

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11265; Ruling  
Date: January 3, 2019; Ruling No. 2019-4825; Agency: Department of Corrections;  
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 Corrections  
Ruling Number 2019-4825  
January 3, 2019

The grievant has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11265. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11265, as found by the hearing officer, include the following:<sup>1</sup>

Grievant supervised Officer P in the Housing Unit until Officer P moved to a Transportation post.

Officer P was fraternizing with Inmate B. She did not disclose this information to others but others at the Facility noticed Officer P’s behavior.

On May 7, 2018, Investigator C learned from another employee that Officer P may have been fraternizing with Inmate B.

Inmate B’s cell was in the Housing Unit. After finishing a transportation run, Officer P would sometimes enter the Housing Unit and speak with Inmate B.

Grievant learned from several offenders that Officer P was being watched. He gave Officer P a “heads up” that offenders told him she was being watched.

Grievant and Officer P communicated by text message. On May 14, 2018 at 6:42 p.m., Officer P sent Grievant a text:

Thanks for the heads up.

Grievant responded, “Cool.”

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<sup>1</sup> Decision of Hearing Officer, Case No. 11265 (“Hearing Decision”), Nov. 26, 2018, at 2-6 (citations omitted).

Officer P said:

Do you honestly think it's just best for me to just stay out of the building for a while now? Or what do you think.

Grievant said:

Just to be safe ... I would

Officer P responded "Yo".

Grievant wrote:

U good?

Officer P wrote:

I'll be ok .... job searching.

Grievant wrote:

Don't leave thou cuz u are pretty go at what u do ... plus I like u

Officer P wrote:

LOL my ass f'k around and get walk out then what

Grievant wrote:

Why would u thou  
U ain't did s—t

Officer P wrote:

Just saying ... I mean I ain't gone lie I guess we do kinda talk a lot but that's it

At 9:50 p.m., Grievant wrote:

Well if that's it then that's nothing

At 9:50 p.m., Officer P wrote:

Yea, you're right

On May 15, 2018, Officer P sent Grievant a text message at 2:32 p.m.:

Wyd? Why you not at work

Grievant wrote:

Went to [location]

Officer P wrote:

Oh ok how was that

Grievant wrote:

It was cool ... way

Officer P wrote:

Home

Grievant wrote:

No work [Person S] asked about u

Officer P wrote:

I did my room and brought my ass home ... [Person S] know about that bs too?

Grievant wrote:

Idk ... I didn't say nothing to her

Officer P wrote:

Oh ok ... way

At 2:40 p.m., Grievant wrote:

On my way home

On May 16, 2018 at 7:59 a.m., Grievant sent Officer P a text message:

Wtfyd

Officer P wrote:

Chillin lol come here

At 4:23 p.m., Grievant wrote:

Ima fight u

At 4:37 p.m., Officer P wrote:

What I do

At 4:45 p.m., Officer P wrote:

Hello

At 7:13 p.m., Officer P wrote:

Are we going to ever get back

At 7:24 p.m., Grievant wrote:

Yeah ... your situation got me shook

Officer P wrote:

I understand

I'll leave you alone until things calm down I guess

Cool?

On May 17, 2018 at 9:20 a.m., Investigator C interviewed Officer P about her relationship with Inmate B. Officer P said she was not having any type of communication with Inmate B or anyone in his family. She said she never brought Inmate B any contraband, nor had she had any kind of relationship with him other than a professional one. At Investigator C's request, Officer P showed him her cell phone text messages including those with Grievant.

Shortly after her interview with Investigator C, Officer P met with the Major and told the Major that she would be resigning effective immediately. She admitted to the Major that she had lied to Investigator C.

Officer P resigned from the Agency on May 17, 2018.

The Agency presented evidence of Inmate B's telephone conversations. The Hearing Officer gives zero weight to that evidence.

On August 7, 2018, the grievant was issued a Group III Written Notice with removal for failing to report fraternization.<sup>2</sup> The grievant timely grieved the disciplinary action and a hearing was held on November 2, 2018.<sup>3</sup> In a decision dated November 26, 2018, the hearing officer found that the agency had presented sufficient evidence to demonstrate that the grievant had failed to report fraternization as charged in the Written Notice and upheld his 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> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>7</sup> The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that the hearing officer’s findings of fact, based on the weight and credibility he accorded to testimony presented at the hearing, are not supported by the evidence in the record. 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 the 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, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In his request for administrative review, the grievant argues that there is no evidence in the record as to any fraternization within his personal knowledge that he accordingly failed to

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

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

<sup>4</sup> *Id.* at 6-8.

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

<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.

report, nor is there evidence to show how he may have obtained that knowledge. While these assertions are accurate descriptions of the record evidence, or lack thereof, EEDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determinations. As stated in the hearing decision, the hearing officer relies primarily on the text messages between the grievant and Officer P. The text messages led the hearing officer to conclude that the grievant's behavior was "consistent with a situation where Officer P was fraternizing with Inmate B and Grievant was aware of that fraternization."<sup>12</sup> While reasonable minds can disagree as to the meaning of these text messages, 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>13</sup>

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 declines to disturb the decision on this basis.

#### 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>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 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>12</sup> Hearing Decision at 7.

<sup>13</sup> See, e.g., EDR Ruling No. 2014-3884.

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

<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).