

Issue: Administrative Review of Hearing Officer's decision in Case No. 9922; Ruling  
Date: November 8, 2012; Ruling No. 2013-3465; Agency: Library of Virginia;  
Outcome: AHO's decision affirmed.



***COMMONWEALTH of VIRGINIA***  
***Department of Human Resources Management***  
***Office of Employment Dispute Resolution***

**ADMINISTRATIVE REVIEW**

In the matter of the Library of Virginia  
Ruling Number 2013-3465  
November 8, 2012

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 9922. For the reasons set forth below, EDR will not disturb the hearing decision.

**FACTS**

The relevant facts as set forth in Case Number 9922 are as follows:<sup>1</sup>

The Library of Virginia employs Grievant as a Housekeeper, Event Supervisor. He began working full time for the Agency in 2000. Grievant supervises four event staff workers but when the Manager is absent, Grievant supervises the entire housekeeping department. No evidence of prior active disciplinary action was introduced during the hearing.

The Manager had counseled Grievant regarding his interaction with his subordinates on several occasions. For example, on April 7, 2011, the Manager overheard Grievant speaking with Ms. M with a harsh, loud and berating tone. The Manager observed that Ms. M had tears in her eyes because of her interaction with Grievant. The Manager told Grievant that he should treat staff with respect and not be raising his voice to them. On August 10, 2011, three members of the housekeeping staff complained to the Manager that Grievant was speaking harshly and "going off" on them. On February 12, 2012, an employee complained to the Manager that Grievant was following her, criticizing her work, and making her feel uncomfortable. The Manager counseled Grievant against engaging in this behavior.

On May 17, 2012, Grievant was supervising a part time evening housekeeper, Ms. R. Ms. R performed her cleaning duties by moving from one

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<sup>1</sup> Decision of Hearing Officer, Case No. 9922 ("Hearing Decision"), Oct. 16, 2012, at 2-3. (Some references to exhibits from the Hearing Decision have been omitted here.)

floor to the next. Ms. R cleaned in the evenings after regular business hours and in parts of the building that were quiet and secluded. Sometimes Grievant appeared on the floor before she got to the floor. Other times, Grievant appeared on the floor after Ms. R had moved to the floor. Grievant did not interact with Ms. R while he was on the floor with her other than saying “uh-huh” several times. Although Ms. R perceived Grievant’s verbal expressions as offensive, several witnesses testified that Grievant regularly said “uh-huh” without any specific reason. Ms. R submitted a written complaint to the Manager because she believed Grievant was harassing her and “nit picking” her with his behavior.

On June 29, 2012, Grievant was issued a Group I Written Notice of disciplinary action for workplace harassment. In an October 16, 2012 hearing decision, the hearing officer upheld the agency’s issuance of the Group I Written notice.<sup>2</sup> The grievant now seeks administrative review from 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>3</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>4</sup>

The grievant’s request for administrative review essentially challenges the hearing officer’s findings of fact based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>5</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>6</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>7</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>8</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

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<sup>2</sup> Hearing Decision at 4.

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

<sup>4</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>5</sup> Va. Code § 2.2-3005.1(C).

<sup>6</sup> *Grievance Procedure Manual* § 5.9.

<sup>7</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>8</sup> *Grievance Procedure Manual* § 5.8.

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 this instance, the grievant contests the evidence presented by the agency that he engaged in disruptive behavior via his treatment of other agency employees. The grievant suggests that the complaining employee in this case, Ms. R, fabricated the allegations she made to agency management, and thus he essentially argues that the agency did not bear its burden of proof to show that this disciplinary action was warranted. The grievant further states that he does not recall receiving prior counseling on the subject of treating fellow employees with respect and not engaging in intimidating or harassing behavior.

The hearing officer found that while the agency did not establish workplace harassment under Department of Human Resource Management policy, it did present sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior and for unsatisfactory work performance.<sup>9</sup> Based on a review of the testimony at hearing and the record evidence, there is sufficient evidence to support the hearing officer's findings of disruptive behavior and unsatisfactory work performance. The grievant's supervisor testified that he had counseled the grievant regarding inappropriate interactions with subordinates on several prior occasions.<sup>10</sup> The agency's Facilities Director, who also serves as the grievant's second-level supervisor, confirmed that he and the grievant's supervisor had several conversations over time regarding the pattern of the grievant's behavior toward other employees.<sup>11</sup> He further testified that, as part of his investigation into the matter, he met with Ms. R and believed her account of having been harassed by the grievant.<sup>12</sup> The grievant did not testify on his own behalf at the hearing.

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. In his hearing decision, the hearing officer found the testimony of the agency's witnesses credible and held that the agency presented sufficient evidence to support the issuance of a Group I offense for unsatisfactory performance and disruptive behavior.<sup>13</sup> Because 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. Accordingly, we decline to disturb the decision on this basis.

#### CONCLUSION AND APPEAL RIGHTS

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

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<sup>9</sup> Hearing Decision at 3.

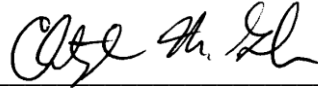
<sup>10</sup> See Hearing Record at 36:12 through 37:23 (testimony of grievant's supervisor).

<sup>11</sup> See Hearing Record at 49:29 through 49:55 (testimony of Facilities Director).

<sup>12</sup> See Hearing Record at 50:03 through 50:20 (testimony of Facilities Director).

<sup>13</sup> Hearing Decision at 3.

review have been decided.<sup>14</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>15</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>16</sup>



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<sup>14</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>15</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>16</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).