

Issue: Compliance/Administrative Review of the hearing and hearing decision; Ruling
Date: December 29, 2003; Ruling #2003-440; Agency: Department of Motor Vehicles;
Outcome: hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Motor Vehicles/ No. 2003-440

December 29, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5801. The grievant claims that the hearing officer's conduct of the hearing and hearing decision do not comply with the grievance procedure.

FACTS

The agency employed the grievant as a Computer Systems Senior Engineer. On June 3, 2003, the grievant was issued a Group III Written Notice and terminated for violating the agency's security practices and protocol. The grievant timely initiated a grievance challenging the Written Notice and termination, which proceeded to hearing on September 17, 2003. On September 26th, the hearing officer issued a decision upholding the agency's actions. Subsequently, the grievant requested this Department to administratively review the hearing officer's decision; he also requested the hearing officer to reopen the hearing or reconsider the hearing decision.

The grievant disputes the decision for several reasons. First, he claims "the hearing officer was led to believe untruths" and erroneously reached a decision based upon those untruths.¹ Additionally, he asserts that statements in the written decision contradict facts contained in the record. Furthermore, the grievant maintains that the three hours given by the hearing officer for the presentation of his case were insufficient to cross-examine the agency's witnesses and to call his own witnesses. According to the grievant, he originally planned to have twenty witnesses testify, but the hearing officer removed two individuals from the witness list, which left eighteen others. Five of the eighteen testified for the agency, and the grievant called one witness during the presentation of his case. Thus, the grievant asserts that when his time expired he still needed additional witness testimony to prove four of the five main points of his grievance. Therefore, based on the above, the grievant seeks reconsideration or a new hearing to have the opportunity to present his case in its entirety.

¹ Letter from the grievant to the Director of this Department, dated October 2, 2003, page 1.

In response, on October 24, 2003, the hearing officer issued a Reconsideration Decision, which discusses in detail each of the grievant's allegations and holds that the grievant's claims basically restate arguments and evidence previously presented at the hearing and considered by the hearing officer in the September 26th decision. Additionally, in response to the grievant's claim that he was given insufficient time to present his case, the hearing officer states that the grievant spent a substantial portion of time cross-examining agency witnesses regarding points not in dispute and focusing on insignificant points in the agency's case. Furthermore, the hearing officer notes he cautioned the grievant several times about his use of time, and more witnesses could have been heard if the grievant had heeded his warnings. Thus, he concluded there was no basis to reopen the hearing or reverse the 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

Claim of Insufficient Time

A grievance hearing is to last no more than eight hours, unless the hearing officer determines that the time is insufficient for a full and fair presentation of the evidence by both sides.⁴

Here, the grievant asserts that the time allotted by the hearing officer for the presentation of his case was insufficient and, thus, violated the procedural requirements of the grievance procedure. We find his claim to be without merit for the following reasons. First, the hearing officer's determination that one day was sufficient for the presentation of the evidence, with both parties being given three hours in which to present their respective cases, was well within his authority. Additionally, the grievant admits that his lack of hearing experience and poor performance at the hearing negatively impacted the presentation of his case.⁵ Significantly, during the hearing, the hearing officer cautioned the grievant regarding his use of time, but the grievant continued to focus on insignificant points rather than on the most important aspects of his defense. If the grievant had followed the advice of the hearing officer, more of his witnesses would have been able to testify. While it is unfortunate that the grievant was unable to call all his witnesses, there is no indication that the hearing officer abused his authority in the

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

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

⁴ *Grievance Procedure Manual* § 5.4, page 13; *Rules for Conducting Grievance Hearings* § III(B), pages 2 and 3.

⁵ Letter from the grievant to the Director of this Department, dated October 2, 2003, page 6.

conduct of the hearing, especially in a case such as this, where the grievant was repeatedly advised to make better use of his time.

Other Alleged Errors: Weighing Evidence/Findings of Fact

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ By statute, hearing officers 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.

In the present case, the grievant makes numerous objections to the veracity of witness testimony and the hearing officer’s consideration of the evidence. The grievant cites many “untruths” the hearing officer was “led to believe” concerning the responsibilities encompassed within his position as a Computer Systems Senior Engineer and his access rights to the agency’s computer network while in that particular position.⁹

The grievant also claims many of the hearing officer’s statements in his decision allegedly “misalign” with the facts presented at hearing.¹⁰ For example, the grievant asserts the hearing officer erroneously found that: (i) the responsibilities of the grievant’s new position were finalized; (ii) a form misa61 was submitted for the grievant’s newly reassigned position; and (iii) when the grievant was assigned to the Zenworks project he was given only the access rights necessary to do his job.¹¹

In his reconsideration decision, the hearing officer discusses the alleged “untruths” and “misalignment” of facts in detail. For example, concerning the grievant’s position that the evidence established that his responsibilities were not yet finalized for the new position, the hearing officer states that even if the grievant’s Employee Work Profile (EWP) had not been in final draft form the weight of the evidence showed that the grievant’s work duties had been finalized by his managers and that the grievant attempted to expand his assigned duties to include network security. Further, the hearing officer indicates that the agency’s testimony that a misa61 form assigns access rights to employees. Likewise, the hearing officer determined the testimony of Ms. KB to be

⁶ Va. Code § 2.2-3005(D)(ii).

⁷ *Grievance Procedure Manual* § 5.9, page 15.

⁸ Va. Code § 2.2-3005(C)(5).

⁹ See Letter from the grievant to the Director of this Department, dated October 2, 2003.

¹⁰ *Id.*

¹¹ Because of the number of statements in the hearing officer’s decision alleged by the grievant to contradict the record facts, not all are discussed with specificity in this ruling. However, all the grievant’s allegations were reviewed by this Department.

more persuasive than that of Mr. BJ regarding whether the grievant was to have full access rights to the network.

In this case, the grievant clearly disagrees with the hearing officer's findings of disputed facts, the weight and credibility that the hearing officer accorded to the testimony of various witnesses at the hearing, and the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision.¹² Such determinations, however, are entirely within the hearing officer's authority.

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. This Department's rulings on matters of procedural compliance are final and nonappealable.¹³ Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's decision becomes a final decision once all timely requests for administrative review have been decided. 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.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵ In noting the right of appeal to the circuit court, this Department expresses no opinion as to whether the final hearing decision conforms to law.

Claudia T. Farr
Director

¹² In his reconsidered decision, the hearing officer notes a typographical error in the original decision where he stated the grievant worked for the agency for seventeen years, when it should have read four years and eight months, an error that had no bearing on the outcome of the case. Additionally, the hearing officer responded to the grievant's claim that the decision incorrectly showed only five witnesses when there were six. He indicated that the hearing decision lists the appearance of individuals and because the agency's Party Designee was already listed as appearing at the hearing he was not listed a second time as a witness.

¹³ Va. Code § 2.2-3003 (G).

¹⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a), page 20.

¹⁵ *Id.*