

Issue: Compliance/administrative review of hearing decision; Ruling date: June 23, 2003; Ruling #2003-113; Agency: Department of Military Affairs; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Military Affairs
Ruling Number 2003-113
June 23, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5638/ 5695/ 5696/ 5697/ 5698/ 5699. The grievant claims that the hearing officer's written decision and conduct at hearing do not comply with the grievance procedure.¹ For the reasons discussed below, this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

Until her March 6, 2003 termination, the grievant had been employed as a Law Enforcement Officer I with DMA. On September 9, 2002, the grievant initiated a grievance (Grievance #1) alleging that the agency retaliated against her after she made complaints regarding a co-worker's behavior, which she claimed was intimidating and physically threatening. The September 9th grievance proceeded to hearing on February 5, 2003. On January 24, 2003, the grievant initiated a second grievance (Grievance #2) that was later administratively closed by this Department as duplicative of Grievance #1.²

After the February 5th hearing, the grievant initiated six additional grievances. Three of those grievances were initiated on February 19, 2003. The first grievance

¹ The grievant lists a host of challenges to the hearing officer's decision, but in most instances failed to expressly identify the specific requirement of the grievance procedure that was purportedly out compliance. 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." Accordingly, this Department will address those objections that appear to challenge the decision on the basis of alleged non-compliance with the grievance process. 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 in light of this Department's responsibility to assure that the hearing officer's conduct of the hearing and written decision comply with the grievance procedure. Moreover, this ruling will not address those issues which have previously been addressed in earlier compliance rulings by this Department (i.e. the correctness of the second-step respondent in Grievance #1 and the adequacy of training by DMA of supervisory personnel).

² See Compliance Ruling of Director # 2003-024, March 4, 2003.

initiated on February 19th (Grievance #3) challenges a letter of caution contained in the grievant's personnel file. The second February 19th grievance (Grievance #4) challenges a negative annual evaluation. The final grievance initiated on February 19th (Grievance #5) challenges a January 21, 2003 memorandum contained in the grievant's personnel file. On February 20, 2003, the grievant initiated two additional grievances. The first grievance (Grievance #6) alleges retaliation, while the second February 20, 2003 grievance (Grievance #7) alleges retaliation and lack of due process with respect to a pre-disciplinary suspension. A final expedited grievance was initiated on March 6, 2003 (Grievance #8) challenging the issuance of two Group III Written Notices with termination.

Grievances #3 through #8 were not resolved in the management resolution steps and were qualified for hearing by the agency on March 25, 2003. Thereafter, on March 26, 2003, the grievant requested consolidation of all grievances for one hearing. On March 31, 2003, this Department consolidated all the grievances for one hearing. The consolidated grievance proceeded to hearing on April 25, 2003. In a May 24, 2003 decision, the hearing officer upheld the grievant's removal but rescinded a Group III Written Notice for undermining the agency's effectiveness.³ The hearing officer denied grievant's requests to rescind a January 21, 2003 memorandum and letter of caution, to order a revision of her evaluation, and for relief for retaliation.⁴ Thereafter, on June 5, 2003, an Appeals Examiner for the Virginia Employment Commission (VEC) found that the grievant is entitled to receive unemployment benefits under the standards established by Virginia law.

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."⁵ 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.⁶

Weighing Evidence/Credibility of Witnesses/Alleged Errors in Findings of Fact

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 Moreover, the grievance hearing is an administrative

³ See Decision of Hearing Officer, Case Number 5638/5694/5695/5696/5697/5698/5699 issued May 24, 2003, page 27.

⁴ *Id.*

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

⁶ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁷ Va. Code § 2.2-3005(D)(ii).

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

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.

In the present case, the grievant makes numerous objections to the veracity of testimony by various witnesses, the hearing officer's failure to consider alleged deceitful acts by agency representatives, the hearing officer's consideration of evidence presented and the hearing officer's factual conclusions. These challenges 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.¹²

Alleged Bias

The Virginia Court of Appeals has stated that as a matter of constitutional due process, recusal by a trial court judge is mandated only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.¹³ While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive. As in the grievance procedure, the threshold used by the Court for disqualification on the basis of bias is quite high. Moreover, the *Rules for Conducting Grievance Hearings* require that the hearing officer establish and maintain a tone of impartiality throughout the hearing process.¹⁴

In this case, the grievant claims that the hearing officer was biased in favor of the agency. Specifically, the grievant claims that (1) the agency referred to the hearing

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

¹⁰ *Id.*

¹¹ Va. Code § 2.2-3005(C)(5).

¹² It should be noted, however, that it appears that the hearing officer's finding that the grievant contended she was suspended without pay was not based upon evidence in the record. This finding may have led to the hearing officer's ultimate conclusion that the agency failed to comply with policy and prompted his order that DMA review the grievant's compensation during the period of suspension and verify that the grievant was compensated. See Decision of Hearing Officer, Case Number 5638/5694/5695/5696/5697/5698/5699 issued May 24, 2003, page 18. However, the grievant has failed to demonstrate how the hearing officer's failure to appropriately state the grievant's pay status during her suspension has prejudiced her case. In fact, the hearing officer's decision on the grievant's suspension favored the grievant. See Decision of Hearing Officer, Case Number 5638/5694/5695/5696/5697/5698/5699 issued May 24, 2003, page 18.

¹³ *Welsh v. Commonwealth of Va.*, 14 Va. App. 300, 315 (1992), (brackets in original).

¹⁴ See *Rules for Conducting Grievance Hearings*, § III(D), page 4.

officer by his first name and engaged in a personal conversation with the hearing officer during a break; (2) the hearing officer and an agency party representative giggled over an agency party representative's alleged staring and facial smirks despite the grievant's requests that the hearing officer put an end to such behavior; (3) the hearing officer purposefully issued his hearing decision on a Saturday over a holiday weekend, thereby giving the grievant little time to challenge the hearing decision¹⁵; and (4) the hearing officer continually justified the alleged improper conduct by the agency.

In his reconsideration decision, the hearing officer admits engaging in a conversation unrelated to the hearing with the agency party representative. Such behavior, however, does not equate to an *ex parte* communication as alleged by the grievant.¹⁶ This Department has reviewed that portion of the hearing tapes which the grievant alleges records the hearing officer's failure to address the agency party representative's staring and facial smirks and then giggling over the incident. Based on a review of the tape and the hearing officer's explanation of how he handled the situation, this Department finds no evidence of "giggling" or any other inappropriate conduct by the hearing officer or bias as a result of the incident. Further, the grievant has presented insufficient evidence to support her assertion that bias motivated the hearing officer's issuance of his decision on a Saturday over a holiday weekend thereby giving the grievant less time to respond to the decision. Moreover, the grievant's final bias claim essentially challenges 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, and the characterizations that he made. Such determinations are entirely within the hearing officer's authority. In sum, because there is no evidence that (1) the hearing officer has a direct, personal, substantial, or pecuniary interest in the outcome of this case, or (2) he rendered an impartial decision, this Department cannot conclude that the hearing officer was biased.

Failure to Consider Mitigating Circumstances

The grievant claims that the hearing officer erred by not finding mitigating circumstances which would have resulted in her Group III Written Notice with removal being reduced. In support of this contention, the grievant claims that evidence submitted at the hearing revealed that the actions for which she was removed were uncharacteristic for her, that she was suffering from depression at the time, she had no prior disciplinary problems, and had an exemplary work history. Additionally, the grievant asserts that

¹⁵ All requests for administrative review must be received by the administrative reviewer within 10 calendar days of the date of the original hearing decision. *Grievance Procedure Manual* § 7.2(a), page 18.

¹⁶ An *ex parte* conversation means that one party is absent from the discussion. See *Rules for Conducting Grievance Hearings*, § III(D), page 4. The grievant, while not specifically engaged in conversation with the hearing officer and the agency party representative, was present during their discussion and the matter was unrelated to the hearing subject matter. However, the hearing officer should bear in mind that any communication between himself and only one party to the grievance can be perceived as partiality by the other party regardless of the content of the discussion. See *Rules for Conducting Grievance Hearings*, § III(D), page 4 (emphasis added).

evidence was presented at hearing that the actions resulting in her removal were similar to those of a co-worker, yet he was given a mere a letter of warning.¹⁷

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.”¹⁸ Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee’s length of service.¹⁹ The grievance procedure, however, does not require hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate can not be viewed as a procedural violation. In any event, it appears from the hearing officer’s May 24, 2003 decision that mitigating circumstances were considered. For example, the hearing officer wrote that “[a]lthough Grievant’s depression may have influenced her actions in part, the evidence is insufficient for the Hearing Officer to conclude that the Grievant would have acted differently if she had not been suffering from depression.”²⁰ While the grievant objects to this finding, the hearing record does not show that the grievant attempted to present any testimony by a medical provider linking her alleged behavior with her depression.

Representatives

According to the *Rules for Conducting Grievance Hearings*, a party may represent themselves or be represented by legal counsel or another individual of their choice.²¹ “The representative, or the party without representation, may examine or cross-examine witnesses and present evidence. If a party is represented by more than one individual, however, only one representative may examine an individual witness.”²²

In the present case, the agency party designee²³ was permitted to cross-examine a witness that had already been cross-examined by the agency legal counsel.²⁴ The

¹⁷ The grievant disputes whether the co-worker actually received the letter of warning and the hearing officer’s conclusion that the agency had no authority to discipline the co-worker. The letter of warning was prepared on August 14, 2002 and allegedly presented to the co-worker thereafter; however, the grievant asserts that evidence at hearing revealed that the letter of warning was never actually given to the employee. The hearing officer found that although the employee works for the DMA police department, he is a Federal employee and subject to Federal disciplinary procedures, not state disciplinary procedures. The grievant asserts that testimony at hearing revealed that DMA does have the authority to discipline the grievant’s co-worker. 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.

¹⁸ *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).

¹⁹ *Id.*

²⁰ Decision of Hearing Officer, Case Number 5638/5694/5695/5696/5697/5698/5699 issued May 24, 2003, page 21.

²¹ See *Rules for Conducting Grievance Hearings*, page 6.

²² *Id.*

²³ Like the agency representative, the agency party designee was also an attorney.

grievant claims that this conduct was improper and very damaging to the grievant's case. As an initial point, the grievant did not object to the questioning until after it was completed. Furthermore, while allowing two representatives to cross-examine a single witness contravenes the *Rules for Conducting Grievance Hearings*, the grievant has presented no evidence that allowing the agency party designee to cross-examine the witness prejudiced her case.²⁵ Moreover, the questioning of that individual witness had no bearing in the hearing officer's ultimate conclusion that the grievant's removal was appropriate.²⁶ Thus, even if allowing the agency party designee to question the witness contradicts the *Rules for Conducting Grievance Hearings*, the error was harmless.

VEC Determination

The grievant claims that the hearing officer's decision is inconsistent with VEC's June 5, 2003 determination and thus is incorrect. As pointed out by the hearing officer in his reconsideration decision, decisions rendered by VEC can not be used in any other judicial or administrative proceeding.²⁷ Moreover, the standard for determining whether the grievant is entitled to relief through the grievance process is different from the standard used to establish whether the grievant is entitled to unemployment benefits.²⁸ As

APPEAL RIGHTS AND OTHER INFORMATION

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.²⁹ In addition to the grievant's request for an administrative review from this Department, the grievant requested an administrative review from the Department of Human Resource Management (DHRM). The hearing decision will become final on the date of DHRM's decision.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³² This Department's rulings on matters of procedural compliance are final and nonappealable.³³

Claudia T. Farr
Director

²⁹ *Grievance Procedure Manual*, § 7.2(d), page 20.

³⁰ *Id.*

³¹ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a), page 20.

³² *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

³³ Va. Code § 2.2-1001 (5).