

Issue: Administrative Review of Hearing Officer's Decision in Case No.10319; Ruling  
Date: June 16, 2014; Ruling No.2014-3911; Agency: Virginia Commonwealth  
University; 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 Commonwealth University  
Ruling Number 2014-3911  
June 17, 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 10319. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by Virginia Commonwealth University (“University”).<sup>1</sup> On March 10, 2014, the grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor’s instructions, a Group II Written Notice of disciplinary action for abuse of state time, and a Group III Written Notice for absence in excess of three workdays without authorization.<sup>2</sup> He was removed from employment and timely initiated a grievance challenging the disciplinary actions.<sup>3</sup> Following a hearing, the hearing officer issued a decision on May 27, 2014.<sup>4</sup> That decision rescinded the Group II Written Notice for abuse of state time, but upheld the Group II Written Notice for failure to follow a supervisor’s instructions, the Group III Written Notice for absence in excess of three workdays without authorization, and the grievant’s removal from employment.<sup>5</sup> The grievant has requested an administrative review by EDR of the hearing officer’s decision.

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>6</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>7</sup>

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<sup>1</sup> Decision of Hearing Officer, Case No. 10319 (“Hearing Decision”), May 27, 2014 at 2.

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 5.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

Fairly read, the grievant's request for administrative review challenges the hearing officer's factual findings. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>8</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>9</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>10</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>11</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.

The grievant did not specifically identify in his request for administrative review the basis for his claim that the hearing officer erred in his findings of fact.<sup>12</sup> Based on a review of the record, there is sufficient evidence to support the hearing officer's factual findings in this case.<sup>13</sup> Although the grievant disputes the hearing officer's conclusion that he engaged in conduct warranting disciplinary action, mere disagreement 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, or even whether sufficient evidence exists to support a finding in favor of 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.

### 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>14</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

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<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B).

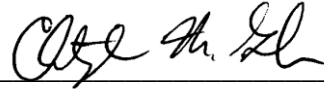
<sup>11</sup> *Grievance Procedure Manual* § 5.8.

<sup>12</sup> The only specific factual finding challenged by the grievant relates to the grievant's alleged abuse of state time. However, the hearing officer rescinded the Group II Written Notice for abuse of state time, finding that to the extent the University's allegations regarding abuse were true, the conduct was also charged by the University in the Group III Written Notice for absence in excess of three days. Hearing Decision at 3-5.

<sup>13</sup> See, e.g., Agency Exhibit 4.

<sup>14</sup> *Grievance Procedure Manual* § 7.2(d).

arose.<sup>15</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>16</sup>



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<sup>15</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>16</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).