

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10170; Ruling
Date: November 8, 2013; Ruling No. 2014-3734; Agency: Department of Medical
Assistance Services; 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 Medical Assistance Services
Ruling Number 2014-3734
November 8, 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 10170. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant is employed by the agency as a policy and planning specialist.¹ On June 28, 2013, the agency issued the grievant a Group II Written Notice for sleeping on the job.² The grievant timely initiated a grievance, and a hearing was held on September 30, 2013.³ On October 1, 2013, the hearing officer issued a decision upholding the disciplinary action. The grievant has requested an administrative review of the hearing officer’s decision 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.”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 action be correctly taken.⁵

Hearing Exhibits

The grievant asserts that the agency failed to provide him with a copy of its hearing exhibits prior to hearing. The grievant did not object to this alleged failure at hearing, however,

¹ Decision of Hearing Officer, Case No. 10170 (“Hearing Decision”), October 1, 2013, at 1.

² *Id.*

³ *Id.*

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

⁵ See *Grievance Procedure Manual* § 6.4(3).

and may not therefore raise this issue on administrative review.⁶ Further, the agency has provided evidence that the documents were sent to the grievant prior to the hearing, but that they were subsequently returned to the agency's advocate as "unclaimed or not accepted."⁷ For these reasons, we will not disturb the hearing officer's decision on this basis.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review also challenges 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 and the facts he chose to include in the decision. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁸ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁹ 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.¹⁰ 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.¹¹ 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 evidence, there is sufficient evidence to support the hearing officer's finding that the agency director observed the grievant sleeping on the job on June 19, 2013.¹² While the hearing officer acknowledged that the grievant denied he was sleeping, the hearing officer found the agency director's testimony to be credible and supported by testimony from the grievant's supervisor that the grievant had been observed sleeping on other occasions.¹³ 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.

⁶ See Hearing Recording at 0:44-1:13. At the beginning of the hearing, the hearing officer indicated that the agency exhibits were being accepted without objection by the grievant. *Id.* A January 13, 2013 Written Notice included in the agency's exhibit binder was withdrawn by the agency as an exhibit. See Agency Exhibit 4.

⁷ It also appears that the documents in the agency's exhibit binder were previously provided to the grievant by the agency, signed by the grievant, authored by the grievant, or generally available DHRM policies. See Agency Exhibits 1-6.

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

¹² Hearing Decision at 3.

¹³ *Id.*; see also, e.g., Hearing Recording at 7:16-8:43, 20:00-21:30.

Grievance Record

The grievant also challenges the following statement by the hearing officer: “During the grievance steps, the Grievant focused on inappropriate monitoring of his conduct, a hostile environment, and discrimination—not on denial of sleeping. The Grievant expressed at the hearing that he was being unfairly treated.”¹⁴ The grievant asserts that he has “repeatedly said [he] was not sleeping.”

To the extent the hearing officer’s statement may be read as a finding that the grievant did not deny sleeping during the grievance steps, we agree that this conclusion is not supported by the grievance record. In his Grievance Form A, the grievant identified the issue grieved as “[t]hat I was sleeping at work on the 19th day of June 2013, is not true.”¹⁵ The grievant also questioned, in a July 24, 2013 letter regarding the second-step meeting, why his accuser could say he was sleeping given his sitting position.¹⁶ In that same letter, the grievant stated that he had been told he did not have any integrity compared to his accuser, and argued that going by his accuser’s account was discriminatory and unfair.¹⁷ From a review of these statements by the grievant, it appears clear that the grievant did in fact deny sleeping during the grievance process.

While any conclusion by the hearing officer that the grievant had not disputed his guilt during the grievance process is factually erroneous, any error is harmless. In finding that the agency had met its burden with respect to the disciplinary action against the grievant, the hearing officer relied upon the testimony of the agency director and the grievant’s supervisor.¹⁸ However, the hearing officer noted in his decision that the grievant denied the allegation by the agency director and asserted that he was actually listening to a phone message at the time of the agency director’s observation.¹⁹ Thus, it appears the hearing officer gave full consideration to the grievant’s denial at hearing of the alleged misconduct and did not rely upon the grievant’s actions during the grievance process in upholding the disciplinary action. Accordingly, there is no basis to disturb the hearing decision on this ground.

Director’s Testimony

Although the grievant’s request for administrative review is unclear, it appears the grievant may also be challenging the hearing officer’s decision on the basis that the agency did not make the content of the agency director’s testimony available to him prior to hearing. The grievant had an opportunity to request documentation during the course of the management steps and prior to the hearing.²⁰ Further, there is no requirement in the grievance procedure that a

¹⁴ Hearing Decision at 3.

¹⁵ Agency Exhibit 2 at 1.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 9. Agency Exhibit 2 also contains a pre-disciplinary e-mail exchange between the grievant and a human resources manager, in which he states that he had been wrongly accused and had not been sleeping. *See* Agency Exhibit 2 at 11.

¹⁸ Hearing Decision at 3.

¹⁹ *Id.*

²⁰ *See Grievance Procedure Manual* § 8.2.

party be informed of the content of an opposing witness's testimony prior to hearing. Accordingly, the hearing decision will not be disturbed 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.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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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).