

Issue: Administrative Review of Hearing Officer's Decision in Case No.10011; Ruling  
Date: June 26, 2013; Ruling No. 2013-3618; Agency: Virginia Department of Health;  
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 Department of Health  
Ruling Number 2013-3618  
June 26, 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 10011. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

On May 31, 2012, the grievant was issued a Group II Written Notice for failure to follow instructions.<sup>1</sup> She initiated a grievance challenging the disciplinary action, and on May 2, 2013, following a hearing, the hearing officer issued a decision upholding the disciplinary action.<sup>2</sup> The grievant sought administrative review from EDR of the hearing officer’s decision by letter dated May 17, 2013.<sup>3</sup> Subsequently, on June 6, 2013, the hearing officer issued a substituted opinion which again upheld the disciplinary action.<sup>4</sup> By letter dated June 20, 2013, the grievant requested administrative review of the substituted opinion.<sup>5</sup>

The relevant facts as set forth in Case Number 10011 are as follows:<sup>6</sup>

The Virginia Department of Health employs Grievant as a Training and Development Coordinator Senior at one of its regional offices. She has been employed by the Agency for approximately nine years. The purpose of her position is:

Independently developing, delivering, and coordinating training agency wide in support of a program. Characteristic activities

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<sup>1</sup> Substituted Decision of Hearing Officer, Case No. 10011-S, (“Hearing Decision”), June 6, 2013, at 1.

<sup>2</sup> *Id.* at 1, 9.

<sup>3</sup> In accordance with Section VII of the *Grievance Procedure Manual*, the grievant provided a copy of the administrative review request to the hearing officer.

<sup>4</sup> Hearing Decision at 1, 9. In his substituted decision, the hearing officer expanded upon and clarified the basis for his conclusion that the grievant had received an instruction and had subsequently failed to follow that instruction.

<sup>5</sup> The grievant also sought a face-to-face meeting to address the issues raised in her June 20, 2013 letter. A face-to-face meeting with EDR is not generally part of the administrative review process. We have viewed no special circumstances warranting such a meeting. Consequently, the grievant’s request is respectfully denied.

<sup>6</sup> *Id.* at 2-5 (internal citations omitted).

include: administration of certification programs, budget development, organizational development, needs assessment, designing course curricula, developing lesson plans & instructional materials; instructional testing, facilitating teams, securing facilities, equipment and other resources for instruction. May supervise support staff. Certification may be required in a specialty area.

When Grievant assisted with a video conference, some of her duties included ensuring that the speakers knew which room to go to and where the camera was located. Grievant had prior active disciplinary action consisting of a Group I Written Notice.

Grievant was one of four regional Training Coordinators who reported to the Supervisor. The Supervisor reported to the Division Director.

On October 9, 2009, the Agency conducted training with one lead training coordinator. Grievant and the other training coordinator were responsible for providing training support at their locations. Grievant left the training to have repairs made to her vehicle. The Division Director later told Grievant that she was responsible for training and that during her training sessions she needs to “be there.”

On February 10, 2011, the Division Director and Grievant spoke by telephone regarding a training session for which Grievant was responsible. The local health director reported to the Agency that Grievant left the training one and a half hours after it began and before it ended. The Division Director told Grievant that once she committed to training, she should expect to stay the entire time at the training. The Division Director sent Grievant an email stating, “It is not acceptable to leave an event you committed to in order to get to another [event]. You should not have asked to help if you were not able to fulfill the requirements of the task - staying to the end to take notes.”

In April 2011, the Supervisor told Grievant that he expected that if she was coordinating training, she should attend the training. He told her that attending training was part of the role of a training coordinator.

The Agency scheduled training for July 19, 2011. The Agency hired a vendor for the presentation and assigned each regional training coordinator responsibility for facilitating a training session and serving as a secondary instructor. Four days before the training was to begin, Grievant asked to take leave on July 19, 2011. The Supervisor denied her request. The Division Director attended the training as a precaution in case Grievant did not attend the training. Grievant reported to the training but was late in her arrival. The Division Director told Grievant that she was responsible for attending training and

that the Division Director would not “write up” Grievant because Grievant made an effort to be at the training even though Grievant was late.

On December 21, 2011, the Supervisor sent the regional training coordinators including Grievant an email stating:

Here is the planned schedule for the VAMRC Polycom training schedule for 2012. Please note that the RTC assignments for coordination are as follows:

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April 3: Public health Education for [Medical Reserve Corp Volunteers] [Grievant] (coordinator).

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For those that have not already done this, coordination involves:

Development and distribution of the flyer.

Placement of the course in TRAIN (following established process).

Coordination (through [State Volunteer Coordinator]) of speakers and slides.

Distribution to the MRC coordinators of any handouts or other instructional materials associated with the training.

Coordination with [Video Conference Engineer] on the VC conference schedule.

Serving as point of contact for the MRC coordinator to answer all TRAIN questions and making sure that all locations are included (correctly) in TRAIN.

Coordination of sign-in sheets and ensuring that all attendees are verified in TRAIN.

Other duties as assigned.

[State Volunteer Coordinator] will work with you ahead of each session to give you details on venue, speakers, instructional materials, etc.

On December 27, 2011, the Supervisor sent the trainers including Grievant a follow-up email stating:

All polycoms are scheduled for broadcast from 6-8 PM and [Video Conference Engineer] has already added them to the VC schedule. You will still need to coordinate with [Video Conference Engineer] as the districts set up their locations in TRAIN. We need to make sure that the TRAIN schedule and the sites listed on the VC schedule are consistent with one another. \*\*\*

On February 8, 2012, the Supervisor sent Grievant an email indicating that the State Volunteer Coordinator wanted a flyer drafted by Grievant to be sent out at least 30 days prior to the scheduled training.

The Agency scheduled a video conference presentation on April 3, 2012 for volunteers throughout the Commonwealth. Volunteers attended approximately 18 different sites to participate in the video conference. The video conference was set to begin at 6 p.m. and end at 8 p.m. Conference speakers were located at the Agency's headquarters. Grievant had been instructed to attend training for which she was responsible and, thus, the Agency anticipated Grievant would "attend" the video conference on April 3, 2012. She could attend by appearing at the Agency's headquarters where the speakers were located or she could attend by working from the conference room in her regional office where video conferencing equipment was available.

Prior to the conference beginning at 6 p.m., Grievant provided the Video Conference Engineer with assistance to ensure that all of the sites were connected to the video conference. Earlier in the morning, Grievant was asked to change the format of the presentation and make it available to the group. She completed the task before the video conference began at 6 p.m.

Grievant did not attend the video conference. At approximately 6 p.m. on April 3, 2012, the Supervisor spoke with the Division Director and said that he did not think Grievant was assisting with the video conference. The Division Director said she would stay and provide assistance during the video conference because of Grievant's absence. The Supervisor and the Division Director assumed Grievant's duties of introducing the speakers, taking roll call, and progressing slides. In short, Grievant did not coordinate the video conference as expected by the Agency.

On April 3, 2012, the State Volunteer Coordinator was the "customer" for the video training. Grievant was expected to work with the State Volunteer Coordinator. One of Grievant's duties was to draft a flyer for the State Volunteer Coordinator describing the upcoming video conference so that the flyer could be distributed to potential viewers of the conference. Grievant had been instructed to finish the flyer at least 30 days before the date of the scheduled video conference. She did not meet the deadline but the reason for the delay was that the State Volunteer Coordinator did not provide her with the necessary content information to enable Grievant to create the flyer at least 30 days before the training.

#### 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>7</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>8</sup>

#### *Procedural Issue*

In her June 20, 2013 letter, the grievant asserts that the hearing officer violated the grievance procedure by issuing a substituted decision prior to the issuance of an administrative review decision by EDR.<sup>9</sup> However, nothing in the grievance procedure prohibits a hearing officer from issuing a corrected or revised opinion prior to an administrative review ruling. To the contrary, EDR considers it commendable that the hearing officer apparently reviewed the request for administrative review provided to him by the grievant, recognized that he had made an error and that additional clarification would be beneficial, and then acted to correct his mistake. We also note that in the event the hearing officer had failed to issue a substituted decision, the administrative review process could have resulted at most in an order that the hearing officer revise the decision so that it complies with policy or the grievance procedure: neither EDR nor DHRM may direct the hearing officer to reach a particular result or reverse a hearing officer’s decision.<sup>10</sup> Thus, if EDR had issued an administrative review ruling finding that the original decision did contain errors or needed clarification of the type challenged and corrected by the hearing officer in the substituted decision, EDR’s ruling would have only ordered the hearing officer to address those issues on remand in the manner the hearing officer has already done.

Furthermore, the issuance of a substituted decision does not result in either party losing the right to dispute any changes from the original decision. Both parties would have an additional 15 calendar days to request administrative review of any substituted decision like the one issued by the hearing officer in this case. The grievant has availed herself of such an appeal right and we address both requests for review in this ruling. In sum, the hearing officer’s substituted decision was appropriate under the grievance procedure and is subject to appropriate appeal.

#### *Inconsistency with State and Agency Policy*

The grievant’s request for administrative review further asserts that the hearing officer’s decision is inconsistent with state and agency policy.<sup>11</sup> The Director of DHRM has the sole

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<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> The grievant’s letter also expresses confusion as to whether EDR provided a ruling prior to the hearing officer issuing the substituted decision. At that time, EDR had not issued a ruling. This is the first ruling by EDR on the grievant’s appeal requests.

<sup>10</sup> *Grievance Procedure Manual* at § 7.2(b).

<sup>11</sup> The grievant also alleges that the hearing officer’s decision was inconsistent with a previously-executed settlement agreement related to a prior grievance. While the agency’s alleged failure to comply with a settlement agreement was apparently considered by the hearing officer as a basis for mitigation to the extent the grievant seeks independent enforcement of the agreement, such relief must be obtained, if at all, through the judicial process rather than the grievance procedure. See Hearing Decision at 7-8.

authority to make a final determination on whether the hearing decision comports with policy.<sup>12</sup> The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed here.

### *Findings of Fact*

Although couched by the grievant primarily as a policy question, the grievant's request for review also challenges the hearing officer's findings of fact: in particular, the finding that she was instructed to attend trainings which she coordinated and knew or should have known this requirement extended to the video training in this case.<sup>13</sup> While the determination of whether the facts found by the hearing officer are sufficient to sustain a Group II for failure to follow instructions is a policy determination for DHRM, the factual findings themselves are subject to administrative review by EDR.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>14</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>15</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>16</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>17</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 record, there is sufficient evidence to support the hearing officer's finding that the grievant failed to comply with the agency's instruction by not attending a training she was responsible for coordinating.<sup>18</sup> In reaching his decision, the hearing officer considered evidence about previous instructions by the agency to the grievant regarding her responsibilities when coordinating a training.<sup>19</sup> Although the grievant asserts that she was not instructed regarding her responsibilities in coordinating the type of training at issue and on occasion was not present at training, the hearing officer rejected that argument, finding that her duty to attend was the same for all trainings she coordinated, and that her excused absences from

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<sup>12</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>13</sup> Hearing Decision at 5-6.

<sup>14</sup> Va. Code § 2.2-3005.1(C).

<sup>15</sup> *Grievance Procedure Manual* § 5.9.

<sup>16</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>17</sup> *Grievance Procedure Manual* § 5.8.

<sup>18</sup> Hearing Decision at 5.

<sup>19</sup> *Id.* at 2-6; *see also* Agency Exhibits 1, 3.

other trainings “show that the Agency’s expectation was for Grievant to attend training unless instructed otherwise.”<sup>20</sup>

EDR does not disagree with the grievant that there was record evidence to support her argument that she did not receive a specific instruction regarding the video training. However, we also cannot disagree with the hearing officer that record evidence supports his findings. The record reflects that although the grievant was not specifically instructed regarding the type of training at issue, she had received more generalized direction regarding the coordination of all trainings, regardless of their nature. The hearing officer found that management’s understanding was that coordinating a training required attendance. Thus, upholding that reasoning as a basis to discipline the grievant for the misconduct charged is a reasonable result based on the hearing record.

That reasonable minds could disagree regarding the evidence does not in itself constitute a basis for overturning the hearing officer’s decision. The test is not whether a hearing officer could reasonably have found for the grievant, but instead whether the hearing officer’s findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, 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.

#### *Failure to Mitigate*

The grievant also challenges the agency’s failure to give her the opportunity to “self-correct,” as allegedly required by a previous settlement agreement. Although the grievant characterizes this challenge as one involving the hearing officer’s interpretation of policy, because the hearing officer considered this factor in the context of mitigation,<sup>21</sup> we will interpret the grievant’s request for administrative review as also challenging the hearing officer’s failure to mitigate on this basis.

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].”<sup>22</sup> 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.”<sup>23</sup> 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,

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<sup>20</sup> Hearing Decision at 2-6.

<sup>21</sup> *Id.* at 7-8.

<sup>22</sup> Va. Code § 2.2-3005(C)(6).

<sup>23</sup> *Rules* § VI(A).



the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>24</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

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 difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.<sup>25</sup> EDR will review a hearing officer's mitigation determination for abuse of discretion,<sup>26</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

Here, the grievant asserts that after the agency learned she did not intend to attend the video training, it should have advised her of her duty to do so and allowed her to "self-correct." The hearing officer rejected this argument in his decision, finding that there was no opportunity to self-correct at the time the grievant's supervisors became aware of her absence.<sup>27</sup> Although the grievant correctly asserts that her supervisor was aware that she would not be attending the training, the supervisor testified that he learned of her intended absence "very close to the time of the training."<sup>28</sup> He also testified that at the time his supervisor became aware of the grievant's absence, any instruction to the grievant to attend would not rectify her failure to be present for the session.<sup>29</sup> Further, even had there been an opportunity for self-correction, a failure to provide this opportunity, given the facts and circumstances present in this case, would not in itself render the hearing officer's decision not to mitigate an abuse of discretion. Accordingly, EDR will not disturb the hearing officer's decision on that basis.

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<sup>24</sup> *Id.* at § VI(B) (citations omitted).

<sup>25</sup> 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).

<sup>26</sup> "'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.*

<sup>27</sup> Hearing Decision at 8.

<sup>28</sup> Hearing Recording at 43:20-43:40.

<sup>29</sup> *Id.* at 2:17:35-2:19:33.

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



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Director  
Office of Employment Dispute Resolution

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<sup>30</sup> *Grievance Procedure Manual* § 7.2(d).

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

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