

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11251; Ruling
Date: November 9, 2018; Ruling No. 2019-4801; Agency: University of Virginia
Medical Center; 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 University of Virginia Medical Center
Ruling Number 2019-4801
November 9, 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 11251. 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 11251 are as follows:¹

The University of Virginia employed Grievant as a Transporter. He began working for the Agency in October 2016. Grievant had prior active disciplinary action. He received a Step 2 Formal Counseling on October 17, 2017. Grievant received a Step 3 Performance Warning with a 24 hour suspension on December 21, 2017. He received a Step 3 Performance Warning with a 24 hour suspension on April 27, 2018.

Grievant and other employees in his Unit were expected to “clock in” and “clock out” at either of two Kronos terminals located in the Basement of the Building. They were prohibited from using Kronos terminals located on other floors. Agency managers wanted employees to clock in and clock out in the Basement so that employees could receive their daily assignments.

On May 29, 2018, the Supervisor met with Grievant and instructed Grievant to clock in and clock out using either of the Kronos terminals located in the Basement. Grievant understood the Supervisor’s instruction.

On May 30, 2018, Grievant clocked in at 8:37 a.m. using a Kronos terminal located on the Second Floor of the Building. On May 30, 2018, Grievant clocked out at 5:10 p.m. using a Kronos terminal located on the First Floor Lobby. On June 1, 2018, Grievant clocked in at 8:31 a.m. using a Kronos terminal located on the Second Floor of the Building.

On June 25, 2018, the grievant was issued a Step 4 Formal Performance Improvement Counseling Form of disciplinary action with removal for failure to follow a supervisor’s

¹ Decision of Hearing Officer, Case No. 11251 (“Hearing Decision”), Oct. 1, 2018, at 2.

instructions.² The grievant timely grieved the disciplinary action, and a hearing was held on September 27, 2018.³ In a decision dated October 1, 2018, the hearing officer upheld the agency's issuance of the disciplinary action, and the grievant's subsequent termination.⁴ The grievant now seeks administrative review from 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”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 a party; the sole remedy is that the action be correctly taken.⁶

The grievant's request for administrative review can be construed as challenging 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”⁷ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁸ 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.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 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. At the hearing, the grievant claimed that he was being treated differently from other employees and followed throughout the workday.¹¹ However, the hearing officer found that the grievant did not produce sufficient evidence that would justify reversing the disciplinary action in this instance.¹²

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 4.

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)(1).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Hearing Record at 25:00 – 26:45, 27:10 – 27:43.

¹² Hearing Decision at 3.

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. In his hearing decision, the hearing officer found the testimony of the agency's witness to be credible and held that "[o]n May 30, 2018 and June 1, 2018, Grievant [clocked in with] terminals located on floors other than the Basement. His actions were contrary to the Supervisor's instructions showing he did not meet all of the performance expectations of his position during the Performance Warning Period. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Step 4 Formal Performance Improvement Counseling with removal."¹³

EEDR has reviewed the record, and cannot find that the hearing officer's determination that the agency met its burden of proof to show that the disciplinary action was proper was without basis in the record. For instance, the agency presented as a witness the grievant's supervisor, who testified as to the two locations where the employees in his department are instructed to clock in.¹⁴ However, the supervisor further testified that, on the two occasions documented in the Written Notice, the grievant used different terminals to clock in, contrary to his instructions.¹⁵ While the grievant may disagree with his supervisor's characterization of the events at issue, 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.¹⁶ 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.

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.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹



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

¹³ *Id.*

¹⁴ Hearing Recording at 4:58 – 5:53

¹⁵ *Id.* at 7:22 – 7:55.

¹⁶ *See, e.g.*, EDR Ruling No. 2012-3186.

¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).