

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9915; Ruling  
Date: January 8, 2013; Ruling No. 2013-3469; Agency: Department of Military  
Affairs; Outcome: Hearing Decision in Compliance.



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

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Military Affairs  
Ruling Number 2013-3469  
January 8, 2013

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 9915. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts as set forth in Case Number 9915 are as follows:<sup>1</sup>

The Department of Military Affairs employed Grievant as a plumber at one of its facilities. He had been employed for approximately 14 years prior to his removal effective June 7, 2012. No evidence of prior active disciplinary action was introduced during the hearing. Grievant's performance evaluations showed that his work performance was satisfactory to the Agency.

The Agency intended to demolish several old buildings at one of its Facilities. Two of the buildings owned by the Agency were leased to the Navy. As a tenant, the Navy had the right to occupy the buildings but did not own the buildings or fixtures in the buildings. These buildings contained radiators made of copper and brass. Grievant recognized that the radiators could be recycled and reduced to valuable copper and brass that he could sell for a profit. Grievant had observed other employees receive permission to remove items from buildings set for demolition. Those employees had received permission from the demolition contractors who had been contracted to demolish buildings. Under the Agency's contract with the demolition companies, the demolition companies took control of the buildings once they started demolition. A demolition contractor was authorized to dispose of the contents of a building by whatever means the contractor chose including giving away the contents.

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<sup>1</sup> Decision of Hearing Officer, Case No. 9915 ("Hearing Decision"), October 22, 2012, at 1-2. (Some references to exhibits from the Hearing Decision have been omitted here.)

Chief B was employed by the Navy and was not a demolition contractor. Grievant knew that Chief B was employed by the Navy and not in Grievant's chain of command. Based on Grievant's observation of Chief B, Grievant believed that Chief B was in control of the two buildings. Grievant did not know of the details of the Navy's lease of the buildings and he considered the two buildings to be owned by the Navy and under the control of Chief B.

Grievant and Chief B began talking about the pending demolition of the two buildings. Grievant asked Chief B if the Navy was done with the radiators. Chief B replied "yes we are done". Grievant asked "so I can have the radiators?" The Chief B replied "I do not need them – you can have them." Chief B believed he was telling Grievant that Grievant could have the radiators in Grievant's capacity as an employee of the Agency. Grievant interpreted Chief B's answer to mean that Chief B had authorized Grievant to remove the radiators for Grievant's personal use. Grievant believed that Chief B had the authority to authorize Grievant to remove the radiators because Chief B was in control of all of the activities and the building and "was the boss down there." On two weekends and with his personal pickup truck and trailer, Grievant went to the buildings and removed the radiators. He did so in plain view of Agency employees including security staff at the Facility's gates and without attempting to hide his behavior.

Grievant sold the radiators to a local recycler for \$1,939.70. He signed the recycler's purchase ticket which stated, "I hereby certify that I have the right to possess and sell this scrap."

When the Agency discovered that the radiators were missing, an investigator questioned Grievant. Grievant admitted to taking the radiators and said that he had been given permission to do so by Chief B. Grievant later paid the Agency \$1,939.70.

In an October 22, 2012 hearing decision,<sup>2</sup> the hearing officer upheld the agency's issuance of the Group III Written Notice with removal.<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

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<sup>2</sup> *Id.* at 4.

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

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>

*Hearing Officer's Consideration of the Evidence*

The grievant's request for administrative review first 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. The grievant argues that the hearing officer made an unsubstantiated finding that the radiators were made of brass and copper, where they were in fact made of iron. The grievant contends that it would have been unreasonable for him to remove the radiators knowing that the composition was brass and copper, and thus valuable, as compared to iron, which would have been discarded with the trash.

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 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 Written Notice was issued to the grievant because he "[d]id not have the proper authority to remove and sell government property. Sold government property for personal gain with no authorization."<sup>9</sup> The composition of the radiators is not indicated. The grievant argues that the composition of the radiators affects the analysis of whether it was reasonable for him to believe that the radiators were being discarded and thus available for him to take. However, the hearing officer's decision found that:

The Agency has established that Grievant's removal of the radiators was unauthorized. No employee of the Agency authorized Grievant to remove the radiators. Grievant knew that Chief B was not an employee of the Agency.

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<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.

<sup>9</sup> Agency Ex. 6.

Grievant assumed that Chief B had the authority to speak on behalf of the Agency. Grievant's assumption was unreasonable.<sup>10</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 that the grievant's removal of the radiators was unauthorized by the agency.<sup>11</sup> The hearing officer did not appear to find that the composition of the radiators was relevant to this analysis, and 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.

*Mitigation: Inconsistent Discipline*

The grievant's request for administrative review further challenges the hearing officer's decision not to mitigate the discipline issued to the grievant. He argues that the agency did not apply disciplinary action to him consistent with another similarly situated employee, Mr. P., and thus, the hearing officer erred by finding that no mitigating circumstances exist to reduce the disciplinary action issued. Section VI(B)(2) of the *Rules* provides that an example of mitigating circumstances includes "whether the discipline is consistent with the agency's treatment of other similarly situated employees." As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.<sup>12</sup>

A review of the hearing record indicates that the grievant raised the issue of potential inconsistent discipline with the hearing officer. This concern was addressed in the hearing decision, stating that the grievant "did not present evidence of any employees who had engaged in theft or unauthorized removal and remained employed by the Agency. Another employee, Mr. P, also took radiators and he was removed from employment."<sup>13</sup> In contrast, the grievant argues in his request for administrative review that Mr. P was removed from employment only following a second offense of this nature and points to an exhibit introduced at hearing as support for this position.<sup>14</sup> However, it is unclear from a review of the record as to precisely when and how Mr. P was disciplined and for which offenses. At a minimum, there appears to be an issue of disputed fact as to whether Mr. P and the grievant were indeed similarly situated and/or disciplined in a consistent manner for the same or similar offenses. Essentially, the hearing officer found that the grievant did not prove that he and Mr. P were similarly situated and disciplined inconsistently, as both the grievant and Mr. P were removed from employment following an investigation into each situation.

Determinations of 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

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<sup>10</sup> Hearing Decision at 4.

<sup>11</sup> See Hearing Record at 22:05 through 22:16 and 25:59 through 26:33 (testimony of Chief B).

<sup>12</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).


<sup>13</sup> Hearing Decision at 4.

<sup>14</sup> See Grievant's Exhibit 1, indicating that Mr. P "took 30 radiators...between October and December. In fact, he had already been taking them prior to that and had been counseled about it specifically."

officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. In this case, there is no dispute that both the grievant and Mr. P were ultimately terminated following unauthorized removal of radiators from the agency's facility. Thus, we cannot conclude that the hearing officer's findings regarding such facts and resulting determinations as to allegations of inconsistent discipline were not based upon evidence in the record. Accordingly, we decline to disturb the decision on that 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 review have been decided.<sup>15</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>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>



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<sup>15</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>16</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>17</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).