

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10760; Ruling  
Date: April 19, 2016; Ruling No. 2016-4327; Agency: Department of Veterans  
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 Veterans Services  
Ruling Number 2016-4327  
April 19, 2016

The Department of Veterans Services (the “agency”) 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 10760. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant is employed by the agency as a unit secretary.<sup>1</sup> On December 7, 2015, the grievant was issued a Group II Written Notice with a five day suspension for a uniform violation and for failing to follow a supervisor’s instructions.<sup>2</sup> The grievant timely grieved the disciplinary action.<sup>3</sup> A hearing was subsequently held on March 8, 2016.<sup>4</sup> On March 9, 2016, the hearing officer issued a decision reducing the disciplinary action to a Group I Written Notice for unsatisfactory work performance.<sup>5</sup> The agency has now requested administrative review of the hearing officer’s decision.<sup>6</sup>

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>7</sup> If the hearing

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<sup>1</sup> See Decision of Hearing Officer, Case No. 10760 (“Hearing Decision”), March 9, 2016, at 2; see also Agency Exhibit 2 at 1.

<sup>2</sup> Agency Exhibit 3; see Hearing Decision at 1.

<sup>3</sup> Agency Exhibit 2; see Hearing Decision at 1.

<sup>4</sup> See Hearing Decision at 1.

<sup>5</sup> *Id.* at 1, 3-5. The grievant was also awarded back pay for the period of the disciplinary suspension. *Id.* at 5.

<sup>6</sup> The agency has also asked the hearing officer to reconsider his decision. The option to request hearing officer reconsideration was eliminated in the 2012 revisions to the grievance procedure. However, the arguments raised by the agency in its request for reconsideration will be considered in the administrative review process.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

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>8</sup>

#### *Inconsistency with Agency Policy*

In its requests for administrative review, the agency asserts that the hearing officer's decision is inconsistent with state and agency policy. In particular, the agency argues that the grievant's conduct did rise to the level of a Group II Written Notice and that the grievant's attire did violate the agency Dress Code Policy, disputing the hearing officer's contrary findings. In addition, the agency asserts that the grievant's conduct was properly disciplined as a Group II offense because of prior disciplinary action.<sup>9</sup> The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>10</sup> The agency has requested such a review. Accordingly, the agency's policy claims will not be discussed in this ruling.

#### *Hearing Officer's Consideration of the Evidence*

Fairly read, the agency's request for administrative review also challenges the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>11</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>12</sup> Further, in cases involving discipline, the hearing officer reviews the evidence *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>13</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>14</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, the agency appears to assert that the hearing officer erred in finding that the grievant was not instructed to return to work.<sup>15</sup> A reasonable conclusion could be drawn that the agency's instruction to the grievant to go home and change clothes necessarily included the implication that she return to work after changing clothes. However, record evidence supports

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<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> EDR notes that no evidence of prior disciplinary action appears to have been presented in this case. Rather, the agency relies on a previous written counseling—not formal discipline—to support its claim that a Group II is warranted. See Agency Exhibit 8 at 1.

<sup>10</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>11</sup> Va. Code § 2.2-3005.1(C).

<sup>12</sup> *Grievance Procedure Manual* § 5.9.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>14</sup> *Grievance Procedure Manual* § 5.8.

<sup>15</sup> Hearing Decision at 4.

the hearing officer's finding that the agency did not specifically advise the grievant that she needed to return to work after changing clothes.<sup>16</sup> In addition, there is also record evidence to support the hearing officer's conclusion that the grievant did not understand that her supervisors' assumptions were that she would return to work.<sup>17</sup> Determinations of witness credibility as well as disputed facts 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. Because 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. Accordingly, we decline to disturb the decision on this basis.

The agency also asserts that the hearing officer erred in concluding that the attire worn by the grievant did not violate the agency dress code. As previously noted, challenges to the hearing officer's interpretation of policy are squarely within the DHRM Director's discretion. However, in this case, the hearing officer's policy interpretation necessarily relies on his factual conclusions that the grievant's attire constituted pajamas and/or loungewear and that such categories of clothing are not specifically discussed by the language of the dress code.<sup>18</sup> These factual determinations are solely within the hearing officer's discretion and must be upheld as long as supported by the record evidence. As record evidence supports the hearing officer's factual determinations, EDR cannot substitute its judgment for that of the hearing officer.<sup>19</sup> Accordingly, we decline to disturb the decision on this basis as well.

#### 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>20</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>21</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>22</sup>



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<sup>16</sup> See Hearing Recording at 23:07-23:18, 35:10-35:13, 1:15:33-1:16:01 (testimony of agency managers).

<sup>17</sup> See, e.g., Hearing Recording at 1:53:19-1:53:44 (testimony of co-worker); Agency Exhibit 9.

<sup>18</sup> See Hearing Decision at 3-4.

<sup>19</sup> See, e.g., Agency Exhibit 2 at 3-5; Agency Exhibit 3; Agency Exhibit 4 at 1-5.

<sup>20</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>21</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>22</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).