

Issue: Reconsideration of EEDR Administrative Ruling No. 2018-4588 issued on August 16, 2017; Ruling Date: August 28, 2017; Ruling No. 2018-4610; Agency: Department of Social Services; Outcome: Original ruling affirmed.



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

RECONSIDERED ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2018-4610
August 25, 2017

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) reconsider its previously issued administrative review of the hearing officer’s decision in Case Number 11014. For the reasons set forth below, EEDR declines to reconsider its original ruling.

DISCUSSION

Re-Evaluation Plan

In her request for reconsideration, the grievant asserts that EEDR erred in concluding that, if the grievant is ultimately reinstated to her former position after all appeals in this case have been decided, “the agency may proceed with the re-evaluation plan in a manner that is consistent with policy.”¹ The grievant argues that the established three-month period for the re-evaluation plan has passed and, thus, she cannot now be subject to re-evaluation under the plan. To further support this position, the grievant cites a hearing officer’s decision in Case Number 10990 for the proposition that once the “finite re-evaluation time period . . . has elapsed, the re-evaluation cannot be reopened or revisited.”

EEDR has carefully considered the grievant’s arguments on this point and finds no basis to alter its original administrative review ruling. Although the grievant relies on Case Number 10990, the facts in that case are not the same as those at issue in this case. Furthermore, the analysis related by the hearing officer in that case as to DHRM policy does not reflect or support the position cited by the grievant. Accordingly, EEDR finds that the hearing officer’s decision in Case Number 10990 does not serve as a basis for altering EEDR’s original administrative review.

Should the grievant ultimately be reinstated, she would return to the point at which she left the re-evaluation plan, to complete the time that was remaining in that plan and have her performance during the re-evaluation period evaluated in full consistent with DHRM Policy

¹ EEDR Ruling No. 2018-4588 at 4.

1.40, *Performance Planning and Evaluation*.² This approach is consistent with EEDR's definition of reinstatement, which is defined in the *Rules for Conducting Grievance Hearings* as "an order returning the employee to the position he or she formerly held prior to a separation, demotion, or transfer."³ Prior to her termination, the grievant was in a position subject to re-evaluation of her performance as a result of an overall rating of "Below Contributor" on her annual evaluation. The reinstatement contemplated here would place the grievant in the position in which she would have been had she not been terminated. While the grievant argues that such a result is unfair, this Office respectfully disagrees.

Factual Findings

The grievant further argues that EEDR did not direct the hearing officer "to make a clear finding in his [reconsidered] decision" on the issue of retaliation. Respectfully, this Office points out that the hearing officer was so directed in the prior ruling.⁴ The grievant also states that the hearing officer must be directed to address mitigation on remand. Mitigation was not at issue in the original administrative review ruling and, accordingly, it was appropriately not addressed. Further, this Office need not remind the hearing officer of the need to consider mitigation as he clearly understands the grievance procedure's requirements to consider and address such questions, evidenced by the fact that he already addressed issues of mitigation in the "alternative analysis."⁵ Nevertheless, the hearing officer's reconsidered decision must comply with the requirements of the grievance procedure. After the hearing officer's reconsidered decision has been issued, 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).⁶ If the grievant believes the reconsidered decision does not comply with the grievance procedure, she may request such a review.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, the grievant's request for reconsideration is denied. The grievant has stated no grounds warranting reconsideration of EEDR Ruling Number 2018-4588, which will stand as issued. 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.⁷ 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

² For example, if the grievant was terminated at a point when there was one month remaining before the conclusion of the original re-evaluation period, she would be reinstated to have an additional month of performance under the re-evaluation plan and then be re-evaluated on her performance over the full three months.

³ *Rules for Conducting Grievance Hearings* § VI(D)(1).

⁴ EEDR Ruling No. 2018-4588 at 3 n.23.

⁵ Decision of Hearing Officer, Case No. 11014, July 5, 2017, at 9-10.

⁶ *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.

⁷ *Grievance Procedure Manual* § 7.2(d).

grievance arose.⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁹



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⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁹ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).