

Issue: Administrative Review of Hearing Decision/Conduct of Hearing; Ruling date:
July 1, 2003; Ruling #2003-037; Agency: Virginia Museum of Natural History;
Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Virginia Museum of Natural History/ No. 2003-037

July 1, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5606. The grievant claims that the hearing officer's conduct of the hearing and the hearing decision do not comply with the grievance procedure. First, the grievant alleges that the hearing officer abused his discretion by interrupting her testimony at hearing and then stating in his written decision that she did not present sufficient evidence to support her claims. Second, she contends that the hearing officer erred by considering evidence that he had previously told her would not be relevant to his decision.

FACTS

The agency employed the grievant as the Assistant Director of Outreach. She reported alleged mismanagement by the Director to the Chairman of the Board (in December 2000 and again in July 2001) and later to the State Fraud, Waste and Abuse Hotline (in December 2001 or January 2002). Additionally, in October 2001, the grievant had disclosed to the Director that she was suffering from Post-Traumatic Stress Disorder. Subsequently, on May 22, 2002, the grievant was given notice of layoff, with an effective date of June 10, 2002.

The grievant timely initiated a grievance challenging her layoff, alleging the agency retaliated against her for reporting the Director's alleged mismanagement. At that time, she also advanced several alternative theories related to the agency's decision to lay her off, including allegations of misapplication of policy, and sex, age and disability discrimination. Additionally, the grievant claimed she was subjected to a hostile work environment due, in part, to a disclosed disability. The grievance was not resolved during the management resolution step process, and the agency head denied qualification of her grievance. The grievant then requested qualification determination from this Department. We concluded that the grievant presented evidence raising a sufficient question of possible retaliation and deemed it appropriate to also send the alternative claims, as well as the related claim of hostile work environment, for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

An administrative hearing was scheduled. During a pre-hearing telephone conversation, the hearing officer allegedly informed the grievant that the museum's financial circumstances subsequent to her layoff would not be relevant to his determination regarding her claims. The grievance hearing was held on January 14, 2003. At the hearing, the grievant claims she had been testifying for approximately an hour from a prepared written chronology regarding management's alleged retaliatory actions when the hearing officer abruptly interrupted her, informing her that the case was about misapplication of policy and she should move on to other testimony. The grievant states that she then started crying uncontrollably, at which time the hearing officer took a short recess. After the resumption of the hearing, the grievant states she did not present additional evidence concerning retaliation or disability discrimination because of the hearing officer's request prior to the recess that she proceed with other testimony.

The hearing officer's written decision was issued on February 3, 2003, holding the elimination of the grievant's position was entirely logical given the grievant's position and the agency's need to dramatically reduce expenses.¹ Further, he indicated the grievant failed to demonstrate by a preponderance of the evidence that any of her proffered alternative theories were the reason behind her layoff. The grievant timely requested this Department to administratively review the hearing officer's decision; she also requested reconsideration from the hearing officer. The hearing officer's subsequent response concluded that there was no basis to reopen the hearing or reverse his 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."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

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, the grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.⁶ Accordingly, the technical rules of evidence do not apply.⁷ By statute, hearing officers

¹ Due to the need to reduce expenditures, the agency eliminated the publishing function, and the grievant's position (PR and Marketing Administrator II) was abolished.

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

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*, page 7.

⁷ *Id.*

have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁸ 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. However, where there is evidence that a party may not have been afforded a full opportunity to present relevant evidence or respond to evidence presented by the opposing party, then this Department may order the hearing officer to reopen the hearing.

The grievant first contends that the hearing officer abused his discretion by interrupting her during the presentation of her case, thereby preventing her from providing all relevant evidence regarding her claims of retaliation and disability discrimination. After allegedly denying her the opportunity to present her case in its entirety, the grievant disputes the hearing officer's finding that she failed to present sufficient evidence establishing the existence of a long-term disability. During the investigation for this ruling, the hearing officer advised the investigating consultant that it was a lengthy hearing and, if he interrupted the grievant's testimony, it was in order to eliminate the presentation of irrelevant or repetitive information.

As discussed above, a hearing officer has the authority to exclude evidence he deems irrelevant or repetitive. In this case, the statements by the hearing officer and the grievant conflict concerning the specifics of her testimony prior to the hearing officer's request for her to proceed to other issues, with the grievant indicating that her testimony at the time she was interrupted was not repetitive. Furthermore, the grievant indicates that the chronological information she was presenting at the time of the interruption also was relevant to the issues qualified for hearing. Because of the conflicting statements, this Department requested the grievant to provide a transcript of the hearing in support of her position,⁹ but due to the costs involved in obtaining a transcript, the grievant was unable to comply with our request. Without a transcript of the hearing, however, we are unable to determine the validity of her claims. Thus, we cannot conclude that the hearing officer abused his discretion by interrupting the grievant while she was testifying.

With respect to the grievant's contention that the hearing officer's alleged improper interruption of her testimony prevented her from presenting all her evidence of disability discrimination, the hearing officer determined sufficient evidence had been presented to reach a legal conclusion of whether the grievant had a "disability" as defined under the Americans with Disabilities Act (ADA). In his decision, he stated that the grievant did not have a "disability" that would qualify under the terms of the ADA

⁸ Va. Code § 2.2-3005(C)(5).

⁹ See *Grievance Procedure Manual* § 7.2(b), page 19. ("An administrative reviewer may require a party to provide a full or partial transcript of the hearing to support the party's position. Additionally, a party may elect to produce a transcript to support its position.")

because her stress disorder does not substantially limit a major life activity.¹⁰ Furthermore, at the time she requested that he reconsider his decision, the grievant provided additional documentation to the hearing officer concerning her “disability.” While neither the grievance procedure rules nor the *Rules for Conducting Grievance Hearings* required the hearing officer to review any additional evidence after the conclusion of the hearing (her evidence was not *newly discovered*),¹¹ the hearing officer elected to explain his original decision in greater detail in his response to her reconsideration request. He affirmed his original determination based upon his conclusion that the grievant “harbors a misconception about the issue of disability,” evidently believing that approval by the Virginia Sickness and Disability Plan (VSDP) to utilize benefits indicates that the grievant has a “disability” for purposes of the Americans with Disabilities Act.¹² He reiterated, “an emotional illness of brief extent, duration and impact is considered a mild impact on major life activities and, therefore, is not a disability.”¹³ He further found that even if the grievant were deemed to have a disability, she had not provided evidence linking any such disability to her layoff. Thus, although the grievant disagrees with the hearing officer’s assessment that she did not have a “disability,” and that her layoff was not related to a disability, the hearing officer’s findings were based upon the record evidence and the material issues of the case. Therefore, we cannot conclude that the hearing officer exceeded his authority with respect to this determination.¹⁴

The grievant also contends the hearing officer erred by considering evidence which he had previously advised her would not be relevant to the decision in her case. In support of this allegation, the grievant states that during the pre-hearing telephone conference the hearing officer informed her that he would not consider the museum’s financial resources after her layoff in May 2002 or the layoff of other museum personnel in August and October 2002 in reaching a determination regarding her grievance claims. However, the grievant alleges that contrary to this statement, the hearing officer did take into account such information in evaluating the merits of her grievance. In response to her allegation, the hearing officer notes in his reconsideration decision that some facts concerning layoffs subsequent to the grievant’s layoff were presented in a footnote and a parenthetical comment for “complete historical context,” but “did not alter the outcome of the decision.”¹⁵

¹⁰ See Decision of Hearing Officer, dated February 3, 2003, page 7.

¹¹ See *Grievance Procedure Manual* § 7.2(a)(1), page 18 and *Rules for Conducting Grievance Hearings*, VII(A)(1) page 16. (A request to reconsider a decision or reopen a hearing is made to the hearing officer generally based upon *newly discovered evidence* or evidence of an incorrect legal conclusion.)

¹² See Decision of Hearing Officer, dated February 18, 2003, page 5.

¹³ *Id.*

¹⁴ To the extent the grievant is challenging the hearing officer’s legal conclusion regarding her disability issue, such a claim is not properly before this Department; a party claiming an incorrect legal conclusion may seek review by the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision on the ground that the decision is contradictory to law. See *Grievance Procedure Manual* § 7.3, page 20.

¹⁵ See Decision of Hearing Officer, dated February 18, 2003, page 5.

While the information at issue may not have “altered” the outcome of the hearing officer’s determination, a review of the decision in its entirety suggests that it may have had some bearing on his determination.¹⁶ Under the given circumstances, however, even if the hearing officer did consider this information, he did not abuse his discretion or exceed his authority. At hearing, a hearing officer has the *duty* to receive probative evidence.¹⁷ Statistical data concerning subsequent layoffs and the financial circumstances of the agency within a few months of the grievant’s layoff is arguably probative as to the legitimacy of the agency’s claims regarding the financial necessity for her layoff. Furthermore, even if the grievant had known the information would impact the hearing officer’s determination, she did not allege in her requests for administrative review to either the hearing officer or this Department that she had evidence to rebut the agency’s statistics or that the numbers provided by the agency were inaccurate in the first place. Thus, the grievant’s case does not appear to have been unfairly prejudiced by the admission of such evidence.

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.¹⁸ 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.¹⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁰

Claudia T. Farr
Director

¹⁶ In the hearing decision, it appears subsequent layoffs did impact the hearing officer’s decision. When determining the validity of the grievant’s claim of age and gender discrimination, the hearing officer states, “[m]ost (67 percent) of the agency’s employees are female” and “[b]ased on the available evidence it appears only coincidental that the first three of 17 people laid off were female and over 40 years of age.” See Decision of the Hearing Officer, dated February 3, 2003, page 7. Additionally, when summarizing his decision the hearing officer states, “the grievant has failed to show, by a preponderance of the evidence, that the Director orchestrated the layoffs of three people (and 14 more within a few months) in order to discharge the grievant.” *Id.*

¹⁷ *Rules for Conducting Grievance Hearings*, page 7 (emphasis added). Probative evidence is that which “affects the probability that a fact is as a party claims it to be.” Edward W. Cleary, *McCormick on Evidence* § 16, page 52 (1984).

¹⁸ *Grievance Procedure Manual* § 7.2(d), page 20.

¹⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a), page 20.

²⁰ *Id.*

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