

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10235; Ruling
Date: February 27, 2014; Ruling No. 2014-3804; Agency: Virginia Department of
Transportation; 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 Transportation
Ruling Number 2014-3804
February 27, 2014

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 10235. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by Virginia Department of Transportation as a senior human resource consultant.¹ On October 17, 2013, the grievant was issued a Group II Written Notice for unsatisfactory performance and failure to follow instructions.² Based on his accumulation of discipline, the agency terminated the grievant’s employment.³ He then timely initiated a grievance challenging the disciplinary action, and on January 14, 2014, following a hearing, the hearing officer issued a decision upholding the disciplinary action.⁴ The grievant has now requested 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 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

¹ Decision of Hearing Officer, Case No. 10235 (“Hearing Decision”), January 14, 2014, at 1.

² *Id.*

³ *Id.*

⁴ *Id.* at 1, 7.

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

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

Findings of Fact

The grievant asserts that the hearing officer failed to make a specific factual finding that the grievant engaged in misconduct and suggests that no factual basis exists on which such a finding could have been made. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰ 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, EDR disagrees with the grievant’s assertion that the hearing officer failed to make a specific finding of misconduct. Although the hearing officer did not use the term “misconduct,” he nevertheless clearly found that “the Grievant had a problem meeting expectations, and that constitutes a legitimate job performance issue.”¹¹ The hearing officer also specifically concluded that the agency had met its burden of proving the offense of unsatisfactory job performance.¹² These findings are sufficient to meet the hearing officer’s duty to determine whether misconduct occurred.

There is also sufficient evidence to support the hearing officer’s finding that the grievant’s work performance was unsatisfactory to the agency.¹³ The agency presented evidence showing that the grievant did not meet performance expectations with respect to weekly reports, the abolishment of a job position, and communicating regarding a pay adjustment and a resignation.¹⁴ The grievant argues that these actions did not rise to the level of misconduct, as indicated by the agency’s “admission” that the agency’s instructions to the grievant regarding these incidents were mere “coaching.” However, that the agency considered it necessary to coach the grievant can support, rather than undermine, the hearing officer’s finding of

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ Hearing Decision at 4.

¹² *Id.* The hearing officer does not appear to have relied on the agency’s claim that the grievant had failed to follow instructions in upholding the disciplinary action, but instead based his finding of misconduct on the grievant’s unsatisfactory work performance and the “progressive nature of the prior discipline.” *Id.*

¹³ *Id.* at 4.

¹⁴ *See, e.g.*, Agency Exhibit 2. The hearing officer concluded the agency had not met its burden with respect to one of the incidents listed by the agency in the Written Notice involving a Pay Action Worksheet. Hearing Decision at 4.

unsatisfactory performance. In determining that the grievant's conduct warranted coaching, the agency has expressed an opinion that the conduct was substandard to some degree. The agency's efforts to improve the grievant's performance through coaching do not in themselves constitute an admission that his performance did not also warrant disciplinary action.¹⁵ Because the hearing decision is supported by record evidence, EDR cannot substitute its judgment for that of the hearing officer with respect to his findings regarding the grievant's unsatisfactory performance. Accordingly, we decline to disturb the decision on this basis.

The grievant also asserts that the hearing officer erred in failing to make a finding of fact with respect to the grievant's claim of retaliation. This contention is not supported by the hearing decision. In his decision, the hearing officer specifically addressed the grievant's claim of retaliation and concluded that the grievant had not met his burden of showing that the disciplinary action was motivated by retaliatory factors, rather than the agency's legitimate, job-related concerns. He wrote:

The Grievant's description of the protected activity is that he voiced at a meeting in August 2013 that the Agency was plagued by pre-selection and nepotism. The Grievant asserts that his discipline and job termination stems from the Agency's reaction and ill will in response to his voicing his opinion. The Grievant engaged in protected activity, and he subsequently suffered an adverse employment action.

There is nothing to show that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct and job performance issues, all of which actions were primarily within the control of the Grievant.¹⁶

These findings were sufficient under the grievance procedure to meet the hearing officer's burden to make findings of fact. Further, the hearing officer's determinations of motive and credibility lie squarely within his sole authority, and the grievant has not shown that this determination was in any way an abuse of the hearing officer's discretion. Therefore, EDR cannot substitute its judgment for that of the hearing officer with respect to his findings regarding the grievant's claim of retaliation. Accordingly, we decline to disturb the decision on this basis as well.

¹⁵ To the extent the grievant is arguing that by "coaching" the grievant in these instances, it somehow waived its ability to take disciplinary action for those events, nothing in the grievance procedure would prohibit a contrary finding under these facts. Whether such an approach is appropriate under policy is a matter for a DHRM policy review, as discussed below. Further, to the extent the grievant argues that "coaching" failed to provide adequate notice of performance deficiencies to allow subsequent discipline under policy, this, too, is a question for DHRM.

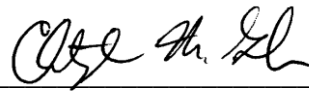
¹⁶ Hearing Decision at 6-7.

Inconsistency with State and Agency Policy

The grievant's request for administrative review may fairly be read to assert that the hearing officer's decision is inconsistent with state and agency policy, particularly with respect to the hearing officer's finding that the grievant's conduct was sufficient to warrant a Group II Written Notice. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁷ Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

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



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¹⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁸ *Grievance Procedure Manual* § 7.2(d).

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

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