Issue: Administrative Review of Hearing Officer's Decision in Case No. 10057, 10101, 10102; Ruling Date: November 21, 2013; Ruling No.2014-3748; Agency: Department of Social Services; Outcome: Remanded to AHO for clarification.

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

ADMINISTRATIVE REVIEW

In the matter of the Department of Social Services
Ruling Number 2014-3748
November 21, 2013

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 decision in Case Number 10057/10101/10102. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

The relevant facts in Case Numbers 10057/10101/10102, as found by the hearing officer, are as follows:[1]

> The Department of Social Services employed Grievant as a Media Specialist IV. The purpose of her position was:
>
> > This is a journeyman level professional position responsible for accessing needs and developing and delivering communications to support the effective delivery of training programs for local departments of social services and their community partners. This includes reviewing and editing training products and designing and developing video productions. The position reports to the Local Programs Training Manager.
>
> She began working for the Agency in March 2011.
>
> Grievant requested documents from other Agency employees. As a result, Ms. C, an HR Manager instructed Grievant that she would have to obtain documents from the Agency pursuant to the Virginia Freedom of Information Act and that Grievant had to make her requests for documents to the HR Manager. Ms. C expected to force Grievant to pay for documents at a rate set by the Agency before receiving them. Ms. C was not in Grievant's chain of command.

[1] Decision of Hearing Officer, Case Nos. 10057/10101/10102 ("Hearing Decision"), October 2, 2013, at 2-6 (citations omitted).

From October 1, 2012 through January 8, 2013, Grievant presented the HR Manager with approximately ten requests for documents. Grievant was provided with an estimate of the cost to produce the documents. In some cases, she would withdraw her request after being advised of the cost to produce the documents.

On October 25, 2012, Grievant attended a meeting with the Supervisor and Mr. H. Grievant was assigned responsibility to edit three videos. Grievant expected to work as part of a team with Mr. H.

Grievant and Mr. H finished working on three videos. When the Supervisor learned that only three videos had been edited, she accused Grievant of failing to comply with the Supervisor's instructions. The Supervisor told Grievant that the Supervisor said 78 videos should be edited not merely three videos. Grievant became concerned that the Supervisor may falsely accuse her of failing to perform the assignment given to Grievant. In the morning of January 8, 2013, Grievant sent Mr. H an email asking, "[c]ould I have a copy of your notes of the meeting described below. Contact me if you have any questions. Mr. H provided the requested notes.

On December 14, 2012, the Supervisor instructed Grievant to provide the Supervisor with a detailed work report every Friday by 5 p.m. The Supervisor told Grievant that "I would like all of your time accounted for" in the weekly report.

On January 8, 2013 11:22 a.m. Grievant used her desktop computer to begin drafting a memorandum to the Office of Employment Dispute Resolution regarding the subject, "Request to Investigate Retaliation". Grievant saved and closed the document on January 8, 2013 at 12:19 p.m. She devoted approximately 57 minutes to drafting the three page document. She was working on or in front of her computer during that time period.

On January 8, 2013 at 1:43 p.m., Grievant sent the HR Manager an email stating:

> I am dropping off some materials to EDR and leaving and 5 minutes and will return to work accordingly. I am request[ing] a copy of the agency's protocol for the use of civil & administrative leave for grievance purposes. I have been asked by my supervisor to track time used for grievance purposes. I will email you upon my return and have copied my supervisor on this request.

On January 8, 2013 at 1:44 p.m., the HR Manager sent Grievant an email stating:

> I advise you to seek approval from your supervisor to leave your work site. Otherwise, you could be subject to corrective action.

On January 8, 2013 at 2:21 p.m., the HR Manager sent Grievant an email stating, in part:

> You can also find information about using work time for limited grievance activities in the Grievance Procedure Manual.
>
> You should not take leave to deliver anything to EDR. You can mail, fax, or e-mail materials. The contact information is as follows:
>
> ***
>
> If it is your preference to hand-deliver something to EDR, I recommend that you do so before or after your scheduled work hours or during your unpaid lunch break. This guidance is in light of your supervisor's concern about the impact of your absenteeism on your successful accomplishment of your job.
>
> ***
>
> You will not find any agency procedure that specifically addresses tracking of time spent on your grievance during work hours. You will find in § 8.8 of the Grievance Procedure Manual the provision (emphasis added), "… in conjunction with a grievance, grievants and advocates who are state employees may make **reasonable use** of agency office equipment including computers, copiers, fax machines, and telephones." In order for your supervisor to determine if you are making reasonable use, and to prevent abuse of state time, your supervisor may require you to account for your time at work as she sees fit. That falls within management's exclusive right to determining methods, means, and personnel by which work activities are undertaken. I recommend that you follow the instructions your supervisor gave you.

On January 8, 2013 at 2:40 p.m., Grievant hand-delivered the memorandum to EDR. She then returned to her office.

On January 8, 2012 at 3:40 p.m., Grievant replied to the HR Manager:

> Thank you, [name]. I'll just use my lunchtime for this trip. Fortunately I had not taken it yet.

Grievant worked in the Agency's Building in her office beginning at 10:11 p.m. on January 8, 2013 until she left at 4:47 a.m. on January 9, 2013. Grievant was working on her responses to the Agency's Notices of Intent to take disciplinary action.

On January 9, 2013, the Supervisor counseled Grievant because she had accessed the Agency's building during that time period. The Supervisor wrote:

> Of great concern to me is the fact that you did not/do not have authority to enter the workplace after hours. This is evidenced by the fact that you do not have a key to the office.

On January 10, 2013, Grievant spoke with another employee, Ms. W, and asked for a copy of the LPT Workspace Key Log that Grievant had signed when she was issued a key to her office/suite, a key to her work office, and an access card.

On January 11, 2013, Grievant sent the Supervisor an email containing her detailed work report for the week of January 7 through January 11, 2013. Grievant did not list the time she devoted to drafting the memorandum to EDR or the time she spent delivering the memorandum to EDR.

On January 22, 2013 at 2:38 p.m., the Supervisor replied to Grievant's January 11, 2013 email and asked "What is your total time accounted for on this one?"

On January 22, 2013 at 3:39 p.m., Grievant replied:

> Time accounted for the work week of Jan. 7 – 11, 2013 noted below is 31 hrs. and 1 min. (does not include breaks or time responding to emails and other minor staff needs throughout the week). It also does not include time spent on responding to your three (3) notices of intent that you gave me for that week.

On January 22, 2013 at 3:43 p.m., the Supervisor sent Grievant an email stating:

> [Grievant's first name] I am confused. I have asked you to track the time you spend on all HR issues and report these to me on your weekly work report. You consistently tell me that you only use breaks and lunches for those responses you are creating. Now, you are telling me that the only time that you did not track was the time I asked you to track? Please explain this.

On January 22 at 4:06 p.m., Grievant sent the Supervisor an email stating:

> The following time spent on responding to Notices of Intent for disciplinary action when forbidden to use work time is as follows:
>
> Time spent on responding to two Notices of Intent given during meeting with you from 4:30 – 5 p.m. on January 8, 2013 that was due on January 9, 2013 by 4 p.m. = 6 hrs. & 36 min. (from 10:11 p.m. on Jan. 8 – 4:47 a.m. on January 9, 2013).
>
> Time spent on responding to one Notice of Intent that you gave me on December 12, 2012 which was due on December 13, 2013 by 4 p.m. = 7 hrs. and 47 min (from 11:58 p.m. Dec. 12 -- 7:45 a.m. on Dec. 13, 2012).
>
> Tomorrow, I will provide the week and time that I spent regarding the Notice of Intent given by you on January 11, 2013 during our meeting from 3:45 – 4:45 p.m. and was due on Monday, January 14, 2013 by 4 p.m.

On January 23, 2013 11:02 a.m., the Supervisor sent Grievant an email stating:

> We have discussed many times that I have asked you to record your time re: HR issues. I had never forbidden you from working on the network. This is again another communications challenge you are having. My request below was for work time spent. You do not need to report to me time spent outside your normal working hours. Thanks.

On January 11, 2013, the agency issued a Group I Written Notice to the grievant for failure to follow established procedure.[2] The grievant was further issued a Group II Written Notice for failure to follow established policy on January 24, 2013, and a Group III Written Notice with removal for falsification of a record on February 7, 2013.[3] In the hearing decision, the hearing officer assessed the evidence as to whether the grievant failed to follow established procedure and/or policy, finding in the negative, and rescinded the Group I and Group II Written Notices.[4] He further determined that the grievant had falsified a record and upheld the agency's issuance of that Group III Written Notice with removal.[5] The grievant now appeals the hearing decision to EDR.

[2] Hearing Decision at 1.
[3] *Id.*
[4] *Id.* at 10.
[5] *Id.* at 9-10.

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]

In her request for administrative review, the grievant claims that the hearing officer did not consider evidence that she had not spent excessive time at work on grievance-related matters. Specifically, she argues that "[t]he presentation of this evidence was not reflected – positively or negatively – in [the] written decision." The grievant further asserts that the agency "failed to carry its burden to prove that [the grievant] engaged in the behavior it alleges that she did," and that as a result the Group III Written Notice should not have been upheld.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] 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.[10] 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.[11] 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, there is some evidence in the record to support the hearing officer's conclusion that the grievant's weekly report to her supervisor "omitted time spent on HR issues including drafting the January 8, 2013 memorandum," and that she thereby "falsified her weekly report."[12] For example, one witness testified extensively about his review of the grievant's computer activity from January 8, 2013.[13] He explained that his review showed that a single document was open during between 11:22 a.m. and 12:19 p.m. and that the document in question

[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 9.
[13] *See* Hearing Recording at 58:15-1:19:58 (testimony of Witness T).

was addressed to EDR.[14] The agency also presented a copy of the document in question, which dealt with grievance-related issues and not her assigned job responsibilities.[15] He further testified that the computer's activity records indicated that the grievant was most likely at her desk and working on the document between 11:22 a.m. and 12:19 p.m. on that day.[16]

However, there is also evidence to show that the grievant may have been performing work tasks between 11:22 a.m. and 12:19 p.m. on January 8, 2013. For example, the grievant presented evidence that she used a work-related website between 10:53 a.m. and 11:47 a.m.;[17] that she sent emails between 10:53 a.m. and 11:37 a.m.;[18] that she may have met with co-workers between 11:22 a.m. and 12:19 p.m.;[19] and that the document addressed to EDR and found on her computer was substantially different from the document actually submitted to EDR later that day.[20]

Based on our review of the hearing record, it is unclear how the hearing officer evaluated and weighed the evidence presented by the parties. The hearing officer could have found that the grievant spent approximately one hour on January 8 working on human resources matters, and that she failed to report that work to her supervisor. Likewise, the evidence could have also supported a finding that the grievant had not spent a significant portion of time performing non-work-related tasks on January 8. The hearing officer did not directly address much of the evidence presented by the grievant that could have led to this conclusion, and particularly that which is discussed above. In addition, the hearing officer seemingly concluded that the grievant claimed that she "was away from her desk working with other employees [between 11:22 a.m. and 12:19 p.m.]" and that this claim was "not believable."[21] The grievant, however, argues that she did not make such a claim, and we have been unable to identify any evidence in the record to show that she was away from her desk between 11:22 a.m. and 12:19 p.m. In essence, we are unable to determine the factual basis for the hearing officer's conclusion that the grievant "drafted a memorandum to EDR on January 8, 2013 during work hours"[22] or his reasons for deciding that the facts supporting this conclusion were more persuasive than those that showed the grievant was working during that time.

Consequently, the hearing decision must be remanded to the hearing officer for further consideration of what facts in the record support (or do not support) the parties' arguments and clarification of the hearing officer's findings of fact as they relate to the evidence presented at the hearing. If the hearing officer maintains the original determination of upholding the Group III Written Notice, which may be a reasonable conclusion here, the hearing officer must include in the remand decision a clearer explanation of his findings of fact as to what the agency has proven

[14] *Id.* at 59:12-1:02:58 (testimony of Witness T).
[15] *See* Agency Exhibit 8 at 5-7.
[16] Hearing Recording at 1:06:45-1:07:43, 1:09:46-1:11:22, 1:12:51-1:13:03 (testimony of Witness T).
[17] Grievant's Exhibits 8, 9.
[18] Grievant's Exhibit 4.
[19] Hearing Recording at 3:25:12-3:25:26, 3:30:20-3:30:34 (testimony of Witness H), 3:38:20-3:38:29 (testimony of Witness J).
[20] *Id.* at 2:26:25-2:27:07 (testimony of grievant); Grievant's Exhibit 13.
[21] Hearing Decision at 9.
[22] *Id.*

by a preponderance of the evidence that the grievant did on January 8 that was not reported and justifies a charge of falsification. For instance, if the hearing officer finds that the grievant's time during the period in question was split between work and non-work activities, the hearing officer must address at what point the grievant's non-work activities crossed the threshold to amounting to time that had to be reported to her supervisor such that a failure to do so would be falsification of a state record. In short, the hearing officer must more fully explain his findings of fact, consideration of both parties' evidence, and basis for the resulting determinations.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration as set forth above. 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.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[23] *Grievance Procedure Manual* § 7.2(d).
[24] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[25] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a); *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).