

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9888; Ruling
Date: March 12, 2013; Ruling No. 2013-3540; Agency: Department of Juvenile
Justice; Outcome: Hearing Officer's Decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3540
March 12, 2013

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review for a third time the hearing officer's decision and remand decision in Case Number 9888. For the reasons set forth below, EDR has no basis to further interfere with the decision in this case.

FACTS

The hearing officer's findings in his September 7, 2012 decision in Case Number 9888,¹ as recounted in EDR's first administrative review in this case (EDR Ruling Number 2013-3443), are hereby incorporated by reference. In EDR Ruling Number 2013-3443, the hearing officer was directed to provide further consideration and explanation of the findings of fact and determinations as to whether the grievant falsified a document. The primary issues for consideration noted in the EDR Ruling were 1) the hearing officer's consideration of a letter from the Assistant Commonwealth's Attorney and any resulting disputed issues of fact, and 2) the basis for the determination that the grievant had falsified a state document with the requisite intent. The hearing officer issued a remand decision on October 23, 2012.

Subsequently, the grievant initiated a second request for administrative review, alleging that the hearing officer did not adhere to the remand directives of EDR. EDR Ruling 2013-3475 noted that, on remand, the hearing officer appeared to address whether the grievant had altered a court order without approval or authority, rather than whether she falsified this document. Thus, the case was again remanded for the hearing officer to clarify whether the grievant falsified a state document with the requisite intent and, in so doing, explain any findings of disputed fact, including consideration of the Assistant Commonwealth Attorney's letter.

On January 31, 2013, the hearing officer issued a second remand decision. This decision held, in relevant part, that:²

The letter from the Commonwealth Attorney does not affect the testimony of the Grievant herself that she received the Agency's copy of the court order and knowingly and willfully added language to the order which was not included by

¹ Decision of Hearing Officer, Case No. 9888, September 7, 2012 ("Hearing Decision").

² Second Remand Decision, Case No. 9888, January 31, 2013, at 2.

the judge thereby falsifying the document. The Grievant's action of falsifying the document was not done by any accident or mistake but rather was done with the specific intent to create a document which was false and not accurate to the original document as created by the Court. Thus, regardless of any proclamation by the Judge in court or recollection by the Commonwealth Attorney the Grievant knowingly and willfully with specific intent created a false document which could be relied upon in error by Agency personnel.

The grievant maintains in her renewed request for administrative review that the hearing officer has still failed to follow EDR's directives on remand, alleging that her intent to falsify a state document was not established by the evidence and the hearing officer abused his discretion in rendering this 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."³ 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.⁴

As the hearing officer found in the second remand decision that the grievant had the specific intent to falsify the document in question, we believe that the grievant's request for administrative review is now fairly read as challenging 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"⁵ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁶ 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.⁷ 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.⁸ 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 hearing officer determined that the record evidence and the grievant's testimony demonstrated an intent to falsify a state record. He concluded that the grievant's "knowingly and willfully" adding language to the court order constituted an intent to falsify this

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

⁴ See *Grievance Procedure Manual* § 6.4(3).

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ *Rules for Conducting Grievance Hearings* § VI(B).

⁸ *Grievance Procedure Manual* § 5.8.

document.⁹ The hearing officer further indicates that the letter from the Commonwealth's Attorney was considered as evidence in rendering this decision.¹⁰ While EDR may not necessarily agree with the conclusions reached by the hearing officer, nevertheless, weighing this evidence and rendering a factual finding is squarely within the hearing officer's authority and it is not within our purview to interfere with his consideration of the evidence in this regard. EDR's review in this case is, therefore, concluded.

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.¹¹ 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.¹² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹³



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁹ Second Remand Decision at 2.

¹⁰ *Id.*

¹¹ *Grievance Procedure Manual* § 7.2(d).

¹² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹³ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).