



EMILY S. ELLIOTT  
DIRECTOR

**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

James Monroe Building  
101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, Virginia 23219  
Tel: (804) 225-2131  
(TTY) 711

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2021-5214  
March 26, 2021

The Department of Corrections (the “agency”) 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 11594. For the reasons set forth below, EDR remands the hearing decision for clarification and reconsideration.

FACTS

On July 1, 2020, the agency issued the grievant a Group II Written Notice for unsatisfactory performance and failure to follow instructions and/or policy.<sup>1</sup> In the “Circumstances considered” section of the Written Notice, the agency stated that “a suspension [was] not being sought” for the grievant’s misconduct and that the grievant would instead “be reassigned . . . to a position with different responsibilities.”<sup>2</sup> The grievant timely filed a grievance challenging the disciplinary action.<sup>3</sup> At the third management step, the agency reduced the discipline to a Group I Written Notice.<sup>4</sup> The agency subsequently qualified the grievance for a hearing, which took place on January 13, 2021.<sup>5</sup>

In a decision dated February 2, 2021, the hearing officer determined that the agency had “presented sufficient evidence to support the issuance of a Group I Written Notice”<sup>6</sup> and that there were no circumstances warranting mitigation of the disciplinary action.<sup>7</sup> The hearing officer went on to address the grievant’s reassignment as described on the Written Notice:

Grievant received a \$1,200 stipend for being assigned on call duties. Grievant’s duties were reassigned “to support a generalize[d] caseload.” Because of the reassignment of duties, Grievant no longer received the stipend. The Agency took

---

<sup>1</sup> Agency Ex. 1; *see* Decision of Hearing Officer, Case No. 11594 (“Hearing Decision”), February 2, 2021, at 1.

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

<sup>3</sup> Agency Ex. 3; *see* Hearing Decision at 1.

<sup>4</sup> Agency Ex. 4; *see* Hearing Decision at 1.

<sup>5</sup> Hearing Decision at 1.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 5.

this action pursuant to its Written Notice. Although the Agency is free to alter an employee's duties, it may not do so pursuant to a Written Notice. The sanctions for Written Notices by the Standards of Conduct do not include reassignment of duties. Thus, the Agency's decision to remove Grievant's on call duties must be reversed.<sup>8</sup>

Based on this analysis, the hearing officer upheld the issuance of the Group I Written Notice and ordered the agency to restore the grievant's on call duties and the stipend he would have received if he had not been reassigned.<sup>9</sup> The agency has requested that EDR administratively review the hearing officer's 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."<sup>10</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 hearing officer correct the noncompliance.<sup>11</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>12</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that the hearing officer erred by restoring the grievant to his former assignment.<sup>13</sup> In support of its position, the agency alleges that the Written Notice describes the reassignment merely "as a consideration in determining the extent of his discipline" and that its "decision to reassign Grievant's duties was based upon his overall performance measures," which the agency concluded were unsatisfactory.<sup>14</sup> As a result, the agency asserts that the hearing officer failed to "give due consideration to management's right to exercise its good faith business judgment in employee matters" and its "right to manage its operations."<sup>15</sup> The agency therefore contends that the hearing officer's order regarding the reassignment must be reversed because the reassignment "was a departmental function and not part of the grievance review."<sup>16</sup>

DHRM Policy 1.60, *Standards of Conduct*, describes the Commonwealth's system of progressive discipline and corrective action for managing employee performance. Depending on the nature and severity of an employee's misconduct, a Written Notice of formal disciplinary action may be issued at the level of a Group I, II, or III offense and be accompanied by varying levels of additional action, including suspension without pay, demotion or transfer either with or without a disciplinary salary action, or termination.<sup>17</sup> In this case, the hearing officer reviewed no

---

<sup>8</sup> *Id.* at 4-5.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>11</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>12</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>13</sup> The agency has not challenged the hearing officer's findings of fact or his determination that the issuance of the Group I Written Notice was warranted and appropriate. Accordingly, those matters are not addressed in this ruling.

<sup>14</sup> Request for Administrative Review at 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *See id.* at 7-9.

evidence of prior active disciplinary action against the grievant.<sup>18</sup> Pursuant to DHRM Policy 1.60, a first-offense Group I Written Notice may not be accompanied by an unpaid suspension.<sup>19</sup> A first-offense Group II Written Notice may include an unpaid suspension of up to 10 workdays.<sup>20</sup> A second active Group II Written Notice “normally should result in termination” but, “when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary action; or transferred to an equivalent position in a different work area with no change in salary.”<sup>21</sup>

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>22</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>23</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>24</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>25</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 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.

There is little evidence in the record about the nature of the grievant’s reassignment and its impact on his employment. At the hearing, the manager who issued the Written Notice testified that the grievant was reassigned as a result of the disciplinary action.<sup>26</sup> Due to the reassignment, the grievant was no longer eligible for a stipend paid to employees for performing on call duties.<sup>27</sup> While the section of the Written Notice form indicating a change in duties, transfer, demotion, or other similar disciplinary action to accompany the Written Notice was not completed,<sup>28</sup> the “Circumstances considered” portion of the document states that, due to the grievant’s past satisfactory performance, no suspension was sought and he was being reassigned.

Under these circumstances, EDR perceives no error in the hearing officer’s factual determination that the agency reassigned the grievant as an additional punishment for the charged misconduct “pursuant to its Written Notice.”<sup>29</sup> As the hearing officer went on to correctly observe,

---

<sup>18</sup> Hearing Decision at 2.

<sup>19</sup> DHRM Policy 1.60, *Standards of Conduct*, at 8.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.*

<sup>22</sup> Va. Code § 2.2-3005.1(C).

<sup>23</sup> *Grievance Procedure Manual* § 5.9.

<sup>24</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>25</sup> *Grievance Procedure Manual* § 5.8.

<sup>26</sup> Hearing Recording at 1:45:57-1:47:20, 2:41:34-2:43:54. The manager also explained that he did not consider the reassignment a demotion. *Id.* at 1:47:21-1:47:29, 2:44:30-2:33:41, 2:46:21-2:47:21. EDR has not reviewed anything in the record in which the grievant has challenged a demotion. Accordingly, EDR will not address whether the reassignment was a demotion.

<sup>27</sup> Hearing Recording at 1:45:57-1:47:20, 2:41:34-2:43:54.

<sup>28</sup> Agency Ex. 1.

<sup>29</sup> Hearing Decision at 4.

DHRM Policy 1.60 does not authorize a disciplinary reassignment when an employee receives a first Group II Written Notice (the level at which the discipline was originally issued) or a first Group I Written Notice (the level to which the discipline was reduced during the management steps). He therefore ordered the agency to restore the grievant's former duties and the stipend.<sup>30</sup> 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. Accordingly, EDR finds no basis to conclude that the hearing officer's analysis of the Written Notice and associated reassignment was inconsistent with the evidence in the record or DHRM Policy 1.60.

Nonetheless, the hearing officer noted that an agency is "free to alter an employee's duties" in its discretion,<sup>31</sup> suggesting that the grievant's reassignment was permissible if carried out apart from the Written Notice. However, the agency cannot presently exercise its discretion to reassign the grievant without, at a minimum, appearing to disregard the hearing officer's order restoring the grievant to his former duties. The hearing officer reasonably determined that the reassignment was not a permissible part of the Written Notice itself. On the record that exists, the hearing officer can direct that the reassignment be separated from the disciplinary action (the Written Notice form). However, the hearing officer did not address the merits of the agency's decision to reassign the grievant, including whether the agency had a separate basis in policy to reassign the grievant. Without such an assessment, the relief of reinstatement to the grievant's former duties is not warranted.

State agencies generally have broad authority to transfer employees laterally within a Pay Band.<sup>32</sup> There are limits to this discretion that could support overturning a lateral transfer, including, for example, a transfer that was accomplished for an improper purpose, such as discrimination or retaliation,<sup>33</sup> or a transfer where the stated factual basis for the action is demonstrated to be untrue or not supported by record evidence. However, a reassignment is not automatically invalidated where the agency uses the facts supporting a disciplinary action as justification for the reassignment. Where, as here, an underlying disciplinary action is upheld by the hearing officer, an agency's business reasons for initiating a lateral transfer/reassignment arising out of the conduct that led to the Written Notice would appear to be appropriate under the discretion granted by state policy (absent evidence of an improper motive). If an agency were found to have appropriately exercised its discretion by reassigning an employee following an incident that resulted in disciplinary action, the associated reassignment could not be overturned simply because a Written Notice was also issued. Based on this analysis, EDR is unable to discern from the hearing record a suitable basis to overturn the grievant's reassignment in this case.

In reviewing the record, it is not clear whether or how the grievant intended to challenge the reassignment. Nevertheless, to the extent the grievant challenged the issuance of the Written Notice – which described the reassignment as based on the instance of unsatisfactory work performance that led to the issuance of the disciplinary action – the hearing officer cannot direct

---

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 4. The grievance statutes and procedure generally reserve to management the exclusive right to manage the affairs and operations of state government. *See* Va. Code § 2.2-3004(B). This includes matters such as the methods, means and personnel by which work activities are to be carried out.

<sup>32</sup> DHRM Policy 3.05, *Compensation*, at 14 ("Reassignment within the Pay Band").

<sup>33</sup> Neither discrimination nor retaliation appears to be at issue in this case.

the relief of reinstatement to the grievant's former duties without also considering whether the reassignment itself was otherwise appropriate under policy. As such, EDR must remand this matter for the hearing officer to consider whether the reassignment was consistent with policy in accordance with the above discussion.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision addressing whether the grievant's reassignment was otherwise consistent with policy as described in this ruling. In so doing, the hearing officer must make appropriate changes to the ordered relief in the original decision.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.<sup>34</sup> 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.<sup>35</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>36</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>37</sup>

*Christopher M. Grab*  
Director  
Office of Employment Dispute Resolution

---

<sup>34</sup> See *Grievance Procedure Manual* § 7.2.

<sup>35</sup> *Id.* § 7.2(d).

<sup>36</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>37</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).