Issue: Administrative Review of Hearing Decision/Compliance; Ruling Date: September 19, 2002; Ruling #2002-152; Agency: Department of Transportation; Outcome: Hearing officer in compliance.

*COMMONWEALTH of VIRGINIA*
***Department of Employment Dispute Resolution***

# COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2002-152
September 19, 2002

The grievant has requested a compliance ruling in the March 14, 2002 grievance (case #5457) that he initiated with the Virginia Department of Transportation (VDOT). The grievant claims that the hearing officer's written decision and conduct at hearing did not comply with the grievance procedure. The grievant claims that the hearing officer (1) relied on irrelevant evidence, (2) did not consider mitigating circumstances, (3) did not separate two different written notices, (4) should not have heard both of his grievance hearings, (5) applied policy not in effect, and (6) improperly limited closing remarks.

## FACTS

The grievant was employed as a resident engineer with VDOT. He was issued a Group II Written Notice in February 2002 for retaliation, intimidation, and interfering with an investigation. The grievant challenged the Group II Notice via the grievance process. A hearing officer ultimately upheld the Group II Notice. This grievance is not a subject of this ruling.

The grievant received a second Group II on March 1, 2002 (the subject of this ruling), for creating a hostile work environment and for failing to comply with state policy. As a result of these Written Notices, VDOT transferred the grievant and reduced his pay by 10%. The grievant contested the disciplinary action through the grievance procedure, and the hearing officer's written decision upheld the March 2002 Group II Written Notice. The grievant requested reconsideration from the hearing officer, and administrative review by this Department and the Department of Human Resource Management (DHRM). The hearing officer issued a comprehensive reconsideration response on August 15, 2002, concluding that there was no basis to amend or reverse the original decision. DHRM reached the same conclusion in its decision.

## DISCUSSION

The grievant lists a host of challenges to the hearing officer's decision. While this ruling does not discuss with particularity each of the 78 specific items asserted in the grievant's request, all of those points have been reviewed and considered in light of this Department's responsibility to assure that the hearing officer's conduct of the hearing and written decision comply with the grievance procedure.

*Evidence Presented at Hearing*

The grievant claims that the hearing officer's decision relies on irrelevant, insufficient evidence. He also disagrees with factual determinations made by the hearing officer and challenges the credibility of the agency's witnesses.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[1] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[2] In challenges to disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the discipline was both warranted and appropriate under all the facts and circumstances.[3]

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[4] Accordingly, the technical rules of evidence do not apply.[5] Hearing officers have the duty to "[r]eceive probative evidence," that is, evidence that "affects the probability that a fact is as a party claims it to be."[6] They may exclude evidence that is "irrelevant, immaterial, insubstantial, privileged, or repetitive."[7] 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.

In this case, the grievant's claims (e.g., that the hearing officer relied on testimony of employees with a "hidden agenda"), when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, and the characterizations that he made. Such determinations were entirely within the hearing officer's authority, and this Department

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[1] Va. Code § 2.2-3005(D)(ii).
[2] *Grievance Procedure Manual* § 5.9, page 15.
[3] *Grievance Procedure Manual* § 5.8(2), page 14.
[4] *Rules for Conducting Grievance Hearings*, page 7.
[5] *Id*.
[6] Edward W. Cleary, McCormick on Evidence § 16, page 52 (1984).
[7] *Rules for Conducting Grievance Hearings*, pages 7.

cannot conclude that the hearing officer's findings were without some basis in the record and the material issues in this case.[8] Further, the hearing officer has considerable discretion in making determinations about the relevancy and admissibility of evidence, and this Department cannot substitute its judgement for that of the hearing officer.

*Mitigating Circumstances*

The grievant claims that the hearing officer did not consider mitigating circumstances, even though mitigating factors were presented at hearing. Under the grievance procedure, "the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct."[9] Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee's length of service.[10] The grievance procedure, however, does not require hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate can not be viewed as a procedural violation. In any event, it appears from the hearing officer's July 22 decision that mitigating circumstances were considered. For example, the hearing officer wrote that "the agency's disciplinary action was an appropriate and measured response that retains the services of a longtime employee while at the same time giving the agency the opportunity to provide new leadership for the residency."[11]

*Separation of Two Written Notices*

The grievant asserts that the hearing officer failed to separate the circumstances surrounding this Written Notice and the earlier Group II Written Notice. As a result, the grievant argues he was subject to "double punishment." The circumstances surrounding the two Written Notices were indeed very closely related. However, as the hearing officer noted, the notices were distinct: the first written notice was limited to a three-day period in February 2002, while the second written notice outlined the "broader offense of creating a hostile work environment over several years."[12] The hearing officer found that the grievant's conduct during the three day period amounted to only a small example of the ongoing hostile work environment the grievant had created.

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[8] The grievant claims that the hearing officer failed "to make any specific finding of any behavior that warrants corrective action." However, the July 22 hearing decision points to several actions of the grievant that justified the disciplinary action, including evidence that he allowed his secretary to use abusive language in the workplace, allowed her to work overtime, intimidated employees, and allowed a dispute between two employees to cause friction in the workplace. *See* Hearing Decision, Case No. 5457, pages 7-9, issued July 22, 2002. The grievant also claims that the hearing officer failed to recognize his performance evaluations. However, the hearing officer expressly states in his opinion that the grievant's "performance evaluation for the 2000-2001 performance cycle rated him a contributor." Hearing Decision, Case No. 5457, page 2.
[9] *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).
[10] *Id.*
[11] Hearing Decision, Case No. 5457, page 11, issued July 22, 2002.
[12] Hearing Decision, Case No. 5457, page 7, issued July 22, 2002.

*Same Hearing Officer for Two Hearings*

The grievant claims that it was improper for the same hearing officer to hear evidence on both of his written notices, because the hearing officer was "influenced" by the first hearing. Under the grievance procedure, where multiple grievances are similar, "the EDR Director may direct that the grievances be heard by the same hearing officer, but with separate hearings and decisions."[13] In this case, the issues in both grievances were closely related. Therefore, it was appropriate for the same hearing officer to hear both grievances.

*Hearing Officer Applied Policy Not in Effect*

At the hearing, the agency alleged that the grievant violated the Commonwealth's Workplace Harassment Policy, Department of Human Resource Management (DHRM) Policy 2.30, which did not go into effect until May 1, 2002. The grievant argues that it was inappropriate to use this policy, as his written notices were issued in February and March 2002, before the policy went into effect. However, the hearing officer duly noted in both his July 22 decision and in his reconsideration decision that the cited policy did *not* apply to this case and he did not use it in making his determination to uphold the disciplinary action. In fact, in the July 22 decision, the hearing officer *agreed with the grievant* that the policy does not apply and that the agency did not demonstrate that the grievant had engaged in workplace harassment. (The hearing officer did, however, conclude that the Agency had presented sufficient evidence that the grievant's conduct violated the standards of conduct.)[14] Therefore, this Department cannot find that the hearing officer abused his authority in this instance.

*Closing Statement*

Finally, the grievant argues that the hearing officer was wrong to limit closing comments to under 8 minutes. He claims that this limitation was inadequate for such a lengthy hearing.

Under the grievance procedure, "each party *may* make . . . closing statements."[15] However, the hearing officer is charged with the responsibility of "conducting the hearing in an equitable and orderly fashion,"[16] and it is within the hearing officer's discretion to limit closing statements in the interest of procedural efficiency. More importantly, in his reconsideration decision, the hearing officer correctly states that closing remarks are not evidence and are only meant to be brief summaries of the evidence presented under oath.

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[13] *Rules for Conducting Grievance Hearings*, page 3.
[14] Hearing Decision, Case 5457, page 7, issued July 22, 2002.
[15] *Rules for Conducting Grievance Hearings*, page 7 (emphasis added); *see also Grievance Procedure Manual* § 5.8(4), page 15.
[16] *Rules for Conducting Grievance Hearings*, page 1.

Therefore, there is no evidence that the hearing officer's decision to limit closing statements violated the grievance procedure.

APPEAL RIGHTS:

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, and for the reasons discussed in this ruling, the July 22, 2002 hearing decision in this case is now a final hearing decision. Pursuant to Section 7.3(a) of the *Grievance Procedure Manual* and Section 2.2-3006(B) of the Code of Virginia, this final hearing decision may be appealed to the circuit court in the jurisdiction in which the grievance arose within 30 calendar days from the date of this ruling.

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Claudia T. Farr
Director

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Leigh Brabrand
Employment Relations Consultant