

Issue: Compliance/Hearing decision; Ruling Date: February 3, 2003; Ruling #2002-233;  
Agency: Virginia 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. 2002-233  
February 3, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5562. 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) influenced her to reduce her witness list and allowed the agency to add witnesses at the hearing who were not on the agency's submitted witness list, (2) allowed as the agency designee a person included on the grievant's witness list and who is the "supervisor and/or performance reviewer of two of the grievant's witnesses thus creating an intimidating environment," (3) did not consider mitigating circumstances, (4) based his decision on a "single piece of evidence signed by [an employee] who did not appear to testify" and (5) that the agency did not meet its preponderance of the evidence burden.

FACTS

The grievant is employed as an Administrative and Program Specialist III with VDOT. She was issued a Group II Written Notice with two-day suspension on March 8, 2002 for interfering with an ongoing investigation and creating an intimidating and hostile work environment. The grievant contested the disciplinary action through the grievance procedure, and the hearing officer's written decision upheld the Group II Notice with suspension.

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 December 9, 2002, concluding that there was no basis to reconsider the original 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 . . . on all matters related to procedural compliance with the grievance procedure."<sup>1</sup> If the hearing officer's exercise of authority is not in compliance with the

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<sup>1</sup> Va. Code § 2.2-1001(2), (3), and (5).

grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>2</sup>

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>3</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>4</sup> 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. 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.<sup>5</sup>

### *Witnesses*

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.<sup>6</sup> Accordingly, the technical rules of evidence do not apply.<sup>7</sup> 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.”<sup>8</sup> They may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive.<sup>9</sup> 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 (that the hearing officer influenced the grievant to reduce her witness list and allowed the agency to add witnesses during the hearing), when examined, simply contest the hearing officer’s discretion in determining the admissibility of evidence. The hearing officer notes in his reconsideration that “[d]uring a prehearing conference the Hearing Officer asked Grievant to establish the reason for calling her witnesses. Grievant either withdrew witnesses or admitted that calling certain witnesses would result in redundant testimony.”<sup>10</sup> Furthermore, he explained that “the Hearing Officer’s prehearing order is intended to foster a productive hearing and does not serve as an exclusionary rule. If a witness or document is not disclosed four workdays before the hearing, the Hearing Officer will only exclude the document or witness if the opposing

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<sup>2</sup> See *Grievance Procedure Manual* § 6.4(3), page 18.

<sup>3</sup> Va. Code § 2.2-3005(D)(ii).

<sup>4</sup> *Grievance Procedure Manual* § 5.9, page 15.

<sup>5</sup> *Grievance Procedure Manual* § 5.8(2), page 14.

<sup>6</sup> *Rules for Conducting Grievance Hearings*, page 7.

<sup>7</sup> *Id.*

<sup>8</sup> Edward W. Cleary, *McCormick on Evidence* § 16, page 52 (1984).

<sup>9</sup> Va. Code 2.2-3005 (C)(5)..

<sup>10</sup> See Reconsideration Decision, Case No. 5562-R, issued December 9, 2002, page 1.

party can show some form of prejudice...Grievant presented no credible evidence of any prejudice.”<sup>11</sup>

The hearing officer has considerable discretion in making determinations about relevancy and admissibility of evidence. A hearing officer does not err by questioning the parties in determining whether testimony is redundant. In addition, where a party shows no prejudice by testimony from a witness not previously designated on a witness list, this Department will not disturb the hearing officer’s decision on the admission of that testimony.

#### *Agency Designee*

The grievant contends that the agency should not have been allowed to have as its representative a supervisor and performance reviewer of two of her witnesses and someone she had included on her witness list. The hearing officer has no authority to determine who will represent a party. The grievance procedure states that “parties may represent themselves or may be represented by *an individual of choice*. The agency chose the Assistant Resident Engineer as its representative and, as such, he had the right to be present throughout the hearing.

#### *Mitigating Circumstances*

The grievant claims that the hearing officer did not consider her “exceptional performance history with the Agency for approximately fifteen years with no prior behavior requiring any disciplinary actions.” 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.”<sup>12</sup> Examples of mitigating factors include whether the employee was given notice of the rule, the consistency of the agency in implementing discipline, and the employee’s length of service.<sup>13</sup> The grievance procedure, however, does not require a hearing officer to lessen the discipline simply because a mitigating factor may exist, e.g., otherwise satisfactory state service or the length of that service. It appears from the hearing decision that the hearing officer was aware of the grievant’s employment history but nevertheless elected not to reduce the level of discipline. Such an exercise of discretion is not error.

#### *Burden of Proof*

The grievant contends that the hearing decision was based on a signed written statement by an individual who did not appear at the hearing and that the statement alone was not enough for the agency to have met its burden of proof. As an initial point, the *Rules for Conducting Grievance Hearings* expressly states that written statements are

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<sup>11</sup> *Id.*, page 2.

<sup>12</sup> *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).

<sup>13</sup> *Id.*

admissible as evidence.<sup>14</sup> Furthermore, the hearing officer duly noted in both his November 27 decision and in his reconsideration decision that the facts surrounding the statement support its credibility. Again, where there is record evidence to support a finding, this Department will not substitute its judgment with respect to that finding.

In sum, the grievant's challenges to the hearing officer's decision, when examined, contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting fact findings and inferences that he drew, the characterizations that he made, or the facts that he chose to include in his decision. This Department cannot conclude that the hearing officer's findings were without some basis in the record and, thus, the hearing officer's decision cannot be said to be out of compliance with the grievance procedure.<sup>15</sup>

#### APPEAL RIGHTS:

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.<sup>16</sup> 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.<sup>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>19</sup>

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Claudia T. Farr  
Director

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<sup>14</sup> See *Rules for Conducting Grievance Hearings*, pages 8-9.

<sup>15</sup> While this Ruling does not expressly address each of the objections raised by the grievant concerning the hearing and ensuing decisions, this Department has carefully considered each objection and has found no non-compliance with the grievance procedure.

<sup>16</sup> *Grievance Procedure Manual*, § 7.2(d), page 20.

<sup>17</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

<sup>18</sup> *Id.*

<sup>19</sup> Va. Code § 2.2-1001 (5).

