

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9756; Ruling
Date: July 11, 2012; Ruling No. 2012-3382; Agency: Department of Corrections;
Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2012-3382
July 11, 2012

The grievant, a former employee of 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 June 15, 2012 Reconsideration Decision in Case Number 9756. For the reasons set forth below, we will not disturb the decision of the hearing officer.

PROCEDURAL FACTS

The original decision in Case Number 9756 was issued on March 8, 2012. EDR has already addressed the grievant's previous request for administrative review in EDR Ruling Number 2012-3310. Following that review, the DHRM Director's designee remanded the matter to the hearing officer for further consideration. In response, the hearing officer issued a Reconsideration Decision on June 15, 2012. The grievant now seeks review of that decision.

DISCUSSION

In the recent ruling request, the grievant again disputes the factual basis for the hearing officer's findings, a question addressed in EDR Ruling Number 2012-3310. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹ and to determine the grievance based "on the material issues and grounds in the record for those findings."² 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.³ 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.⁴ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority

¹ Va. Code § 2.2-3005.1(C).

² *Grievance Procedure Manual* § 5.9.

³ *Rules for Conducting Grievance Hearings* § VI(B).

⁴ *Grievance Procedure Manual* § 5.8.

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 the Reconsideration Decision, the hearing officer has explained, based on his analysis and interpretation, how the "stripper" comment violated DHRM Policy 2.30. As similarly determined in EDR Ruling Number 2012-3310, EDR has no basis to dispute the hearing officer's factual findings. Further, to the extent the grievant disputes that the hearing officer made no factual findings as to "Subparagraphs" (2) and (3) in the definition of "workplace harassment" in DHRM Policy 2.30, because it appears that the hearing officer made factual findings as to "Subparagraph" (1), no such findings as to the other "Subparagraphs" were necessary. The "Subparagraphs" are separated by an "or," which would appear to indicate that a finding as to any one of the three items meets the definition.⁵ Consequently, there is no basis for EDR to remand for a failure to make a factual finding as to the other two items. To the extent the challenged issues are a question of policy, the DHRM Director has sole authority to make a final determination on whether the decision comports with state or agency policy.⁶

APPEAL RIGHTS AND OTHER INFORMATION

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.⁷ 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.⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁹



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⁵ DHRM Policy 2.30, *Workplace Harassment*.

⁶ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁷ *Grievance Procedure Manual* § 7.2(d).

⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).