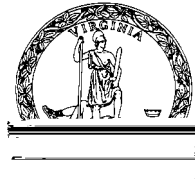


Issue: Compliance/Hearing Decision; Ruling Date: April 18, 2003; Ruling #2003-063;
Agency: Department of Transportation; Outcome: Hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2003-063
April 18, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5655/5673. The grievant claims that the hearing officer exceeded the scope of his authority and abused his discretion by (1) making disrespectful statements at the hearing; (2) interjecting incorrect findings of fact in the hearing decision; and (3) failing to consider the alleged illegality of an earlier Group II Written Notice that was used to terminate the grievant. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

The Virginia Department of Transportation (VDOT or agency) employed the grievant as a Transportation Maintenance Crew Member until her removal on November 21, 2002. On November 15, 2002, the grievant initiated a grievance alleging that VDOT had not adequately addressed safety concerns and that management had discriminated and retaliated against her. On November 21, 2002, the grievant was issued a Group II Written Notice with termination for unauthorized use or misuse of state records. The following day, she initiated a second grievance challenging her discharge, and, in an attachment to this second grievance, made reference to alleged gender discrimination and purported retaliation for having initiated an Equal Employment claim and her November 15th grievance.

The agency head qualified the November 22, 2002 grievance, but did not qualify the November 15, 2002 grievance. On March 3, 2003, the Director of this Department qualified the November 15, 2002 grievance and consolidated the two grievances for hearing. The consolidated grievance proceeded to hearing on March 5, 2003. In a March 17, 2003 decision, the hearing officer upheld the disciplinary action and grievant's removal and denied relief for discrimination and retaliation.¹

DISCUSSION

¹ See Decision of Hearing Officer, Case Number 5655/5673 issued March 17, 2003, page 7.

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 “In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the Director of EDR.”³ 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 hearing officer correct the noncompliance.⁴

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁵ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁶ 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.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

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁹ 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.

Hearing Officer’s Statements

At the hearing, the agency representative objected to the consolidation of the November 15, 2002 and November 22, 2002 grievances and attempted to submit a written objection to the hearing officer. The hearing officer refused to entertain the objection stating:

The hearing officer has absolutely nothing to do with consolidation. That decision was made solely by the EDR

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

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

⁴ *Grievance Procedure Manual* § 6.4(3), page 18.

⁵ Va. Code § 2.2-3005(D)(ii).

⁶ *Grievance Procedure Manual* § 5.9, page 15.

⁷ See *Rules for Conducting Grievance Hearings*, § VI(B), page 11.

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

⁹ Va. Code § 2.2-3005(C)(5).

director, so you can object to me all you want. It makes no difference. Your objection should have been raised with the EDR director, because she is the one who makes that decision. Quite frankly I would have preferred if they were not consolidated, but that's not my call. It's out of my control, so I will not entertain that objection.¹⁰

The grievant admits that the hearing officer's statements regarding his authority and the authority of the Director of EDR on consolidation issues were correct, however, the grievant asserts that the hearing officer's opinion on consolidation was inappropriate and disrespectful to her and the Director of this Department.

While the hearing officer's interjection of his opinion on the consolidation was perceived as improper by the grievant,¹¹ he did not violate a procedural rule, nor did the remark amount to an abuse of authority. And though the remark was offensive to the grievant, there is no evidence that she was prejudiced or harmed by it, or that the hearing officer was in fact biased against her consolidated claims.

Alleged Errors in the Findings of Fact

At hearing, the grievant contended that she suffered a work-related injury but was not allowed to file an injury form until two days after she was injured. With regard to how the grievant was injured, the hearing decision states that on "November 12, 2002, one of the Grievant's Co-worker's was operating a machine and it 'threw a nut.'"¹² The grievant contends that the hearing record proves that her co-worker threw a nut at her, not a machine and, as such, the hearing decision contains incorrect findings of fact.

Based upon evidence in the grievance record and excerpts from the March 5, 2003 hearing transcript, it appears that the grievant's co-worker "threw a nut," not a machine operated by a co-worker.¹³ In light of the evidence, it appears that the hearing officer's finding with regard to how the grievant was hit with a metal nut may not be based upon evidence in the record. However, the hearing officer's reference to how the grievant was hit had no bearing in his decision's ultimate conclusions that (1) the grievant failed to establish that the agency violated some state policy by not processing a written notice of injury on the day following an injury; and (2) the Transportation Operations Manager II

¹⁰ Transcript of March 5, 2003 hearing at page 9; lines 13-24.

¹¹ And indeed, the *Rules for Conducting Grievance Hearings* advises, however, that hearing officers should avoid making remarks that could "be perceived as partiality" by a party to a grievance. *Rules* at page 4.

¹² Decision of Hearing Officer, Case No. 5655/5673 issued March 17, 2003, page 5.

¹³ A management response to the grievant's November 22, 2002 grievance states, "The incident of November 12, 2002 where [grievant] was struck on the arm by a second metal nut **thrown by [co-worker]** (aiming at the bathroom door) was investigated by the Residency, discussed with the District HR Section and action taken toward [co-worker] by issuance of a Group I – Disruptive Behavior." (emphasis added). Additionally, an excerpt from the March 5, 2003 hearing transcript reveals that a co-worker, not a machine, threw the metal nut at the grievant. See Transcript of March 5, 2003 hearing at page 184; lines 1-4.

and the supervisor displayed the wrong attitude upon learning of the grievant's injury.¹⁴ Thus, even if the statement about how the grievant was hit with the metal nut was erroneous, the error was harmless.

Additionally, the hearing decision states that in order "to prove the fraud, [grievant] opened the Supervisor's file and removed copies of the supporting documentation for the Co-worker. She made photographs of the documents and then returned them to the file folder."¹⁵ The grievant contends that she never removed anything from the folder and, as such, the hearing decision contains an erroneous finding of fact. The grievant asserts that the folder was lying open on the supervisor's desk and she took photographs of papers contained in the folder.

This challenge by the grievant, however, simply contests the hearing officer's findings of disputed fact, 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.

Failure to Consider Alleged Illegality of November 5, 2001 Group II Written Notice

The grievant's termination resulted from an accumulation of active Written Notices.¹⁶ As such, the agency was permitted to enter into evidence an active Group II Written Notice issued to the grievant on November 5, 2001. At hearing, the hearing officer did not allow the grievant to argue the alleged illegality of the November 5, 2001 Group II Written Notice, stating that she had failed to challenge the Written Notice upon issuance and he was not going to determine its merits now.¹⁷ The hearing officer simply admitted the Group II Written Notice into evidence because it was relevant to the issue of discipline based on an accumulation of active Written Notices. The grievant contends the hearing officer's refusal to hear her arguments was error.

To contest discipline through the grievance process, an employee must initiate a written grievance within 30 calendar days of the date she received the Written Notice.¹⁸ Hearing officers do not have the power to determine the merits of a Written Notice that was not grieved.¹⁹ Because the grievant did not challenge the November 5, 2001 Group II Written Notice through the grievance process, the issue of the "legality" and appropriateness of that Written Notice could not come before the hearing officer for

¹⁴ See Decision of Hearing Officer, Case No. 5655 /5673 issued March 17, 2003, pages 6-7. Nor does this error appear to have had any impact on the hearing officer's conclusions regarding the allegations of improper discipline, retaliation, and discrimination raised by the grievant.

¹⁵ Decision of Hearing Officer, Case No. 5655/5673 issued March 17, 2003, page 5.

¹⁶ On September 17, 2001, the grievant received a Group I Written Notice for disruptive behavior. Thereafter, on November 5, 2001, the grievant was issued a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy.

¹⁷ See Transcript of March 5, 2003 hearing at page 45; lines 1-17.

¹⁸ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4(1), page 6.

¹⁹ See *Rules for Conducting a Grievance Hearing*, § V(C), page 9.

adjudication. He had to consider its existence, however, as accumulated discipline in support of the grievant's termination, and for that reason it was properly entered as evidence. Therefore, this Department concludes that the hearing officer did not violate the grievance procedure by failing to hear arguments relating to the legality and propriety of the November 5, 2001 hearing.

APPEAL RIGHTS

For the reasons discussed above, this Department concludes that the hearing officer neither abused his discretion nor exceeded his authority under the grievance procedure in conducting or 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 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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Director

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

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

²² *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

²³ Va. Code § 2.2-1001 (5).