

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11250; Ruling No. 2019-4810; Ruling Date: December 13, 2018; 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 2019-4810
December 13, 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 11250. 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 11250 are as follows:¹

The Department of Corrections employed Grievant as a Food Operations Supervisor. Grievant had prior active disciplinary action. On January 27, 2017, Grievant received a Group I Written Notice for unprofessional conduct and inappropriate use or misuse of State equipment. On August 3, 2017, Grievant received a Group I Written Notice for conviction of a moving traffic violation in a State vehicle. On May 11, 2017, Grievant received a Group II Written Notice for failure to report fraternization.

Grievant received training regarding the Agency’s Prison Rape Elimination Act policy.

Grievant complained to her two supervisors about Offender S. Offender S had been fired from his position in the kitchen and Grievant did not want Offender S to be returned to the kitchen where she worked. The two supervisors disregarded Grievant’s request and returned Offender S to work in the kitchen.

On April 11, 2018, Grievant was in an office working using a computer. Offender S approached Grievant and said he needed to show her something. Grievant told him that he had nothing that she wanted to see. Grievant said, I go by the 3F rule which is you don’t feed me, finance me, and you can figure the other [one].” Grievant told Offender S, “You need to stay the hell away from me.”

On April 12, 2018, Grievant filed a Disciplinary Offense Report because Offender S, “called me over to the dish room where he was working because he

¹ Decision of Hearing Officer, Case No. 11250 (“Hearing Decision”), November 13, 2018, at 2-3.

said he needed to talk to me. He let me know that his interest in me was to f—k me because he heard I give good head.”

During the inmate’s disciplinary hearing, the Alternate Hearings Officer learned of the allegation that Grievant told Offender S about her 3F rule. She referred the matter to the Agency’s PREA Investigator and the Agency began an investigation.

The grievant timely grieved her termination from employment and a hearing was held on October 30, 2018.² On November 13, 2018, the hearing officer issued a decision upholding the disciplinary action and subsequent termination of the grievant.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 argues in her request for administrative review that the agency did not meet its burden of proof to show that she violated agency policy, essentially 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”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 5.

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 her termination was warranted and appropriate given the circumstances of her case. In support of this assertion, she disputes the hearing officer's finding that her behavior constituted a violation of the agency's Operating Procedure 038.3, which implements the Federal Prison Rape Elimination Act of 2003 ("PREA").¹⁰ She argues that the hearing officer erred in finding her behavior to be a violation of this policy, because she never had a sexual relationship with any offender, and further, she disputes that the language she used constituted sexual harassment under the policy.

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. Based on a review of the testimony at hearing and the facts in the record, there is sufficient evidence to support the hearing officer's findings that the grievant engaged in the behavior described in the June 22, 2018 Written Notice and that the behavior constituted misconduct.¹¹ The agency's investigator testified that he reviewed the comments that the grievant admitted to having made, and determined from the context of the conversation that prohibited sexual content was implied.¹² The testimony from the agency's Regional PREA Coordinator supported this conclusion, as she pointed to the inclusion of "verbal comments" in the policy's definition of sexual harassment,¹³ and affirmed that the comments the grievant admitted to having made would fit this definition, as the agency has "zero tolerance" for any comments that imply sexual content.¹⁴ 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, EEDR declines to disturb the decision on this basis.

Alleged Bias of Hearing Officer

The grievant further alleges that the hearing officer was biased in favor of the agency because the agency pays for the cost of the hearing. The *Rules* provide that a hearing officer is responsible for:

[v]oluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EEDR Policy No. 2.01, Hearing Officer Program Administration.¹⁵

¹⁰ See Hearing Decision at 3.

¹¹ See *id.*

¹² Hearing Recording 36:57 – 38:40.

¹³ Agency Exhibit 3 at 14.

¹⁴ Hearing Recording 13:24 – 14:18; 17:32 – 20:45.

¹⁵ *Id.* § II. See also EEDR Policy 2.01, *Hearings Program Administration*, which indicates that a hearing officer shall be deemed unavailable for a hearing if "a conflict of interest exists or it is otherwise determined that the hearing officer must recuse himself/herself."

The applicable standard regarding EEDR's requirement of a voluntary disqualification when the hearing officer "cannot guarantee a fair and impartial hearing," is generally consistent with the manner in which the Court of Appeals of Virginia reviews recusal cases.¹⁶ The Court of Appeals has indicated that "whether a trial judge should recuse himself or herself is measured by whether he or she harbors 'such bias or prejudice as would deny the defendant a fair trial.'"¹⁷ EEDR finds the Court of Appeals' standard instructive and has held that in compliance reviews of assertions of hearing officer bias, the appropriate standard of review is whether the hearing officer has harbored such actual bias or prejudice as to deny a fair and impartial hearing or decision.¹⁸ The party moving for recusal has the burden of proving the hearing officer's bias or prejudice.¹⁹

In this particular case, there is no such evidence. The *Rules for Conducting Grievance Hearings* provide that, in every case, the agency pays a fee for the hearing officer regardless of the outcome.²⁰ The hearing officer, however, is not an employee of the Department of Corrections, but rather, a neutral and independent decision-maker appointed by this Office. The mere fact that the agency pays the cost of the hearing does not mean that anything improper occurred with respect to any particular case, and the grievant has provided no evidence to suggest that anything inappropriate took place. EEDR has thoroughly reviewed the hearing record, and finds no indication that any improper influence affected the outcome of the hearing decision. EEDR therefore declines 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.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



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

¹⁶ While not always dispositive for purposes of the grievance procedure, EEDR has in the past looked to the Court of Appeals of Virginia and found its holdings persuasive.

¹⁷ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459 (1992) (citation omitted); see *Commonwealth v. Jackson*, 267 Va. 226, 229, 590 S.E.2d 518, 520 (2004) ("In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge.").

¹⁸ *E.g.*, EDR Ruling No. 2014-3904; EDR Ruling No. 2012-3176.

¹⁹ *Jackson*, 267 Va. at 229, 590 S.E.2d at 519-20.

²⁰ *Rules for Conducting Grievance Hearings* § VII.

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).