

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10552; Ruling
Date: July 23, 2015; Ruling No. 2015-4165; Agency: Department of Game and
Inland Fisheries; Outcome: Hearing Decision Not in Compliance – Remanded to AHO.



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

ADMINISTRATIVE REVIEW

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2015-4165
July 23, 2015

The Department of Game and Inland Fisheries (the “agency”) 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 10552. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

On or about December 29, 2014, the grievant was issued a Group III Written Notice with termination for unauthorized use of state property or records, theft, damaging state property or records, and interference with state operations and terminated from employment with the agency.¹ The grievant timely grieved the disciplinary action and a hearing was held on April 20, 2015.² In a decision dated May 20, 2015, the hearing officer determined that the agency had not presented sufficient evidence to show that the grievant engaged in the charged misconduct, rescinded the disciplinary action, ordered the agency to reinstate the grievant, and directed that he be provided with back pay for the period of his removal.³ The agency now appeals the hearing decision to 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁵

¹ Agency Exhibit 8 at 3-4.

² See Decision of Hearing Officer, Case No. 10552 (“Hearing Decision”), May 20, 2015, at 1.

³ *Id.* at 3-4.

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

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

Inconsistency with State and Agency Policy

The agency claims the hearing officer's application of state and agency policy, specifically certain provisions of 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.⁶ The agency has requested such a review. Accordingly, its policy claims will not be addressed in this ruling.

Issues with the Hearing Recording

The grievance statutes and procedure state that the hearing officer must "oversee a verbatim recording of the evidence"⁷ to ensure there is an accurate record of the proceedings "should there be an administrative or judicial review of the hearing decision."⁸ Upon conducting an initial review of the hearing record in this case, EDR discovered that the recording of the hearing is incomplete. As far as EDR can determine, the entirety of the grievant's testimony at the hearing was not recorded. It is possible that other portions of the hearing may have also not been captured on the recording. EDR cannot conduct an administrative review of the case if the hearing record is incomplete.⁹ In addition, if this case is ultimately appealed to circuit court, it is likely that the court would remand the case to the hearing officer for a rehearing on the basis that it could not properly review the hearing decision without a verbatim recording of the entire hearing.¹⁰

In an attempt to resolve this issue, EDR contacted the parties, advised them of the issue with the recording, and requested that they discuss the possibility of coming to an agreement about how to proceed. Specifically, EDR directed the parties to consider whether they could agree to (1) re-open the hearing record for the purpose of reconstructing those portions of the hearing that were not recorded, (2) stipulate to the content of the grievant's testimony and any other facts presented to the hearing officer that are not on the recording, (3) waive any objection to the error with the recording of the hearing such that it would not serve as a basis for remand in a later appeal, or (4) propose some other solution. Unfortunately, the parties appear to have not reached any agreement.¹¹ On the final day set by EDR for the parties to come to an agreement, the grievant, by his attorney, provided EDR with an affidavit setting forth the information to which he purportedly testified at the hearing. The agency made no response, other than to dispute several of the facts contained in the grievant's affidavit and reiterate its position that the hearing decision should be reversed.

⁶ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁷ Va. Code § 2.2-3005(C)(5).

⁸ *Rules for Conducting Grievance Hearings* § IV(B); *Grievance Procedure Manual* §§ 5.6, 5.7.

⁹ *See Rules for Conducting Grievance Hearings* § VII(A); *See Grievance Procedure Manual* § 7.2.

¹⁰ On at least one occasion, a circuit court has remanded a case to the hearing officer for a full rehearing because part of the hearing record was not available. *See Va. Dep't of Corr. v. Hodges*, 2011 Va. App. LEXIS 148 (May 3, 2011) (discussing the procedural background of the case and holding that the circuit court's decision to remand the case for rehearing was an interlocutory order not subject to appeal).

¹¹ It is unclear whether the parties even attempted to discuss the issue of the hearing recording.

EDR cannot accept the grievant's affidavit as conclusive proof of his testimony at the hearing absent an agreement between the parties that it is accurate. Accordingly, the case must be remanded to the hearing officer and the hearing officer directed to re-open the hearing record in order to correct the error in the recording and create a verbatim record of the evidence presented by the parties.¹² The hearing officer is directed to accept and consider any additional evidence that the parties may wish to present, testimonial or otherwise, regardless of whether it was available or offered at the original hearing. In particular, she must accept evidence to reconstruct those portions of the hearing that were not captured on the recording. The hearing officer should then issue a remand decision that addresses all of the evidence in the record as well as EDR's directives in this ruling.

Furthermore, though this case has not yet reached the stage at which EDR may conduct a complete review of the hearing officer's findings of fact and conclusions, there is at least one area on which the hearing officer must provide additional discussion in her remand decision. At the hearing, the agency provided photographic evidence of the grievant "opening the truck door and accessing the relay panel."¹³ Though there is no recording of it, the grievant apparently testified that he entered the vehicle to search for keys, "found the relay panel cover not properly shut and proceeded to remove and realign it to close it."¹⁴ Based on EDR's review of the available evidence, the hearing officer's decision requires additional explanation of her consideration of the evidence submitted by both parties on this issue. For example, the photographs could be interpreted to depict the grievant opening and closing the relay panel, but not indicating a search for keys or any other conduct in the vehicle while the truck door was open.¹⁵ There appear to be conflicting facts and arguments that require further consideration and explanation in the remand decision. Ultimately, the facts are unclear at this stage because the record is incomplete. In her remand decision, the hearing officer is directed to more fully consider this evidence, as well as any additional evidence presented, and provide more complete discussion of her factual findings as they relate to the grievant's actions when he accessed the truck.

Procedural Guidance

Having reviewed the available evidence in the record, there are several procedural issues with the hearing decision that must be corrected in the hearing officer's remand decision as well. Generally, in disciplinary cases when "the hearing officer rescinds or reduces a Written Notice and the employee's total accumulated active Written Notices are insufficient to sustain a termination, the employee must be reinstated."¹⁶ To be final and binding, however, the hearing officer's decision must be "consistent with law and policy."¹⁷ The facts of this case are, in short, unique.

¹² This ruling is consistent with EDR's past practice in cases when a verbatim recording of the hearing did not exist. See EDR Ruling No. 2012-3113; EDR Ruling No. 2011-3022.

¹³ Hearing Decision at 2; Agency Exhibit 3.

¹⁴ Hearing Decision at 3.

¹⁵ See Agency Exhibit 3.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B)(4).

¹⁷ Va. Code § 2.2-3005.1(C).

After he was terminated, the grievant was charged and convicted of a crime arising out of the conduct for which he was disciplined.¹⁸ As a part of his sentence, the court issued an order barring the grievant from agency property for a presumed period of one year from the date of his conviction.¹⁹ As a result, EDR finds that, as a matter of the grievance procedure, the grievant cannot be reinstated to his former position at this time because he is “unable to meet the working conditions of his [] employment”²⁰ In other words, the grievant cannot return to work while the court order stating that he is prohibited from entering property owned by the agency is in effect. The hearing officer’s order that the grievant must receive back pay from the date of his termination is inconsistent with the grievance procedure for the same reason. While it may be disputed whether the hearing officer can award back pay for the time between the issuance of the discipline and the date of the criminal conviction if she concludes the disciplinary action must be rescinded, at a minimum, the grievant would not be eligible for back pay while he is barred from agency property, as he is not able to satisfy the conditions of his employment during that time.

If, on remand, the hearing officer determines that the agency has not presented evidence to justify the issuance of the discipline, she does not have the authority to order the agency to immediately reinstate the grievant to his former position or award full back pay based on and to be consistent with the court’s order in the criminal proceeding. The hearing officer must take this guidance into account in her remand decision in order to reach a decision that is consistent with the grievance procedure.

CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for a reopening of the hearing record and for further consideration of the evidence in the record as further discussed above. After receiving additional evidence from the parties, the hearing officer is directed to issue a remand decision taking that evidence into account and more fully considering whether the grievant’s explanations of events is consistent with the other evidence in the record. At a minimum, the hearing officer must modify her award of relief consistent with the procedural guidance set forth in this ruling.

The hearing officer should issue her remand decision before DHRM addresses the agency’s request for administrative review based on questions of compliance with state and/or agency policy. Following the remand decision, DHRM will have the opportunity to address all issues of policy that have been timely raised or that may be raised after the remand decision is issued. In addition, it appears that the agency’s challenge to the hearing officer’s decision in its administrative review request to EDR relates to her findings of fact and whether they are supported by the evidence in the record. As this ruling remands the hearing decision for the hearing officer to reconstruct the hearing record, provide additional discussion regarding the persuasiveness and credibility of certain pieces of evidence, and address any other information

¹⁸ See Agency Exhibit 9.

¹⁹ *Id.* at 2.

²⁰ DHRM Policy 1.60, *Standards of Conduct*, § H(1). Indeed, had the grievant been simply suspended without pay when he was charged criminally, see DHRM Policy 1.60, *Standards of Conduct*, § C(2), instead of terminated prior to the criminal charges, Section H(1) of the *Standards of Conduct* might have allowed the agency to simply remove the grievant from employment following the court’s order without the need of a formal Written Notice.

presented by the parties, EDR will wait to review challenges to the hearing officer's conclusions on these and related matters until the remand decision is issued, to the extent such claims are raised in a future request for administrative review of the remand decision.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).²¹ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.²² 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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵



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²¹ See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²² See *Grievance Procedure Manual* § 7.2.

²³ *Id.* § 7.2(d).

²⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).