Consideration of Evidence

In addition, the agency essentially argues that the hearing officer’s findings of fact, based on the weight and credibility he accorded to the testimony presented at the hearing, are not supported by the evidence. More specifically, the agency argues that the hearing officer erred in concluding that the grievant’s actions were not a pretext for a retaliation, and contends that the evidence in the record supports a determination that the grievant retaliated against Ms. M. Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁸ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁹ 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.²⁰ 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.²¹ 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 reconsidered decision, the hearing officer addressed the agency’s charges of retaliation and interference in great detail. For example, the hearing officer repeatedly stated that the “Grievant took corrective action against Ms. M based on Ms. M’s work performance,”²² and that the grievant’s conduct was not based on any protected category to which Ms. M belonged or protected activity in which she engaged, including her placement at the Facility as an accommodation under the Americans with Disabilities Act (“ADA”).²³ The hearing officer further determined that the “Grievant did not take any action that was reasonably likely to interfere with the exercise or enjoyment of ADA rights by Ms. M,” and that her actions were

¹⁶ *Rules for Conducting Grievance Hearings* § IV(C).

¹⁷ *Id.*

¹⁸ Va. Code § 2.2-3005.1(C).

¹⁹ *Grievance Procedure Manual* § 5.9.

²⁰ *Rules for Conducting Grievance Hearings* § VI(B).

²¹ *Grievance Procedure Manual* § 5.8.

²² Reconsideration Decision at 7; *see id.* at 8-9, 11-12.

²³ *See* Reconsideration Decision at 6-11.

instead properly viewed as attempts to correct Ms. M's poor work performance.²⁴ The hearing officer's analysis culminated in the following discussion:

Ms. M was subject to corrective action and criticism for wearing leggings, failing to keep HR records confidential and attempting to access Facebook.

The Agency has not established a connection or "causal connection" between Ms. M's protected activity and Grievant's corrective action and criticism of Ms. M. Grievant took action against Ms. M because of Ms. M's poor work performance and not because Ms. M received an accommodation from the Agency. Grievant's actions were not a pretext for retaliation against Ms. M.²⁵

EEDR has thoroughly reviewed the hearing record and the agency's request for administrative review and finds that there is evidence in the record to support the hearing officer's conclusion that the grievant's conduct, as charged on the Written Notice, did not support the issuance of disciplinary action in this case. At the hearing, for example, multiple witnesses—including the grievant—testified that Ms. M wore leggings to work in violation of the Facility's dress code policy.²⁶ The grievant testified that Ms. M's work performance with regard to the handling of personnel records was not satisfactory, and that she decided to cross-train Ms. M on other functions in an attempt to improve Ms. M's abilities in this area of responsibility.²⁷ The grievant further explained that she was not certain Ms. M had accessed Facebook or misused the Internet while at work, but stated that she saw the Facebook logo on Ms. M's computer screen and believed this was a "flag" that Ms. M may have been misusing the Internet.²⁸ The grievant acknowledged that she was not pleased with Ms. M's placement at the Facility, but denied that any of her actions were due to Ms. M's request for accommodation or ADA status.²⁹

The agency asserts that the hearing officer erred in basing his reconsideration decision on "irrelevant items, such as whether or not Ms. M wore leggings, [and] did Ms. M mishandle [sic] boxes of confidential information in an improper fashion" However, the agency's investigation of the grievant's behavior specifically focused on whether the grievant had engaged in retaliation and interference based on her conduct in relation to Ms. M; namely, (1) reprimanding Ms. M for allegedly wearing leggings in violation of the Facility's dress code, (2) improperly modifying Ms. M's job duties due to alleged concerns about Ms. M's handling of confidential employee records, and (3) improperly requesting a review of Ms. M's Internet usage

²⁴ *Id.* at 12.

²⁵ *Id.* at 11.

²⁶ *E.g.*, Hearing Recording at 3:59:57-4:02:01 (testimony of Ms. K), 4:47:39-4:48:59, 4:50:33-4:52:13 (testimony of Ms. H), 5:23:43-5:24:00 (testimony of Ms. F), 5:45:03-5:45:20 (testimony of grievant). In the original hearing decision, the hearing officer acknowledged that the definition of leggings is inherently subjective. Hearing Decision at 14-15. Under the circumstances, he determined that the grievant's decision to address the issue with Ms. M was reasonable because she believed Ms. M was wearing leggings. *See id.*

²⁷ *See* Hearing Recording at 5:54:57-5:58:40, 6:41:56-6:44:16 (testimony of grievant).

²⁸ *E.g.*, Hearing Recording at 6:11:32-6:12:26 (testimony of grievant).

²⁹ *E.g.*, *id.* at 5:41:16-5:42:02, 5:46:16-5:46:27, 6:17:29-6:18:27, 6:25:05-6:25:44 (testimony of grievant); *see* Agency Exhibit 9 at 1-2.

records.³⁰ This behavior was also listed on the Written Notice as the basis for the agency's charge of retaliation and/or interference.³¹ The question of whether the grievant had an improper motive (i.e., retaliation or interference) for these actions will necessarily involve an assessment of the purported factual basis for the actions. EEDR finds that the hearing officer properly considered the grievant's alleged underlying acts of retaliation and/or interference as part of his discussion about whether the grievant had engaged in the charged misconduct.

In cases involving discipline, the burden is on the agency to show that the grievant engaged in the behavior charged on the Written Notice, that the behavior constituted misconduct, and that the discipline was consistent with law and policy.³² While the agency conducted an investigation and determined that the grievant had engaged in retaliation and/or interference,³³ the grievant presented evidence at the hearing to show that there were legitimate, non-retaliatory reasons for her behavior, as described more fully above. The agency's witnesses testified that they believed the grievant's behavior was unacceptable and warranted the issuance of disciplinary action.³⁴ EEDR has not, however, identified evidence in the record to demonstrate that the hearing officer abused his discretion by finding that the agency had not established a causal connection between Ms. M's protected status and/or protected activity and the grievant's alleged misconduct. For example, the EEO Manager testified that Ms. M's protected activity was her ADA placement at Facility,³⁵ but also stated that she did not know the reason the grievant engaged in the allegedly retaliatory behavior charged on the Written Notice.³⁶

The outcome of a case such as this one will necessarily depend on the hearing officer's assessment of the evidence presented by the parties, including the credibility of the witnesses who testified at the hearing and the corresponding weight given to their testimony. Indeed, conclusions as to the credibility of witnesses 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.³⁷

In summary, and although it is clear the agency disagrees with the decision, there is nothing to indicate that the hearing officer's consideration of the charges set forth on the Written Notice was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely

³⁰ See Agency Exhibit 15.

³¹ Agency Exhibit 1 at 2.

³² *Rules for Conducting Grievance Hearings* § VI(B)(1).

³³ Agency Exhibit 15.

³⁴ See, e.g., Hearing Recording at 2:47:02-2:50:23, 2:53:52-2:55:24 (testimony of EEO Manager), 4:28:03-4:29:24 (testimony of Regional Administrator).

³⁵ *Id.* at 2:47:02-2:49:18 (testimony of EEO Manager).

³⁶ *Id.* at 2:49:58-2:50:23 (testimony of EEO Manager).

³⁷ See, e.g., EDR Ruling No. 2014-3884.

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. 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.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's reconsideration 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.³⁸ 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.³⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁰



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³⁸ *Grievance Procedure Manual* § 7.2(d).

³⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).