

Issue: Compliance/Hearing officer decision; Ruling Date: December 20, 2002; Ruling #2002-193; Agency: Radford University; Outcome: Hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULINGS OF DIRECTOR

In the matter of Radford University/ No. 2002-193
December 20, 2002

The grievant has challenged the hearing officers' decision in Hearing Case Number 5532. The grievant asserts that the hearing officer erred by: (1) concluding that the agency had provided adequate notice of Family Medical Leave Act (FMLA) to Radford University employees; and (2) holding that the University adequately addressed alleged threatening behavior and alleged racist and sexually charged statements by a co-worker. The grievant also asserts that the agency should have notified her of her rights to pursue an Equal Employment Opportunity Commission claim relating to alleged racist and sexual comments.

FACTS

Radford University employed the grievant as a Housekeeping Lead Worker until her removal on August 14, 2002. On August 13, 2002, the grievant received a Group I Written Notice with removal for "unsatisfactory attendance."¹ She challenged the Written Notice by initiating a grievance on August 14, 2002. This grievance advanced to hearing and on October 9, 2002, the hearing officer issued a decision, which upheld the issuance of the Group I Written Notice with removal. The hearing decision noted that the grievant had received a letter of counseling and three Group I Written Notices all regarding unsatisfactory attendance prior to the August 13th Written Notice.² The decision held that "[m]issing 16 complete shifts and part of four shifts during a 23 workday period is unsatisfactory attendance."³

On October 17, 2002 the grievant requested that this Department review the hearing officer's 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

¹ The August 13, 2002 Written Notice further asserts that the "Employee continues to maintain an unacceptable attendance record. Over the 23 workdays – [grievant] missed 16 complete shifts and part of four other shifts."

² Hearing Decision, page 2.

³ Hearing Decision, page 3.

decisions in 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, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁵

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁷ 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.⁸

The Agency’s Alleged Failure to Provide FMLA Notice

The grievant challenges the hearing decision based on her assertion that she was not informed of her FMLA rights. In the hearing decision, the hearing officer found while the University’s “human resources staff could have done a better job of assisting Grievant by advising her of the FMLA,” there was “no evidence” presented at hearing that the University failed to provide the grievant with notice of its FMLA policy. The grievant, in turn, has provided no evidence that the hearing officer’s finding regarding FMLA notice was in error.⁹

The Agency’s Alleged Failure to Respond to Discriminatory Treatment

The grievant alleges the hearing officer erred by holding that the University adequately addressed alleged threatening behavior and alleged racist statements by a co-worker. 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. At the grievance hearing, a member of management testified regarding the agency’s response to the grievant’s allegations that a co-worker made racist and sexually charged statements. Thus, the record evidence supports the hearing officer’s finding that the agency investigated the matter and took action to have the comments stopped. Therefore, this Department will not disturb that finding.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁶ Va. Code § 2.2-3005(D)(ii).

⁷ *Grievance Procedure Manual* § 5.9, page 15.

⁸ *Grievance Procedure Manual* § 5.8(2), page 14.

⁹ The finding that the University provided the grievant with FMLA notice is substantiated by the inclusion of a FMLA section in the University’s employee manual. The grievant does not deny that she was provided a copy of the manual when she was hired.

The grievant also appears to assert that the hearing officer should have held that the University failed to adequately inform her of her civil rights under Title VII. It should be noted that University's personnel manual, includes a section regarding Equal Employment Opportunity (EEO) procedures including instruction on how to initiate a complaint with the Office of Equal Employment Services (OEES), a division of the Department of Human Resources Management (DHRM).¹⁰ The grievant has provided no evidence that she did not receive a copy of the employee manual.¹¹

CONCLUSION AND APPEAL RIGHTS

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

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.¹² 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.¹³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁴ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁵

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¹⁰ The policy manual states that "harassment in any form is a serious offense that will not be tolerated in state employment." The manual also includes a toll-free phone number for contacting OEES, a web site address where complaint forms can be downloaded, and statement explaining that calls or visits to OEES are held in "strict confidence."

¹¹ In contrast, the agency has produced a copy of the Classified Employee Orientation Checklist, bearing the grievant's signature, which indicates that the grievant reviewed and discussed both University and state employee handbooks as well as the discrimination complaint procedure.

¹² *Grievance Procedure Manual*, § 7.2(d), page 20.

¹³ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

¹⁴ *Id.*

¹⁵ Va. Code § 2.2-1001 (5).