Issue: Compliance/Hearing Decision; Ruling Date: August 12, 2003; Ruling #2003-129; Agency: Alcoholic Beverage Control; Outcome: hearing officer not in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Alcoholic Beverage Control/ No. 2003-129
August 12, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5693. The grievant contends that the hearing officer (1) did not consider evidence of a causal link to support the grievant's retaliation claim, (2) relied on incorrect facts and drew incorrect conclusions, and (3) did not allow into evidence a Virginia Employment Commission (VEC) ruling in favor of the grievant.

FACTS

The grievant was the Lead Mechanic with the Department of Alcoholic Beverage Control (ABC) until his removal on January 9, 2003. On December 20, 2002, the grievant received a Group III Written Notice with suspension for not responding to a fire alarm on November 22 and for violating safety procedures.[1] On January 9, 2003, the grievant received a Group II Written Notice for failure to follow a supervisor's instructions and for insubordinate attitude during a December 6, 2002 meeting.[2] Based on an accumulation of Written Notices, ABC terminated the grievant's employment on January 9. The grievant filed grievances on January 8 and February 6, 2003 challenging the Written Notices and claiming retaliation, arbitrary and capricious performance evaluation, and wrongful discharge.[3]

The hearing took place on April 28, 2003 and the hearing officer issued his decision on June 2, 2003. In his decision, the hearing officer concluded that the grievant failed to respond to an alarm on November 22 and upheld the Group III Written Notice. In addition, the hearing officer reduced the Group II Written Notice, stating that the grievant's actions on November 30, at most, amounted to unsatisfactory job performance, which is a Group I offense. However, because of the accumulation of Written Notices, the hearing officer upheld

[1] On November 22, an alarm sounded at approximately 4:45 p.m. The grievant silenced the alarm and went to investigate. He saw a technician working in the area on Riser #12, and believing that the technician was handling the situation, the grievant left for the day. The agency and the grievant disagree about whether the grievant spoke with the technician about the alarm. The hearing officer concluded that the grievant did not speak with the technician. The Group III Written Notices states that the grievant should have investigated the situation more thoroughly, informed the technician about the alarm, and determined the nature of the alarm. *See* Group III Written Notice, dated December 20, 2002.

[2] In this Written Notice, the grievant's supervisor claims that the grievant spent 3.5 hours responding to a call on November 30, 2002 that should have only taken 1.5 hours. It further notes that in a December 6 meeting about the grievant's performance, the grievant was "very rude, disrespectful, and . . . argumentative." *See* Group II Written Notice, dated January 9, 2003.

[3] *See* Grievance Form A, dated January 8, 2003 and Grievance Form A, dated February 6, 2003.

the grievant's termination of employment. Finally, the hearing officer determined that retaliation was not a factor in the disciplinary actions against the grievant.[4]

DISCUSSION

Failure to Find Retaliation

The grievant claims that the hearing officer did not consider evidence demonstrating a causal link between the grievant's engagement in a protected activity and the disciplinary actions against him. In this case, the hearing officer addressed the grievant's retaliation claim, stating that the grievant "has not established . . . a link between his protected activity and the adverse employment action."[5] Given that the hearing officer did not find that retaliation played a role in the agency's decision to discipline and terminate the grievant, he is not bound to recite in his decision all evidence proffered by the grievant that he ultimately deemed insufficient to establish a link between the protected activity and the termination. In other words, if a hearing officer concludes that a grievant has not provided sufficient evidence to establish an element of a claim, he has, in essence, stated the facts, or more to point, the lack thereof, that formed the basis of his decision. In sum, this Department finds no procedural error regarding the manner in which the hearing officer dealt with the issue of retaliation in his hearing decision.[6]

Incorrect Factual Determinations

The grievant further claims that the hearing officer relied on unreliable testimony by the grievant's supervisor and incorrectly concluded that the grievant failed to respond to a fire alarm. Specifically, the grievant claims that the alarm on November 22 was not a "fire" alarm, but a "high air" alarm on Riser #12, which is not dangerous.[7] He believed that a technician was responding to the high air alarm and left the worksite when his shift ended. He further notes that a fire alarm did sound on November 22 on Riser #5, but it occurred after he left work. He contests the hearing officer's finding that he failed to respond to a fire alarm, when the alarm that sounded during his shift was, in fact, *not* a fire alarm. Therefore, the grievant claims that the hearing officer incorrectly based his decision on the fire alarm on

[4] The hearing officer also found that the grievant's claim of arbitrary and capricious performance evaluation was moot because the agency had removed his evaluation and replaced it with a "Notice of Improvement Needed." The agency decided that it was not appropriate to complete a performance evaluation for the grievant for the 2001-2002 performance cycle because he was out for much of the year on disability.

[5] Hearing Decision, Case No. 5693, page 6, issued June 2, 2003.

[6] The hearing officer concluded that the grievant did not present evidence that his supervisor knew of the grievant's allegations against him. The grievant presented evidence at hearing that he notified his supervisor via email about meetings with auditors, but the emails do not specify that the meetings were about the supervisor. Upon review of the evidence, it is not clear whether the supervisor had knowledge of the investigation against him. Therefore, this Department cannot substitute its judgement for that of the hearing officer with respect to the grievant's retaliation claim.

[7] During this Department's investigation, the grievant described a "riser" as a valve that senses either (1) an imbalance of air or (2) a fire. A "high-air" alarm sounds if there is too much air in the valve. The grievant further noted that a high-air alarm and a fire alarm sound different. The testimony of a Security Sergeant appears to indicate that a fire alarm has different characteristics from other alarms, for instance a high-air alarm.

Riser #5, which occurred after the grievant's shift ended, rather than on the high air alarm on Riser #12 that did occur on the grievant's shift. In addition, the grievant asserts that the hearing officer incorrectly concluded that he spent 3.5 hours on a project on November 30.[8]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] In challenges to disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the discipline was both warranted and appropriate under all the facts and circumstances.[11]

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[12] Accordingly, the technical rules of evidence do not apply.[13] Hearing officers have the duty to "[r]eceive probative evidence," that is, evidence that "affects the probability that a fact is as a party claims it to be."[14] They may exclude evidence that is "irrelevant, immaterial, insubstantial, privileged, or repetitive."[15] 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, the grievance procedure also requires that the hearing decision "contain findings of fact on the material issues and the grounds in the record for those findings."[16] In his original decision, the hearing officer held that the grievant should have determined the location of the alarm and whether there was any smoke or fire.[17] The decision further states that "the key to preventing the extensive damage caused by fire is the quick identification and suppression of that fire."[18] Importantly, the hearing officer failed to distinguish between the alarms on Risers #5 and #12, a distinction that could materially affect the outcome of the grievant's case. Furthermore, the decision does not discuss the differences between high-air and fire alarms and whether high-air alarms, like fire alarms, are safety concerns. The hearing officer failed to address whether a *fire* alarm, as opposed to a *high-air* alarm, even occurred during the grievant's shift. Moreover, the hearing officer's Reconsideration Decision of June 26 does not clarify these questions of material fact. Rather, the decision reiterates that the grievant "did not take action to find out if there was an actual fire" and does not mention a fire

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[8] The grievant claims he spent 1.5 hours actually working on the project and that he claimed 3.5 hours on his timesheet to account for travel time.
[9] Va. Code § 2.2-3005(D)(ii).
[10] *Grievance Procedure Manual* § 5.9, page 15.
[11] *Grievance Procedure Manual* § 5.8(2), page 14.
[12] *Rules for Conducting Grievance Hearings*, page 7.
[13] *Id*.
[14] Edward W. Cleary, McCormick on Evidence § 16, page 52 (1984).
[15] *Rules for Conducting Grievance Hearings*, pages 7.
[16] *Grievance Procedure Manual* § 5.9, page 15; *see also Rules for Conducting Grievance Hearings*, page 9.
[17] Hearing Decision, Case No. 5693, page 5, issued June 2, 2003.
[18] *Id.*

alarm on Riser #5.[19] These unanswered questions of fact could materially affect the outcome of the grievant's case.[20] Accordingly, the hearing officer is ordered to modify his written decision by including an explanation of the *findings of fact on the material issues and the grounds in the record for those findings* that justified the issuance of the Group III Written Notice and resulting termination.

Due Process Concerns

In his request for administrative review, the grievant questions whether ABC issued the disciplinary action for the alarm on Riser #12 or the alarm on Riser #5. He claims that the confusion between the two alarms affected the outcome of the hearing decision. The grievant is essentially raising a claim that his pre-termination due process rights were violated.[21] It should be noted, however, that questions of the adequacy of pre-termination due process are legal and, therefore, appropriately addressed by the circuit court in the jurisdiction in which the grievance arose.[22]

VEC Determination

The grievant further claims that the hearing officer violated the grievance procedure when he did not admit VEC's determination into evidence. As pointed out by the hearing officer in his reconsideration decision, however, decisions rendered by VEC cannot be used in any other judicial or administrative proceeding.[23] Moreover, the standard for determining whether the grievant is entitled to relief through the grievance process is different from the

[19] Reconsideration Decision, Case No. 5693, page 2, issued June 26, 2003.
[20] The distinction between which alarm was not properly dealt with could be dispositive to this case. If the grievant was found to have improperly responded to the alarm at Riser #12, purportedly a high air alarm, which may not pose a safety risk, then it is possible that the grievant's actions (or inaction) would not support a Group III Notice. Under the Standards of Conduct, DHRM Policy 1.60, inadequate or unsatisfactory job performance is a Group I offense, whereas violating safety rules where there is a threat of physical harm constitutes a Group III offense. Significantly, the decision does not address whether the alarm at Riser #12 could be and was properly distinguished by the grievant as a high air alarm as opposed to a fire alarm. If a high air alarm is indistinguishable from a fire alarm and the grievant did not appropriately respond to an unidentified alarm, a finding that his inaction placed employees at risk would appear justified. In contrast, such a finding may not be justified if the facts show that the alarm to which the grievant failed to appropriately respond had not signaled a potential threat of physical harm.
[21] Where a state creates a property right in continued employment, it may not constitutionally authorize the deprivation of such an interest without "appropriate procedural safeguards." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Prior to termination, the U.S. Constitution and state and agency policy generally entitle an employee of the Commonwealth to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond. *Id.* at 546. A more comprehensive post-termination hearing follows termination. Importantly, the pre-termination notice need not be elaborate, but must describe the grounds for the termination. In this case, the grievant alleges that the agency did not fulfill the notice requirement of pre-termination due process because it was not clear whether he was terminated for failure to respond to an alarm on Riser #12 or on Riser #5.
[22] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* §§ 7.2(d) and 7.3(a), page 20.
[23] *See* Va. Code § 60.2-623(B).

standard used to establish whether the grievant is entitled to unemployment benefits.[24] As such, this Department concludes that the VEC determination has no bearing on the hearing decision and the hearing officer neither abused his discretion nor exceeded his authority in refusing to consider it.

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.[25] The hearing officer's modified written decision, once issued, will be a final hearing decision. 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27] This Department's rulings on matters of procedural compliance are final and nonappealable. [28]

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Claudia T. Farr
Director

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[24] "In 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." *Rules for Conducting Grievance Hearings* § VI(B), page 11; DHRM Policy No. 1.60(IX)(B). 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. *Grievance Procedure Manual* § 5.8(2), page 14. The VEC can deny a claimant unemployment benefits if it finds the claimant was discharged for misconduct connected with work. Va. Code § 60.2-618(2). The Supreme Court of Virginia has defined "misconduct connected with his work" to mean deliberately violating a company rule designed to protect legitimate business interests or acting with *willful disregard* of those interests and the duties and obligations he owes his employer. Branch v. Virginia Employment Commission, 219 Va. 609, 611, 249 S.E.2d 180, 182 (1978) (emphasis added).

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

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

[27] *Id.*

[28] Va. Code § 2.2-1001 (5).