

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10753; Ruling Date: May 17, 2016; Ruling No. 2016-4349; Agency: Department of Conservation and Recreation; Outcome: AHO's decision affirmed.



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

ADMINISTRATIVE REVIEW

In the matter of Department of Conservation and Recreation
Ruling Number 2016-4349
May 17, 2016

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 10753. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant is employed as an accountant by the Department of Conservation and Recreation (“agency”).¹ On April 13, 2015, the grievant was issued a Group II Written Notice for failure to follow policy and/or instructions.² The grievant timely grieved the disciplinary action and a hearing was held on March 28, 2016.³ On April 15, 2016, the hearing officer issued a decision upholding the disciplinary action.⁴ The grievant has now requested administrative review of the hearing officer’s 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”⁵ 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.⁶

Witnesses

The grievant appears to argue that the hearing officer erred in failing to draw an adverse inference against the agency for not producing her desired witnesses. Pursuant to the *Rules for*

¹ See Decision of Hearing Officer, Case No. 10753 (“Hearing Decision”), April 15, 2016, at 2; Agency Exhibit 1 at 1.

² Agency Exhibit 2.

³ See Hearing Decision at 1; Agency Exhibit 1.

⁴ *Id.* at 1, 7.

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

⁶ See *Grievance Procedure Manual* § 6.4(3).

Conducting Grievance Hearings, it is the agency's responsibility to require the attendance of agency employees who are ordered by the hearing officer to attend the hearing as witnesses.⁷ Failure on the agency's part in this regard can lead to the hearing officer taking an adverse inference against the agency.⁸ However, in this case, the grievant, through her advocates, never asked the hearing officer to issue orders that the grievant's witnesses appear. Rather, it appears that the grievant listed the desired witnesses on her witness list without requesting that orders be issued for their appearance. If the grievant desired the opportunity to question her desired witnesses at the hearing, she should have requested that the hearing officer issue witness orders for their appearances.⁹ As she did not do so,¹⁰ we cannot find that the hearing officer's failure to take an adverse inference against the agency improper under the grievance procedure.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review also appears to challenge the hearing officer's findings of fact and determinations 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"¹¹ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹² Further, in cases involving discipline, the hearing officer reviews the evidence *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 a disciplinary action.¹³ 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.¹⁴ 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 grievant argues, in effect, that the hearing officer failed to understand the evidence she presented. EDR's review of the hearing record indicates that there is sufficient record evidence to support the hearing officer's finding that the grievant received instructions to provide desk procedures in an editable format, but that she failed to do so in a timely manner.¹⁵ Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely

⁷ *Rules for Conducting Grievance Hearings* § III(E).

⁸ *Id.* § V(B).

⁹ It should be noted that the hearing officer does not have subpoena power. See Va. Code § 2.2-3005(C); *Rules for Conducting Grievance Hearings* § V(B).

¹⁰ See Grievant's Witness and Exhibit List.

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁴ *Grievance Procedure Manual* § 5.8.

¹⁵ Hearing Decision at 5; see also, e.g., Agency Exhibits 4, 10-11; Grievant's Exhibit 4; Hearing Recording at 41:11-41:38; 1:22:23-1:24:06.

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. 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.

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.¹⁶ 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.¹⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁸



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¹⁶ *Grievance Procedure Manual* § 7.2(d).

¹⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁸ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).