

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10057, 10101, 10102; Ruling Date: February 19, 2014; Ruling No. 2014-3802; Agency: Department of Social Services; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Social Services  
Ruling Number 2014-3802  
February 19, 2014

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review for a second time the hearing officer’s decision and reconsideration decision in Case Numbers 10057/10101/10102. For the reasons set forth below, EDR has no basis to further interfere with the decision in this case.

FACTS

The hearing officer’s findings in his October 2, 2013 decision in Case Numbers 10057/10101/10102, as recounted in EDR’s first administrative review in this case (EDR Ruling Number 2013-3748), are hereby incorporated by reference. In EDR Ruling Number 2014-3748, the hearing officer was directed to further explain his findings of fact and consideration of the evidence presented by the parties as it related to his determination that the grievant had engaged in falsification of records.

The hearing officer issued a Reconsideration Decision on May 10, 2013. This decision held, in relevant part, as follows:<sup>1</sup>

The Agency’s Chief Information Security Officer testified that he reviewed the activity on Grievant’s computer and he could put the Grievant at her desk the entire time the document was open. He testified that there were thousands of time stamps in the log for the computer and that he could place Grievant at her computer the entire time the document was open. The auto-save feature of Word would not have generated a time stamp in the log. The Chief Information Security Officer testified that there was “no internet activity” during the relevant times. The testimony of the Chief Information Security Officer was credible and more believable than significant parts of Grievant’s testimony.

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<sup>1</sup> Reconsideration Decision, Case No. 10057/10101/10102-R (“Reconsideration Decision”), January 13, 2014, at 3-6 (internal citations omitted).

Grievant only worked on one Word document from 11:22 a.m. until 12:19 p.m. She did not work on any spreadsheets or Adobe documents as well. Grievant's email account was open.

On January 8, 2013, at 11:24 a.m., Grievant sent an email to Ms. RH regarding "FW: Family Services Video". At 11:37 a.m., Grievant sent an email to Ms. RH regarding "Family Services Video Editing Project." If the Hearing Officer assumes for the sake of argument that Grievant did not work on the Broadcast document after she created it at 11:22 a.m. until 11:37 a.m., the amount of the remaining time have been enough that Grievant should have reported that time on her weekly report.

Grievant saved and closed the document at 12:19 p.m. Grievant had the document open for 57 minutes. The document was approximately three pages. A time of approximately 57 minutes would be sufficient for Grievant to draft a several page document.

At 1:43 p.m. on January 8, 2013, Grievant sent the HR Manager an email stating that she was "leaving in 5 minutes" to drop of materials at EDR and "will return to work accordingly. If Grievant left as she described, she would have left her office at approximately 1:48 p.m. The Agency asserted and Grievant testified that she left at 1:57 p.m. Grievant delivered the document to the EDR Secretary at 2:40 pm. She returned to her office at 3:11 p.m. This return time is supported by the Sonitrol record showing that she swiped her identification badge at 3:11 p.m. at the entrance to her office. Thus, Grievant was away from her office for approximately 74 minutes. She described this as her "lunch hour." She exceeded her 60 minute lunch break by at least 14 minutes. She did not record this time as HR time on her weekly report.

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The testimony of the Chief Information Security Officer was that Grievant was at her desk from 11:22 a.m. until 12:19 p.m. His testimony was credible. Grievant's assertion that she was working on something other than the document was not credible. The testimony of Ms. RH and Ms. KJ was not sufficient to show that Grievant met with them from 11:22 a.m. until 12:19 p.m.

When the evidence is considered as a whole, Grievant created the Broadcast document at 11:22 a.m. she drafted that document until 12:19 p.m. when she saved and closed it. She was asked to report this time on her weekly report and she knowingly failed to do so thereby falsifying her weekly report.

The grievant submitted a request for administrative review of the Reconsideration Decision on January 23, 2014.

## 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>2</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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>3</sup>

In her second request for administrative review, the grievant makes a number of claims related to the hearing officer’s findings of fact and consideration of the evidence in the record. Specifically, she asserts that (1) the evidence in the record is not sufficient to support a finding that the agency proved its case by a preponderance of the evidence, (2) the Reconsideration Decision contains findings of fact that are not supported by the evidence in the record or are contradicted by evidence in the record, and (3) the hearing officer upheld the discipline based on alleged misconduct that was not charged on the Group III Written Notice.

### *Sufficiency of the Evidence*

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>4</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>5</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>6</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>7</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.

In this case, there is evidence in the record to support the hearing officer’s conclusion that the grievant “knowingly” failed to report time she spent at work drafting a document related to human resources matters, “thereby falsifying her weekly report” of her work activities.<sup>8</sup> The agency’s Chief Information Security Officer testified that he reviewed the grievant’s computer use from January 8, 2013. He determined that the grievant created a document at 11:22 a.m., that

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

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

<sup>4</sup> Va. Code § 2.2-3005.1(C).

<sup>5</sup> *Grievance Procedure Manual* § 5.9.

<sup>6</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>7</sup> *Grievance Procedure Manual* § 5.8.

<sup>8</sup> Reconsideration Decision at 6.

she saved and closed that document at 12:19 p.m., that she did not open or access any other documents during that time, and that the document was addressed to EDR.<sup>9</sup> The agency presented a copy of the document in question, which dealt with grievance-related issues and not the grievant's assigned job responsibilities.<sup>10</sup> The Chief Information Security Officer further testified that the computer's activity records indicated that the grievant was at her desk for a significant portion of the time between 11:22 a.m. and 12:19 p.m. on January 8 and was most likely working on the document during that time period.<sup>11</sup>

There is also some evidence in the record to suggest that the grievant may have been performing work tasks between 11:22 a.m. and 12:19 p.m. on January 8, 2013. For example, the grievant presented evidence that she used a work-related website between 10:53 a.m. and 11:47 a.m.,<sup>12</sup> that she sent emails between 10:53 a.m. and 11:37 a.m.,<sup>13</sup> that she may have met with co-workers between 11:22 a.m. and 12:19 p.m.,<sup>14</sup> and that the document addressed to EDR and found on her computer was substantially different from the document actually submitted to EDR later that day.<sup>15</sup> However, the hearing officer explicitly stated in the Reconsideration Decision that "Grievant's demeanor showed that she was deceptive," her "assertion that she was working on something other than the document was not credible," and "[t]he testimony of [co-workers] was not sufficient to show that Grievant met with them from 11:22 a.m. until 12:19 p.m."<sup>16</sup> Determinations of credibility as to disputed facts of this nature 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.

EDR 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 factual findings made by the hearing officer.<sup>17</sup> Other individuals, had they been in the hearing officer's position, may not have reached the same conclusion as the hearing officer in this case. The question to be answered, however, is not whether another person would have made the same decision as the hearing officer in any particular case, but whether that decision is based on the evidence in the record. While the evidence presented by the agency in this case was minimal and not without its weaknesses, weighing the evidence and rendering a factual finding is squarely within the hearing officer's authority. Having reviewed the hearing record, we cannot conclude that the evidence, slight though it may have been, was insufficient to support the hearing officer's finding that the grievant engaged in the misconduct charged.

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<sup>9</sup> Hearing Recording at 59:12-1:02:58 (testimony of Witness T).

<sup>10</sup> See Agency Exhibit 8 at 5-7.

<sup>11</sup> Hearing Recording at 1:06:45-1:07:43, 1:09:46-1:11:22, 1:12:51-1:13:03 (testimony of Witness T).

<sup>12</sup> Grievant's Exhibits 8, 9.

<sup>13</sup> Grievant's Exhibit 4.

<sup>14</sup> Hearing Recording at 3:25:12-3:25:26, 3:30:20-3:30:34 (testimony of Witness H), 3:38:20-3:38:29 (testimony of Witness J).

<sup>15</sup> *Id.* at 2:26:25-2:27:07 (testimony of grievant); Grievant's Exhibit 13.

<sup>16</sup> Reconsideration Decision at 2, 6.

<sup>17</sup> See, e.g., EDR Ruling No. 2012-3186.

*Alleged Factual Errors in the Reconsideration Decision*

With respect to the grievant's allegations regarding factual errors in the Reconsideration Decision, we are not persuaded that any such error, to the extent it may exist, warrants further remand in this case. For example, the grievant asserts that the hearing officer incorrectly interpreted the testimony of the Chief Information Security Officer to mean that "there were thousands of time stamps during the relevant time recorded from [grievant's] computer." The Reconsideration Decision states that the Chief Information Security Officer testified that "there were thousands of time stamps in the log for the computer and that he could place Grievant at her computer the entire time the document was open."<sup>18</sup> The hearing officer did not find that there were thousands of logs from the grievant's computer from the relevant time period. Rather, he stated that the agency's monitoring system creates thousands of logs, and he indicated that some such logs were created between 11:22 a.m. and 12:19 p.m. on January 8, 2013. The evidence in the record supports this conclusion.<sup>19</sup>

Likewise, the grievant appears to misinterpret the hearing officer's findings of fact as they relate to the grievant's use of an agency-related survey website on January 8, 2013. The grievant argues that the hearing officer erroneously concluded that "the Agency did not have a Survey Monkey account" and that "it was possible that [grievant] was working on 'another survey site account.'" The Chief Information Security Officer's testimony was confusing on this point. He stated that the agency had an account with Survey Monkey, but it also appears that individual employees may have had their own Survey Monkey accounts with unique usernames and passwords for use on the agency's behalf.<sup>20</sup> He did not know whether the grievant had such an account with Survey Monkey.<sup>21</sup> It seems, therefore, that the evidence in the record is not inconsistent with the hearing officer's conclusion that the agency did not have a set of unique login credentials for employees to use with Survey Monkey.<sup>22</sup> The Chief Information Security Officer's testimony also supports the hearing officer's finding that "it was possible Grievant was working on another survey site account [i.e., her own Survey Monkey account] on another computer."<sup>23</sup> Furthermore, any error in the Reconsideration Decision as it relates to these issues is harmless, if it exists, because the hearing officer clearly considered whether and to what extent the grievant may have accessed Survey Monkey during the relevant time period, regardless of how the evidence was characterized.<sup>24</sup>

The grievant asserts that "[t]he testimony of the Chief Information Security Officer shows that the log entries recorded by the network were, at best, inconsistent and failed to record every keystroke or mouse movement" and that the log entries do not reflect the grievant's email and internet activity during the relevant time period on January 8, 2013. No evidence was presented at the hearing to indicate that there was any error or malfunction in the agency's

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<sup>18</sup> Reconsideration Decision at 3.

<sup>19</sup> See Hearing Recording at 1:09:49-1:10:50 (testimony of Witness T).

<sup>20</sup> Hearing Recording at 1:28:06-1:28:12, 1:30:53-1:31:15 (testimony of Witness T).

<sup>21</sup> *Id.* at 1:28:12-1:28:18 (testimony of Witness T).

<sup>22</sup> Reconsideration Decision at 5.

<sup>23</sup> *Id.*; see Hearing Recording at 1:32:30-1:32:40, 1:33:36-1:33:50 (testimony of Witness T).

<sup>24</sup> See Reconsideration Decision at 5.

computer system that records such activity. In addition, the Chief Information Security Officer explained that there were separate records showing the grievant's email and internet activity on January 8, 2013.<sup>25</sup> It may be that any apparent discrepancy in the log entries could be accounted for by a review of that information. However, no such evidence was presented at the hearing, nor is there any evidence in the record to substantiate the grievant's claim that the log entries described by the Chief Information Security Officer were flawed or otherwise inaccurate. Though the testimony of the Chief Information Security Officer was somewhat vague on this point, we cannot find that the evidence in the record shows the log of the grievant's computer activity was so unreliable that the hearing officer should not have considered it.

The grievant further claims that the hearing officer failed to consider evidence that the grievant's identification badge was swiped at the entrance to her office at 12:11 p.m., during the time when she was alleged to have been working on the document for EDR. Only one piece of evidence was presented at the hearing on this point: the agency's record of the times at which the grievant's security access badge was used on January 8, 2013.<sup>26</sup> EDR has been unable to identify any additional evidence in the record to explain or clarify what this record might mean. In the absence of such information, this fact does not conclusively prove that the grievant was away from her desk at 12:11 p.m. on January 8. Indeed, the grievant was adamant in her previous request for administrative review that "neither she nor the Agency [had] ever alleged that she was away from her desk at any time between 11:22 am 12:19 pm on January 8, 2013." It is, at the least, somewhat inconsistent that she now claims she was, in fact, away from her desk during that time. Regardless, there is no indication that the hearing officer failed to consider the record for the grievant's identification badge from January 8, or that the hearing officer's conclusion that the grievant was at her desk between 11:22 a.m. and 12:19 p.m. was contrary to the evidence in the record.

#### *Consideration of Conduct Not Charged on the Written Notice*

The grievant argues that the hearing officer's finding that the grievant had "exceeded her 60 minute lunch break by 14 minutes" was improper because "the Group III Written Notice was not based on, nor was an allegation made that, her failing to report this 14 minutes of time was a falsification of a record." The *Rules for Conducting Grievance Hearings* provide that "a hearing officer's review is limited to the conduct charged in the Written Notice and attachments."<sup>27</sup> While the grievant is correct that the Written Notice did not charge the grievant with falsifying her weekly report by failing to account the fourteen minutes of additional time she used to deliver the document to EDR, and as a result such conduct would not have properly been considered in relation to the falsification charge, we do not find that this is an error that warrants remanding the case to the hearing officer.

In the Reconsideration Decision, the hearing officer explicitly stated that, even if the grievant did not work on the document for the entire fifty-seven minute period between 11:22

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<sup>25</sup> Hearing Recording at 1:24:07-1:24:22, 1:32:53-1:33:15 (testimony of Witness T).

<sup>26</sup> See Grievant's Exhibit 2.

<sup>27</sup> *Rules for Conducting Grievance Hearings* § VI(B).

a.m. and 12:19 p.m., “the amount of the remaining time” on which she worked on the document was such “that Grievant should have reported that time on her weekly report.”<sup>28</sup> It is clear that the hearing officer would have reached the same decision regardless of the whether he considered the fourteen minutes that the grievant did not report as part of her time spent on human resources matters in her weekly report. As a result, we cannot conclude that the hearing officer’s consideration of the fourteen unreported minutes was a material error such that remanding the Reconsideration Decision to address this issue would alter the outcome of the case.

For the reasons set forth above, we decline to further disturb the hearing officer’s original decision and Reconsideration Decision. EDR’s review in this case is, therefore, concluded.

### 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>29</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>30</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>31</sup>



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<sup>28</sup> Reconsideration Decision at 4.

<sup>29</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>30</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>31</sup> *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).