

Issue: Administrative Review of Hearing Officer's Remand Decision in Case No. 10417;
Ruling Date: May 28, 2015; Ruling No. 2015-4146; Agency: Virginia Department of
Health; Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Health
Ruling Number 2015-4146
May 28, 2015

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s remand decision in Case Number 10417. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10417, as found by the hearing officer, are set forth in EDR Ruling No. 2015-4012 and will not be repeated here. As directed by Ruling No. 2015-4012, on April 16, 2015, the hearing officer issued a remand decision which again upheld the disciplinary action against the grievant.¹ The grievant now appeals the remand decision to 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.”² 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.³

Compliance with EDR Directives

In her request for administrative review, the grievant argues that the hearing officer failed to comply with EDR’s directives in Ruling No. 2015-4012. In that ruling, EDR directed:

Accordingly, this case must be remanded to the hearing officer for a limited reopening of the hearing record. To the extent any documents that are responsive to the requests listed above exist, they must be provided to the grievant and the hearing officer within a reasonable time as determined by the hearing

¹ See Remand Decision of Hearing Officer, Case No. 10417 (“Remand Decision”), April 16, 2015, at 1, 5.

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

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

officer. If responsive documents do not exist, the agency shall inform the grievant and the hearing officer of that fact. If any responsive documents exist and are relevant, the hearing officer shall consider them as evidence and issue a revised decision that takes those documents into account. The hearing officer may allow the parties to submit briefs in conjunction with the submission and receipt of any such documents and may reopen the hearing to receive additional testimony or other evidence if necessary.

The grievant asserts, among other things, that the hearing officer was required to issue orders mandating document production by the agency, to require the agency to produce a “senior official” to certify that additional responsive documents did not exist, to question the agency as to the non-existence of documents, and to, in effect, direct the manner of the agency’s document search. However, EDR’s review indicates that the hearing officer complied with the directives set forth in EDR Ruling No. 2015-4012. That ruling did not require the hearing officer to issue any additional orders, contemplate the extensive monitoring of the discovery process sought by the grievant, or impose any requirements on the manner in which the agency could certify that no further documents existed.⁴ While such oversight by the hearing officer would not necessarily have been improper, there is no evidence that, given the facts and circumstances in this case, the hearing officer abused her discretion in accepting the agency’s chosen manner and means of production. Accordingly, there is no basis to remand the hearing for further proceedings on this basis.⁵

Mitigation

The grievant also asserts that the hearing officer erred in failing to mitigate the disciplinary action on the basis of inconsistent treatment and/or lack of notice. Specifically, she appears to argue that the hearing officer erred by not sufficiently discussing the issues of inconsistent treatment and notice and by not addressing the examples set forth in the appendices to the grievant’s brief. We disagree. Although the hearing officer may have defined or addressed the grievant’s arguments in ways she finds objectionable, there is no basis to conclude that the hearing officer’s analysis constituted an abuse of discretion. While the evidence in this case could be subject to more than one interpretation, 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’s review of the remand decision does not support a conclusion that the hearing officer abused her discretion in concluding that the evidence did not demonstrate inconsistent treatment or a lack of notice warranting mitigation. EDR’s review in this case is, therefore, concluded.

⁴ The grievant appears to argue that the agency’s statement that it was unable to locate additional documents responsive to the grievant’s document request is not compliant with EDR Ruling No. 2015-4012, as it is not a statement that the documents “do not exist.” As EDR deems the agency’s statement that no additional documents can be located as functionally equivalent to a statement that no further documents exist, we do not find merit in the grievant’s argument.

⁵ To the extent the grievant seeks to re-assert her claims regarding the third request for production, those claims were addressed in EDR’s previous administrative review and will not be addressed here. *See* EDR Ruling No. 2015-4012.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.⁶ 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.⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁸



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⁶ *Grievance Procedure Manual* § 7.2(d).

⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁸ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).