

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10992; Ruling  
Date: July 28, 2017; Ruling No. 2017-4566; Agency: Virginia Department of  
Transportation; Outcome: AHO's decision affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution<sup>1</sup>**

**ADMINISTRATIVE REVIEW**

In the matter of the Virginia Department of Transportation  
Ruling Number 2017-4566  
July 28, 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 10992. 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 10992 are as follows:<sup>2</sup>

The Agency provided me with a notebook containing 24 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing 24 tabs. The Agency objected to the Grievant’s documentary notebook for not being timely filed.

I held a conference call with the Grievant and Agency Counsel on April 17, 2017. At that time, it was established that all documentary evidence would be exchanged on or before 5:00 p.m., on May 2, 2017. Subsequently, that date was extended until May 5, 2017. The Agency filed its documentary evidence with me and the Grievant on May 5, 2017. The Grievant did not file any documentary evidence with either me or the Agency until May 15, 2017, the day prior to the hearing. Upon questioning by me, the Grievant had a litany of reasons for why she was unable to timely file her documentary evidence. Some of those reasons were that- she was under stress; the first company that she went to for photocopies of the documents stapled them together rather than three-hole-punching them; a subsequent company ran out of toner; her copier broke; she did not have anyone

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<sup>1</sup> Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office’s name post-merger as the Office of Equal Employment and Dispute Resolution.

<sup>2</sup> Decision of Hearing Officer, Case No. 10992 (“Hearing Decision”), May 24, 2017, at 2-4 (citations omitted).

to assist her in putting this notebook together; and other such excuses which I found wholly unsatisfactory. Accordingly, I sustained the Agency's objection and the Grievant's notebook was excluded.

As the hearing commenced, I heard substantial testimony regarding the Agency's Utility Bill Payment System ("VUBPS"). It became obvious to me that VUBPS was not the issue that I was being asked to rule on in this matter. Accordingly, I ruled during the course of the hearing that I needed to hear no further testimony regarding VUBPS, as it was not the matter before me.

On November 16, 2016, the Grievant acknowledged receipt of her Performance Evaluation for the 2015-2016 cycle. That evaluation rated her as "Below Contributor."

Pursuant to this evaluation and pursuant to DHRM Policy 1.40, a Performance Planning Employee Development Plan ("Plan") was developed for the Grievant. The Plan was reviewed and discussed with the Grievant on or about November 17, 2016. The Plan was to be completed on or about February 15, 2017.

During the course of this Plan, meetings were held between the Grievant and appropriate Agency personnel on December 1, 2016; December 15, 2016; December 29, 2016; January 12, 2017; and February 2, 2017. Progress or lack thereof was discussed at each of these meetings and suggested corrective actions were made by the Agency to the Grievant.

The Agency introduced an Exhibit that set forth the errors that the Grievant made during the course of the Plan. That Exhibit shows that approximately 250 errors were made during this 90-day period. I heard testimony that, as a vendor for the State submitted an invoice, the data from that invoice was keyed into a document known as a voucher. The creation of the voucher was not done by the Grievant. One of the Grievant's roles prior to being placed on the Plan was to take the voucher and compare it to the vendors invoice and other supporting documentation. The Grievant was a second set of eyes to make sure that voucher, which was created from the data taken from the vendor's invoice and supporting documentation, was correct. Based on Agency Exhibit 1, Tab 5, Page 1, it is clear that the Grievant, even though she was on the Plan and even though duties had been taken away from her so that she could focus on only 25 vouchers per day, still was capable of making an extreme number of errors. Examples of those errors could be found at Agency Exhibit 1, Tabs 19-22.

Based on the documentary evidence before me and the testimony before me at the hearing, I can find no justification for the quality or quantity of the errors made by the Grievant. The Grievant offered no witnesses who could testify to a justification for the nearly 250 errors that were made in a 90-day period and

the Grievant, herself, declined to testify. Further, I find that the Agency complied with Policy 1.40, in granting the Grievant a re-evaluation period. There is ample evidence for the Agency to conclude that the Grievant's performance at the end of the re-evaluation period continued to be "Below Contributor." The Agency made the determination that its only course of action was termination of the Grievant and I find that to be a justifiable determination.

The grievant timely grieved her termination from employment and a hearing was held on May 16, 2017.<sup>3</sup> On May 24, 2017, the hearing officer issued a decision upholding the re-evaluation and subsequent termination of the grievant.<sup>4</sup> 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 . . . ."<sup>5</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>6</sup>

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

The grievant's request for administrative review essentially challenges 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.<sup>7</sup> Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>8</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>9</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>10</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>11</sup> Where the

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<sup>3</sup> Hearing Decision at 1.

<sup>4</sup> *Id.* at 1, 4.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> The agency argues that the grievant's request for administrative review should be denied because the grievant failed to refer to a particular section of the *Grievance Procedure Manual* with which the decision was not in compliance. While the agency's argument is correct under a strict construction of the *Grievance Procedure Manual*, nevertheless, EEDR has historically interpreted this provision broadly, so as to afford grievants, especially *pro se* grievants, the opportunity to raise challenges to the hearing officer's factual findings.

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>11</sup> *Grievance Procedure Manual* § 5.8.

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 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 the testimony regarding VUBPS was irrelevant, and argues that the evidence showed her strong knowledge of this system. Further, she asserts that she was never provided with feedback on how to improve her performance and that the supervisors' expectations of her frequently changed.

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 grievant's supervisor and other agency witnesses to be credible and held that the agency's actions in terminating the grievant were in compliance with state and agency policy and that there existed "ample evidence for the Agency to conclude that the Grievant's performance at the end of the re-evaluation period continued to be 'Below Contributor.'"<sup>12</sup>

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 grievant's termination was proper was without basis in the record. For instance, the grievant's manager testified to the fact that the grievant was not meeting the core responsibilities contained within her Employee Work Profile, and thus received a "Below Contributor" rating on her performance evaluation for 2015-2016.<sup>13</sup> He further testified that the agency developed a performance improvement plan and reduced the grievant's duties in an attempt to allow her to improve her performance.<sup>14</sup> However, the grievant's performance did not improve during the 90 day re-evaluation period.<sup>15</sup> While the grievant may disagree with her supervisor's assessment of her performance, as the hearing officer noted, the grievant did not testify on her own behalf at the hearing.<sup>16</sup> 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.<sup>17</sup> 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

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<sup>12</sup> Hearing Decision at 4.

<sup>13</sup> Hearing Recording at 46:06-46:55.

<sup>14</sup> *Id.* at 48:16-49:36; *see* Agency Exhibit 4.

<sup>15</sup> Hearing Recording at 49:39-49:58.

<sup>16</sup> Hearing Decision at 4.

<sup>17</sup> *See, e.g.*, EDR Ruling No. 2012-3186.

for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

To the extent that the grievant argues that the hearing officer did not address every piece of evidence presented during the hearing, including emails regarding the possibility of her completion of a self-evaluation, we find no basis to disturb the decision for this reason. It is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented, and there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing or rulings on objections made during the hearing. Mere silence as to a particular witness's testimony or other piece of evidence does not constitute a basis for remand in this case.

### *Exclusion of Exhibits*

The grievant's request for administrative review also asserts that the hearing officer erred by not allowing her exhibit notebook into evidence. Upon objection by the agency advocate, the hearing officer heard argument from each side regarding the timeliness of the submission of the grievant's exhibits.<sup>18</sup> The hearing officer ultimately determined that he would not admit the exhibits into evidence because they had not been provided to the agency prior to the deadline for the parties to exchange copies of their exhibits.<sup>19</sup>

Receiving probative evidence is squarely within the purview of the hearing officer.<sup>20</sup> Under the *Grievance Procedure Manual*, a hearing officer has the authority to rule on procedural matters, render written decisions and provide appropriate relief, and take any other actions as necessary or specified in the grievance procedure.<sup>21</sup> To this end, the hearing officer has the authority to require the parties to exchange a list of witnesses and documents.<sup>22</sup> An action taken by a hearing officer in the exercise of his or her authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.<sup>23</sup> In this instance, a review of the record indicates that there was no dispute that the grievant's proposed exhibits had not been provided to the agency by the deadline established by the hearing officer.<sup>24</sup> Under the *Rules for Conducting Grievance Hearings*, the hearing officer may exclude evidence not timely exchanged consistent with the hearing officer's orders.<sup>25</sup> Thus, we cannot conclude that the hearing officer exceeded his authority in refusing to admit the exhibits into evidence.

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<sup>18</sup> See Hearing Recording at 3:41-9:58.

<sup>19</sup> *Id.* at 8:03-9:58; Hearing Decision at 3.

<sup>20</sup> Va. Code § 2.2-3005(C).

<sup>21</sup> *Grievance Procedure Manual* § 5.7; see also Va. Code § 2.2-3005.

<sup>22</sup> *Grievance Procedure Manual* § 5.7(2).

<sup>23</sup> See, e.g., EDR Ruling No. 2014-3777; EDR Ruling No. 2005-1037; EDR Ruling No. 2004-934.

<sup>24</sup> See Hearing Recording at 3:41-9:58.

<sup>25</sup> *Rules for Conducting Grievance Hearings* § IV(D).

*Newly Discovered Evidence*

The grievant has also submitted additional information to EEDR which she requests be considered as part of EEDR's administrative review. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."<sup>26</sup> Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.<sup>27</sup> The party claiming evidence was "newly discovered" must show that

(1) the evidence was newly discovered since the judgment was entered; (2) due diligence...to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.<sup>28</sup>

Here, the grievant has provided no information to support a contention that the additional documentation should be considered newly discovered evidence under this standard. It appears the grievant had the ability to obtain this evidence prior to the hearing. In fact, it appears that at least some of the information may have been included in the grievant's proposed exhibit binder which was excluded by the hearing officer, as discussed above. As the grievant already had the opportunity at the hearing to submit this evidence in support of her position, there is no basis for EEDR to reopen or remand the hearing for consideration of this additional evidence.

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>26</sup> Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); see EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

<sup>27</sup> See *Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989).

<sup>28</sup> *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

<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).