

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10020; Ruling
Date: April 30, 2013; Ruling No. 2013-3592; Agency: Virginia Department of
Transportation; 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 Virginia Department of Transportation
Ruling Number 2013-3592
April 30, 2013

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 decision in Case Number 10020. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 10020, as found by the hearing officer, are as follows:¹

The Virginia Department of Transportation employs Grievant as an Engineering Tech III at one of its Facilities. The purpose of his position is:

To assist the District Locally Administered Projects Coordinator in the review and approval of Enhancement SAFETEA-LU and Locally Administered projects in an accurate and precise manner.

To maintain high skills in new design technology and construction methodology and provide extraordinary customer service.

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding the Agency’s Information Technology Security Awareness and the Agency’s Security Agreement. For example, on September 15, 2011, Grievant received a Certificate of Compliance for completing Security Awareness Training. Grievant acknowledged under the Agency’s ITD 33A Security Agreement:

Although I have access to VDOT and COV information and data, I shall not read or access information and data that is not needed to perform my job.

¹ Decision of Hearing Officer, Case No. 10020 (“Hearing Decision”), April 5, 2013, at 2-3 (citations omitted).

The Agency's policies governing use of its information technology systems were located on the Agency's intranet and provided as part of employee training. Grievant had access to these policies.

Each time Grievant logged into the Agency's computer system he was required to acknowledge:

This system is for the use of authorized users only. Authorized users are permitted access to the Internet and VDOT's electronic communication system to assist in the performance of their duties.

Many of the Agency's photocopiers were also document scanners. When documents were photocopied by an employee or on behalf of an employee, a copy of the scanned document would appear in an electronic folder under the employee's name. For example, if Ms. F made a copy of a document or scanned a document under her name, an electronic copy of the document would appear in her electronic folder and remain there until she removed it. Anyone with access to the Agency's computer system could access Ms. F's electronic folder and read the document she scanned.

On July 11, 2012, the Engineering Manager received a telephone call from someone claiming that Grievant was accessing the electronic files of other employees. The Agency initiated an investigation. The Agency created a mirror image of Grievant's computer hard drive and also viewed his "My Recent Documents" folder. Grievant's recent documents folder showed that he frequently accessed the electronic folders for other employees without any business need or specific authorization to do so. For example, Grievant accessed the electronic file folder of Ms. F on July 23, 2012. On May 1, 2012 and June 20, 2012, he accessed the electronic file folder of Ms. H who was the Human Resource Manager. Ms. H's folder contained electronic copies of grievances filed by Agency employees and other private human resource matters. On February 3, 2011, Grievant accessed the folder of the Engineering Manager. On November 3, 2011 and April 24, 2012, Grievant opened and read .pdf documents showing grievances filed by another employee. On March 22, 2012, Grievant opened the electronic folder of the District Administrator. Grievant had a copy of an Acknowledgement of Extraordinary Contribution earned by an employee in May 2004.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant failed to follow agency policy, finding in the affirmative.² The hearing officer upheld the agency's issuance of a Group II Written Notice of disciplinary action.³ The grievant now appeals that hearing decision to EDR.

² Hearing Decision at 4-5.

³ *Id.*

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.”⁴ 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 hearing officer correct the noncompliance.⁵

Hearing Officer’s Consideration of the Evidence

The grievant’s request for administrative review appears to argue that the hearing officer’s findings of fact, based on the weight and credibility that he accorded to testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁷ 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.⁸ 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.⁹ 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.

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 this case, there is sufficient evidence in the record to support the hearing officer’s decision that the grievant violated the agency’s policy regarding acceptable computer use. At the hearing, the agency introduced evidence that the grievant repeatedly accessed electronic folders designated for other employees without authorization or business need, and that the grievant’s computers contained many personal documents unrelated to the conduct of the agency’s business.¹⁰ Furthermore, the agency produced records showing that the grievant had repeatedly been advised of the agency’s computer use policies through several types of security awareness training.¹¹ The grievant argued that the agency failed to properly secure its computer system, and that this excused any breach of

⁴ Va. Code § 2.2-1202.1(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4.

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ See Agency Exhibits 9-11, 13.

¹¹ Agency Exhibits 6-7.

security he committed. In the hearing decision, the hearing officer concluded the grievant had accessed data without permission in violation of agency policy, and that any deficiency on the agency's part did not allow the grievant to disregard the agency's computer security policies.¹² While the grievant may not agree with the hearing officer's conclusions, the hearing record shows nothing to suggest his decision regarding the grievant's violation of the agency's computer use policy was in any way unreasonable or not based on actual evidence in the record.

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, EDR will not disturb the decision on this basis.

Inconsistent Discipline

The grievant argues that the agency did not apply disciplinary action to him consistent with other similarly situated employees. Section VI(B)(2) of the *Rules for Conducting Grievance Hearings* 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.¹³ At the hearing, the grievant asserted that other employees of the agency engaged in violations of policy regarding acceptable computer system use but were not disciplined.¹⁴

Essentially, the hearing officer found that the grievant did not submit sufficient evidence to show that he was similarly situated to the other employees in question. Specifically, the hearing officer found that the agency investigated the grievant's claims and concluded that it "could not prove the employees violated policy or that the employees were not similarly situated with Grievant in terms of the number and degree of policy violations."¹⁵ While reasonable minds may differ as to the weight that should be granted to testimony provided by the grievant that might tend to support such a finding, the hearing officer has the sole authority to weigh evidence, determine credibility, and make such factual findings.¹⁶ As long as the hearing officer's findings are based upon record evidence 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, EDR cannot conclude that the hearing officer's decision was an abuse of discretion or unsupported by record evidence.

Alleged Misconduct of Agency's Representative

The grievant alleges the hearing officer allowed the agency's representative to act inappropriately during the hearing. Specifically, he argues that the agency's representative attempted to whisper to a witness in response to a question posed by the grievant.

The hearing record appears to show that the agency's representative attempted to communicate with a witness while the grievant was questioning that witness.¹⁷ The grievant asks

¹² Hearing Decision at 4-5.

¹³ *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B)(2).

¹⁴ Hearing Decision at 5.

¹⁵ *Id.*

¹⁶ Va. Code § 2.2-3005.1(C).

¹⁷ Hearing Record at 01:05:15.

the witness a question, then immediately states, “Objection: you can’t whisper to the witness, he’s my witness now.”¹⁸ The hearing officer did not address this issue when it arose at the hearing. While the *Rules for Conducting Grievance Hearings* do not directly address this situation, they do state that hearings must be conducted in an “orderly, fair, and equitable fashion.”¹⁹ Allowing either party’s representative to communicate with a witness in this manner could create an appearance of unfairness and partiality on the part of the hearing officer. While it is unclear from the hearing record precisely whether any attempted communication occurred, or if the communication was improper,²⁰ EDR encourages hearing officers to ensure that such situations are promptly addressed, especially in light of a stated objection, so that an appearance of prejudice does not occur. However, there is no clear evidence in the record that the hearing officer or the agency’s representative acted improperly, and consequently EDR cannot conclude that the grievant was prejudiced by the agency representative’s alleged misconduct in this regard. While hearing officers are cautioned to prevent parties and representatives from engaging in conduct that creates an appearance of bias or prejudice, EDR cannot, in this case, disturb the hearing officer’s decision based on the grievant’s allegation.

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.²¹ 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³



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¹⁸ It is not clear from the hearing record that any communication, or attempted communication, in fact occurred between the witness and the agency’s representative. The agency’s representative’s voice is not audible and, aside from the grievant’s objection to the alleged communication, there is no evidence that there was any attempted communication. See Hearing Record at 01:05:20.

¹⁹ *Rules for Conducting Grievance Hearings* § IV(C).

²⁰ For example, the nature of the conversation and the level of the witness in the organization could be relevant considerations as to whether such a communication was proper.

²¹ *Grievance Procedure Manual* § 7.2(d).

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).