Issue: Administrative Review of Hearing Officer's Decision in Case No. 10595; Ruling Date: June 16, 2015; Ruling No. 2015-4158; Agency: Department of Behavioral Health and Developmental Services; 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 Department of Behavioral Health and Developmental Services
Ruling Number 2015-4158
June 16, 2015

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 10595. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10595, as found by the hearing officer, are as follows:[1]

> The Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer III at one of its facilities. Grievant worked at a Facility with several buildings on a campus. He was responsible for patrolling the campus to ensure safety of the Agency's clients and employees. He had been employed by the Agency for approximately four years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Security officers at the Facility were required to carry an Agency-owned cell phone during their shifts. The Security Director wanted to track the activities of security officers as they worked their shifts. He obtained permission from Agency managers to install a tracking software application on the cell phone. The Agency's information technology employee loaded the software application onto the cell phone. An icon for the application remained on the cell phone and was visible to users. The tracking application used the "ping" signals between the cell phone and cell phone towers to determine the longitude and latitude of cell phone's location. The application generated a report showing the longitude and latitude of the cell phone over time in approximate five or ten minute intervals. The Agency did not notify Grievant or other employees that a tracking application had been placed on the Agency's cell phone.
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> Grievant's regular shift consisted of a "straight eight" meaning that he worked an eight hour shift without taking a meal break. Grievant worked two shifts on January 4, 2015. He came to work at approximately 6:02 a.m. and left the Facility at approximately 10:11 p.m. Grievant could take short breaks during

[1] Decision of Hearing Officer, Case No. 10595 ("Hearing Decision"), May 22, 2015, at 2-3 (citations omitted).

> his shift as needed but he was expected to remain on grounds during his breaks. Grievant was reminded by an email dated July 17, 2014, "Do not leave [Facility] while on duty."
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> At approximately 7:23 p.m., Grievant left the Agency's campus and went to a Shopping Center located over a mile away from the Facility. At approximately 7:28 p.m., Grievant was at the Shopping Center. At approximately 7:33 p.m., Grievant was at the Shopping Center. A video image showed Grievant returned to the campus at approximately 7:39 p.m. The tracking application showed he returned at approximately 7:44 p.m. Grievant did not obtain permission from a supervisor prior to leaving the campus. He did not leave the campus for any business-related reason.

On March 16, 2015, the grievant was issued a Group III Written Notice with termination for leaving work without permission, abuse of state time, and falsifying records.[2] The grievant timely grieved the disciplinary action[3] and a hearing was held on May 5, 2015.[4] In a decision dated May 22, 2015, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had left work without permission and demonstrated that "the elevation of disciplinary action" to a Group III Written Notice was justified under the circumstances.[5] The grievant now appeals the hearing 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."[6] 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.[7]

Inconsistency with Agency Policy

The grievant asserts in his request for administrative review that the hearing officer's decision is inconsistent with state and/or agency policy. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The grievant has requested such a review. Accordingly, the grievant's policy claims will not be discussed in this ruling.

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[2] Agency Exhibit A at 1-2.
[3] Agency Exhibit B.
[4] *See* Hearing Decision at 1.
[5] *See id.* at 3-7. Typically, leaving work without permission is a Group II offense, but DHRM Policy 1.60, *Standards of Conduct*, provides that "in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense" and that "[a]gencies may consider any unique impact that a particular offense has on the agency" in making such a determination. DHRM Policy 1.60, *Standards of Conduct*, Attachment A.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of Evidence

In essence, the grievant asserts in his request for administrative review that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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 the hearing decision, the hearing officer assessed the evidence and concluded that the evidence showed the "Grievant left his work place without permission from a supervisor" on January 4, 2015, which would typically justify the issuance of a Group II Written Notice, and further determined that the grievant's "absence without permission was a circumstance justifying the elevation of disciplinary action from a Group II offense to a Group III offense."[13] The grievant presents a number of claims disputing the hearing officer's factual conclusions in his request for administrative review.

First, the grievant argues that the hearing officer failed to consider testimony from a co-worker about the location of the cell phone on January 4. At the hearing, the co-worker testified that she drove the grievant's vehicle off-campus, and that she observed the agency-owned cell phone in the vehicle during that time.[14] The grievant argues that this evidence "was not challenged" at the hearing and that the hearing officer erred in not rescinding the discipline based on the co-worker's testimony.[15] The hearing officer directly addressed the grievant's claim that "he did not leave the campus but rather he left the cell phone in his car" while the co-worker

[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] Hearing Decision at 3-4; *see also* Hearing Recording at 3:24:11-3:24:41 (testimony of supervisor) (describing the circumstances of the grievant's conduct in this case that warranted elevation of the discipline).
[14] Hearing Recording at 5:19:59-5:22:00 (testimony of co-worker).
[15] The grievant also appears to assert that the co-worker "previously testified in another [grievance] hearing" and was found to be credible in that case, and thus the hearing officer should have found her testimony credible in this case as well. There is nothing in the grievance procedure to support this argument. Hearing officers must base their decisions "on the material issues and the grounds in the record for those findings." *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearing* § V(C); *see* Va. Code § 2.2-3005.1(C). This requires evaluating the credibility of each witness in every case in which he or she testifies. That a witness may have previously testified credibly does not mean that he or she will always do so, and it is squarely within the authority of the hearing officer to make such determinations.

drove his vehicle and determined that "[t]his assertion [was] not supported by the evidence."[16] There is evidence in the record to support this conclusion. Data from the tracking software shows that the cell phone was not in the parking lot, where the grievant's vehicle was located, for several hours before the grievant left the campus. The hearing officer noted as much, stating that "a pattern of points would appear around the parked vehicle if Grievant's assertion were true."[17] The grievant was in the gym during this time period,[18] and the tracking software shows that the cell phone was also in the gym.[19] This evidence is consistent with the hearing officer's conclusion that "a pattern of points appears around the gym where Grievant was working inside."[20]

In addition, the grievant asserts that the hearing officer erred in relying on the tracking software because it was not reliable. The hearing officer also considered this argument in his decision and concluded that, "[a]lthough an occasional data point may have been inaccurate . . . , there were enough data points before and after the inaccurate data point to establish a reliable trend of data showing Grievant's approximate location on the campus."[21] The hearing officer's determination on this issue has support in the record. The agency provided evidence to show that it had tested the accuracy of the tracking software and found it to be reliable.[22] While the grievant disputed the accuracy of the tracking software,[23] there is evidence in the record to support the hearing officer's conclusion that the tracking software accurately recorded the grievant's location throughout his shift on January 4. As a result, there is no basis for EDR to conclude that the hearing officer's decision on this point was in error or otherwise constitutes an abuse of discretion.

The grievant further alleges that the agency had no policies relating to breaks or employees' ability to leave the campus while on duty. It appears the grievant is correct that the agency had no written policies explaining its expectation that staff were not allowed to leave the campus without first receiving permission from a supervisor. However, there is evidence in the record to support the hearing officer's conclusion that the grievant was not permitted leave the campus without approval.[24] For example, the grievant's supervisor testified that he gave the grievant a verbal directive not to leave the campus without permission before January 4.[25] The agency also presented a document, dated July 17, 2014 and initialed by the grievant, that ordered security staff not to leave the campus while on duty.[26] Another witness who also reports to the grievant's supervisor testified that, while there is no written policy regarding breaks, he was previously directed to notify agency management before leaving the campus during his shifts.[27] This witness also stated that, if he were planning to drive to the shopping center while on duty,

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[16] Hearing Decision at 4.
[17] *Id.*
[18] *See* Agency Exhibit F at 4-5; Agency Exhibits L, M; Hearing Recording at 5:18:39-5:19:44 (testimony of co-worker).
[19] Agency Exhibit H at 3-4; Agency Exhibit I at 28-47; Hearing Recording at 3:01:00-3:01:40 (testimony of supervisor).
[20] Hearing Decision at 4.
[21] *Id.* at 4.
[22] Hearing Recording at 3:18:17-3:19:06 (testimony of supervisor).
[23] *See, e.g., id.* at 3:40:59-3:42:56.
[24] *See* Hearing Decision at 3-4.
[25] Hearing Recording at 2:58:56-2:59:41, 4:07:48-4:09:50 (testimony of supervisor).
[26] Agency Exhibit O.
[27] Hearing Recording at 4:42:09-4:43:06, 4:49:35-4:51:00 (testimony of Witness C).

he would first call his supervisor and ask for permission to do so.[28] This evidence supports the hearing officer's conclusion that the grievant's decision to leave the campus without approval was contrary to agency practice and justified the issuance of the disciplinary action.[29]

Finally, the grievant argues that his travel "off grounds" on the date in question "was in the regular course of business" and that he was disciplined in retaliation for filing a complaint of discrimination. While there was some testimony to suggest that the grievant and other agency employees occasionally left campus to refill their vehicles with gas,[30] the hearing officer did not find this explanation for the grievant's actions credible.[31] The tracking software data and video camera footage show that the grievant was not at the refueling station near the campus between 7:13 p.m. and 7:39 p.m., but was instead at a shopping center several miles away from the campus.[32] There is no evidence in the record to show that it was "in the regular course of business" for agency employees to drive to the shopping center.[33] Similarly, the hearing officer evaluated the grievant's arguments relating to his allegation of retaliation and determined that "he engaged in protected activity"[34] and "suffered an adverse employment action," but had not "established a connection" between these two actions.[35] Having reviewed the hearing record, we cannot conclude that the hearing officer's decision on this issue is contrary to the evidence presented by the parties or otherwise constitutes an abuse of discretion.

In summary, while the grievant may disagree with the hearing officer's findings of fact, there is evidence in the record to support his conclusion that the grievant left work without permission on January 4 and that his actions justified the issuance of a Group III Written Notice. As discussed more fully above, the agency presented evidence to show that the grievant left the campus between approximately 7:13 p.m. and 7:39 p.m.,[36] and that agency staff are not permitted to leave the campus without permission from a supervisor.[37] 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. In this case, the hearing officer's findings are based upon evidence in the record and the material issues of the case, and EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on any of these bases.

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[28] *Id.* at 4:51:11-4:52:42 (testimony of Witness C).
[29] *See* Hearing Decision at 3-4.
[30] Hearing Recording at 4:49:35-4:51:00 (testimony of Witness C).
[31] Hearing Decision at 6.
[32] Agency Exhibit F at 10; Agency Exhibit H 4-5; Agency Exhibit I at 48-50.
[33] *See* Hearing Recording at 4:51:11-4:52:42 (testimony of Witness C).
[34] The evidence in the record shows that the grievant filed a complaint of discrimination with state and federal agencies before January 4, 2015, and that at least two agency managers were aware the grievant had done so. Grievant's Exhibit 5; *see* Hearing Recording at 1:28:19-1:28:50 (testimony of HR Manager), 4:13:49-4:14:01 (testimony of supervisor).
[35] Hearing Decision at 7.
[36] Agency Exhibit F at 10-11; Agency Exhibit H at 4-5; Agency Exhibit I at 48-50.
[37] *E.g.*, Agency Exhibit O; Hearing Recording at 2:58:56-2:59:41, 4:07:48-4:09:50 (testimony of supervisor), 4:42:09-4:43:06, 4:51:11-4:52:42 (testimony of Witness C).

Admission of Evidence

The grievant further argues that the hearing officer erred in admitting and considering evidence from the tracking software because it was allegedly obtained in violation of Virginia law. Section 18.2-60.5 of the Code of Virginia states that, with certain exceptions, it is a crime to "install[] or place[] an electronic tracking device through intentionally deceptive means and without consent . . . and use[] such device to track the location of any person . . . ."[38] As an initial point, this section of the Code is not an evidentiary rule governing grievance proceedings prohibiting the admission of evidence. However, the grievant appears to claim that the hearing officer should have applied the exclusionary rule[39] to suppress evidence from the tracking software because the agency allegedly violated this statute by installing the tracking software on the agency-owned cell phone.[40] Contrary to the grievant's assertions, EDR is unaware of any law or policy that would require a hearing officer to exclude relevant evidence of this type and declines to adopt the exclusionary rule as a remedy based on the grievant's allegations in this case.[41]

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[38] *See* Hearing Decision at 4-5. In the decision, the hearing officer did not determine that the agency had violated this statutory provision and nothing in this ruling is meant to indicate that EDR believes there was an actual violation.

[39] The exclusionary rule is "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of an illegal search and seizure." *Id.* at 347; *see* Weeks v. United States, 232 U.S. 383 (1914) (creating the exclusionary rule and applying it in federal criminal proceedings); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states through the Due Process Clause of the Fourteenth Amendment). Its purpose is to deter "future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . ." *Calandra*, 414 U.S. at 347 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

[40] In effect, the grievant seems to assert that installing the tracking software constituted an unreasonable search in violation of the Fourth Amendment. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). The Supreme Court has held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" United States v. Jones, 132 S. Ct. 945, 949 (2012) (footnote omitted). The grievant apparently argues that a similar principle applies to the installation of the tracking software on the agency-owned cell phone.

[41] *See* United States v. Janis, 428 U.S. 433, 447 (1976) ("In the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state."); *cf.* Fahrenbacher v. Dep't of Veterans Affairs, 89 M.S.P.R. 260, 268 n.5 (2001) (holding that "the 'exclusionary rule,' derived from the fourth amendment [sic] protection against unlawful search and seizure, does not apply to administrative proceedings" of the Merit Systems Protection Board (citing Delk v. Dep't of the Interior, 57 M.S.P.R. 528 (1993))). In his request for administrative review, the grievant relies on *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (per curiam), to support his assertion that the hearing officer should have applied the exclusionary rule. Neither of those cases, however, stands for the proposition that the exclusionary rule is available in administrative proceedings. In *Lopez-Mendoza*, the Supreme Court applied a balancing test to weigh the costs and benefits of applying the exclusionary rule in deportation proceedings, concluding that such an analysis weighed "against applying the exclusionary rule in civil deportation hearings held by the INS." 468 U.S. at 1040-1050. The Court stated in *Grady* that the protections of the Fourth Amendment extend beyond criminal investigations and that "a State [] conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." 135 S. Ct. at 1369-1371 (citations omitted). However, the Court also noted that "[t]he Fourth Amendment prohibits only *unreasonable* searches" and remanded the case for further consideration of whether requiring a recidivist sex offender to enroll in a satellite-based monitoring program was an unreasonable search. *Id.*

Accordingly, there is no basis for EDR to conclude that the hearing officer erred in considering and relying on information obtained by the agency through the tracking software, and we decline to disturb the hearing decision on this basis. EDR has reviewed nothing in this case that indicates the hearing officer erred under the grievance procedure by considering this evidence. To the extent the grievant is seeking a determination as to whether the hearing officer erred as a matter of law in deciding that the exclusionary rule does not apply in the context of a grievance hearing,[42] this claim is best addressed by the circuit court in which the grievance arose rather than EDR.[43] Accordingly, we will not address the legal merits of the hearing officer's findings on this issue.

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.[44] 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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[42] *See* Hearing Decision at 6.
[43] *See* Va. Code § 2.2-3006(B).
[44] *Grievance Procedure Manual* § 7.2(d).
[45] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[46] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).