

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10151; Ruling
Date: July 16, 2014; Ruling No. 2014-3898; Agency: Department of Corrections;
Outcome: Hearing Decision in Compliance.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2014-3898
July 16, 2014

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision and reconsideration decision in Case Number 10151. For the reasons set forth below, EDR has no basis to further interfere with the decision in this case.

FACTS

The hearing officer’s findings in her January 8, 2014 decision in Case Number 10151, as recounted in EDR’s first administrative review in this case (EDR Ruling Number 2014-3797), are hereby incorporated by reference. In EDR Ruling Number 2014-3797, the hearing officer was directed to provide further consideration and explanation of her findings of fact and determinations as to whether the grievant engaged in internet use constituting misconduct under Department of Corrections (“agency”) Operating Policy 310.2, *Information Technology Security*, and if so, whether the grievant had established mitigating circumstances warranting a reduction of the disciplinary action.¹ The hearing officer subsequently issued a remand decision concluding that the grievant had violated agency Operating Policy 310.2, that this conduct warranted a Group II Written Notice, and that mitigation was not warranted.² The grievant has now requested administrative review of the hearing officer’s decision on remand.

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.”³ 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 a party; the sole remedy is that the action be correctly taken.⁴

¹ See EDR Ruling No. 2014-3797 at 6-7, 9-10.

² Reconsideration Decision of Hearing Officer, Case No. 10151-R (“Reconsideration Decision”), May 19, 2014, at 2-5.

³ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁴ See *Grievance Procedure Manual* § 6.4(3).

Internet Use

The grievant asserts that the hearing officer erred in finding that the grievant's actions constituted misconduct under Operating Policy 310.2. Specifically, the grievant argues that the hearing officer improperly failed to identify a specific amount of computer usage by the grievant, as directed by EDR in its previous ruling. The grievant also asserts that the hearing officer wrongfully concluded the grievant's computer usage violated agency policy.

Specific Amount of Usage

In the initial January 8, 2014 hearing decision in this matter, the hearing officer found that the grievant spent "a lot of time on the computer because he often had no patients," and that the "considerable time" the grievant had available to engage in computer use would not be consistent with "incidental and limited use."⁵ In EDR Ruling Number 2014-3797, EDR remanded the case for further factual findings regarding the grievant's internet use, explaining that the hearing officer's finding that the grievant had used the computer "a lot" lacked adequate specificity, and that the finding of "considerable time" in which use could have occurred did not equate to a finding of an amount of actual use.⁶ EDR further explained that in making such a finding of actual use, "some kind of estimate of the time based on the record evidence would be sufficient."⁷

Despite these instructions, the hearing officer again found in the reconsideration decision that the grievant engaged in "a lot" of internet use, without making any finding or estimate as to the actual quantity of use.⁸ Rather, the hearing officer looked to the online Merriam-Webster Dictionary definitions of "a lot" and "incidental" to find that "a lot" of usage constituted more than "incidental" use.⁹ As we cautioned in EDR Ruling Number 2014-3797, however, "describing the grievant's conduct as more than 'incidental and limited' use is simply a conclusion that the policy was violated, not a factual finding regarding his actual use."¹⁰ Nevertheless, while EDR agrees with the grievant that the hearing officer has not complied with EDR Ruling Number 2014-3797 in failing to make findings regarding the grievant's actual use, we see no purpose in remanding the decision to the hearing officer. Having now twice failed to identify a specific amount of usage by the grievant, the hearing officer has presumably concluded that the record lacks sufficient evidence from which she could reach a more specific finding or estimate of use, and additional efforts to clarify the hearing officer's findings regarding the grievant's internet use would almost certainly be fruitless and unnecessarily time-consuming. Accordingly, the hearing decision will not be remanded on this basis.

⁵ Decision of Hearing Officer, Case No. 10151 ("Hearing Decision"), January 8, 2014, at 5; *see also* EDR Ruling No. 2014-3797 at 4-7.

⁶ EDR Ruling No. 2014-3797 at 6.

⁷ *Id.* at 6 n.31.

⁸ Reconsideration Decision at 2-3.

⁹ *Id.* The definition of "a lot" applied by the hearing officer was "to a considerable degree or extent." *Id.* at 3.

¹⁰ EDR Ruling No. 2014-3797 at 6.

Application of Operating Policy 310.2

In the initial hearing decision, the hearing officer concluded that the grievant's internet use was not consistent with the "incidental and limited use" permitted under Operating Policy 310.2.¹¹ In EDR Ruling No. 2014-3797, EDR directed the hearing officer to clarify her finding that the grievant had engaged in misconduct, noting that the applicable policy language provides that "[i]nternet use during work hours should be incidental and limited to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities."¹² As previously noted, in her reconsideration decision, the hearing officer applied the online Merriam-Webster dictionary definition of "incidental" to find that "a lot" of internet use demonstrated more than incidental use.¹³ She further found that although "[t]here was no evidence to show the personal computer use inhibited or degraded his work duties," "once it was established his personal use of the computer was more than 'incidental' the competency of his work was irrelevant."¹⁴

The grievant has challenged the hearing officer's conclusion that his internet use violated Operating Policy 310.2 simply because it may have constituted more than "incidental" use. A number of policy questions appear to be raised by the grievant's appeal, including the following:

1. Does *any* internet use greater than "incidental and limited" use violate agency Operating Policy 310.2? Further, was the hearing officer's definition of "incidental"—"being likely to ensue as a chance or minor consequence"¹⁵--consistent with the definition of that term contemplated by agency policy? For example, while many agencies (including the agency in this case, as suggested by the warden's testimony)¹⁶ might permit employees to periodically check some non-work-related websites during work, these actions would appear to be inconsistent with the definitions applied by the hearing officer, as such actions are deliberate, rather than occurring by chance or mere consequence.
2. Can internet use violate the policy when there is no impact on work performance? As previously noted, the hearing officer in this case specifically found that the grievant performed his work competently and that "[t]here was no evidence to show the [grievant's] personal computer use inhibited or degraded his work duties."¹⁷
3. Is disciplinary action for excessive internet use consistent with policy when, as here, a grievant engages in internet use during periods without work, and the lack of work is

¹¹ Hearing Decision at 5.

¹² EDR Ruling No. 2014-3797 at 5-6; *see* Agency Exhibit 9 at 8.

¹³ Reconsideration Decision at 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The warden testified that he engaged in non-work-related use of the internet while at work. *See* Hearing Recording, Disc 1 at 4:39:35-4:40:14

¹⁷ Reconsideration Decision at 3.

not the grievant's responsibility? We note that in this case, the hearing officer concluded that the grievant "was often idled as Officers would be taking patients to the medical department rather than the dental department," that the agency brought "an insufficient number of patients" to fill the grievant's schedule during his workweek, and that the grievant's internet use was apparently related to his lack of work.¹⁸ Further, the hearing officer overturned a Group II Written Notice in this case charging the grievant with failing to "take adequate action to resolve the problem of not having enough security officers available to escort patients to the dental clinic,"¹⁹ finding that he was not responsible for maintaining his patient load.²⁰

While not necessarily explicit on all of these questions, the result of the hearing decision indicates that the hearing officer has interpreted the relevant policy language to answer the above questions in the affirmative. Assuming such interpretations of policy are appropriate, EDR has no basis to interfere in this decision any further. However, the Director of DHRM has the sole authority to make a final determination on whether a hearing decision comports with policy.²¹ Thus, these questions must ultimately be answered by DHRM, not EDR. The grievant has requested a review by DHRM of the hearing officer's decision, and EDR will take no further actions with regard to the grievant's policy challenges.

Mitigation

The grievant also asserts that the hearing officer erred in not mitigating the Group II Written Notice for violating the agency's internet use policy. Specifically, he argues that the hearing officer failed to consider evidence that other employees had engaged in internet use comparable to that of the grievant. We disagree. Although the hearing officer narrowly defined that conduct she considered to be comparable,²² there is no basis to conclude that this interpretation was so limited as to constitute an abuse of discretion. Further, while the evidence in this case could certainly be subject to more than one interpretation, a review of the Reconsideration Decision does not support a conclusion that the hearing officer abused her discretion in concluding that the grievant had failed to meet his burden of demonstrating inconsistent treatment. Although EDR may not necessarily agree with the conclusion reached by the hearing officer, nevertheless, weighing this evidence and rendering a factual finding is squarely within the hearing officer's authority and it is not within our purview to interfere with her consideration of the evidence in this regard. EDR's review in this case is, therefore, concluded.

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

¹⁸ Hearing Decision at 3, 5.

¹⁹ Agency Exhibit 10.

²⁰ *Id.* at 4-5.

²¹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

²² Reconsideration Decision at 4-5.

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



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²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).