

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10109; Ruling Date: September 13, 2013; Ruling No. 2014-3681; Agency: Department of Rail and Public Transportation; 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 Rail and Public Transportation
Ruling Number 2014-3681
September 13, 2012

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 10109. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed by the Department of Rail and Public Transportation (“agency”). On March 13, 2013, the grievant was issued a Group I Written Notice for failing to submit leave slips for a total of 2.5 hours of sick leave and 24 hours of annual leave.¹ The offense code used by the agency on the Written Notice identified the conduct disciplined as “abuse of state time.”² The grievant timely grieved the disciplinary action and a hearing was held on July 25, 2013.³ On July 26, 2013, the hearing officer issued a decision upholding the disciplinary action.⁴ The grievant has now requested an 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.”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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁶

¹ Decision of Hearing Officer, Case No. 10109 (“Hearing Decision”), July 26, 2013, at 1. The date stated on the Hearing Decision is June 26, 2013, but this appears to be a typographical error.

² Grievant’s Exhibit 2 at 1-2.

³ Hearing Decision at 1.

⁴ *Id.* at 5.

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

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

Inconsistency with State Policy

Fairly read, the grievant's request for administrative review challenges the hearing officer's finding that the grievant's failure to submit leave slips constitutes a basis for a Group I Written Notice under DHRM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.⁷ Accordingly, if he has not already done so, the grievant may, within **15 calendar days** of the date of this ruling, raise this issues in a request for administrative review to the Director of the Department of Human Resource Management, 101 North 14th St., 12th Floor, Richmond, VA 23219.

Failure to Address Behavior Charged

The grievant also asserts that the hearing officer failed to comply with Section 5.9 of the *Grievance Procedure Manual* by "not address[ing] the behavior described in the Written Notice, nor "Abuse of State Time'..." Although the hearing officer could have more thoroughly articulated his basis for upholding the disciplinary action, the hearing decision clearly found that the grievant engaged in the conduct for which he was disciplined (failure to submit leave slips) and that this conduct was sufficient to sustain a Group I Written Notice under DHRM Policy 1.60. That policy provides that Group I offenses are those "that have a relatively minor impact on agency operations but still require management intervention" and gives several non-exclusive examples including "abuse of state time" and "unsatisfactory work performance."⁸ As it was unnecessary for the agency to prove that the grievant abused state time to establish the existence of misconduct (failing to submit leave slips) warranting a Group I, the hearing officer's determinations that the grievant engaged in the charged conduct and that this conduct warranted a Group I were sufficient in this case.

Findings of Fact

Broadly construed, the grievant's request for administrative review may also be read to challenge the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁹ and to determine the grievance based "on the material issues and grounds in the record for those findings."¹⁰ 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.¹¹ 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

⁷ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁸ DHRM Policy 1.60, *Standards of Conduct*, at Attachment A.

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

warranted and appropriate under all the facts and circumstances.¹² 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, including the grievant's own admission,¹³ to support the hearing officer's finding that the grievant failed to submit leave slips to the agency.¹⁴ 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

For the reasons stated above, EDR will not disturb the hearing decision in this case. 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.¹⁵ 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.¹⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁷



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¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Decision at 3.

¹⁴ *Id.* at 4.

¹⁵ *Grievance Procedure Manual* § 7.2(d).

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

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