

Issue: Administrative Review of Remand Decision in Case No. 10094; Ruling Date: June 15, 2015; Ruling No. 2015-4152; Agency: Department of State Police; Outcome: AHO's Remand Decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Virginia State Police
Ruling Number 2015-4152
June 15, 2015

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s remand decision in Case Number 10094. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed as a Special Agent by the Virginia State Police (“agency”).¹ On March 27, 2013, the grievant was issued a Group III Written Notice of disciplinary action for making a false official statement, a Group II Written Notice for failure to follow instructions and/or policy, a Group III Written Notice with removal for theft, and a Group III Written Notice with removal for damaging State property or records.² He initiated a grievance challenging the disciplinary action, as well as other conduct by the agency. On September 9, 2013, following a hearing, the hearing officer issued a decision upholding the Group II Written Notice for failure to follow instructions and/or policy, but rescinding the remaining disciplinary actions.³ However, as the grievant had a previous Group II Written Notice, the hearing officer upheld the grievant’s removal based on the accumulation of disciplinary actions.⁴

The grievant requested administrative review of the hearing officer’s decision by EDR.⁵ After EDR’s administrative review upheld the hearing officer’s decision, the grievant appealed to the appropriate circuit court. That court remanded the case to the hearing officer for the limited purpose of further consideration of the federal agent’s testimony.⁶ In his reconsideration decision, the hearing officer affirmed his previous decision.⁷ The grievant has now requested an administrative review of the hearing officer’s reconsideration decision.

¹ The underlying facts of this case are set forth in EDR Ruling No. 2014-3717.

² Decision of Hearing Officer, Case No. 10094 (“Hearing Decision”), September 9, 2013 at 2.

³ *Id.* at 16.

⁴ *Id.* at 14.

⁵ See EDR Ruling No. 2014-3717. The grievant also requested an administrative review by DHRM, *see id.*, but as that review is not at issue in this ruling, it will not be discussed further.

⁶ See Reconsideration Decision of Hearing Officer, Case No. 10094-R (“Reconsideration Decision”), April 23, 2015, at 1.

⁷ *Id.* at 7.

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.”⁸ 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.⁹

Scope of Review

The grievant raises a number of arguments in his request for administrative review. Specifically, the grievant asserts that the Written Notice resulting in the grievant’s termination is defective; that the agency failed to call any rebuttal witnesses at hearing to oppose or contradict the grievant’s or the federal agent’s testimony; that there is insufficient specificity to the agency’s instruction for the grievant “to cease ‘heavy reliance’” on federal agents; that the grievant’s interactions with the federal agent did not constitute heavy reliance; that the hearing officer erred in assessing the relative credibility of an agency witness and the federal agent; and that the hearing officer erred in regard to the computer constituting evidence; and that the reconsideration decision failed to consider the grievant’s alleged post-traumatic stress disorder.

In its order remanding this case to the hearing officer, the circuit court limited the hearing officer’s review to “further consideration of the testimony offered by [the federal agent] and factual determinations, if any, as a result.” Thus, the only challenges properly before EDR in this administrative review are those involving the hearing officer’s factual findings regarding the federal agent’s testimony in the reconsideration decision. To the extent the grievant seeks to reopen other matters, such as the sufficiency of the Written Notice, these requests either were in fact raised and decided in the previous administrative review or could have been raised and are therefore now waived. As those challenges are not properly before EDR in this review, they will not be addressed in this ruling.

Findings of Fact

The grievant challenges a number of the hearing officer’s conclusions regarding the weight of the evidence and the credibility of witnesses. 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 EDR noted in its previous ruling, based on a review of the record evidence, it appears there is a sufficient basis in the record to support the hearing officer’s determination that the grievant had failed to follow agency policy and instructions by his supervisor.¹⁰ In particular, the agency presented evidence showing that the grievant was instructed to handle his own cases without undue reliance on the federal agent; that the grievant had been counseled regarding the need to have forensic analysis

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Reconsideration Decision at 4-7; EDR Ruling No. 2014-3717.

performed by the agency rather than the federal authorities; that the grievant in fact allowed the federal agent to participate significantly in the “knock and talk” and to take the computer for forensic analysis; that the grievant had not been given permission for these actions by his supervisor; and that the grievant’s actions failed to comply with agency policy regarding the handling of evidence.¹¹ As EDR explained in Ruling Number 2014-3717, the test is not whether a hearing officer could reasonably have found for the grievant, or even whether sufficient evidence exists to support a finding in favor of the grievant, but instead whether the hearing officer’s findings are based upon evidence in the record and the material issues of the case. Because the hearing decision meets that standard, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant also asserts that the hearing officer erred in concluding that the status of the computer as evidence was irrelevant “within the context of the Federal Agent’s testimony.”¹² In his first decision, the hearing officer rejected the grievant’s apparent argument that the computer was not evidence because it did not contain images of child pornography.¹³ The hearing officer appears to have concluded that because it was possible that a forensic examination would subsequently reveal criminal content, the grievant violated policy and/or instructions by allowing the federal agent to take the computer.¹⁴ In his reconsideration decision, the hearing officer further explained that whether or not the grievant and the federal agent believed that the computer contained prohibited content was irrelevant to the alleged policy violation, as at the time the grievant allowed the federal agent to take the computer, neither the grievant nor the federal agent could have been certain that there were no images of child pornography present.¹⁵ Although the grievant appears to argue that the grievant and federal agent’s alleged belief that the computer lacked evidentiary value should be dispositive, EDR cannot conclude that the hearing officer acted outside of his discretion in determining that the grievant violated policy and/or instructions by allowing the federal agent to take a computer with potential evidentiary value, even if they believed that value to be negligible or non-existent. Accordingly, we decline to disturb the decision on this basis.

Mediation

The grievant argues that the agency has failed to comply with law and policy by rejecting the grievant’s requests for mediation. Section 2.2-3000(B)(4) of the Code of Virginia provides that each agency shall participate in the state workplace mediation program administered by EDR pursuant to Section 2.2-1202.1. Contrary to the grievant’s assertions, the agency is a participant in EDR’s mediation program.¹⁶ Further, under its statutory directive to establish a workplace mediation program, EDR has promulgated Workplace Mediation Program

¹¹ See, e.g., Hearing Recording at CD 1, Track 1, 59:25-1:01:59; 1:02:41-1:02:48; 1:08:00-1:08:27; Agency Exhibit 22 at 5, 21, 35-43, 55; Agency Exhibits 38-39.

¹² Reconsideration Decision at 7.

¹³ Hearing Decision at 14.

¹⁴ *Id.*

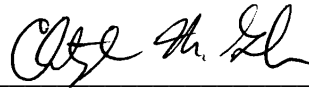
¹⁵ Reconsideration Decision at 7.

¹⁶ EDR lists every agency that has an agency workplace mediation coordinator for the EDR mediation program on its website, including the agency involved in this case.

Guidelines.¹⁷ Section II(A) of those Guidelines provides that mediation through the state workplace mediation program is a *voluntary* process. As participation in a mediation is voluntary, EDR cannot conclude that the agency has violated its obligations under law and policy by electing not to participate in mediation with the grievant.¹⁸

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.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹



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¹⁷ EDR's Workplace Mediation Guidelines and other mediation resources are available at <http://www.dhrm.virginia.gov/employmentdisputeresolution/mediationresourcesguidelines>.

¹⁸ In addition, EDR concurs with the agency's assessment that this case is not appropriate for mediation under our program. EDR's mediation program is not intended for negotiated settlements, but rather for addressing workplace conflict among active state employees.

¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).