

Issue: Administrative Review of Hearing Officer's Remand Decision issued on October 7, 2015; Ruling Date: November 18, 2015; Ruling No. 2016-4254; Agency: Department of Game and Inland Fisheries; Outcome: AHO's decision affirmed.



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 2016-4254
November 18, 2015

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s reconsideration decision in Case Number 10552. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The hearing officer’s findings of fact in her May 20, 2015 decision in Case Number 10552, as recounted in EDR’s first administrative review in this case, EDR Ruling Number 2015-4165, are hereby incorporated by reference.¹ In brief, 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 on or about December 29, 2014.² In the original hearing decision, 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that the agency had not presented sufficient evidence to show that the grievant engaged in the charged misconduct, rescinded the disciplinary action, ordered the agency to reinstate the grievant, and directed that he be provided with back pay for the period of his removal.³

On administrative review, EDR discovered that the recording of the hearing was incomplete and remanded the case to the hearing officer for a reopening of the hearing record and further consideration of the evidence in the record from the original hearing.⁴ A rehearing was held on September 11, 2015, at which the parties submitted affidavits recounting the facts presented at the original hearing that were not captured on the recording and offered new evidence for the hearing officer to consider in making her decision.⁵ The hearing officer issued a reconsideration decision on October 6, 2015 that contained the following discussion of the evidence in the record:⁶

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

² Agency Exhibit 8 at 3-4 (Original Hearing).

³ Hearing Decision at 3-4.

⁴ EDR Ruling No. 2015-4165.

⁵ See Reconsideration of Decision of Hearing Officer, Case No. 10552 (“Reconsideration Decision”), October 6, 2015, at 2.

⁶ *Id.* at 2-3 (citations omitted).

In reviewing the evidence along with new evidence it is again difficult to determine, based on the weight of the evidence, which party should prevail in the issue of whether or not Grievant had committed the act for which he was terminated. While the Hearing Officer cannot simply supplement her opinion as to the severity of Grievant's discipline, the Hearing Officer can certainly find the underlying reason for the dis[ci]pline to not support the disciplinary action.

Again, this matter is difficult to determine based on the weight of the evidence as both sides simply produced opposing evidence.

The facts favorable to the Agency's case are:

1. Grievant had lied in the past when confronted with evidence of wrong doing.
2. Grievant initially denied his actions to the State Police in regards to opening a circuit box.
3. In checking the vehicles for keys all the vehicles except the vehicle in question were checked on a Saturday.
4. Grievant checked the vehicle in question as the only vehicle checked on the next day, Sunday.
5. In the video Grievant was never shown "looking for the keys".
6. Grievant had in the past purchased a State vehicle for more than \$500.00.
7. Grievant entered into an Alford Plea in regards to tampering with this vehicle and was found guilty of such by the Smyth County General District Court.

Facts in favor of Grievant are:

1. Repairs were made to the fuel system of the vehicle which could have attributed to its inability to start before being taken to the garage.
2. The circuit panel could have been in the truck when it left for repair.
3. There is no evidence that points to a specific time that Grievant may have had the opportunity to remove the circuit panel from the truck before its repair or when Grievant would have had exclusive access to the truck.
4. Removing a control panel from a vehicle for the purpose of disabling the vehicle is only one of several reasons why a panel might be removed. A person could have taken it for resale, could have taken it for their own use or could have removed the panel for the purpose of "framing" Grievant
5. Grievant categorically states under oath that he has not tampered with the vehicle.

Based on the evidence above and after due consideration I find that Grievant was aware that he could purchase state property such as the truck for over \$500.00. Grievant had purchased a state vehicle for more than \$500.00 in the past and, while he may not have known it was a state vehicle at the time, certainly

ascertained who the owner of the vehicle was after its purchase. Yet, Grievant lead the Hearing Officer to believe he could never have purchased the vehicle in question as it would have sold for a value much greater than \$500.00. Grievant's failure to remember he had removed the circuit panel from the vehicle in question until he saw the video of himself removing the panel raises questions of his veracity. Further, Grievant's stated reason for being in the truck was to ascertain if the keys had been left in the truck. Yet, the video shows no indication he was looking for keys but rather his attention was solely orientated to the breaker panel.

In the reconsideration decision, the hearing officer determined that the agency had presented sufficient evidence to show that the grievant had tampered with state property and upheld the Group III Written Notice with termination.⁷ The grievant now appeals the reconsideration 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.”⁸ 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.⁹

In his request for administrative review, the grievant essentially argues that the hearing officer's findings of fact, based on the weight and credibility that she accorded to evidence in the record, are not supported by the evidence. Specifically, the grievant claims the hearing officer did not make findings of fact in the reconsideration decision, but merely recounted the evidence in the record that was favorable to each party in reaching her decision. The argument is not persuasive. The grievance procedure provides that a hearing officer's decisions “shall . . . contain findings of fact as to the material issues in the case”¹⁰ and “the grounds in the record for those findings.”¹¹ The reconsideration decision clearly contains a recitation of the evidence that was presented by the parties and citations to the evidence supporting her conclusions.¹²

The grievant challenges certain of the hearing officer's factual determinations and the weight provided to these findings by the hearing officer. 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 the 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

⁷ *Id.* at 3.

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² See Reconsideration Decision at 2-3.

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

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.

In his request for administrative review, the grievant challenges the hearing officer's conclusion that "Grievant initially denied his actions to the State Police in regards to opening a circuit box"¹⁷ and argues that "the circuit box cover was open when he opened the door" of the truck. Regardless of whether the grievant's action is characterized as opening, closing, or adjusting the relay panel, there is evidence in the record to show that the grievant initially denied entering the truck when questioned by law enforcement.¹⁸ Furthermore, it appears the hearing officer cited this piece of evidence because it tended to support the conclusion that the grievant's testimony was not credible, not that the grievant opened, rather than closed or adjusted, the relay panel. The hearing officer stated as much in the reconsideration decision, noting that "Grievant's failure to remember he had removed the circuit panel from the vehicle in question until he saw the video of himself removing the panel raises questions of his veracity."¹⁹ The hearing officer's finding that the grievant denied entering the truck when he was initially interviewed by state police is supported by the evidence in the record and was relevant to her assessment of the grievant's credibility.

Similarly, the grievant disputes whether some of facts cited by the hearing officer are truly "favorable to the Agency's case."²⁰ For example, the grievant claims the hearing officer's conclusion that "all the vehicles except the vehicle in question were checked on a Saturday" and that "Grievant checked the vehicle in question . . . on the next day, Sunday,"²¹ do not support the agency's position that the grievant engaged in the misconduct charged on the Written Notice. The grievant does not, however, argue that these statements are incorrect and, indeed, EDR's review show that they are supported by the evidence in the record.²² It appears that grievant merely believes the hearing officer should have determined that this evidence supported the grievant's "version of the facts." Regardless of whether the evidence is construed to support the agency's case or the grievant's, however, there is support in the record for the hearing officer's factual findings relating to the timeline of events. That the grievant disagrees with the hearing officer's conclusion that these facts were favorable to the agency is not a basis for remand in this case.

The grievant further claims that the hearing officer erred in stating that there was "video" evidence of the grievant entering the truck because the evidence in the record consists of a series of still photographs. The grievant is correct that the agency presented photographs that showed

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

¹⁶ *Grievance Procedure Manual* § 5.8.

¹⁷ Reconsideration Decision at 2.

¹⁸ Original Hearing Recording at 17:41-18:54 (testimony of Manager H).

¹⁹ Reconsideration Decision at 3.

²⁰ *Id.* at 2.

²¹ *Id.*

²² Rehearing Recording at 3:27-3:57, 8:17-8:44 (testimony of grievant).

him entering the truck, not a video recording.²³ However, any error in the hearing decision on this issue had no material impact on the outcome of the case such that remanding the hearing decision is warranted in this case. The photographs presented by the agency were taken by a motion-sensitive camera and consist of ten photographs taken at five-second intervals over a period of approximately one minute, from the time the grievant entered the vehicle until he closed the door.²⁴ It appears the hearing officer described the photographs as a “video” in the hearing decision as a shorthand method of referring to the evidence that showed the grievant’s actions when he entered the truck.²⁵ There is nothing to indicate that the hearing officer’s decision was based on anything other than the actual evidence in the record or that the hearing officer considered any evidence other than that which was presented by the parties.

Finally, the grievant argues that the evidence in the record shows he “could not have purchased” the truck “because he was an employee” of the agency and would have been unable to bid more than \$500 for the truck on the website that could have been used for a potential sale. In support of this argument, the grievant claims that the vehicle he purchased in the past was sold at a public auction and was not owned by the agency. He further asserts that another witness, not the grievant, testified about the limitations on the grievant’s ability to purchase the truck. There may be some merit to the grievant’s assertion that the evidence in the record relating to his previous purchase of state-owned property and the potential restriction on his ability to bid on the truck at an auction if it had been sold as surplus property is inconclusive. However, whether the grievant could have bid more than \$500 on the truck if it were sold is not, by itself, dispositive of the question of whether the grievant engaged in the conduct charged on the Written Notice, and for that reason EDR concludes that any error in the hearing officer’s decision on this point would not impact the outcome of this case. Having reviewed the hearing record, moreover, EDR finds that the hearing officer’s findings with regard to the grievant’s knowledge of and potential ability to purchase the truck are not without support from the evidence in the record.²⁶ Accordingly, EDR has no basis to dispute the hearing officer’s factual determinations in this regard or the weight and application of these determinations to her ultimate conclusions in this case.

While the grievant may disagree with the hearing officer’s decision, determinations of credibility as to disputed facts, such as those cited in the grievant’s request for administrative review, are precisely the sort of findings reserved solely 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 in this case 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.

²³ See Agency Exhibit 3 (Original Hearing).

²⁴ Original Hearing Recording at 11:26-15:08 (testimony of Manager H); Agency Exhibit 3 (Original Hearing).

²⁵ See Reconsideration Decision at 2-3.

²⁶ See Original Hearing Recording at 38:22-39:32 (testimony of Manager H); Rehearing Recording at 7:24-7:54, 12:54-13:33 (testimony of grievant); Agency Exhibit 4 (Rehearing).

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, we decline to disturb the hearing officer's decision. 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.²⁷ 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.²⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

²⁷ *Grievance Procedure Manual* § 7.2(d).

²⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).