

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10037; Ruling
Date: April 23, 2013; Ruling No. 2013-3579; Agency: Virginia Employment
Commission; 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 Virginia Employment Commission
Ruling Number 2013-3579
April 23, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10037. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 10037 are as follows:¹

The Virginia Employment Commission employs Grievant as a Hearing Officer in one of its offices. She has been employed by the Agency for approximately 23 years. The purpose of her position is:

To render monetary and non-monetary determinations concerning claimant’s eligibility or qualification for unemployment benefits based on findings of fact from claimants and employers and application of law and regulations.

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a unique identification and password enabling her to access the Agency’s Virginia Automated Benefits System (VABS). This database contained information regarding claims filed by individuals seeking benefits from the Agency. The computer system also identified employees assigned responsibility for individual claims. Access to VABS was governed by Agency Policy Statement No. 1-95. On May 10, 2010, Grievant signed an Acknowledgment Certificate to certify that she had read the Agency’s Policy Statement No. 1-95 Internal Security and Ethics Policy and that she agreed to abide by the policy.

¹ Decision of Hearing Officer, Case No. 10037 (“Hearing Decision”), April 4, 2013 at 2-4. (Some references to exhibits from the Hearing Decision have been omitted here.)

Grievant's Son applied for unemployment compensation benefits with the Agency. He called his local office approximately three times and did not receive a return telephone call even though he left voice messages seeking assistance. The Son was frustrated that he was not receiving assistance from staff at his local VEC office so he called Grievant for assistance. She did not know the name of the Hearing Officer who might be able to assist her Son so she asked her son for his social security number. She logged into VABS. Grievant used the information contained in the VABS to determine that Mr. B was the Hearing Officer working on her Son's claim.

On November 1, 2012 at 10:16 a.m., Grievant sent an email to Mr. B stating:

Is there anyway you can do this claimant's decision today. [social security number]. He is in need of his medication.

On November 1, 2012 at 12:37 p.m., Mr. B replied:

Good afternoon. I am waiting for clarification on the B14 from the physician's office but I'll get to it when they respond or the deadline has passed.

On November 1, 2012 at 1:32 p.m. Grievant wrote:

What is wrong with the B-14? I checked it over carefully.

On November 1, 2012 at 1:37 p.m. Grievant wrote:

You can call me. [Telephone number].

On November 1, 2012 at 2:18 p.m., Mr. B wrote:

The B14 states the claimant is totally unable to work from 8/30/12 to currently. At the same time the physician indicated that he is currently able to work and listed restrictions. This is a contradiction that I have called for clarification on.

On November 1, 2012 at 2:26 p.m. Grievant wrote:

Yea, but if you looked down [to] the bottom it states his restrictions. He is able and available for work for light duty. He cannot do heavy manual labor anymore and the doctor advised him to quit. They did not know how to fill out the form. When I saw the form the first time, I took

him back to the doctor's office to correct it. They apologized for confusion. [Name] is my son. He does not live with me, and I know right now he is having financial problems and [is] low on his pain medication. He is been trying to call the center, and has not been able to get thru. I told him I would see what I could do to get in touch with you.

On November 1, 2012 at 2:48 p.m. Mr. B wrote:

I did see the restrictions but it also states he is currently unable to work and I can not just ignore that. Even though he is your son and you state he is able to do light duty work if the physician's statement does not clearly support that I have no choice [but] to wait for clarification. In fact, I have just received what the physician's office terms as a "corrected form" (this new B14 is attached) that states he is unable to work and it is unknown at this time when he will be able to work. I know you are acting out of concern for your child and I understand that as I have two little ones but I must make a decision as I do in each case based upon the facts on record. Thanks.

On November 1, 2012 at 2:51 p.m. Grievant wrote:

Okay, that form is not correct. I will call the doctor's office myself. They told me he could work but no heavy lifting.

Once Mr. B learned that Grievant was inquiring on behalf of her son, he notified his supervisor and the Son's case was assigned to another Hearing Officer.

The agency issued the grievant a Group II Written Notice of disciplinary action with a one day suspension for violating its Internal Security and Ethics Policy.² The grievant initiated a grievance challenging the disciplinary action,³ and on April 4, 2013, the hearing officer issued a decision upholding the Written Notice and suspension.⁴ The grievant now requests an administrative review by 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."⁵ If the hearing officer's

² Hearing Decision at 1.

³ *Id.*

⁴ *Id.* at 6.

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

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.⁶

Inconsistency with State and Agency Policy

The grievant's request for administrative review asserts that the hearing officer's decision is inconsistent with the agency's Internal Security and Ethics policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Findings of Fact

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 and the facts he chose to include in the decision. 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 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.¹⁰ 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.¹¹ 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 record evidence, there is sufficient evidence to support the hearing officer's finding that the grievant violated the agency's Internal Security and Ethics policy when she obtained information about her son's claim and then "knowingly participated in the processing and attempted to influence the outcome" of that claim.¹² In reaching his decision, the hearing officer apparently considered evidence regarding the agency's policy and the grievant's knowledge of that policy, the grievant's having obtained information through the VABS system, and the grievant's contact with Mr. B regarding her son's claim.¹³ While the grievant apparently disagrees with the hearing officer's factual determination that she violated the Internal Security and Ethics policy, that disagreement does not in itself constitute a basis for overturning the hearing officer's decision. Because the hearing officer's findings are based upon

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Hearing Decision at 5.

¹³ See Hearing Decision at 4-5.

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.

Mitigation

The grievant also challenges the hearing officer's decision not to mitigate the disciplinary action. Under 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 [EDR]."¹⁴ The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" therefore, "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."¹⁵ 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.¹⁶

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 that 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.¹⁷ EDR will review a hearing officer's mitigation determination for abuse of discretion,¹⁸ and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

¹⁴ Va. Code § 2.2-3005(C)(6).

¹⁵ *Rules* § VI(A).

¹⁶ *Rules* § VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040 ; EDR Ruling No. 2011-2992 (and authorities cited therein).

¹⁷ *E.g., Id.*

¹⁸ "'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.*

The grievant argues in her request for administrative review that the hearing officer should have mitigated the disciplinary action because she was not treated consistently with other employees who violated the Internal Security and Ethics policy and was disciplined for an improper purpose. The hearing officer addressed these arguments in his decision,¹⁹ and although the grievant might disagree as to whether she was treated consistently or singled out, we cannot find that the hearing officer abused his discretion in finding that the evidence presented at hearing was not sufficient to mitigate the grievant's disciplinary action.

Therefore, based upon a totality of the circumstances, there is nothing to indicate that the hearing officer's mitigation determination was in any way unreasonable or an improper application of the "exceeds the limits of reasonableness" standard. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²



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¹⁹ Hearing Decision at 6.

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).