

Issue: Administrative Ruling of Hearing Officer's Decision in Case No. 11014; Ruling
Date: August 16, 2017; Ruling No. 2018-4588; Agency: Department of Social
Services; Outcome: Remanded for Clarification.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2018-4588
August 16, 2017

Both the grievant and the Department of Social Services (the “agency”) have 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 11014. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

After receiving an overall rating of “Below Contributor” for the 2015-16 performance cycle, the grievant was placed on a three-month re-evaluation plan beginning on January 19, 2017.² On March 16, 2017, while the re-evaluation plan was in effect, the grievant was issued a Group II Written Notice for failure to follow instructions and unsatisfactory performance.³ The grievant was issued a second Group II Written Notice on March 30, 2017, also for failure to follow instructions and unsatisfactory performance,⁴ and terminated from employment based on her accumulation of disciplinary action.⁵

The grievant timely grieved the disciplinary actions⁶ and a hearing was held on June 15, 2017.⁷ In a decision dated July 5, 2017, the hearing officer concluded that the agency had not followed state policy by issuing disciplinary action to the grievant to address matters relating to her work performance that was subject to the re-evaluation plan during the three-month period in which the re-evaluation plan was in effect, and further stated that, under these circumstances, it was reasonable to infer that “the Agency improperly retaliated against th[e] Grievant” based on her past use of the grievance procedure by “impos[ing] its correction power through two punitive processes”⁸

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. 11014 (“Hearing Decision”), July 5, 2017, at 4.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ See DHRM Policy 1.60, *Standards of Conduct*, § (B)(2)(b) (stating that the issuance of “[a] second active Group II Notice normally should result in termination”).

⁶ Agency Exhibit 3; see Hearing Decision at 1.

⁷ See Hearing Decision at 1.

⁸ *Id.* at 4-7.

The hearing officer further included an “Alternative Analysis and Conclusion” intended to apply if his primary decision should be reversed.⁹ In both the primary and alternative decisions, the hearing officer directed the agency to reinstate the grievant and “to complete the re-evaluation plan as originally implemented.”¹⁰ The grievant and the agency now appeal the hearing decision to 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.”¹¹ 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 either party; the sole remedy is that the hearing officer correct the noncompliance.¹²

Agency’s Claim Regarding Inconsistency with State Policy

The agency argues that the hearing decision is inconsistent with DHRM Policy 1.40, *Performance Planning and Evaluation*, and DHRM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹³ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.¹⁴

In the hearing decision, the hearing officer assessed the question of “whether the Agency may switch to the written notice discipline, with early termination, for the same performance issues for which it committed to the 3-month re-evaluation plan,” found that such an action was not permissible under the circumstances presented in this case, and concluded that “the Agency prematurely and improperly ended the re-evaluation plan by issuing two Group II Written Notices and an early termination based on the claimant’s lack of improvement under the re-evaluation plan.”¹⁵ The hearing officer further explained the rationale for his decision as follows:

The Agency elected which path to take—either Policy 1.40 or Policy 1.60—to address the Grievant’s poor work performance. It chose the framework within Policy 1.40, following the annual performance evaluation resulting in an overall below contributor rating. The Agency explicitly placed the Grievant under a 3-month re-evaluation plan, after which the Agency could have exercised options, including termination for the Grievant’s lack of sufficient improvement. Instead, the Agency, departing to the parallel track of Policy 1.60, opted to issue two consecutive Group II Written Notices and termination for the Grievant’s lack of improvement before the end of the 3-month re-evaluation period. Of particular importance, the written notices were based on the re-evaluation plan, as

⁹ *Id.* at 7.

¹⁰ *Id.* at 7, 11.

¹¹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹² See *Grievance Procedure Manual* § 6.4(3).

¹³ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁴ See *Grievance Procedure Manual* § 7.2(a).

¹⁵ Hearing Decision at 5.

readdressed by management and noted within the re-evaluation plan that had not run its course.¹⁶

Finally, the hearing officer noted that, “[i]f failing to improve adequately under a re-evaluation plan is ground for a written notice, particularly with termination, it renders the purpose of the re-evaluation plan meaningless.”¹⁷ As a result, the hearing officer found that “the Agency acted from an improper motivation,” namely retaliation based on the grievant’s past use of the grievance procedure, and rescinded both Written Notices.¹⁸

In its request for administrative review, the agency asserts that Policy 1.40 and Policy 1.60 “are not inconsistent” with one another but rather “deal with different aspects of performance management,” and that its decision to issue the Written Notices to grievant was appropriate under these policies. In particular, the agency relies upon a provision of Policy 1.40 stating that “[t]he re-evaluation process does not prevent the agency from taking disciplinary action based on the employee’s poor performance or other reasons stipulated in Policy 1.60.”¹⁹

After the close of the hearing, the hearing officer permitted the parties to submit additional written arguments regarding the application of Policy 1.40 in this case.²⁰ The agency provided an official policy interpretation from the DHRM HR Policy Manager stating that, “if an employee who has been rated as ‘Below Contributor’ for a performance cycle and is engaged in a performance improvement plan during the re-evaluation period, continues to demonstrate unsatisfactory performance, his/her supervisor may issue a [W]ritten [N]otice for the continuing poor performance.” The hearing officer acknowledged this submission in the hearing decision, but found that it was “not instructive for the unique circumstances presented in this grievance.”²¹

Having considered the hearing record and the submissions of the parties, EEDR finds that the policy interpretation provided by the agency would apply under the circumstances presented by this case. The policy interpretation from DHRM provided to the hearing officer by the agency clearly and directly answers the question presented by the hearing officer in this case. Because DHRM has final authority to establish and interpret personnel policies,²² this interpretation must be adhered to in the hearing decision. As the hearing officer did not apply or follow the DHRM interpretation of policy, the hearing decision is not consistent with policy and must be remanded.²³

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ DHRM Policy 1.40, *Performance Planning and Evaluation*.

²⁰ Hearing Decision at 1, 5.

²¹ *Id.* at 5.

²² Va. Code § 2.2-1201(13).

²³ Neither this ruling nor the DHRM policy interpretation address whether the particular circumstances disciplined in this case are properly categorized as Group II offenses or otherwise proper under DHRM Policy 1.60, *Standards of Conduct*. Those determinations are left to the hearing officer on remand. In addition, the hearing officer must reassess whether his findings as to retaliation are affected by the application and adherence to the DHRM policy interpretation in this case.

Parties' Claims Regarding the "Alternative Analysis and Conclusion"

Both parties challenge the hearing officer's "Alternative Analysis and Conclusion" as not in compliance with the grievance procedure. Neither the *Grievance Procedure Manual* nor EEDR's *Rules for Conducting Grievance Hearings* contemplate the utilization of an alternate decision. Further, there is nothing in the grievance procedure that would make an alternative decision effective if some other portion of the decision is found to be inconsistent with policy, the grievance procedure, and/or law.²⁴ Accordingly, EEDR will consider the "Alternative Analysis and Conclusion" offered by the hearing officer as a commentary on the evidence provided by the parties, having no force or application in this case.²⁵

Grievant's Claim Regarding the Re-Evaluation Plan

Finally, the grievant claims that the hearing officer erred by ordering the agency "to complete the re-evaluation plan as originally implemented" in his decision rescinding the Written Notices and reinstating the grievant.²⁶ In essence, the grievant appears to assert that she was terminated based on her accumulation of disciplinary action rather than her failure to perform satisfactorily under the re-evaluation plan, and thus she should no longer be subject to the re-evaluation plan upon reinstatement. Under the grievance procedure, a hearing officer has the authority to order an employee reinstated to her former position or, if her former position is occupied, to an equivalent position.²⁷ The effect of such an order is to place the grievant in the same position she would have occupied but for the issuance of the disciplinary action; i.e., to restore her to employment as if the termination had never happened. In this case, the grievant had not completed the re-evaluation plan at the time she was terminated. Accordingly, should the grievant be reinstated after the hearing officer's reconsidered decision is issued and any further appeals have been decided, the agency may proceed with the re-evaluation plan in a manner that is consistent with policy.

CONCLUSION AND APPEAL RIGHTS

Because the hearing decision is not consistent with state policy for the reasons discussed above, this case is remanded to the hearing officer for further consideration of the evidence in the record. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).²⁸ Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁹

²⁴ A notable distinction about the "Alternate Analysis and Conclusion" is not that the hearing officer used an alternate theory to reach the same conclusion as the primary decision, but rather used an alternate theory to reach a completely different outcome. Nothing in this ruling is meant to discourage a hearing officer from reaching the same conclusion based on multiple theories of analysis.

²⁵ As a practical matter, the "Alternative Analysis and Conclusion" will have no effect because the hearing decision is remanded as discussed above, and the hearing officer must issue a reconsidered decision that is consistent with the relevant provisions of state policy.

²⁶ Hearing Decision at 7.

²⁷ See *Grievance Procedure Manual* § 5.9(a); *Rules for Conducting Grievance Hearings* § VI(D)(1).

²⁸ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²⁹ See *Grievance Procedure Manual* § 7.2.

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.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³²



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³⁰ *Id.* § 7.2(d).

³¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).