

Issue: Compliance-Hearing decision; Ruling Date: December 13, 2001; Ruling #2001-217; Agency: Department of Conservation and Recreation; Outcome: Hearing officer in compliance.

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COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2001-217

December 13, 2001

The grievant has requested a compliance ruling regarding the November 2, 2001 hearing decision from consolidated cases #5287 and #5288. The grievant claims that the hearing officer exceeded the scope of his authority and abused his discretion by: (1)

On November 20, 2001, the hearing officer issued a reconsideration decision denying the grievant's request for review on the grounds that it was untimely. On December 6, 2001, DHRM issued a ruling affirming the hearing decision.

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 in all matters related to procedural compliance with the grievance procedure.”² 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.³

Timeliness

The *Grievance Procedure Manual* §7.2 (a) provides that “all requests for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision.”⁴ In this case, the grievant hand-delivered his requests for administrative review to this Department on November 14, 2001, two days beyond the 10 calendar days that followed the issuance of the original decision. Moreover, the grievant has presented no evidence of a “just cause” for the delay.⁵ Accordingly, the grievant's request for administrative review by this Department is untimely and this Department will not disturb the original hearing decision.

In addition, based on the lack of timeliness, the hearing officer did not err by refusing to consider the grievant's request for reconsideration. While this Department cannot disturb the hearing decision because of the belatedness of the request for review, a brief discussion of several of the points raised in the ruling request may prove instructive.

Inconsistency with Policy

The grievant objects to the decision on the basis that it is inconsistent with state policy. The Department of Human Resources Management (DHRM), not this Department, has the sole authority to interpret all policies affecting state employees and to ensure that

² Va. Code § 2.2-1001(2), (3), and (5).

³ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁴ Emphasis in original.

⁵ “Just cause” is defined as a “reason sufficiently compelling to excuse not taking a required action in the grievance process.” *Grievance Procedure Manual* § 9, page 24.

hearing decisions are consistent with state policy.⁶ Thus, this Department could not have reviewed the decision on the basis of conformance with policy even if it had been timely.

The Timeliness of the Hearing Decision

The grievant asserts that the hearing decision was issued in an untimely manner because it was issued more than thirty days beyond the date of appointment of the hearing officer. The grievant is correct that a hearing must be held and a decision issued within thirty calendar days of the appointment of the hearing officer. However, this time may be extended upon a showing of just cause. More importantly, the fact that the hearing decision was issued more than 30 days from the date of the appointment has no effect on the grievant's rights under the grievance procedure. Thus, the delay in receiving the decision cannot serve as grounds for reversal or modification of the hearing decision.

Inadequate Time to Prepare for Hearing

With respect to grievant's claim that he did not have time to prepare his attorney for the hearing between the September 6, 2001 notification of the hearing officer's appointment and the October 4, 2001 hearing date, a party *may choose* to be represented by an attorney at the grievance hearing, but is not required to under the grievance procedure.⁷ Furthermore, although one month may be viewed by some as a relatively short period of time to prepare for a hearing, the grievance process is intended to provide an expeditious means to address workplace disputes. In the attempt to balance expediency and the opportunity to select representation of one's choosing, the grievance process affords *all grievants* approximately one month to prepare for hearing. Thus, the grievant did not have any less time to prepare for hearing than does the average grievant.

False Testimony and Failure to Consider Documentary Evidence

Finally, the grievant claims that the hearing officer erred by accepting false testimony and by ignoring a correspondence issued by the Department of Engineering and Buildings (DEB). These objections essentially contest the weight and credibility that the hearing officer accorded to several exhibits and the testimony of the various witnesses at the hearing, the resulting inferences that he drew, and the characterizations that he made. Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weight 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. This Department cannot

⁶ Va. Code § 2.2-3006; *Grievance Procedure Manual* § 7.2 (a)(2), page 19.

⁷ *Grievance Procedure Manual* §5.8, page 14.

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conclude that the hearing officer's findings were without some basis in the record and the material issues in the case.⁸

APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual* a hearing officer's decision becomes a final hearing decision once all timely⁹ requests for review have been decided. On December 6, 2001, DHRM issued its response to the grievant's request for an administrative review. Therefore, the hearing decision became a final hearing decision on that date and the grievant now has 30 calendar days from December 6th to appeal the decision to the circuit court in the jurisdiction in which the grievance arose. The basis of any such appeal must be that the final hearing decision is contradictory to law. In noting the further right of appeal to the circuit court, this Department expresses no opinion as to the decision's conformance to law.

Sincerely,

Neil A. G. McPhie, Esquire
Director

Chris Miller
Employment Relations Consultant

⁸ For instance, the grievant claims that he wants the hearing reopened so that the Bureau Chief can be questioned regarding alleged false testimony. Significantly, the Bureau Chief appeared as a witness at the October 4th hearing. The grievant should have used the testimony by the Bureau Chief to impeach the alleged false testimony during the October 4th hearing, not a subsequent or reopened hearing.

⁹ It is not clear that the appeal to DHRM was timely. However, DHRM elected to consider the ruling and issued a response on December 6th. Under the circumstances of this case, therefore, this Department will give the grievant the benefit of the doubt and presume the appeal timely.