

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11247; Ruling  
Date: January 25, 2019; Ruling No. 2019-4824; Agency: Department of Alcoholic  
Beverage Control; Outcome: AHO's decision affirmed.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Alcoholic Beverage Control  
Ruling Number 2019-4824  
January 25, 2019

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 11247. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11247, as found by the hearing officer, are as follows:<sup>1</sup>

At the time he was discharged, Grievant was an Assistant Manager at one of the largest ABC stores in Northern Virginia (hereinafter Store XXX). He was hired as a part time Sales Associate in 2009 and subsequently promoted to Assistant Manager. He worked at store XXX for approximately one year and ten months. At the time of his discharge he had no prior disciplinary record. As a Sales Associate and as an Assistant Manager, Grievant received ongoing training in ABC’s policies and procedures including the Workforce Harassment Policy. Grievant is from Ethiopia and is fluent in Amharic and English.

Grievant’s supervisor[] is an experienced manager. He was hired by ABC in 2001 and worked his way up the agency structure first as a Sales Associate, an Assistant Manager and finally the Manager of ABC store XXX, one of the largest ABC stores in Northern Virginia. Store XXX served restaurant licensees and retail customers. He managed both operations. During his employment with ABC he received ongoing training in ABC’s policies and procedures including the Workforce Harassment Policy. He is from Ethiopia and is fluent in Amharic and English.

Beginning in January 2018, the work environment at ABC Store XXX was disrupted by Grievant’s treatment of [a] female Sales Associate[].

As a sales associate, [the Sales Associate]’s principal responsibility was to operate a cash register to serve customers in the store. She was also required, on occasion, when the store was not busy to break down liquor boxes in the back-

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<sup>1</sup> Decision of Hearing Officer, Case No. 11247 (“Hearing Decision”), Nov. 23, 2018, at 2-5 (citations omitted).

storage room. [The Sales Associate] is also from Ethiopia and is fluent in Amharic and somewhat fluent in English.

[The Sales Associate] complained to the [S]tore [M]anager[] that Grievant frequently yells at her, orders her to stop her cashier duties and break down boxes in the back room when other employees are available to do so, then follows her into the back room and laughs at her as she is breaking down boxes. She also complained that Grievant treats her differently from other sales associates by requiring her to ask him for her bag of money to operate the cash register. Other managers provide the money bag to cashiers without waiting for the associate to ask for the bag.

On January 11, 2018, Grievant accused [the Sales Associate] of time wasting, refusing to work on the cash register he assigned her to, and taking a break without telling him. After reviewing the store's video which showed that [the Sales Associate] arrived on time for her 2 p.m. shift and was on the floor at 2:03 p.m. [The Store Manager] determined that the time-wasting allegation was false. [The Sales Associate] denied she refused to go to her assigned register. She asserts that Grievant did not clearly tell her which register to operate, and she operated a register that was further from the entrance door to stay warm. She also explained that she took her break at 6 p.m. as she was supposed to. The Hearing Officer credits [the Sales Associate]'s and [the Store Manager]'s version of these facts.

On January 16, 2018, [the Store Manager] had a meeting with [the Sales Associate] and Grievant to resolve the ongoing conflict. After letting them air their concerns, he told them essentially to act professionally and respect each other's position. He ordered Grievant to treat [the Sales Associate] as he did other employees and give her a cash bag as soon as she clocked in. Grievant was not satisfied and complained to [the Store Manager]'s supervisor, [the Regional Manager].

On March 16, 2018 [the Sales Manager] had another meeting with [the Sales Associate] and Grievant to resolve the ongoing issues. Grievant accused [the Sales Associate] of not asking for her cash bag when she clocked in and leaving the cash register to go to the back room to get an exclusive brand of scotch for a customer. That meeting ended prematurely with both [the Sales Associate] and Grievant calling each other names. [The Store Manager] observed that "Grievant had a bad temper, everything should go the way he wants it 100 percent."

The meeting resumed the next day and ended prematurely and badly. [The Sales Associate] accused Grievant of treating her like a servant. Grievant exploded with anger and told [the Sales Associate] "you speak like prostitution", "you are crazy" and "you are inferior." Grievant's angry, vitriolic outburst left [the Sales Associate] shaken and in tears. [The Store Manager] stopped the meeting immediately.

All the attendees to that meeting, except Grievant, had the same recollection of the events. The words were spoken in English and Amharic which the attendees spoke and understood. The Hearing Officer credits [the Sales Associate]'s and [the Store Manager]'s version of the events at the meeting.

The words were particularly offensive to [the Sales Associate] and to Ethiopians generally.

During her testimony, [the Sales Associate] struggled to retain her composure and cried when she recounted the meeting and the effect the words had on her.

The Hearing Officer finds that Grievant used the words with knowledge of the pain it would cause [the Sales Associate] at work and at home and disrupted the operations of the store.

Grievant denies he said the offensive statement and does not explain or defend that most serious accusation against him. Rather, in an apparent attempt to deflect and mislead agency investigators, he accused the store manager of favoritism to certain Ethiopian employees including [the Sales Associate] and [the Assistant Manager].

[The Store Manager] categorically denied the accusations and explained why they were false. The Hearing Officer credits [the Store Manager]'s version and finds that the accusations are baseless and false.

The charges against Grievant were fully investigated by agency management. The investigation was led by the Employee Relations Manager, [] who has worked in Human Resources for 18 years and is an experienced investigator.

Grievant and all Store XXX employees that worked on shifts with [the Sales Associate] and Grievant were independently interviewed by a panel of 3 agency investigators and their statements contemporaneously recorded by [the Employee Relations Manager].

Grievant continued to work at the store during the investigation. [The Sales Associate] was transferred to two other stores for approximately 5 weeks before she was returned to Store XXX.

During her absence, Grievant acted as if he had succeeded in getting [the Sales Associate] transferred.

A female Assistant Manager[] complained that Grievant treated male employees different from her. He refused to assist her in performing job related tasks but works cooperatively with other male sales associates. In order to do her job, [the Assistant Manager] avoided contact with Grievant. [The Assistant Manager] has worked for ABC for approximately 10 years.

On May 24, 2018, Grievant was handed a Notice of Pending Disciplinary Action and he returned to work. He was ordered to stop working and leave the ABC store when upon returning to work, he told the [S]tore [M]anager “you lied on me, I will make sure you pay for it.” The [Store M]anager feared that Grievant would hurt him and reported the incident to the local police and a case file was opened.

On June 5, 2019, the grievant was issued a Group III Written Notice with termination for “creat[ing] an uncomfortable and intimidating work environment by harassing a female employee.”<sup>2</sup> The grievant timely grieved the disciplinary action and a hearing was held on September 19, 2018.<sup>3</sup> In a decision dated November 23, 2018, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had created a hostile work environment for the Sales Associate based on her sex and upheld the issuance of the Group III Written Notice with termination.<sup>4</sup> The grievant now appeals the hearing decision to EEDR.

### DISCUSSION

By statute, EEDR 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>5</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>6</sup>

In his request for administrative review, the grievant essentially argues that the hearing officer’s findings of fact, based on the weight and credibility that he accorded to evidence 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”<sup>7</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>8</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>9</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>10</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

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<sup>2</sup> Agency Exhibit 13.

<sup>3</sup> Hearing Decision at 1.

<sup>4</sup> *Id.* at 1, 8-11.

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

<sup>6</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code § 2.2-3005.1(C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>10</sup> *Grievance Procedure Manual* § 5.8.

the case, EEDR 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 determined that the allegations regarding the grievant's behavior, as charged on the Written Notice, were substantiated: in particular, he found that the grievant "called [the Sales Associate] crazy and said, 'she spoke like prostitution'" in a meeting with the Store Manager and the Sales Associate, and that the grievant "verbally and physically intimidated [the Sales Associate] by barking orders and maintaining an intimidating physical presence near her as [the Sales Associate] completed the work Grievant ordered her to do."<sup>11</sup> State and agency policy prohibit harassment on the basis of sex, and specifically define workplace harassment as "[a]ny unwelcome verbal, written or physical conduct that either denigrates or shows hostility of aversion toward a person on the basis of . . . sex . . . that . . . has the purpose or effect of unreasonably interfering with an employee's work performance . . . ."<sup>12</sup> The hearing officer concluded that the grievant's conduct "had the purpose and effect of unreasonably interfering with the Sales Associate's work performance and was properly characterized as workplace harassment" based on the Sales Associate's sex,<sup>13</sup> thus warranting the issuance of the Group III Written Notice and the grievant's termination.<sup>14</sup>

In his request for administrative review, the grievant generally disputes the hearing officer's conclusions and assessment of the evidence. More specifically, the grievant disputes the hearing officer's factual determinations about what occurred during the March 16, 2018 meeting, when he allegedly called the Sales Associate "crazy" and "inferior," and said that she "spoke like prostitution."<sup>15</sup> The grievant also argues that the Sales Associate's and the Store Manager's testimony about the meeting, as well as his conduct in general, were false, that the hearing officer did not consider evidence about the Sales Associate's inappropriate behavior, and that the hearing officer listed "arbitrary factors to characterize [him] as negative . . . ." The grievant further contends that the evidence was insufficient to support a conclusion that his alleged conduct toward the Sales Associate was based on her sex.

EEDR has thoroughly reviewed the hearing record and the grievant's request for administrative review and concludes that most of the alleged errors in the hearing officer's assessment of the evidence were either not material or are simply factual findings on which the grievant disagrees with the hearing officer's conclusions or the impact of the findings. The hearing officer clearly assessed the evidence presented by the parties and found that the agency had met its burden of showing that the grievant engaged in the conduct described in the Written Notice, that his behavior constituted misconduct, and that the discipline imposed was consistent with law and policy. EEDR's review of the hearing record indicates that there is evidence to

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<sup>11</sup> Hearing Decision at 8.

<sup>12</sup> Agency Exhibit 2 at 4; Agency Exhibit 3 at 5.

<sup>13</sup> Hearing Decision at 10.

<sup>14</sup> *See id.* at 8-11.

<sup>15</sup> The grievant also disputes that hearing officer's citation to the testimony of the Assistant Manager in support of his conclusions regarding the grievant's behavior at the March 16, 2018 meeting, noting that the Assistant Manager was not present. This appears to be a clerical error. The hearing officer explicitly referred to the Store Manager's presence at the meeting, and the Store Manager testified about the grievant's behavior during the meeting in detail. *See* Hearing Recording at 5:00:46-5:07:09 (testimony of Store Manager).

support those findings.<sup>16</sup> While the grievant may disagree with the hearing officer's assessment of the witnesses' credibility and/or his characterization of the evidence, conclusions as to these matters are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.<sup>17</sup>

In addition, the grievant argues that the hearing officer did not consider his testimony and other evidence in the record in support of his argument that he did not engage in the behavior charged on the Written Notice. EEDR's review of the hearing record, however, clearly indicates that the hearing officer considered the grievant's testimony and, indeed, explicitly addressed his "blanket denial" that he engaged in any of the charged misconduct.<sup>18</sup> The hearing officer found that the testimony of the Sales Associate and the Store Manager was "more credible"<sup>19</sup> than the grievant's and, as discussed above, there is evidence in the hearing record to support that conclusion. Furthermore, to the extent any aspect of the grievant's testimony was not specifically addressed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testifies at a hearing. Thus, mere silence as to specific testimony and/or other evidence does not necessarily constitute a basis for remand. In addition, it is squarely within the hearing officer's discretion to determine the weight to be given to the testimony presented. Here, it would appear that the hearing officer did not address all of the grievant's testimony specifically because he did not find it to be credible and/or persuasive on the issue of whether his conduct created a hostile work environment for the Sales Associate based on her sex.

In summary, and although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to 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 in this case are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, EEDR will not disturb the hearing decision on the bases cited by the grievant.<sup>20</sup>

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<sup>16</sup> *E.g.*, Agency Exhibit 5 at 1; Agency Exhibit 6; Grievant's Exhibit 17 at 1-5; Grievant's Exhibit 18; Hearing Recording at Track 1, 3:10:18-3:12:28, 3:31:56-3:35:47, 3:48:11-3:48:22 (testimony of Sales Associate), Track 1, 5:00:46-5:07:09 (testimony of Store Manager).

<sup>17</sup> *See, e.g.*, EDR Ruling No. 2014-3884.

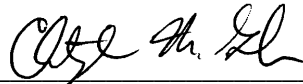
<sup>18</sup> Hearing Decision at 9; *see, e.g.*, Grievant's Exhibits 1, 3; Grievant's Exhibit 17 at 5-7.

<sup>19</sup> *Id.* at 9-10.

<sup>20</sup> To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>21</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>22</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>23</sup>



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<sup>21</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>22</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>23</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).