

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11000; Ruling
Date: August 3, 2017; Ruling No. 2018-4583; Agency: Virginia Department of
Transportation; 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 Virginia Department of Transportation
Ruling Number 2018-4583
August 3, 2017

The grievant, by counsel, 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 11000. For the reasons set forth below, EEDR has no basis to disturb the decision of the hearing officer.

FACTS

On February 24, 2017, the agency removed the grievant from employment following a three-month re-evaluation.² The grievant timely initiated a grievance to challenge the re-evaluation, and a hearing was held on June 14, 2017.³ In a decision dated June 28, 2017, the hearing officer found that the re-evaluation was not arbitrary or capricious and that the agency had complied with state policy governing the grievant’s removal.⁴ Accordingly, the hearing officer upheld the grievant’s termination.⁵ The grievant has now requested administrative review of the hearing 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”⁶ If the hearing

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. 11000 (“Hearing Decision”), June 28, 2017, at 1; *see* Agency Exhibits 17, 19-20. The relevant facts as set forth in the hearing decision in Case Number 11000 are incorporated by reference. *See* Hearing Decision at 2-6.

³ Agency Exhibit 1; Hearing Decision at 1.

⁴ Hearing Decision at 6.

⁵ *Id.*

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁷

Further, while the grievant's request for administrative review primarily concerns issues of state policy, the hearing officer's findings in this regard also contain factual determinations. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁸ and to determine the grievance based "on the material issues and grounds in the record for those findings."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 the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In his request for administrative review, the grievant raises four ways in which the hearing officer determined that the agency had failed to adhere to DHRM Policy 1.40, *Performance Planning and Evaluation*: 1) the re-evaluation plan was not presented to the employee within 10 workdays of the evaluation meeting, 2) the re-evaluation plan did not clearly indicate that it was such a re-evaluation plan, 3) the reviewer did not sign the re-evaluation plan, and 4) the reviewer did not sign the re-evaluation.¹⁰ Although the hearing officer found these issues to violate DHRM Policy 1.40, he determined that each was "harmless error" that did not adversely affect the re-evaluation or the grievant's termination.¹¹ The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹² The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.¹³ Accordingly, the grievant's policy claims will be addressed below.

Timing of Re-evaluation Plan

DHRM Policy 1.40 provides that "[w]ithin 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan" The hearing officer determined that the relevant evaluation meeting took place on November 4, 2016.¹⁴ The hearing decision does not contain a finding as to when the re-evaluation plan was presented to the grievant. However, the hearing officer determined that the re-evaluation plan was not created within 14 days of November 4, 2016.¹⁵

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ Hearing Decision at 2-4, 6.

¹¹ *Id.*

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

¹³ See *Grievance Procedure Manual* § 7.2(a).

¹⁴ Hearing Decision 2-3. Interestingly, no exhibit documents that the meeting occurred on this date. However, testimony from the grievant's supervisor supports this finding. Hearing Recording at 11:35-11:44.

¹⁵ Hearing Decision at 3.

While it would be natural to equate “14 days” to the 10 workdays actually spelled out in policy, 14 days leads to a different computation than 10 workdays in this instance. As the performance evaluation meeting took place on November 4, 2016, there was an intervening holiday on November 11. Consequently, 10 workdays from November 4, would actually be November 21. Again, the hearing decision contains no finding as to when the re-evaluation plan was presented to the grievant. The only evidence in this regard in the record appears to be testimony from the grievant’s supervisor that indicates the plan was developed and given to the reviewer for approval on November 18,¹⁶ and later presented to the grievant on November 21, but made effective November 28, following the Thanksgiving holiday.¹⁷ As such, it may very well be that the agency had adhered to the 10 workday requirement in this instance.

EEDR is unable to evaluate the hearing officer’s findings in this regard because there are not underlying factual determinations stated in the record to support them. However, even if it is assumed that the hearing officer’s determination is supported by the evidence and policy, we have no basis to dispute the hearing officer’s finding that the delay was “harmless error” under the facts of this case. EEDR has reviewed nothing in the record to support that any delay, if it existed here, resulted in any material detriment to the grievant or her re-evaluation.

Identification of the re-evaluation plan

DHRM Policy 1.40 provides that “[t]he form [on which the re-evaluation plan is developed] should clearly indicate that it is a re-evaluation.” The hearing officer found “[t]he Agency failed to properly describe the Development Plan as a Re-Evaluation Development Plan.”¹⁸ The hearing officer found this alleged violation of the policy to be “harmless error.” Importantly, the policy language cited merely states that the form “should” indicate that it is a re-evaluation. Because the policy does not utilize mandatory (i.e., “must”) language in this regard, the agency has not failed to adhere to a mandatory requirement of policy that would in any way invalidate the plan. Consequently, EEDR has no basis to disagree with the hearing officer’s ultimate assessment that this point had no material bearing on the outcome of the matter, i.e., that it was “harmless error.”

Failure of the reviewer to sign the re-evaluation plan

DHRM Policy 1.40 provides that “[t]he employee’s reviewer, and then the employee, should review and sign the performance re-evaluation plan.” The hearing officer determined that the reviewer did not comply with this provision by not signing the re-evaluation plan.¹⁹ The hearing officer also determined that the reviewer had approved the re-evaluation plan and the failure to sign it was “harmless error.”²⁰ Because the policy again utilizes non-mandatory language (“should”), the reviewer did not fail to adhere to a mandatory requirement of policy that would invalidate the plan. Consequently, EEDR has no basis to disagree with the hearing

¹⁶ Hearing Recording at 11:5012:08.

¹⁷ *Id.* at 12:5013:03, 58:15-58:22, 59:13-1:00:07.

¹⁸ Hearing Decision at 6.

¹⁹ *Id.* at 3.

²⁰ *Id.*

officer's ultimate assessment that this point had no material bearing on the outcome of the matter, i.e., that it was "harmless error."

Failure of the reviewer to sign the re-evaluation

The hearing officer determined that the reviewer failed to comply with the requirements of DHRM Policy 1.40 by not signing the re-evaluation.²¹ Upon review of the policy, there is no requirement (mandatory or otherwise) that the reviewer sign the re-evaluation. Accordingly, the hearing officer's determination is not supported by the express language of the policy. However, because the hearing officer found this issue to be "harmless error," there is no basis to remand the matter for further consideration as there would be no material effect on the outcome of the case.

CONCLUSION AND APPEAL RIGHTS

Based on the foregoing, EEDR has no basis to find that the hearing decision has failed to comply with state policy warranting remand in this case.²² The grievant's request for administrative review is denied. 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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵



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

²¹ *Id.* at 4.

²² This ruling makes no findings regarding the hearing officer's interpretation of policy that led to the order that the date of termination be moved and back pay provided because that determination was not appealed by the agency.

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).