

Issue: Compliance/Administrative Review of Hearing Decision; Ruling Date: February 20, 2003; Ruling #2003-021; Agency: Department of Conservation and Recreation; Outcome: Hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Conservation & Recreation/ No. 2003-021
February 20, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5576. The grievant claims that the hearing officer's conduct of the hearing and hearing decision do not comply with the grievance procedure.

FACTS

The agency employed the grievant as a Chief Ranger. On September 23, 2002, the grievant was issued a Group III Written Notice and terminated for sexual harassment. The grievant initiated a grievance challenging the Written Notice and termination on September 26, 2002, which proceeded to a hearing on November 18, 2002. On January 15, 2003, the hearing officer issued a decision upholding the Group III Written Notice and termination. On January 27, 2003, this Department received the grievant's request for an administrative review of the hearing officer's January 15 decision.¹ The grievant has also requested that the Department of Human Resource Management review the 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."² If the hearing officer's exercise of authority is not in compliance with the

¹ The Grievance Procedure requires that requests for administrative review be received by this Department within ten calendar days of the issuance of the hearing decision. *See Grievance Procedure Manual* § 7.2(a), page 18. However, when the tenth day falls on a Saturday or Sunday, requests received on the next business day (Monday) will be considered timely.

² 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.³

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁴ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁵ Further, “[i]n 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. “If misconduct is found but the hearing officer determines that the level of discipline administered was too severe, the hearing officer may reduce the discipline.”⁶ Mitigating factors include, but are not limited to, “conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity” and “an employee’s long service or otherwise satisfactory work performance.”⁷ 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.⁸

Further, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁹ Accordingly, the technical rules of evidence do not apply.¹⁰ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹¹ 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.

Procedural Noncompliance

The grievant alleges that the hearing officer failed to issue a timely decision and that the delay in the issuance of the decision may have impacted the hearing officer’s recall of detailed testimony and evidence presented at the hearing. According to the grievance procedure rules established by this Department, hearing officers are to hold the hearing and issue a written decision within 30 calendar days of their appointment.¹² In this case, the hearing officer’s appointment letter is dated October 31, 2002, and the

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

⁴ Va. Code § 2.2-3005(D)(ii).

⁵ *Grievance Procedure Manual* § 5.9, page 15.

⁶ *Rules for Conducting Grievance Hearings*, § VI(B), page 11; DHRM Policy No. 1.60(IX)(B).

⁷ DHRM Policy No. 1.60 VII(C)(1).

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

⁹ *Rules for Conducting Grievance Hearings*, § IV(D), page 7.

¹⁰ *Id.*

¹¹ Va. Code § 2.2-3005(C)(5).

¹² *Grievance Procedure Manual* § 5.1, page 13.

hearing was held on November 18, 2002. The hearing decision, however, was not issued until January 15, 2003, substantially outside the 30 calendar day time period. During the investigation for this ruling, a representative of the Division of Hearings indicated that the cause for the delay was the hearing officer's full hearing schedule for the months of November, December and January, as well as the Thanksgiving and Christmas holidays.

While it is preferable that decisions are written as soon as possible after the hearing, when testimony of the witnesses is fresh,¹³ this Department recognizes that circumstances beyond the control of a hearing officer may arise that prevent the issuance of a timely decision. Such appears to be the case here. Moreover, the grievant has not shown that his case has in any way been prejudiced by the delay. As discussed below, the hearing officer's findings were based on evidence in the record and the material issues of the case. Thus, the hearing officer's delay does not constitute noncompliance with the grievance procedure such as to require a rehearing.

Other Errors

The grievant also disputes the hearing officer's findings of fact, claiming that relevant evidence and testimony presented at the hearing were not cited in the decision and may not have been properly considered by the hearing officer. Therefore, he claims the decision was arbitrary and capricious, without a reasoned basis.¹⁴

In this case, the hearing officer was charged with deciding whether the Group III Written Notice and termination was warranted. The Written Notice stated that the grievant had sexually harassed a female Maintenance Ranger ("the Ranger") from April 7, 2002 through September 18, 2002 and that such harassment was persistent, pervasive and unwelcome. The hearing officer found the Ranger's account of events credible and upheld the agency's disciplinary action and the grievant's removal on that basis.¹⁵

To challenge the agency's determination that his actions were sufficiently serious to merit the level of discipline imposed, the grievant presented two witnesses at the hearing, his wife and a male co-worker. Additionally, a state police trooper, who is a long-time friend of the grievant, testified as a character witness. In his request to this Department for review of the decision, the grievant lists numerous statements of these witnesses and related exhibits, which were not discussed in the decision, that allegedly contradict the Ranger's testimony, cast doubt on her credibility, and indicate that a less severe punishment may have been warranted.¹⁶ The grievant contends that the omission of a detailed review of his witnesses' testimonies indicates that the hearing officer failed to reach a conclusion "based upon the reasoned application of evidence provided."¹⁷

¹³ *Rules for Conducting Grievance Hearings*, § V(C), page 9.

¹⁴ See Request for Administrative Review, page 1.

¹⁵ Hearing Decision, page 8.

¹⁶ See Request for Administrative Review, page 1.

¹⁷ *Id.* at 4.

Although the hearing decision does not discuss conflicting evidence with specificity,¹⁸ the hearing officer clearly notes and addresses the grievant's contention that the Ranger's statements at hearing were inconsistent with the evidence presented by the grievant. The decision explicitly discusses the alleged inaccuracies in the Ranger's statements:

Grievant contends that portions of the Maintenance Ranger's testimony were overstated or untrue. Grievant's counsel conducted a rigorous and thorough cross examination of the Maintenance Ranger that an untruthful witness would not have survived. The Maintenance Ranger's account of events was credible and supports the Agency's disciplinary action.¹⁹

Thus, consistent with his authority, the hearing officer considered the demeanor of the Ranger during cross examination, weighed the conflicting evidence presented, and found greater credibility in her testimony than he did the statements of the grievant or the grievant's witnesses. As such, he accorded the Ranger's testimony greater weight and determined that the disciplinary action was warranted and appropriate under all the facts and circumstances. While the grievant may disagree with the hearing officer's findings of fact, he has presented no evidence that the findings were not based upon the record evidence.

This challenge by the grievant, when examined, simply contests 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, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

CONCLUSION

For the reasons discussed above, this Department finds that the hearing officer in this grievance neither abused his discretion in his 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.²⁰ 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.²¹ Any such appeal must be based on the

¹⁸ The hearing office does discuss an inconsistency between the Ranger's testimony and that of the grievant related to the date that an incident allegedly occurred. The hearing officer, however, found the date of the occurrence to be insignificant. *See* Hearing Decision, page 5.

¹⁹ Hearing Decision, page 8.

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

²¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

assertion that the final hearing decision is contradictory to law.²² This Department's rulings on matters of procedural compliance are final and nonappealable.²³

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²² *Id.*

²³ Va. Code § 2.2-1001 (5).