

Issue: Administrative Review of Case #5645; Ruling date: June 17, 2003; Ruling #2003-066; Agency: Virginia Department of Transportation; Outcome: hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Numbers 2003-066
June 17, 2003

The grievant has requested an administrative review by this Department of his March 5, 2003 hearing decision. While the grievant has raised numerous objections to the hearing decision, for the reasons set forth below, this Department finds no error.

FACTS

The grievant is employed with the Virginia Department of Transportation (VDOT or the agency). The grievant was issued a Group II Written Notice with suspension for personal use of the Internet during business hours. In response to the Group II Written Notice, the grievant initiated a grievance on October 24, 2002.

The grievance advanced to an administrative hearing on March 4, 2003, and the hearing officer issued his decision on the following day, upholding the Group II. The grievant requested that both this Department and the Department of Human Resources Management (DHRM) administratively review the hearing decision. He also requested that the hearing officer reconsider his opinion. Both DHRM and the hearing officer upheld the original decision.¹

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 “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

¹ The only criticism DHRM had of the hearing decision was unrelated to any of the objections raised by the grievant. DHRM noted in its decision that the hearing officer’s statement -- “[i]f grievant does not violate the Standards of Conduct during the active period of this disciplinary action, the Notice will be removed from his personnel file and he will have an unblemished record” -- was incorrect. As DHRM explained, under state policy, once the active period of a Written Notice expires, the written notice still remains in the employee’s penneile.

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

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

The grievant has raised numerous objections to the original hearing decision but did not expressly identify any specific requirement of the grievance procedure that was purportedly out compliance.⁵ Accordingly, this Department will address those objections that appear to challenge the decision on the basis of alleged non-compliance with the grievance process.⁶

Evidentiary Issues

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁸ 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.⁹ 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.¹⁰

Accordingly, 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.

The grievant objects to the accuracy of the computer audit data admitted to evidence at hearing. For instance, the grievant challenged an exhibit that indicated the grievant had spent an average of two hours per day on the Internet over a 9-day period. The grievant advanced multiple theories as to why this figure is inaccurate, including that break and meal times should be subtracted from the average times. The grievant concludes that the “corrected

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

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

⁵ Under §7.2(a)(3) of the *Grievance Procedure Manual* “a challenge that the hearing decision does not comply with the grievance procedure is made to the Director of EDR” and “[t]his request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance.”

⁶ While this ruling may not expressly address every argument that could plausibly be construed as based on alleged non-compliance with the grievance procedure, all arguments advanced have been reviewed and considered, and none warrant disturbing the hearing officer’s decision.

⁷ Va. Code § 2.2-3005(D)(ii).

⁸ *Grievance Procedure Manual* § 5.9, page 15.

⁹ See *Rules for Conducting Grievance Hearings*, § VI(B), page 11.

¹⁰ *Grievance Procedure Manual* § 5.8(2), page 14.

¹¹ Va. Code § 2.2-3005(C)(5).

average daily internet use would be 1 hour and 6 minutes per day for internet use which is under the state audit threshold of a 2 hour threshold and is well under the definition of casual and incidental usage as determined by state policy.” This argument was advanced to the hearing officer, EDR, and DHRM.¹² The hearing officer notes in his reconsideration decision that “there is no basis to suggest that break and lunch time should be deducted from the amount of time the computer was used for personal reasons.” This Department concludes that the grievant has not provided any evidence that the hearing officer’s finding was not based on the evidence in the record or was incorrect. Moreover, DHRM did not expressly address the grievant’s contention that 1 hour and 6 minutes of daily personal internet usage would fall within the scope of “incidental and casual use,” and the grievant has provided no evidence to support his assertion that such use is incidental and casual. Thus, EDR will not disturb this decision in this regard.

The grievant also notes that while he was accused of spending hours per day browsing the internet, the raw data submitted detailing his browsing history listed only a few minutes of specific site visits. The hearing officer has explained that the data presented by the agency was only intended to serve as a sampling of the non-work related sites visited, not a complete catalog of all accessed sites.¹³ Again, this Department finds no error.

The grievant makes numerous objections to the veracity of testimony by various witnesses. These challenges, however, simply contest 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.

Waiver

The grievant claims that the agency waived its ability to discipline him because it had allowed him to occasionally use his computer for personal use. This argument bears no merit. Even if the agency had waived its ability to discipline him for his incidental and casual use, the grievant was disciplined for *excessive* use. Thus, any tacit approval by the agency of incidental and casual use had no bearing on its ability to discipline him when his usage reached an excessive level.

Legal Issues

The grievant made several arguments that appear to challenge the lawfulness of the decision. For instance, the grievant asserts that the Information Security Agreement is not enforceable because it is missing a critical requirement: a beginning and termination date. All

¹² The grievant sent an identical ruling request (appeal) to the hearing officer, EDR and DHRM, presumably, in order that each could respond in accordance with their respective scopes of authority, e.g., DHRM fielding the policy arguments and EDR handling the grievance procedure objections.

¹³ The grievant’s ruling request, in fact, recognizes that the IT investigator who investigated his computer usage “testified that he randomly selected graphic thumbnail images for random days and times.” Ruling Request, pages 6-7.

objections based on the hearing decision's non-conformity with law must be made in the circuit court in the jurisdiction in which the grievance arose. It bears mentioning, however, that not every agreement, term, or condition of employment must meet the legal criteria necessary to constitute a legal and binding contract. For instance, state policy prohibits sleeping on the job, theft of state property, and threatening behavior toward of other state workers. While state policy does not contractually bind employees to follow these workplace rules, employees are nevertheless bound to abide by the policies that prohibit such behavior, and when they do not, they are subject to disciplinary action, regardless of the lack of a contractual obligation to do so.

For all the reasons set forth above this Department declines to disturb the hearing officer's decision.

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.¹⁴ With this ruling, such is the case in this grievance. Thus, within 30 calendar days of the date of this ruling, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁷

Claudia T. Farr
Director

¹⁴ *Grievance Procedure Manual*, § 7.2(d), page 20.

¹⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

¹⁶ *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

¹⁷ Va. Code § 2.2-1001 (5).