

Issue: Administrative Review of hearing decision; Ruling Date: May 4, 2004; Ruling #2004-650; Agency: Department of State Police; Outcome: hearing officer did not exceed or abuse authority



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of State Police/ No. 2004-650  
May 4, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 568. The grievant contends that the hearing officer's decision does not comply with the grievance procedure because (1) the agency failed to demonstrate by a preponderance of the evidence that its disciplinary action was warranted and appropriate and (2) the hearing officer's findings of fact are not supported by the evidence presented at hearing.

FACTS

The grievant is a Senior State Trooper with the Virginia Department of State Police (VSP) and has been employed for approximately 23 years. On November 14, 2003, the grievant received a Group III Written Notice with a five workday suspension for disobeying a lawful command of a supervisor and shirking his official duties by failing to respond to a civil disturbance following a concert as instructed.

On July 6, 2003, the grievant was working the 2:00 p.m. – 10:00 p.m. shift. Close to the end of his shift, the VSP dispatcher received notice that the local police department would be requesting assistance from VSP in controlling a large crowd at a local concert pavilion. The Sergeant stated, in the grievant's presence, that when the local police request came in, everyone would need to respond to this call, including the grievant. However, a witness (witness A) testified at hearing that the grievant later stated "I'm going to get out before we're called out [to the concert pavilion]."<sup>1</sup> The grievant disputes the claim that he made this comment.

At approximately 9:30 p.m. the request for assistance came in and the VSP dispatcher began dispatching troopers by vehicle number. The grievant claims that his vehicle number was called before he entered his car, so he did not know that he was supposed to answer the dispatch. Moreover, the grievant states that he did not have a radio with him and the dispatcher did not attempt to reach him by cell phone.

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<sup>1</sup> Hearing Decision, Case No. 568, page 4, issued March 4, 2004.

The grievant challenged the disciplinary action in a December 5, 2003 grievance. The hearing took place on March 1, 2004 and the hearing officer issued his decision on March 4, 2004. In his decision, the hearing officer upheld the disciplinary action, concluding that “[b]ecause Grievant failed to respond to his supervisor’s instruction, he disobeyed a lawful command of a supervisor. Moreover, he shirked his official duty by failing to travel to the concert pavilion”<sup>2</sup> The grievant requested administrative review by this Department.

The grievant claims that the evidence presented at hearing proved that the grievant had no knowledge that he was supposed to respond to the call at the concert pavilion. He claims that if he had truly desired to avoid the call to the concert pavilion, he could have requested sick leave, as he had advised the Sergeant earlier in his shift that he was suffering from a headache. However, in his written decision, the hearing officer concluded that when the sergeant stated that the call would include the grievant, the grievant was instructed to proceed to the pavilion once the request came in. The grievant disagrees with the hearing officer’s conclusion and claims that there is no evidence that he even heard the sergeant’s statement. Moreover, the grievant challenges the hearing officer’s determination that the grievant should have immediately proceeded to the concert pavilion when he learned that units had been dispatched, because, the grievant asserts, it is not standard procedure for an officer to respond to a call if the officer has not been dispatched to do so (and the grievant believed he had not been included in the dispatch).

### DISCUSSION

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>3</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>7</sup> 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

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<sup>2</sup> Hearing Decision, Case No. 568, page 5, issued March 4, 2004.

<sup>3</sup> Va. Code § 2.2-3005(D)(ii).

<sup>4</sup> *Grievance Procedure Manual* § 5.9, page 15.

<sup>5</sup> *See Rules for Conducting Grievance Hearings*, § VI(B), page 11.

<sup>6</sup> *Grievance Procedure Manual* § 5.8(2), page 14.

<sup>7</sup> Va. Code § 2.2-3005(C)(5).

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 objects to 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. Indeed, based on the record evidence, there appears to have been sufficient support for the hearing officer's determination to uphold the disciplinary action against the grievant: the hearing officer determined that witness A, who testified that the grievant planned to "get out" before the dispatch to the pavilion, was a credible witness, and that the grievant failed to assist the local police department at the concert pavilion on July 6, 2003 even though the sergeant told him to respond to the request for assistance.<sup>8</sup> The hearing officer further reasoned that even if the grievant did not hear his vehicle call number, he knew that he should respond, based on the sergeant's instruction. Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings have some basis in the record evidence and the material issues in the case.

#### APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department finds that the hearing officer did not exceed his authority or abuse his discretion under the grievance procedure in deciding Case Number 568.

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.<sup>9</sup> 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.<sup>10</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>11</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>12</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> See Hearing Decision, Case No. 568, page 3, issued March 4, 2004.

<sup>9</sup> *Grievance Procedure Manual* §7.2(d), page 20.

<sup>10</sup> See *Grievance Procedure Manual* §7.3(a), page 20.

<sup>11</sup> *Id.*

<sup>12</sup> Va. Code § 2.2-1001(5).