

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11042; Ruling
Date: August 25, 2017; Ruling No. 2018-4605; Agency: Virginia Employment
Commission; 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 Employment Commission
Ruling Number 2018-4605
August 25, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 11042. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11042, as found by the hearing officer, are as follows:²

The genesis of this matter seems to have been an assignment that was given to the Grievant on January 23, 2017. On that date, the Grievant was asked to modify the Agency’s Check File that is sent to the Department of Treasury from their legacy Unemployment Insurance Benefits applications. On or about that same time, a second employee [“AB”] of the Agency was asked to also propose an implementation strategy on how to solve this assignment. The Agency’s witnesses testified that their process was to assign a problem to more than one person, analyze the proposed solutions to the problem, and then assign the project to one of the people whose solution was not accepted. While the merits of this process may be debated, that is not the issue before me.

Subsequent to this assignment to two people on or about January 23, 2017, a series of meetings took place on January 27th, January 30th, February 3rd, February 9th, and February 14th. Those meetings were attended by some or all of: the Grievant, AB, the Grievant’s immediate supervisor and that supervisor’s supervisor. On February 14, 2017, the two proposed strategies were discussed and

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. 11042 (“Hearing Decision”), August 1, 2017, at 2-4 (citations omitted).

considered and on February 16, 2017, the strategy of AB was accepted, and management directed the Grievant to implement AB's strategy

On February 24, 2017, a meeting took place between the Grievant, AB, Grievant's immediate supervisor and the director of IT. In the intervening ten days, since the meeting of February 14, 2017, the Grievant had not started development on this project. The director of IT testified before me that he asked the Grievant directly as to whether or not she would perform the assignment. His testimony was that her response was that she would not do it if she had to follow AB's strategy. This statement is supported by the proposed disciplinary action notice of February 24, 2017, which he gave to the Grievant. The Grievant's immediate supervisor also testified before me and corroborated the director's testimony.

On February 27, 2017, the Grievant delivered to the director of IT a statement which seems to encompass her thoughts regarding this matter. It is compelling to see that in her own words, she stated the following:

...I was told 'you are doing it [AB's] way YES or NO' I did not understand why it has to be done the way [AB's] proposed. It was not logical to me to do it the way she proposed and not beneficial. I said if you insist [AB's] way it is better for [AB] do it...

In addition, the Grievant wrote:

...Only I do not like busy work that gets us nowhere. For this assignment I thought work will need to be done the way I presented. I also respect that if other's want to do things their way. But if they want the work done their way, they should be the one doing it, not force me or anybody else do it the way they want it to be done. I will not have any objection for that...

The Grievant's own written statement indicates that she would not perform the task as assigned to her. Management has the absolute right to assign tasks to whomever they feel can best perform the task and it is not up to the employee to impose his or her standards or understandings of how best the work could be performed.

The Grievant testified that she had many questions regarding this assignment and that they were not fully answered. However, her testimony was similar in content and tone to her written statement referenced earlier. I find that the Agency has borne its burden of proof regarding any questions asked and that the Grievant simply did not wish to perform a task where she did not agree with

the way in which the task was being assigned and she did not agree with the way to perform the task.

On March 6, 2017, the grievant was issued a Group II Written Notice for failure to follow instructions and/or policy.³ The grievant timely grieved the disciplinary action⁴ and a hearing was held on July 27, 2017.⁵ In a decision dated August 1, 2017, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant failed to follow her supervisor's instructions and upheld the issuance of the Group II Written Notice.⁶ The grievant now appeals 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.”⁷ 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.⁸

Hearing Officer's Consideration of Evidence

In her request for administrative review, the grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ Further, in cases involving discipline, the hearing officer reviews the facts *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.¹¹ 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.¹² 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

³ See Hearing Decision at 1.

⁴ See *id.*

⁵ See *id.*

⁶ See *id.* at 2-4.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer assessed the evidence and concluded that the agency had presented evidence to show that the grievant was directed to perform an assignment and failed to do so.¹³ As a result, he concluded that the grievant had failed to follow a supervisor's instructions, thus justifying the issuance of a Group II Written Notice.¹⁴ The grievant asserts in her request for administrative review that the hearing officer "recited a portion of" a written statement she provided to the agency before the discipline was issued, "but excluded that part of her statement indicated [sic] that she wished to perform the assigned task, but requested instructions because the task confused her." In essence, the grievant appears to dispute the hearing officer's conclusion that her "written statement indicates that she would not perform the task as assigned to her."¹⁵

There is evidence in the record to support the hearing officer's determination that the grievant failed to follow a supervisor's instructions. At the hearing, the director of IT testified that he asked the grievant to complete the assignment as directed and she responded that she would not perform the task in the manner it had been assigned.¹⁶ The grievant's immediate supervisor, who was present at the meeting, confirmed the instruction given by the director of IT and the grievant's refusal to complete the assignment as directed.¹⁷ While the grievant is correct that some portions of her written statement indicate she had questions about the manner in which she should have completed the assignment,¹⁸ there is also witness testimony that the task assigned to her was not complex and that she should have known how to complete the assignment.¹⁹ Furthermore, to the extent the hearing officer did not discuss the portions of the grievant's written statement cited in her request for administrative review, there is no requirement under the grievance procedure that a hearing officer explicitly discuss every piece of evidence presented by the parties at a hearing. Thus, mere silence as any specific piece of evidence does not necessarily constitute a basis for remand. It is squarely within the hearing officer's discretion to determine the weight to be given to the witness testimony and evidence presented. In this case, it would appear the hearing officer did not quote from the grievant's written statement in its entirety because he did not find it to be credible and/or persuasive on the issue of whether her failure to complete the assignment was justified.

While the grievant may disagree with the hearing officer's decision, conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider

¹³ Hearing Decision at 3-4.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ Hearing Recording at 33:13-33:57 (testimony of director of IT); *see* Agency Exhibit 1, Tab 1 at 5.

¹⁷ Hearing Recording at 1:29:11-1:29:36 (testimony of immediate supervisor).

¹⁸ Agency Exhibit 1, Tab 1 at 6-7.

¹⁹ *See* Hearing Recording at 52:11-53:00 (testimony of director of IT), 1:21:53-1:22:29 (testimony of immediate supervisor).

potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and 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.²⁰ Because the hearing officer's findings in this case 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.

Mitigation

The grievant also argues that the disciplinary action should have been mitigated based on her length of employment and prior satisfactory work performance. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management"²¹ The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."²² More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²³

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.²⁴ EEDR will review a hearing officer's mitigation determination for abuse

²⁰ See, e.g., EDR Ruling No. 2012-3186.

²¹ Va. Code § 2.2-3005(C)(6).

²² *Rules for Conducting Grievance Hearings* § VI(A).

²³ *Id.* § VI(B)(1).

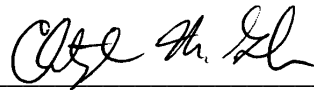
²⁴ The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. E.g., EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

of discretion,²⁵ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The grievant's claim that her length of employment and otherwise satisfactory performance should have been considered as a mitigating factor is unpersuasive. While it cannot be said that length of service or prior satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.²⁶ The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant that otherwise satisfactory performance becomes. In this case, the grievant's prior satisfactory performance is not so extraordinary that it would clearly justify mitigation of a Group II Written Notice for conduct that was determined by the hearing officer to support the issuance of such a disciplinary action. Based upon a review of the hearing record, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or not based on the evidence in the record. Accordingly, EEDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.²⁷ 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.²⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁹



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²⁵ "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

²⁶ See EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

²⁷ *Grievance Procedure Manual* § 7.2(d).

²⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).