

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10457; Ruling  
Date: December 17, 2014; Ruling No. 2015-4041; Agency: Department of Social  
Services; Outcome: AHO's decision affirmed.



**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 2015-4041  
December 17, 2014

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10457. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed by the Department of Social Services (the “agency”).<sup>1</sup> On May 8, 2014, the agency issued the grievant a Group II Written Notice for failure to follow agency instructions regarding adjusting air conditioning vents.<sup>2</sup> The grievant timely grieved the disciplinary action<sup>3</sup> and on October 21, 2014, a hearing was conducted.<sup>4</sup> In her hearing decision, issued November 10, 2014, the hearing officer upheld the disciplinary action.<sup>5</sup> The grievant has now requested an administrative review.

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.”<sup>6</sup> 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.<sup>7</sup>

*Inconsistency with State and Agency Policy*

The grievant appears to challenge the hearing officer’s application of state and agency policy. The Director of DHRM has the sole authority to make a final determination on whether

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<sup>1</sup> See Agency Exhibit 2 at 1.

<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> See Decision of Hearing Officer, Case No. 10457 (“Hearing Decision”), November 10, 2014, at 1.

<sup>5</sup> *Id.* at 1, 9.

<sup>6</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>7</sup> See *Grievance Procedure Manual* § 6.4(3).

the hearing decision comports with policy.<sup>8</sup> The grievant has requested such a review. Accordingly, her policy claims will not be addressed in this review.

### *Findings of Fact*

The grievant's request for administrative review also challenges the hearing officer's findings of fact based on the weight and credibility that she accorded to evidence presented and testimony given at the hearing. She asserts, in effect, that the hearing officer erred in accepting as true the testimony of other employees regarding the grievant's conduct. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>9</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>10</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>11</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>12</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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Based on a review of the record, there is sufficient evidence to support the hearing officer's conclusion that the grievant moved an air vent in violation of the instructions given to her by the agency.<sup>13</sup> 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 are based upon evidence in the record and the material issues of the case, EDR cannot substitute its

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<sup>8</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>9</sup> Va. Code § 2.2-3005.1(C).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>12</sup> *Grievance Procedure Manual* § 5.8.

<sup>13</sup> *See, e.g.*, Hearing Decision at 2-7; Hearing Recording at Track 1, 20:05-20:18, 32:16-32:23, Track 2, 18:22-19:10; Agency Exhibit 1 at 6-7, Agency Exhibit 2 at 3-4, 6. The grievant asserts that the hearing officer erred in stating that the grievant had indicated her husband worked in heating and air conditioning. In fact, the hearing decision states that the grievant's co-worker's husband worked in heating and air conditioning. Hearing Decision at 6. The grievant also appears to argue that the hearing officer's finding that she kept a yardstick in her office was erroneous; however, the grievant admits that she did in fact have a yardstick there. *See* Agency Exhibit 2 at 6. With respect to the grievant's claims regarding Agency Witness 1 having seen the grievant exit her supervisor's office with a yardstick, EDR's review of the hearing recording indicates that the hearing officer may have misidentified, in part, the source for her findings, *see* Hearing Decision at 4, 6-7, but we find that error to be harmless as that information may be found in multiple other record sources.

judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on this basis.

### *Mitigation*

The grievant also appears to challenge the hearing officer's decision not to mitigate the disciplinary action. Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."<sup>14</sup> The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'"; therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>15</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>16</sup>

Thus, the issue of mitigation is only reached if the hearing officer first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.<sup>17</sup> EDR will review a hearing officer's mitigation determination for abuse of discretion,<sup>18</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

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<sup>14</sup> Va. Code § 2.2-3005(C)(6).

<sup>15</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>16</sup> *Id.* § VI(B)(1).

<sup>17</sup> The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>18</sup> "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

The grievant appears to assert that the hearing officer should have mitigated the disciplinary action because the punishment was too severe for the nature of her offence. While the agency could have chosen to address the grievant's conduct through a less severe form of disciplinary action, its decision to give the grievant a Group II Written Notice was not outside the limits of reasonableness. EDR therefore cannot find the hearing officer erred by not mitigating the disciplinary action on this basis.<sup>19</sup> Accordingly, EDR will not disturb the hearing officer's decision.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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.<sup>20</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>21</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>22</sup>



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<sup>19</sup> See Hearing Decision at 7-8.

<sup>20</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>21</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>22</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).