

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10218; Ruling
Date: March 25, 2014; Ruling No. 2014-3835; Agency: Department of Juvenile
Justice; 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 Juvenile Justice
Ruling Number 2014-3835
March 25, 2014

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 10218. For the reasons set forth below, EDR will not disturb the decision of the hearing officer.

FACTS

The grievant was employed by the agency as a Court Service Unit (“CSU”) Director.¹ After conflict arose between the grievant and the Juvenile Court to which he was assigned, the Court apparently barred the grievant from the Courthouse.² The agency conducted an investigation of the Juvenile Court’s complaints and transferred the grievant to the newly-created position of Assistant Certification Manager.³ The grievant timely grieved the transfer.⁴ After the grievance was not resolved in the management resolution steps, the grievant requested qualification of the grievance for hearing by the agency head.⁵ The agency head denied the grievant’s request, and the grievant appealed to EDR.⁶ In Ruling No. 2014-3721, EDR qualified the grievance for hearing. In reaching this determination, EDR explained that the determination of whether the transfer was disciplinary in nature should be made by the hearing officer, not EDR, and that the grievant would bear the burden of proof on that issue.⁷

A hearing was held on January 6, 2014.⁸ In his February 20, 2014 decision, the hearing officer found that the grievant had not met his burden of showing that his reassignment by the agency was disciplinary.⁹ The hearing officer explained that while the Juvenile Court’s actions towards the grievant were disciplinary in nature, the reassignment was merely a reaction to the

¹ Decision of Hearing Officer, Case No. 10218 (“Hearing Decision”), February 20, 2014, at 1.

² *Id.* at 4-5.

³ *Id.* at 1, 3-6.

⁴ *Id.* at 1.

⁵ EDR Ruling No. 2014-3721.

⁶ *Id.*

⁷ *Id.*

⁸ Hearing Decision at 1.

⁹ *Id.* at 8.

actions taken by the Court and was not in itself a disciplinary action.¹⁰ The grievant has now requested administrative review of the hearing officer's decision by 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."¹¹ 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.¹²

Findings of Fact

The grievant asserts that the hearing officer erred in finding that the agency's action against him was not disciplinary in nature. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹³ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹⁴ 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.¹⁵ 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.¹⁶ 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.

Based on a review of the record, there is sufficient evidence to support the hearing officer's finding that the transfer was merely a response to the Juvenile Court's actions and was not a disciplinary action by the agency. Evidence introduced at hearing indicates that the Court complained to the agency about the grievant and asked the agency to hire a new CSU director.¹⁷ This evidence further supports the hearing officer's apparent conclusion that the agency's actions were in response to the court's complaints and refusal to work with the grievant.¹⁸ That reasonable minds could disagree regarding the evidence does not in itself constitute a basis for overturning the hearing officer's decision. The test is not whether a hearing officer could

¹⁰ *Id.*

¹¹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹² *See Grievance Procedure Manual* § 6.4(3).

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

¹⁷ Agency Exhibits 2-4.

¹⁸ *Id.*

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. Accordingly, we decline to disturb the decision on this basis.

Inconsistency with State and Agency Policy

Fairly read, the grievant's request for administrative review also asserts claims that the agency's actions were inconsistent with policy. Specifically, the grievant appears to argue that the agency should have "stood up" to the Court instead of reassigning him in response to the Court's actions. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁹ The grievant has requested such a review. Accordingly, the grievant's policy claims will not be addressed in this review.

Appearance of Judges

The grievant also argues that because the Juvenile Court judges did not appear to testify at hearing as ordered, the hearing officer "erred in not finding that the grievant has established that the Agency, by its actions of reassigning the grievant to a new position, was in fact disciplinary in nature." While EDR certainly understands the grievant's position, there is no basis under the grievance procedure to award relief on this ground. Although a hearing officer has the authority to issue orders for non-parties to appear, there is no subpoena power under the grievance procedure.²⁰ Thus, the judges were under no legal compulsion to appear. Further, while Section V(B) of the *Rules for Conducting Grievance Hearings* gives hearing officers the authority to take adverse inferences where an agency fails to produce witnesses in its employ, the judges are not agency employees. Consequently, drawing adverse inferences against the agency for the judges' non-appearance would not be consistent with the hearing officer's authority. For these reasons, the hearing decision will not be remanded on this basis.

The grievant also argues that the judges' failure to appear infringed his right to due process. Due process is a legal concept appropriately raised with the circuit court, and ultimately resolved by judicial review. As the grounds of the grievant's due process claim falls outside the scope of the grievance procedure, as stated above, it must be addressed through a court appeal of the hearing decision or other judicial process, if at all.

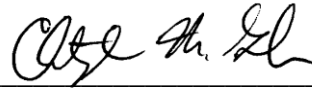
CONCLUSION AND APPEAL RIGHTS

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

¹⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

²⁰ *Rules for Conducting Grievance Hearings* § III(E).

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



Christopher M. Grab
Director
Office of Employment Dispute Resolution

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).