

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10779; Ruling Date: October 19, 2016; Ruling No. 2017-4420; Agency: Department of Aging and Rehabilitative 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 Aging and Rehabilitative Services  
Ruling Number 2017-4420  
October 19, 2016

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 10779. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 10779, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Aging and Rehabilitative Services employed Grievant as a Certified Rehabilitation Counselor. Grievant began working for the Agency’s predecessor in July 1, 1972. The purpose of Grievant’s position was:

In partnership with persons with disabilities, provides comprehensive vocational rehabilitation services which result in employment and enhanced independent living in compliance with federal, state, and agency policy and procedures. Core case management services may include guidance and counseling, training, physical/mental restoration, and job placement services. Caseload consists of individuals with disabilities.

Grievant’s duties included providing timely and quality vocational services for employment to persons with disabilities. Grievant provided career counseling, job readiness training, job placement and monitoring to the Agency’s clients.

Grievant reported to the District Manager from July 2014 to April 2015. He began reporting to the Unit Supervisor beginning April 2015. The Unit Supervisor reported to the District Manager. The Unit Supervisor supervised seven employees.

Grievant is 73 years old. The Unit Supervisor was aware of his age.

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<sup>1</sup> Decision of Hearing Officer, Case No. 10779 (“Hearing Decision”), September 8, 2016, at 2-8 (citations omitted).

AWARE is a case management computer system used by agency employees to enter data about clients and track their vocational rehabilitation progress. The Agency implemented AWARE in March 2008. Grievant received AWARE training when the system was implemented.

In October 2014, Grievant took medical leave in order to recover from surgery. He was out of work from approximately October 2014 through January 2015. He returned to work on a physician-modified schedule and then returned to work full time on February 9, 2015. During Grievant's absence from work, the Agency upgraded its computer system. Grievant missed the training and transition period afforded other employees.

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On October 26, 2015, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

The Unit Supervisor drafted a re-evaluation plan for Grievant. The plan was reviewed by the District Manager and a human resource employee. On October 29, 2015, Grievant received the re-evaluation plan . . . .

....

The Unit Supervisor met with Grievant and read the re-evaluation plan to Grievant. She allowed Grievant an opportunity ask questions. She explained that he would be subject to removal if he did not satisfy the terms of the re-evaluation plan.

The Unit Supervisor met with Grievant several times during the re-evaluation period. She met with him on October 29, 2015, October 30, 2015, November 25, 2015, November 30, 2015, December 7, 2017, and December 16, 2015. The Unit Supervisor spoke with Grievant on a daily basis. Grievant was not absent more than 14 days during the re-evaluation period.

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On January 26, 2016, Grievant received a three month re-evaluation with an overall rating of Below Contributor . . . .

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Grievant received Below Contributors ratings in four of the six categories. The Agency concluded he should receive an overall rating of Below Contributor for the re-evaluation period.

The District Manager considered Grievant's improved work performance during the re-evaluation period but continued to believe his work performance showed significant inadequacies that demoting or transferring him to another

position would not be feasible. She concluded that removing some of Grievant's duties was not possible. The Unit Supervisor and a Human Resource employee were also involved in the decision to remove Grievant from employment.

Grievant improved his performance for some tasks during the re-evaluation period. For example, he increased his "applicant intake". After a client applies for services and is determined eligible, Grievant was responsible for developing a plan for employment for the client. Grievant had a goal of 10 during the re-evaluation period but he developed 22 plans.

On November 5, 2015, Grievant filed a complaint with the Equal Employment Opportunity Commission alleging that he was discriminated against because of his disability. He claimed the Agency retaliated against him because he took medical leave and because of his age.

The District Manager testified that Grievant's filing of a complaint did not affect her assessment of Grievant. Her testimony was credible. She also testified credibly that Grievant's age was not a factor in her conclusions regarding Grievant's work performance.

The Unit Supervisor learned of Grievant's complaint after she had completed the re-evaluation plan. Grievant's age and complaint did not affect how the Unit Supervisor evaluated Grievant.

On or about January 21, 2016, following the three-month re-evaluation period, the agency removed the grievant from employment due to unsatisfactory work performance.<sup>2</sup> The grievant filed a grievance to challenge his removal<sup>3</sup> and a hearing was held on April 19, 2016.<sup>4</sup> In a decision dated September 8, 2016, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant's work performance was unsatisfactory and upheld the agency's decision to remove him from employment.<sup>5</sup> 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."<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 either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>7</sup>

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<sup>2</sup> Agency Exhibit 7.

<sup>3</sup> See Hearing Decision at 1.

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* at 1, 8-11.

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

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

### *Timeliness of Hearing Decision*

In his request for administrative review, the grievant asserts that the hearing officer did not comply with the grievance procedure because he “fail[ed] to issue a timely ruling.” In particular, the grievant argues that the decision was not issued “until . . . more than twenty weeks after the hearing,” and that “[i]t is simply not reasonable . . . for the Hearing Officer to take” that length of time to issue a decision. The *Rules for Conducting Grievance Hearings* state that the hearing officer’s “written decision shall be issued as promptly as reasonably possible after the close of the evidentiary record.”<sup>8</sup> While the grievant’s concern with the delay in this case is understandable, and the length of time between the date of the hearing and the issuance of decision is not insignificant, EDR has reviewed nothing to indicate that the amount of time between the hearing and the issuance of the hearing decision in this case was so great that the decision itself does not comply with the grievance procedure. The facts of each case are unique and the time necessary to evaluate the evidence and reach a decision will, of necessity, vary somewhat from case to case. It does not appear that any delay in the issuance of the hearing decision here was the cause of material prejudice to a party in the decision itself.<sup>9</sup> Accordingly, EDR declines to disturb the decision on this basis.

### *Hearing Officer’s Consideration of the Evidence*

In addition, the grievant appears to argue 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. Specifically, he claims that: (1) there are “simple errors” in the decision that “reflect the amount of time that had lapsed” between the hearing and the issuance of the decision as discussed above; (2) the hearing officer did not discuss the testimony of “third party witnesses called in support of [the grievant]”; and (3) the hearing officer “made no finding regard the [grievant’s] allegations of discrimination.”

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>10</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>11</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>12</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>13</sup> Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the

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<sup>8</sup> *Rules for Conducting Grievance Hearings* § V(C).

<sup>9</sup> As a practical matter, there would seem to be little or no effectual relief offered by remanding a case for further consideration based solely on a delay in the issuance of the hearing decision itself. On administrative review, EDR evaluates the question of whether the content of the hearing decision complies with the grievance procedure. It is unclear how remanding a case to the hearing officer would result in the correction of an issue with the timeliness of decision itself.

<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>13</sup> *Grievance Procedure Manual* § 5.8.

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 the hearing decision, the hearing officer assessed the evidence in the record and determined that “[t]he Agency ha[d] presented sufficient evidence to show that it did not disregard any material facts of Grievant’s work performance during the re-evaluation period” and “its opinion of Grievant’s work performance during the re-evaluation period was reasonable.”<sup>14</sup> The hearing officer further discussed the grievant’s assertions that his performance improved during the re-evaluation period and that the agency had not given him proper training on the use of its computer system, concluding that the evidence on those issues did not demonstrate that the agency’s assessment of his performance during the re-evaluation period was unreasonable or not supported by the facts.<sup>15</sup>

In his request for administrative review, the grievant asserts that the hearing decision contains errors due to the passage of time between the date of the hearing and the issuance of the decision. As an example, the grievant notes that the hearing decision states the hearing took place at the agency’s office, when it actually occurred “in a conference room of a public library,”<sup>16</sup> and argues that the delay “made it extremely difficult for the Grievant and his counsel to articulate” the errors in the decision. The grievant is correct that the hearing took place at a public library and not at the agency’s office; however, it must be noted that the vast majority of grievance hearings are held at the office where the grievant works (or, in cases involving termination, formerly worked). EDR has reviewed nothing to suggest that the hearing officer’s recitation of the hearing location indicates that other facts in the decision are inconsistent with the evidence in the record or, indeed, constitutes anything other than a clerical error. In addition, the grievant has presented nothing to support his contention that the delay in this case created any hardship in articulating an appeal that is not present in any other grievance hearing.<sup>17</sup> Consequently, there is no basis to remand the decision for any further proceedings based on these arguments.

Although the grievant has not alleged any specific errors in the decision about the hearing officer’s findings of fact relating to his re-evaluation and removal, EDR has thoroughly reviewed the hearing record and finds no basis to conclude that the hearing decision is not supported by the evidence in the record. The hearing officer noted in the decision that, in cases involving an agency’s evaluation of a grievant’s work performance, “[t]he question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee’s job performance.”<sup>18</sup> In this case, the

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<sup>14</sup> Hearing Decision at 10.

<sup>15</sup> *Id.* The hearing officer applied the correct standard in reaching these conclusions. For the hearing officer to rescind the performance evaluation, there would have to have been record evidence to support a finding that the grievant’s re-evaluation was arbitrary or capricious or otherwise based on an improper basis. *See, e.g., Rules for Conducting Grievance Hearings* § VI(C)(2).

<sup>16</sup> *See* Hearing Decision at 1.

<sup>17</sup> It is arguable that, in this case, the grievant would have had additional opportunities to prepare for an appeal not available in a case if there was a fast turnaround on the decision. Both parties are free to request a copy of the hearing recording following the conclusion of the hearing. *See Grievance Procedure Manual* § 5.6. Had the grievant’s representative done so, he would have had ample opportunity to go over the hearing record in detail. It does not appear the recording was requested in this case.

<sup>18</sup> Hearing Decision at 9.

agency presented evidence to show that the three-month re-evaluation of the grievant was conducted in a manner consistent with policy and that the performance issues cited in the grievant's re-evaluation, which resulted in his removal, were reasonable and supported by the facts.<sup>19</sup> That the grievant disagrees with the agency's assessment of his performance as it was presented at the hearing does not, in itself, render that assessment invalid. It is within the hearing officer's authority to weigh the evidence presented by the parties and make findings of fact. 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 factual findings made by the hearing officer, as is the case here.<sup>20</sup>

With respect to the grievant's argument that the hearing officer failed to consider witness testimony favorable to him, it does not appear that the hearing officer's evaluation of the evidence was in any way deficient or improper. Several witnesses testified that, in their opinion, the grievant was competent and his work performance was satisfactory.<sup>21</sup> Those witnesses also testified that they did not have supervisory authority over the grievant, nor did they formally evaluate his work performance.<sup>22</sup> While the grievant correctly notes that this evidence was not discussed in the hearing decision, there is no requirement under the grievance procedure that a hearing officer specifically discuss the testimony of each witness who testified at a hearing. In addition, there is nothing in the record to suggest that the hearing officer failed to consider the grievant's arguments on these points; rather, it seems likely that he merely concluded the evidence in question was not relevant and/or persuasive because it did not demonstrate whether the agency's assessment of the grievant's work performance during the three-month reevaluation period was arbitrary or capricious.<sup>23</sup>

Finally, the grievant claims the hearing officer "made no finding regarding [his] allegations of discrimination." The decision, however, plainly states that the "Grievant argued that the Agency retaliated against him for missing time from work and taking Family and Medical Leave" and "discriminated against him and retaliated against him based on his age," and that "[t]he evidence is overwhelming that the Agency's decision to re-evaluate Grievant was based solely on his work performance and not for any improper purpose."<sup>24</sup> As discussed above, determinations of disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. There is evidence in the record to support the hearing officer's conclusion that the agency's re-evaluation and removal of the grievant did not have a discriminatory or retaliatory motive,<sup>25</sup> and there is nothing to indicate that the hearing officer's analysis of the evidence regarding the agency's motive for the grievant's removal was in any way unreasonable or not based on the actual evidence in the record. Weighing the evidence and rendering factual

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<sup>19</sup> *E.g.*, Agency Exhibit 2 at 10; Agency Exhibit 9; Hearing Recording at 1:44:05-1:57:25 (testimony of Unit Supervisor).

<sup>20</sup> *See, e.g.*, EDR Ruling No. 2012-3186.

<sup>21</sup> *E.g.*, Hearing Recording at 2:39:03-2:40:07 (testimony of Witness T), 2:58:37-3:01:14 (testimony of Witness S1), 3:07:44-3:08:22 (testimony of Witness S2).

<sup>22</sup> *E.g., id.* at 2:40:42-2:40:51 (testimony of Witness T), 3:01:33-3:01:41 (testimony of Witness S1), 3:08:28-3:08:37 (testimony of Witness S2).

<sup>23</sup> *See* Hearing Decision at 9-10.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *See supra* note 19 and accompanying text; Hearing Recording at 52:03-53:32 (testimony of District Manager), 2:00:35-2:00:43 (testimony of Unit Supervisor).

findings is squarely within the hearing officer's authority, and EDR cannot conclude that the hearing officer's decision constitutes an abuse of discretion in this case.

Other individuals, had they been in the hearing officer's position, may not have reached the same conclusion as the hearing officer in this case. The question to be answered, however, is not whether another person would have made the same decision as the hearing officer in any particular case, but whether that decision is based on the evidence in the record. As discussed above, there is nothing in the hearing recording or the hearing decision to indicate that the hearing officer abused his discretion in assessing the relative persuasive weight of the evidence presented by the parties. 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 office and declines 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.<sup>26</sup> 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.<sup>27</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>28</sup>



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<sup>26</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>27</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>28</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).