Issue: Compliance-Hearing Decision; Ruling Date: February 21, 2002; Ruling #2001-146; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing officer ordered to modify decision.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of The Department of Health
Ruling Number 2001-219
February 21, 2002

The grievant has requested a compliance ruling in the October 18, 2000 grievance that she initiated with The Department of Health. The grievant claims that the hearing officer exceeded the scope of his authority and abused his discretion by: (1) being biased in favor of the Department of Health, (2) handing the tapes of the recorded hearing over to the agency representative for possible tampering, (3) failing to provide a transcript of the hearing after repeated requests, (4) mailing the hearing decision by first class mail, and (5) using a number figure in his decision that was not presented by either party at the hearing.

FACTS

The grievant is employed as a Dental Assistant, at one of the agency's facilities. Grievant was denied a position upgrade to a Pay Grade 6 position after failing to meet criteria established by the Department of Health. Grievant initiated a grievance on October 18, 2000, claiming that the review process for re-grade was unfair and she was entitled to the upgrade. A hearing was held on August 21 and 23, 2001, and a decision was issued on November 14, 2001. The evidence shows that during the hearing a possible settlement was discussed off the record and the agency made an offer that was tentatively accepted by the grievant after the hearing was concluded. The hearing officer spoke off the record with each party separately and together concerning the possible settlement. The offer by the agency was revoked a short time after the hearing was concluded and the hearing officer then issued a hearing decision. The grievant timely requested that this Department administratively review the hearing officer's November 14, 2001 decision. Grievant concurrently sought reconsideration from the hearing officer and from the Department of Human Resources Management (DHRM). The hearing officer denied the reconsideration request in a November 28, 2001 response. We now respond to the grievant's request for administrative review.

DISCUSSION

By statute, this Department 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."[1] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[2]

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[3] Accordingly, the technical rules of evidence do not apply.[4] By statute, hearing officers have the duty to "[r]eceive probative evidence" and to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs."[5] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Alleged Bias

The Virginia Court of Appeals has stated that as a matter of constitutional due process, recusal by a trial court judge is mandated only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[6] While not dispostive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive. As in the grievance procedure, the threshold used by the Court for disqualification on the basis of bias is quite high.

In this case, Grievant claims that the hearing officer was biased in favor of the Department of Health. Grievant specifically cites to the hearing officer actively participating in settlement negotiations held intermittently throughout the hearing in which he allegedly stopped recording and spoke with each party separately and together as a group concerning a possible settlement. Although, the hearing officer in this case did help facilitate ongoing negotiations between the parties by speaking individually with each party and together as a group, there is no evidence that he was partial toward either party.[7]

Furthermore regarding the allegation of bias, grievant also points to the hearing officer's alleged statement "You can go all night if you want, but I have already made my

[1] Va. Code § 2.2-1001(2), (3), and (5).
[2] *Grievance Procedure Manual* § 6.4 (3), p. 18.
[3] *Rules for Conducting Grievance Hearings*, IV (D), p. 7.
[4] *Id.*
[5] Va. Code § 2.2-3005 (C)(5).
[6] Welsh v. Commonwealth of Va., 14 Va. App. 300, 315 (1992), (brackets in original).
[7] Hearing officers should be mindful that confidence in the impartiality of the hearing process is a vital element of the grievance procedure. A hearing officer should make every effort to avoid even the appearance of bias.

decision." There is evidence that the hearing officer did make this statement when the agency's legal advocate was re-examining a witness. The grievant claims that this shows that the hearing officer had made his decision before the conclusion of the case. However, no evidence has been shown that the hearing officer predetermined the case. While making such a statement may give the appearance of predetermination, there is evidence that the hearing officer meant that he had made his decision regarding what he determined was the testimony of the particular witness at that time and did not need further testimony. Accordingly, because there is no evidence that (1) the hearing officer has a direct, personal, substantial, or pecuniary interest in the outcome of this case, or (2) he rendered an impartial decision, this Department cannot conclude that the hearing officer was biased.

Alleged Tampering

Also, the grievant states that the hearing officer handed the tapes of the recorded hearing over to the agency representative after the hearing was concluded, and that possible tampering could have occurred. However, there is no evidence to support this claim, and the hearing officer has stated that the tapes which were handed to the agency representative were the extra blank tapes provided by the agency as required by the *Rules for Conducting Grievance Hearings*.[8] The hearing officer maintains that he still has possession of the recorded tapes in his office, and they have not been given to either party. In this regard, there is no evidence to support the grievant's claim and it was well within the hearing officer's authority to return the unused tapes to the agency.

Alleged Failure to Provide Transcript of Hearing to Grievant

The grievant also claims that the hearing officer has failed to provide her with a transcript of the hearing after repeated requests. The hearing officer does not deny this claim and has stated that he would provide the transcript prepared by his staff at the cost to grievant. The *Grievance Procedure Manual* provides that a grievant may request a copy of a transcript of his or her hearing. However, the cost of the transcript is to be assumed by the grievant.[9] In this case, the grievant is entitled to a transcript and it should be provided to the grievant at *her* expense.[10]

Mailing of Hearing Decision by First Class Mail

The grievant claims that the hearing decision was mailed first class, instead of by certified mail as mandated by the grievance procedure. The hearing officer has affirmed

[8] *Rules for Conducting Grievance Hearings*, IV (B), p. 6, which states that the agency will provide the recording equipment [hearing tapes].
[9] *Grievance Procedure Manual*, § 7.2 (b), p. 19; *Rules for Conducting Grievance Hearings*, IV (B) pp. 6-7.
[10] Note that if the agency has ordered or elects to provide a transcript, the grievant must be allowed, upon request, reasonable access to the transcript. *Grievance Procedure Manual*, § 7.2 (b), p. 19.

that he mailed the hearing decision to the grievant and the agency by first class mail. The grievance procedure provides that the hearing officer is to send his decision to each party by certified mail, return receipt requested.[11] Although, the hearing officer's action did not conform to the grievance procedure, it did not prejudice the grievant's rights in any way and the grievant was able to timely request an administrative review of the hearing decision.

Alleged Number Error

The grievant claims that the hearing officer used a number in his decision that was not presented by either party at the hearing. Specifically, the grievant claims that the figure of 1,649.04 annual hours worked was not introduced into evidence and, therefore, must have been created post-hearing. However, Exhibit 12, which was introduced into evidence and used by the hearing officer, reflects the 1,649.04 number, albeit not expressly. However, this figure is easily derived by taking the total of all minutes worked, as reported by the doctor for whom the grievant works (98,942.1), and dividing that number by 60 (minutes in an hour). The resulting figure is 1,649.035. Although the grievant disagrees with the number used by the hearing officer, grievant has not shown that the hearing officer made an error of fact or that his determination of this issue was not based on record evidence.[12]

CONCLUSION

For the reasons discussed above, this Department finds that the hearing officer neither abused his discretion in his conduct of the hearing nor exceeded his authority in deciding this case.

APPEAL RIGHTS

Pursuant to Section 7.2 (d) of the *Grievance Procedure Manual*, and for the reasons discussed on this ruling, the November 14, 2001 hearing decision in this case will become a "final hearing decision" when all timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.[13] The November 14, 2001 hearing decision may be appealed to the circuit court

[11] *Grievance Procedure Manual*, § 5.9, p. 15.
[12] It should be noted, as the hearing officer correctly points out in his decision, that the 1,649.04 figure tends to "afford the Grievant the benefit of the doubt" by *increasing* the percentages of time that she purportedly worked in the various categories under study. See *Hearing Decision*, p. 13. Had the 2080 figure been used, her percentages would have been lower, placing the grievant even further from the required 25% needed for the re-grade.
[13] *See Grievance Procedure Manual*, §§ 7.2 (d) and 7.3 (a), p. 20.

in the jurisdiction in which the grievance arose within 30 calendar days from the date at which the original decision becomes[14] a final hearing decision.

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Neil A. G. McPhie, Esquire
Director

[14] If the Director of DHRM has issued an opinion upholding the hearing officer's decision, then the original hearing decision becomes a final hearing decision as of the date of this Department's decision. Assuming that the review request to DHRM was timely and DHRM has not yet issued its decision, the original decision will become a final hearing decision when DHRM issues its decision and, if ordered by DHRM, the hearing officer issues a revised decision.