

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10878; Ruling Date: July 7, 2017; Ruling No. 2017-4572; Agency: Department of Conservation and Recreation; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution¹

ADMINISTRATIVE REVIEW

In the matter of the Department of Conservation and Recreation
Ruling Number 2017-4572
July 7, 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 10878. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

On August 16, 2016, the agency issued the grievant a Group II Written Notice with removal for unsatisfactory performance and failure to follow instructions.² The grievant timely initiated a grievance to challenge the Group II Written Notice, and a hearing was held on January 26, 2017.³ The factual determinations made by the hearing officer are as follows:⁴

The Department of Conservation and Recreation employed Grievant as a Fixed Asset and Leasing Accountant. She began working for the Agency in 2008. Grievant had prior active disciplinary action. She received a Group II Written Notice on April 13, 2015 for failure to follow instructions.

Unit employees have a shared network computer drive designated as the I drive. Grievant was expected to post her work to the I drive instead of saving it to her personal computer drive. Electronic documents she kept on her personal computer drive were not usable by other employees needing them. The R drive was a personal computer drive.

Grievant was placed on an Improvement Plan. On January 21, 2016, the Manager told Grievant she was rescinding the Improvement Plan. The Manager told Grievant she must perform all of the duties listed in her Employee Work

¹ 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.

² Decision of Hearing Officer, Case No. 10878 (“Hearing Decision”), June 6, 2017, at 1; *see* Agency Exhibit 1.

³ Hearing Decision at 1.

⁴ Hearing Decision at 2-3 (citations omitted).

Profile. Grievant was advised that all work related files must be maintained on the shared I drive with no restrictions to access.

Grievant saved files that were part of the Fixed Assets Accounting and Control System (FAACS) on her personal computer drive (R drive) and not on the shared I drive as instructed. Examples of these files included the:

- Controlled Access Lists
- Construction in Progress and Land Closed Projects
- Monthly Certifications of FAACS users
- Depreciation and Nomenclature Code Files
- FAACS User ID Listings
- Master File Downloads at Year End.

On February 1, 2016, the Supervisor reminded Grievant that her Lease Accounting System (LAS) reports were due to the Supervisor within 30 days after the end of each quarter for review and signature. On February 1, 2016, the Supervisor sent Grievant an email stating:

Please ensure a comprehensive lease report is provided within 30 days after the end of each quarter. This means a report is due to me for review and signature January 30, April 30, July 30, and October 30. *** In addition, please have the report for quarter ended 12/31/2015 to me for review by 2/12/2016.

Grievant did not submit the December lease report by January 30. Grievant was given a revised due date of February 12, 2016. Grievant did not provide the lease report by February 12, 2016. Grievant was reminded that she did not meet the due date for the report. Grievant provided a lease report on February 16, 2016 that did not meet the requested format and date requirements. The Supervisor sent the report back to Grievant and informed Grievant how to present the report. Grievant did not provide any additional lease reports.⁵

In a decision dated June 6, 2017, the hearing officer found that evidence presented by the agency was sufficient to support the issuance of the disciplinary action.⁶ The hearing officer determined that the grievant had acted contrary to instructions by 1) failing to submit a report on time, and 2) storing work-related files on a personal drive rather than a networked drive.⁷ Accordingly, the hearing officer upheld the Group II Written Notice and termination due to

⁵ While the agency presented other issues of alleged unsatisfactory performance, the hearing officer only made factual determinations related to the issues noted here because the remaining issues, as stated by the hearing officer, would not have supported the Group II Written Notice that was issued. Hearing Decision at 3.

⁶ Hearing Decision at 3-4.

⁷ *Id.*

accumulation of disciplinary action.⁸ The grievant has now requested administrative review of the hearing decision.⁹

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”¹⁰ 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.¹¹

Inconsistency with Agency Policy

In her request for administrative review, the grievant may have attempted to assert that the hearing officer’s decision is inconsistent with state or agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹² However, upon review of the grievant’s submission, EEDR is unable to find any argument, not otherwise addressed herein, that raises any way in which a state or agency policy was not followed by the hearing officer. Accordingly, there is no basis to find that the hearing decision is inconsistent with policy.¹³

Hearing Officer’s Consideration of the Evidence

The grievant’s request for administrative review challenges the hearing officer’s findings of fact and determinations therefrom, essentially disputing that she had unjustifiably failed to submit the report on time and improperly saved documents to a personal drive. Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁴ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹⁵ 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.¹⁶ Thus, in disciplinary actions the hearing

⁸ *Id.* at 4.

⁹ The grievant’s initial request for review was timely received on June 21, 2017. The grievant provided an additional submission on June 30, 2017, after the conclusion of the 15-day appeal period. *Grievance Procedure Manual* § 7.2. To the extent the grievant’s additional submission raises new issues, including a possible request to submit or obtain new evidence, that were not contained in her initial appeal, EEDR is unable to address them in this ruling.

¹⁰ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹¹ See *Grievance Procedure Manual* § 6.4(3).

¹² Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹³ To the extent the grievant’s submission on June 30, 2017 raises policy-based arguments, these issues were raised untimely and cannot be addressed in this ruling. *Grievance Procedure Manual* § 7.2.

¹⁴ Va. Code § 2.2-3005.1(C).

¹⁵ *Grievance Procedure Manual* § 5.9.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B).

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.¹⁷ 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.

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 the hearing officer found sufficient to support the issuance of the Written Notice.¹⁸ On appeal, the grievant has presented some fact-based contentions as to why she did not engage in such conduct or why her conduct was not improper. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely 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. EEDR's review of the record finds that the hearing officer's findings are supported by the record evidence. 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.

Witness Issues

The grievant states, with little detail, that there were five agency employees who were ordered by the hearing officer to appear as witnesses at the hearing, but did not appear. While these witnesses apparently did not attend the hearing, the grievant has presented no information about the potential testimony of these witnesses. It is possible that this issue was addressed off the record between the parties and the hearing officer, but a review of the recording revealed no substantive discussion about why these witnesses did not attend the hearing or what the grievant wanted them to testify about.¹⁹

EEDR has held that a material witness's participation in a grievance hearing should not be viewed as a discretionary, voluntary process.²⁰ While a hearing officer has no specific authority to compel testimony or to hold a witness in contempt, an agency presumably can, in most cases, compel an employee to provide testimony in a grievance hearing just as it can require an employee to participate in an investigation.²¹ *The Rules for Conducting Grievance*

¹⁷ *Grievance Procedure Manual* § 5.8.

¹⁸ Hearing Decision at 3-4.

¹⁹ The grievant did mention in her closing statement that she had discussed a number of issues with one of the witnesses, a human resources representative, but it was unclear how testimony from this witness would have been different than what the grievant did or could have testified about herself. Hearing Recording at 7:40:20-7:40:50.

²⁰ EDR Ruling No. 2012-3290.

²¹ Clearly an agency could not compel an employee to testify against him or herself in a matter that could potentially result in criminal prosecution, absent a *Garrity* warning. The *Garrity* rule comes from the United States Supreme Court case of *Garrity v. New Jersey*, 385 U.S. 493 (1967). It is essentially the right of a governmental employee to be free from compulsory self-incrimination. The basic thrust of the *Garrity* Rule is that an employee may be

Hearings provide that it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.²² Furthermore, in the absence of evidence of extenuating circumstances preventing the agency employee from attending the hearing, when an agency fails to require the employee to appear for the hearing, the hearing officer has the authority to draw an adverse inference against the agency if warranted by the circumstances.²³

Moreover, due process requires the accused be granted the opportunity to question and cross-examine witnesses. When a witness who potentially has relevant and material information refuses to answer questions, a grievant is potentially denied due process.²⁴ The agency is in a position to prevent such a denial by instructing employees to, in good faith, participate in the process. If an agency fails to instruct witnesses to participate in the grievance hearing process, a hearing officer has the authority to draw an adverse inference against an agency on any factual basis that could have been addressed by the absentee witness.²⁵

In this case, five agency employees ordered to attend the hearing did not appear, although some other agency-employee witnesses ordered to appear did attend and testify. Thus, EEDR presumes that the witness orders were conveyed to the witnesses. It is concerning that so many agency employees ordered to appear did not attend the hearing. However, while EEDR has questions about what would have led so many agency employees to not appear and whether the agency itself failed to take necessary steps to ensure their attendance, there is little in the record for EEDR to find improper conduct.²⁶

As it relates to the hearing itself however, the hearing officer had the authority to draw adverse factual inferences as to these witnesses' planned testimony. Importantly, it does not appear the grievant addressed anything about these potential witnesses' planned testimony on the record. As such, it is unclear what adverse inferences would have been appropriate for the hearing officer to draw. In addition, it is not clear, even if there were more on the record about these witnesses, that any such adverse inferences would have had any material effect on the outcome of this case. In conclusion, while EEDR is concerned about so many witnesses not appearing, there has been nothing presented that would allow EEDR to find that the hearing officer erred or failed to exercise appropriate discretion with regard to the nonappearance of

compelled to give statements under threat of discipline or discharge, but those statements may not be used in the criminal prosecution of the individual.

²² *Rules for Conducting Grievance Hearings* § III(E) ("The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. . . . The agency shall then provide a copy of the order to the employee and require his/her attendance at hearing.").

²³ *Id.* § V(B) ("Although a hearing officer does not have subpoena power, he or she has the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or EEDR had ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process.").

²⁴ See *Detweiler v. Va. Dep't of Rehab. Servs.*, 705 F.2d 557, 562 (4th Cir. 1983).

²⁵ EDR Ruling No. 2012-3290.

²⁶ If the appropriate agency representatives direct employees to appear at a grievance hearing and they fail to adhere to that directive without justification, such conduct could warrant being held accountable for failing to follow legitimate directives of management. See DHRM Policy 1.60, *Standards of Conduct*.

witnesses. In short, EEDR has no basis to remand this case for the witness issues and potential adverse inferences to be addressed by the hearing officer because there nothing in the record that supports any suggestion that the outcome of this case would be affected. As such, EEDR declines to remand on this issue.

CONCLUSION AND APPEAL RIGHTS

Based on the foregoing, EEDR has no basis to find that the hearing officer abused her discretion in any way or that remand is otherwise warranted.²⁷ 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.²⁸ 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.²⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁰



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²⁷ To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EEDR has determined that such arguments did not support remand to the hearing officer. EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

²⁸ *Grievance Procedure Manual* § 7.2(d).

²⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁰ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).