

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9940, 9993;  
Ruling Date: February 22, 2013; Ruling No. 2013-3525; Agency: Department of  
Juvenile Justice; Outcome: Hearing Decision in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resources Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Juvenile Justice  
Ruling Number 2013-3525  
February 22, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management administratively review the hearing officer's decision in Case Numbers 9940, 9993. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Numbers 9940, 9993 are as follows:<sup>1</sup>

The Department of Juvenile Justice employed Grievant as an Office Service Assistant at one of its facilities until her removal effective October 18, 2012. She began working for the Agency in October 2001. No evidence of prior active disciplinary action was introduced during the hearing.

On June 18, 2012, Grievant was one of four office service assistants working at the facility. She was working at the front desk which was separated by a door to the office service assistant's pool. Ms. L and Ms. B were working at two of several desks grouped together. Grievant called Ms. B and asked Ms. B to come relieve her so that she could go to the restroom. Ms. B said she was on her lunch break until 1 p.m. Grievant asked Ms. B if Ms. L was on her lunch break. Ms. B asked Ms. L if Ms. L was on her lunch break and Ms. L said "yes" and that her lunch break was scheduled to end at 1 p.m. Ms. B told Grievant what Ms. L said. Grievant became angry because she recognized that the other employees were not acting in accordance with their prior agreement that only two office service assistants could be on break at the same time. Another office service assistant, Ms. S, had left the building to pick up lunch for other staff and bring it back to the office. When Ms. S returned to the facility, she relieved Grievant and Grievant went to the restroom. Grievant complained to the Team Leader that the other employees were not following the established practice. Grievant walked to the officer service assistant pool and began speaking in a loud voice to Ms. L.

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<sup>1</sup> Decision of Hearing Officer, Case Nos. 9940, 9993 ("Hearing Decision"), January 15, 2013 at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

Grievant said, “You girls can’t be taking lunch at the same time.” Grievant did not use profanity. Grievant walked back to the front desk and resumed her duties.

Ms. [X] is a Senior Probation Officer at the Facility. She and Grievant had a good working relationship.

On either July 30, 2012 or August 6, 2012, Ms. [X], Ms. G, and an intern were working at or near Ms. [X]’s desk. Someone had placed a pile of folders on Grievant’s desk. Grievant asked who placed the folders in her office and she was told that Ms. [X] did so. Grievant walked to Ms. [X]’s office and asked why Ms. [X] had given her so much work to do. Grievant approached Ms. [X] from Ms. [X]’s left side. Grievant placed her left hand around the front of Ms. [X]’s throat. Grievant placed her right hand around the back of Ms. [X]’s neck. Grievant then squeezed her two hands together. Grievant did not squeeze so hard as to prevent Ms. [X] from breathing. Ms. [X] was shocked, confused, and angered by Grievant’s action. She turned her head to her right and said to Grievant, “You have two f—king milliseconds to get your hands from my neck.” Grievant removed her hands from Ms. [X]’s neck. Ms. [X] asked Grievant to leave. Grievant walked away from the area. If Ms. [X] had not been able to exercise self-control, she would have punched Grievant in the face. Ms. [X], Ms. G and the intern expressed dismay at what Grievant did. One of the group asked, “Did this just happen?” Another one of the group asked, “Has she lost her mind?”

Ms. [X] did not report the matter immediately because she believed she would get in trouble for cursing in front of an intern. Only in later discussions with Agency managers did the incident become known.

In the January 15, 2013 hearing decision, the hearing officer rescinded the agency’s issuance of a Group I Written Notice for disruptive behavior on June 18, 2012, but upheld the Group III Written notice with termination for workplace violence occurring in late July or early August 2012.<sup>2</sup> The grievant now seeks administrative review from EDR.

## DISCUSSION

By statute, EDR 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.”<sup>3</sup> If the hearing 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.<sup>4</sup>

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<sup>2</sup> Hearing Decision at 7.

<sup>3</sup> Va. Code § 2.2-1202.1(2), (3), and (5).

<sup>4</sup> See *Grievance Procedure Manual* § 6.4(3).

*Inconsistency with Agency Policy*

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with state policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>5</sup> The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

*Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. The grievant denies putting her hands around the neck of the complaining employee in this case and states that she fabricated the allegations she made to agency management, providing false testimony at the hearing. The grievant claims that she placed her hands on the employee's shoulders in a playful or "massaging" manner but denies that she choked Ms. X, thus, she essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>6</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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, EDR 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 record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant engaged in workplace violence via her threatening behavior toward Ms. X. Ms. X provided testimony that that the grievant entered her work space, approached Ms. X and put her hands around her neck.<sup>10</sup> Ms. X stated that she felt the grievant's hands squeezing her neck and was "shocked" by this action.<sup>11</sup> The

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<sup>5</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>6</sup> Va. Code § 2.2-3005.1(C).

<sup>7</sup> *Grievance Procedure Manual* § 5.9.

<sup>8</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>9</sup> *Grievance Procedure Manual* § 5.8.

<sup>10</sup> See Hearing Record at Track 1, 01:25:53 through 01:26:53 (testimony of Ms. X).

<sup>11</sup> See Hearing Record at Track 1, 01:28:32 through 01:30:58 (testimony of Ms. X).

hearing officer questioned Ms. X extensively and asked that she demonstrate the grievant's actions.<sup>12</sup> Further, the agency presented a second witness who was present in the same room as the grievant and Ms. X on the day of the incident in question, and provided independent testimony corroborating the events as Ms. X had relayed them.<sup>13</sup> The grievant disputed the account of events as provided by the agency's witnesses and contends that she was only joking with Ms. X and massaging her shoulders.<sup>14</sup> However, the hearing officer found that this argument was not supported by the record evidence.<sup>15</sup>

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. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group III offense for workplace violence.<sup>16</sup> Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

### *Retaliation*

The grievant contends that the agency, specifically, the Unit Director, acted in retaliation when issuing the discipline, allegedly due to her filing of a complaint with the Fraud, Waste, and Abuse hotline. To this, the hearing officer found that:<sup>17</sup>

Although the Unit Director was involved in discussions with Agency managers regarding Grievant's behavior, he was not a deciding voice regarding whether Grievant would receive disciplinary action and the appropriate level of disciplinary action. There does not appear to be a sufficient nexus between the protected activity and the adverse employment action such that the Agency retaliated against Grievant. If the Hearing Officer assumes for the sake of argument that the Unit Director was sufficiently involved in the Agency's disciplinary decision making, Grievant's behavior is sufficiently egregious for the Hearing Officer to conclude that the Agency would have issued a Group III Written Notice with removal in the absence of any retaliatory motive. The Agency's disciplinary action in this case is not a pretext to retaliation.

With respect to her allegation of retaliation, the grievant's request for administrative review appears to contest issues such as the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the

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<sup>12</sup> See Hearing Record at Track 1, 01:28:32 through 01:32:02 (testimony of Ms. X).

<sup>13</sup> See Hearing Record at Track 1, 01:46:20 through 01:47:15 (testimony of Ms.G).

<sup>14</sup> See Hearing Record at Track 2, 43:52 through 44:00 (testimony of grievant).

<sup>15</sup> Hearing Decision at 5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 7.

resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority. While the grievant may not agree with the hearing officer's determination that she did not satisfy the burden of proof to show that the agency's actions were retaliatory, a review of the hearing record shows nothing to suggest that the hearing officer's determination regarding the alleged retaliation was in any way unreasonable or not based on the actual evidence in the record. Thus, we will not disturb the decision on that basis.

#### CONCLUSION AND APPEAL RIGHTS

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.<sup>18</sup> 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.<sup>19</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>20</sup>



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Office of Employment Dispute Resolution

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<sup>18</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>19</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>20</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).