Issue: Administrative Review of Hearing Officer's decision in Case No. 10453; Ruling Date: November 26, 2014; Ruling No. 2015-4034; 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 Department of Corrections
Ruling Number 2015-4034
November 26, 2014

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 10453. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10453, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employed Grievant as a Training Development Coordinator Sr. at one of its facilities.
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> Grievant had prior active disciplinary action. On August 19, 2013, Grievant received a Group I Written Notice for failure to follow instructions. On April 19, 2014, Grievant received a Group III Written Notice with a ten workday suspension for displaying threatening/coercive behavior towards employees.
>
> Grievant was responsible for scheduling the Games Offenders Play program as a one day program in the Agency's scheduling software, e-Scheduler. He incorrectly entered a start date of November 28 and an end dated of September 18 into the e-Scheduler. On November 23, 2013, the Registrar sent Grievant and email asking him to check the dates for the 2014 Games Offenders Play. The Registrar reminded Grievant again on February 24, 2014. On March 3, 2014, the Supervisor sent Grievant an email, "[p]lease follow up with [Registrar] this week regarding the [Games Offenders Play] class . . . ." Grievant replied, "It's a one day class . . . ." The Supervisor answered, "[p]lease see the original e-mail to resolve the discrepancy." On March 4, 2014, Grievant sent the Supervisor an email with a copy to the Registrar stating, "Original e-mail reviewed . . . . Clearly the class begins and ends on November 28, 2014 . . . . If a new scheduling form is needed please advise . . . . Outside of that, I don't know how I can be of further assistance." On March 10, 2014, the Registrar sent Grievant an email with a copy

[1] Decision of Hearing Officer, Case No. 10453 ("Hearing Decision"), October 20, 2014, at 2-3 (citations omitted).

to the Supervisor indicating she had changed the scheduling form to show the class would begin no November 28, 2014 and end on November 28, 2014. She asked Grievant to "[p]lease correct the eScheduler." On the same day, the Registrar realized that November 28, 2014 would be the day after the Thanksgiving holiday when the Agency's offices are closed. She sent Grievant an email saying, "You will need to reschedule the program for another date."

On June 11, 2014, the Supervisor sent Grievant an email stating:

> Please refer to the emails below and attached scheduling form. This program is still showing upon on the eScheduler supervisor's report. However, the dates have never been finalized below because they are not correct. If you wish to still hold the program, please update the eScheduler and let me know. I would like to bring closure to this issue.

Grievant replied, "Will do!"

Grievant did not change the eScheduler. On July 7, 2014, the Supervisor sent Grievant an email stating:

> Please submit a corrected e-Scheduler form for the Games Offenders Play program. The one submitted listed the program as a two-day class.

Grievant replied, "Noted."

On January 23, 2014, the Supervisor sent Grievant an email instructing him, "please complete all the necessary requirements/lessons for certification to facilitate the Spanish program by Friday March 7, since responsibility for this program has now been transferred to you." The Supervisor sent Grievant email on February 26, 2014 instructing him to complete by March 7 the materials required to obtain the certification. Grievant did not complete the certification process by March 7, 2014. Grievant did not complete the Spanish Certification program requirements.

On July 17, 2014, the grievant was issued a Group II Written Notice for "[f]ailure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."[2] He was terminated based on his accumulation of discipline.[3] In the hearing decision, the hearing officer assessed the evidence as to whether the grievant engaged in

[2] Agency Exhibit 1.
[3] *Id.* DHRM Policy 1.60, *Standards of Conduct*, states that "[a]n employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstances should be notified that any subsequent Written Notice for any level offense during the active life of the Written Notice may result in termination." DHRM Policy 1.60, *Standards of Conduct*, § (B)(3)(c).

the charged misconduct, concluded that the grievant had failed to follow a supervisor's instructions, and upheld the agency's issuance of a Group II Written Notice with termination.[4] The grievant now appeals the hearing decision to EDR.

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."[5] 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.[6]

Inconsistency with State and Agency Policy

The grievant's request for administrative review appears to assert that the hearing officer's decision is inconsistent with state policy. Specifically, the grievant argues that the agency failed to follow policy because it did not complete a "substandard performance plan" prior to issuing the Written Notice and that he "was not terminated for having multiple Group notices," but for failing to follow a supervisor's instructions. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy, including whether the agency's issuance of the Written Notice and its decision to terminate the grievant were consistent with state policy.[7] Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise these issues in a request for administrative review to the Director of the DHRM, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review further argues that the hearing officer's findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence in the record. Specifically, the grievant claims that the hearing officer erred in determining that he failed to complete the Spanish certification testing process.[8]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] Further, in cases involving discipline, the hearing officer reviews the facts

[4] Hearing Decision at 3-5.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] *See* Hearing Decision at 3.
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.

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.[11] 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.[12] 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 hearing officer stated the following in his decision:

> Grievant argued that he completed the Spanish certification testing process. Grievant did not testify to support this allegation. No evidence was presented to show that Grievant completed the test. The Agency contacted the testing site and verified that Grievant had not completed the test.[13]

The grievant argues that his decision not to testify at the hearing is a "nonissue[]" because he was not called as a witness by the hearing officer or the agency. The grievant further asserts that he "submitted the completed Spanish test" as one of his exhibits and that this exhibit demonstrates he completed the task as assigned.

The *Rules for Conducting Grievance Hearings* provide that "[a]ll parties to the grievance, including the employee who initiates the grievance, may testify at hearing."[14] The grievance procedure further provides that "[t]he responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances"[15] and that the hearing decision must be based on the evidence in the hearing record,[16] which consists in part of witness testimony.[17] While it was the grievant's decision whether or not to testify at the hearing, the hearing officer was required to base his decision on the evidence in the record. The hearing decision merely notes that the grievant did not testify to support the allegation that he completed the Spanish certification testing process and, based on EDR's review of the hearing recording, it appears that the hearing officer's statement on this point is accurate.

Having reviewed the hearing record, we also find that there is nothing to suggest the hearing officer erred in concluding that the grievant received an email "instructing him to complete by March 7[, 2014] the materials required to obtain the" Spanish certification and that

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[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] Hearing Decision at 4.
[14] *Rules for Conducting Grievance Hearings* § IV(E).
[15] *Id.* § VI(B)(1).
[16] *Grievance Procedure Manual* § 5.9; *see Rules for Conducting Grievance Hearings* § V(C).
[17] *See Rules for Conducting Grievance Hearings* § VII(B).

he "did not complete the certification process by" that date.[18] There is evidence in the record to support the hearing officer's determination that the grievant was given an instruction from his supervisor to complete the Spanish certification by March 7[19] and that he had not finished the certification process by that time.[20] While the grievant is correct that he introduced a copy of the completed Spanish test into the hearing record, the document itself contains no indication as to when it may have been filled out or submitted.[21] Furthermore, the grievant's supervisor testified that she had never received any information from the grievant to verify that he had actually completed the Spanish certification testing process.[22]

While the grievant may disagree with the hearing officer's decision and his assessment of the evidence presented at the hearing, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is nothing to indicate that the hearing officer's consideration of the evidence regarding the Spanish certification testing process was in any way unreasonable or not based on the actual evidence in the record. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR 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.[23] Because the hearing officer's findings are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer. For these reasons, we decline to disturb the hearing decision.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.[24] Within thirty 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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[18] Hearing Decision at 3.
[19] Agency Exhibit 10 at 1; *see* Hearing Recording at 1:45:08-1:46:03, 1:53:53-1:54:35 (testimony of Supervisor).
[20] *E.g.*, Hearing Recording at 40:28-40:32, 41:10-42:08, 43:48-43:56.
[21] *See* Grievant's Exhibit Q.
[22] *See* Hearing Recording at 1:46:41-1:47:08, 1:54:38-1:54:47 (testimony of Supervisor).
[23] *See, e.g.*, EDR Ruling No. 2012-3186.
[24] *Grievance Procedure Manual* § 7.2(d).
[25] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[26] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).