EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Medical Assistance Services
Ruling Number 2021-5246
May 26, 2021

The Department of Medical Assistance Services ("the agency") has requested that the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's reconsideration decision in Case Number 11615-R. For the reasons set forth below, the Office of Employment Dispute Resolution ("EDR") will not disturb the reconsideration decision.

BACKGROUND

The relevant facts in Case Number 11615, as found by the hearing officer, were recited in EDR's first administrative review in this matter, and they are incorporated herein by reference.[2] Upon requests from both parties for administrative review of the original hearing decision, EDR remanded the case to the hearing officer for further findings "as to whether the grievant refused to assist in the transition of her team, whether the grievant lacked specific knowledge that was required by her job, and what level of discipline may be upheld" based on the reconsidered issues.[3]

On March 25, 2021, the hearing officer issued a reconsideration decision in which he concluded that his original findings sustaining misconduct by the grievant were in error and that the agency "did not meet its burden of proof" as to the Group III Written Notice with termination it had issued to the grievant.[4] As the hearing officer had also determined in the original decision,

[1] *See* Agency's Second Request for Administrative Review ("Second Request"). In its Second Request, the agency seeks review of this matter by the Director of DHRM, or her designee, and objects to review by the undersigned or by the Office of Employment Dispute Resolution ("EDR") in general. However, EDR is the office designated within DHRM to administer the state grievance procedure. Accordingly, while the Director maintains discretion to review such matters independently, in this case she has directed EDR to continue to exercise its authority to render a final decision on behalf of DHRM, as prescribed by statute. *See* Va. Code § 2.2-1202.1(5).
[2] *See* EDR Ruling Nos. 2021-5199, 2021-5200; Decision of Hearing Officer, Case No. 11615 ("Hearing Decision"), January 6, 2021, at 3-8.
[3] EDR Ruling Nos. 2021-5199, 2021-5200, at 17.
[4] Reconsideration Decision of Hearing Officer, Case No. 11615-R ("Reconsideration Decision"), March 25, 2021.

the hearing officer ordered the agency to reinstate the grievant with back pay and benefits.[5] The agency has requested that DHRM administratively review the reconsideration decision.

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 a party; the sole remedy is that the hearing officer correct the noncompliance.[7] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its second request for administrative review, the agency maintains its position that the grievant committed misconduct meriting a Group III Written Notice. It argues that the grievant engaged in "gross insubordination" by not answering questions from managers about the work of the agency's web development team,[9] being "evasive" when the agency's Lead Web Architect attempted to discuss the same or similar information with her,[10] and intentionally withholding information about how to access the website "source code" when asked by management.[11] The agency also contends that the hearing officer himself committed misconduct by excluding evidence regarding the grievant's motives and by reversing the Group III Written Notice in retaliation against the agency.[12]

Scope of Review

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[13] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[14] 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.[15] 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

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[5] *Id.* at 9.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Second Request at 4.
[10] *Id.* at 3, 4.
[11] *Id.* at 3-5.
[12] *Id.* at 1, 7.
[13] Va. Code § 2.2-3005.1(C).
[14] *Grievance Procedure Manual* § 5.9.
[15] *Rules for Conducting Grievance Hearings* § VI(B).

circumstances.[16] 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 on 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 EDR's first administrative review, we identified no reversible errors in the hearing officer's affirmative findings of fact or in his conclusion that the grievant did not commit intentional misconduct. We further found no basis to disturb the hearing decision on the agency's assertions that the hearing officer exhibited bias and improperly excluded evidence regarding the grievant's alleged motivation to misappropriate the agency's source code intentionally. However, we remanded the matter for more specific fact-finding as to whether the grievant (1) failed to assist in the transition of her team throughout August 2020, as the agency maintained, and (2) lacked knowledge she was required to have as part of her job, as the hearing officer had concluded. Consistent with the grievance procedure, our previous ruling confirmed that the parties would be able to request administrative review of any *new* matter addressed in the remand decision, *i.e.* any matters not resolved by the original decision.[17]

Noting that the agency's Second Request incorporates by reference "all points raised in the original appeal,"[18] certain claims reiterated by the agency in its Second Request were resolved with administrative finality in EDR Ruling Numbers 2021-5199 and -5200. These issues include charges that the grievant refused to attend meetings on August 28 and 31, 2020 and subsequently withheld information requested by the agency's Chief Information Officer.[19] Our previous ruling also addressed the agency's allegation that the hearing officer ignored and/or excluded evidence regarding the grievant's motives, and that he exhibited various biases in his original decision.[20]

Because these issues were not within the scope of our remand instructions, EDR concludes that they are not appropriate for further review.[21] Accordingly, this ruling will address only the agency's other arguments with respect to the grievant's failure to assist in her team's transition, its objections to the hearing officer's findings as to the grievant's job requirements, and new allegations of hearing officer retaliation against the agency.

"Refusal to Assist in Transition" Offense

In our previous ruling, we noted that the hearing decision identified three areas of charged misconduct: failure to provide the website source code upon request, refusal to attend mandatory meetings, and refusal to assist management in the transition of the web development team.[22] Upon

[16] *Grievance Procedure Manual* § 5.8.
[17] EDR Ruling Nos. 2021-5199, 2021-5200, at 17.
[18] Second Request at 1.
[19] EDR Ruling Nos. 2021-5199, 2021-5200, at 9, 11-12.
[20] *Id.* at 14-16.
[21] *See*, *e.g.*, EDR Ruling No. 2020-5051.
[22] EDR Ruling Nos. 2021-5199, 2021-5200, at 9.

the agency's claim that the hearing decision did not adequately address the third area, we remanded for clarification of whether the grievant committed misconduct in that regard.[23]

On reconsideration, the hearing officer made the following additional findings:

> [O]n August 3, 2020, an email was sent to the Director of OCLA (DOCLA), Grievant's immediate supervisor, seeking answers to Questions and this was a precursor to the transfer. . . . [T]he first request for information regarding the transfer was sent to the DOCLA, not to the Grievant. In his response, DOCLA states that **"we"** will get working on the answers. "We" would normally connotate that he was involved and in charge.
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> On August 7, 2020, DOCLA sent an email to LWA, the person who would be taking control of the former OCLA. This email stated that Grievant was busy with other matters and that a meeting needed to be postponed until the following week. **LWA responded that would be fine.**
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> On August 12, 2020, the Director of Strategic Communications sent Grieavnt an email asking about the Questions. She clearly indicated that she had not had time to get to them but would, if someone told her to reprioritize her workflow. **No one ever indicated in writing, or from testimony I heard, to make these answers a first priority.**
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> On August 14, 2020, the Director of IMD (DIMD) sent Grievant [an] email asking if she had received a copy of the Questions. **He provided no due date, nor did he direct a reprioritization of her workflow.** Grievant responded on August 17, 2020 and stated that she would try to get to the Questions "this week."
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> On August 19, 2020, DOCLA sent an email to DIMD indicating conditions were present for "a perfect storm." He seems to be the first person at the Agency who realized what ultimately resulted when the 6 contract employees (Contractees) of OCLA were terminated.
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> On August 20, 2020, the Lead Web Architect (LWA) sent an email to DIMD regarding a meeting he had with Grievant. He emphasized the need for answers to the Questions and indicated his frustration regarding the pending transfer of OCLA to IMD. **Yet, he did not give Grievant a hard deadline, nor did he tell her to reprioritize her workflow.**
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> Finally, on August 24, 2020, the CFO becomes involved. . . . **He did not demand immediate answers to the Questions. He seemed content to wait until August 28, 2020.**

[23] *Id.*

> . . . [A]t no time did anyone in the management chain indicate to the Grievant that the Questions needed to be answered by a time certain or that they should take priority over the other tasks she had been assigned. I heard no testimony from any Agency witness that the Grievant was orally instructed as to a time certain. As late as August 21, 2020, the CIO indicated that **"I was a little fuzzy myself" regarding the status of the transition from OCLA to IMD.** Accordingly, I find that the failure to address the Questions in an unknown time frame does not indicate an untimely response and does not rise to the level of failure to assist in the transition.
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> . . . . I find in none of the documentary evidence or in the witness testimony any indications of refusal to assist. I do find a plethora of unfocused general requests for answers with no particular deadline or order of task priority established. In each case, the Grievant responded to these requests with answers indicating that she had not yet had time to focus on the Questions and the response from management was simply silence by way of setting a deadline or indicating its concept of priority.
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> The Agency also asserts that the Grievant instructed the Contractees to not communicate with the Agency. . . . The best evidence before me regarding this assertion was that the third-party employer of the Contractees made this request. One of the Contractees testified that the Grievant did not tell him or them to not cooperate with the Agency.[24]

Consistent with EDR's remand instructions, these findings directly addressed the issue of whether the grievant refused to assist in the transition of the agency website, leading the hearing officer to conclude that the record evidence did not support this charge. The agency disagrees with this conclusion, maintaining that agency management gave instructions or made requests with which the grievant failed to comply. However, the hearing officer found that the evidence presented did not establish such instructions or requests as a foundation for the offense; nor did it demonstrate that the grievant undermined coordination between the development team and the agency. These findings are based on the hearing officer's reasoned consideration of evidence in the record. Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. 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.[25]

[24] Reconsideration Decision at 5-7 (citations omitted) (emphasis in original).
[25] *See*, *e.g.*, EDR Ruling No. 2020-4976.

"Lack of Knowledge" Offense

The original hearing decision found that the grievant committed misconduct by failing "to know exactly what and where the source code" for the agency's website was, which was "part of her job."[26] Upon the grievant's claim that lack of knowledge did not constitute misconduct, EDR concluded that the hearing decision lacked clear findings about what knowledge the grievant was responsible for as part of her job and did not have (*e.g.* the difference between executable code and source code and their respective locations). Accordingly, we remanded for clarification on this point to enable our review of whether the hearing officer's findings had a basis in the record.

On reconsideration, the hearing officer concluded that his previous findings sustaining misconduct in this regard were in error:

> [L]ack of knowledge becomes important where the knowledge is required for the competent and satisfactory performance of job duties. In this matter, the Grievant's EWP clearly indicated that technical skills around the maintenance of the website were not important to her position. Further, regarding what, where, and why of source code, neither the DOCLA, CIO, CFO, LWA, DIMD, or any other employee of the Agency knew the answer as to where it was located.
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> . . . . Based on the Grievant's EWP, her testimony and the testimony of Agency's witnesses, I find no evidence that her job required technical knowledge regarding source code, coding or how servers worked. I find Grievant was a conduit of information from management to those technical Contractees who had such knowledge.[27]

The agency challenges these findings on grounds that the grievant never claimed ignorance about the requested information – such as the location of the website source code on GitHub, the access credentials, and other information responsive to the Questions.[28] This objection aligns with the grounds for remand on this issue in the first place: that the original hearing decision did not contain findings sufficient to support its conclusion that the grievant lacked knowledge she was required to have. The agency itself never advanced this charge, as its Second Request makes clear.[29] While the agency maintains that the grievant in fact knew (or had access to) important information and purposefully refused to share it, the hearing officer rejected the agency's theory

[26] Hearing Decision at 8, 10.
[27] Reconsideration Decision at 8-9.
[28] As set forth in the original hearing decision and in EDR's first administrative review, the agency's charge regarding the website source code focuses on an exchange in which the DIMD asked the grievant where the source code was, and she responded that it was on the agency's servers. *See* EDR Ruling Nos. 2021-5199, 2021-5200, at 5. The DIMD testified that in fact the code on the servers was "executable code," not human-readable "source code." *Id.*at 5, 13. In her testimony, the grievant expressed her belief that the "source code" could be in different locations such as GitHub "depending on its development stage," but the "final version" was stored on the servers. Hearing Recording at 1:47:50-1:48:15. The agency maintains that the grievant committed misconduct by not offering information about GitHub. *See* Second Request at 4.
[29] Second Request at 4.

of intentional misconduct in the original hearing decision. Thus, as explained above, those findings are no longer subject to administrative review.

Although the hearing officer did not find that the grievant intentionally withheld information, he originally concluded instead that she lacked the knowledge or understanding necessary to provide satisfactory responses to management. Thus, the initial hearing decision sustained discipline in part on grounds that this lack of knowledge constituted misconduct.[30] Upon reconsideration, however, the hearing officer determined that the grievant's particular job duties did not require her to have a more nuanced understanding of the technical aspects of the website than her responses indicated.[31] Accordingly, the hearing officer set aside his earlier finding of misconduct in this regard and concluded that the agency's disciplinary action was not supported.[32] Because the hearing officer's conclusions upon reconsideration comply with EDR's remand instructions and are based upon evidence in the record, we cannot say that his analysis was in error or otherwise unreasonable.

Hearing Officer Misconduct

Finally, the agency asserts that the hearing officer committed misconduct in both his original hearing decision and upon reconsideration. The agency further objects that EDR, in its first administrative review, failed "to properly address the hearing officer's misconduct and remand[ed] it to the very person engaging in it."[33]

As an initial matter, the agency's Second Request does not elaborate on its claim that EDR's first administrative review was inadequate, beyond the following conclusory assertion:

> The agency has presented overwhelming evidence that the hearing officer violated the Grievance Procedure, Rules for Conducting Grievance Hearings, the Virginia Personnel Act, the Hearing Officer Deskbook, the Canons, and the Establishment Clause. EDR in response simply told him not to do that anymore, and then the hearing officer retaliated.[34]

Notwithstanding the agency's implication, our previous ruling did not sustain these alleged violations or misconduct by the hearing officer. On the contrary, we specifically concluded: "nothing in the record or the hearing decision suggests that its conclusions are based on anything other than the hearing officer's reasoned and objective consideration of the evidence in the record."[35] Although we observed that some language in the original hearing decision may have been "overly dismissive" in characterizing the agency's argument, we did not determine that this

[30] Hearing Decision at 8, 10.
[31] Reconsideration Decision at 7-8.
[32] *Id.* at 8-9.
[33] Second Request at 1.
[34] *Id.* at 7.
[35] EDR Ruling Nos. 2021-5199, 2021-5200, at 16.

language or any other act or omission constituted hearing officer misconduct.[36] While the agency clearly disagrees with our analysis, nothing in the Second Request elucidates the claim that these issues were "not fully addressed" in our first administrative review.[37]

Further, pursuant to the grievance procedure, upon a request for administrative review claiming non-compliance by the hearing officer, "EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with written policy and the grievance procedure."[38] Here, the agency has objected to our remand of the hearing decision to the same hearing officer pursuant to the grievance procedure; yet it points to no authority that might have supported a different administrative path for this matter. Moreover, as stated above, pursuant to the grievance procedure, any claims addressed in our first administrative review that were not the subject of remand are resolved with administrative finality. Thus, we will not revisit our analysis of the agency's previous allegations of hearing officer bias and misconduct.

However, the agency asserts that the reconsideration decision demonstrates additional improper conduct by the hearing officer. The agency claims the hearing officer "ignor[ed] evidence and us[ed] his own standard of review."[39] In addition, the agency alleges that the hearing officer's findings upon reconsideration were motivated by retaliation for the agency's initial appeal.[40]

EDR finds no support for the agency's accusations. While the agency reiterates several of its charges against the grievant and claims the hearing officer "ignored" them, the record suggests instead that the agency's evidence was susceptible to multiple interpretations as to whether the grievant committed misconduct. As expressed in its Second Request, the agency has sought to show that the grievant's alleged misconduct was intentional because her "loyalties" were not to the agency.[41] However, because disloyalty and misappropriation were not among the charges described on the agency's Written Notice, it appears that the hearing officer's focus throughout this process has appropriately been on whether the grievant committed the actual misconduct charged.[42] That the hearing officer was not persuaded by the agency's presentation of the grievant's behavior does not suggest he ignored evidence. As to the assertion that the hearing officer adopted his own standard of review upon reconsideration, EDR's review of the reconsideration decision indicates that the hearing officer carefully followed our instructions upon remand, thoroughly addressed the specific issues we articulated, and identified the basis in the record for any new findings.

Nevertheless, the agency notes that the reconsideration decision resulted in "an unusual change of mind," from sustaining a Group II Written Notice and 30-day suspension in the original

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[36] *Id*. at 15. Accordingly, it is not clear on what basis or authority EDR should have referred the hearing officer's conduct to the Supreme Court of Virginia, as the agency has asserted. *See* Second Request at 1.
[37] Second Request at 1.
[38] *Grievance Procedure Manual* § 7.2(a).
[39] Second Request at 1.
[40] *Id.* at 1, 7.
[41] *Id.* at 5.
[42] *See* Agency Ex. 2.

hearing decision to reversing the disciplinary action entirely.[43] While the outcomes in the two decisions may differ, such changes are not necessarily unusual upon a remand. In this complex case, we agreed with arguments from both parties that the hearing officer's original findings, though substantial, were not sufficient to fully resolve the material issues of the grievance. Upon reconsideration, the hearing officer revisited the evidence relevant to the issues upon remand, noted our guidance that the misconduct analysis appeared to depend on the grievant's specific job duties, and concluded that his initial finding was not supported in light of the evidence about those duties. The hearing officer set forth all new findings with detailed reasoning and citations to the record. Beyond the mere fact that this determination was adverse to the agency, then, EDR perceives no indication that the reconsideration analysis was retaliatory or otherwise improper in any way.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the reconsideration decision in this matter. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[44] 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[43] Second Request at 6.
[44] *Grievance Procedure Manual* § 7.2(d). If there has been a petition for attorneys' fees submitted by the grievant's attorney, the hearing decision will not become final until the hearing officer issues a fees addendum and any appeals as to the fees addendum are addressed. *Grievance Procedure Manual* § 7.2(e).
[45] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[46] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).