Issue: Compliance/Administrative Review of Hearing Case #537; Ruling Date: May 10, 2004; Ruling #2004-614; Agency: Virginia Department of Transportation; Outcome: Hearing officer in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2004-614
May 10, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 537. The grievant contends that the hearing officer (1) refused to allow the introduction of evidence regarding the grievant's claim of conspiracy/retaliation, (2) admitted hearsay testimony by agency witnesses, (3) accepted testimony by agency witnesses that was not credible, (4) allowed a witness to the leave the hearing without testifying, (5) misinterpreted the facts, and (6) asked an inappropriate question about PMS.

FACTS

The grievant is an Engineering Technician with the Virginia Department of Transportation (VDOT), where she has been employed for 25 years. On August 21, 2003, the grievant received a Group II Written Notice for failure to follow supervisor's instructions/established workplace violence policy. According to the agency, on August 6, 2003, the grievant embarrassed an assistant permit manager during a meeting with a citizen. When the assistant permit manager confronted the grievant about the incident, the agency claims that the grievant responded in a loud, angry voice and repeatedly stated that the assistant permit manager's question to the citizen was "stupid." Three VDOT employees claim to have been working in the area at the time of the confrontation between the grievant and the assistant permit manager.

On August 7, 2003, the grievant's supervisor questioned the grievant, the assistant permit manager, the three employees, and the citizen about the events of August 6. The three employees stated that the grievant spoke loudly and sounded upset, while the assistant permit manager remained calm. Moreover, the citizen stated during VDOT's investigation that she felt humiliated by the grievant's comments during the meeting on August 6 and that the grievant had implied that the citizen was lying about her true purpose for her visit to the VDOT office. The agency determined that the grievant's behavior toward the assistant permit manager constituted a violation of the workplace violence policy and issued a Group II Written Notice on August 21, 2003.

The grievant challenged the disciplinary action in a September 18, 2003 grievance. The hearing took place on February 5, 2004 and the hearing officer issued his decision on February 10, 2004. In his decision, the hearing officer upheld the disciplinary action, finding that the "grievant humiliated a supervisor during a meeting with a citizen, that she subsequently verbally intimidated him by loudly and angrily making derogatory comments in the presence of coworkers, and that she made the citizen feel uncomfortable."[1] The hearing officer further found that the agency's disciplinary action was not retaliatory, discriminatory, or a misapplication of policy. The grievant requested administrative review by this Department.

DISCUSSION

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[2] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[3] 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.[4]

The grievance hearing is an administrative process that envisions a more liberal admission of evidence than a court proceeding.[5] Accordingly, the technical rules of evidence do not apply.[6] 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."[7] They may exclude evidence that is "irrelevant, immaterial, insubstantial, privileged, or repetitive."[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.

Failure to Allow Testimony Showing Retaliation/Conspiracy

The grievant asserts that none of her witnesses were permitted to provide testimony to support her allegation that VDOT employees conspired against her and that her supervisor retaliated against her. As noted above, this Department does not substitute its judgment for that of the hearing officer regarding the admissibility of evidence. However, where there is evidence that a party may not have been afforded a full

---

[1] Hearing Decision, Case No. 537, page 6, issued February 10, 2004.
[2] Va. Code § 2.2-3005(D)(ii).
[3] *Grievance Procedure Manual* § 5.9, page 15.
[4] *Grievance Procedure Manual* § 5.8(2), page 14.
[5] *Rules for Conducting Grievance Hearings*, page 7.
[6] *Id*.
[7] Edward W. Cleary, McCormick on Evidence Ch. 16, page 542 (1984).
[8] *Rules for Conducting Grievance Hearings*, page 7.

opportunity to present relevant evidence or respond to evidence presented by the opposing party, then this Department may order the hearing officer to reopen the hearing.

In this case, the hearing decision states that the grievant "offered only one witness who said he thought there was a conspiracy against the grievant," and concludes that the evidence merely showed that the grievant was unpopular, not that there was a conspiracy against her.[9] Moreover, in his reconsideration decision, the hearing officer observed that several of the grievant's own witnesses provided no evidence of a conspiracy.[10] During the investigation for this ruling, this Department's review of the tapes of the grievant's hearing confirmed that observation. Moreover, from the hearing record, it appears that the grievant's witnesses had not been prohibited from testifying about conspiracy or retaliation against the grievant. The hearing officer merely stated during the hearing that he would not allow multiple witnesses to testify as to the grievant's popularity, but invited witnesses to cite specific examples of conspiracy or retaliation. Indeed, the witnesses were asked to testify whether they witnessed any *specific* acts of conspiracy or retaliation by the grievant's supervisor. As noted above, hearing officers have the authority to limit evidence that is repetitive or irrelevant.[11]

The grievant claims that her witnesses would have testified about the daily negative treatment by her co-workers and supervisor. However, she was unable to state any specific examples of conspiracy or retaliatory acts by the co-workers or supervisor about which her witnesses might have testified. In order to prove retaliation at hearing, the grievant must demonstrate that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) a causal link exists between the adverse employment action and the protected activity.[12]

In this case, the hearing officer determined that, due to the lack of specific evidence, he could find no causal link between the grievant's protected activities and her disciplinary action. In reviewing the hearing tapes for this ruling, no evidence was found indicating that the hearing officer prevented the grievant's witnesses from testifying about a causal link. Although the grievant disagrees with the hearing officer's assessment that she was not the target of a conspiracy or retaliation, the hearing officer's findings were based upon the record evidence and the material issues of the case. Therefore, we cannot conclude that the hearing officer exceeded his authority with respect to this determination.

---

[9] Hearing Decision, Case No. 537, pages 8-9, issued February 10, 2004.

[10] The decision states that "Grievant's witness V testified that one person does not like grievant. Grievant's witness R testified that she was unaware of any conspiracy. Grievant's witness B testified that she had not seen grievant's supervisor create any problems for grievant. Grievant's witness J testified that some female coworkers resented grievant but he had no knowledge of retaliatory acts or a conspiracy. Grievant's witness H was the only witness who alleged a conspiracy, however, under cross-examination he could only identify two women who wanted to isolate grievant and thought that her work performance was poor." Reconsideration Decision, Case No. 537, page 2, issued February 23, 2004.

[11] *Rules for Conducting Grievance Hearings*, page 7.

[12] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).

Failure to Admit Evidence Showing Retaliation/Conspiracy

The grievant further claims that several relevant documents demonstrating a conspiracy or retaliation were not admitted into evidence, including: (1) prior grievance and EEOC investigations against the grievant's supervisor, (2) evidence of a retaliatory/hostile work environment created by her supervisor, (3) her position description and performance evaluation, (4) evidence that the engineering section does not have jurisdiction over sidewalk maintenance, and (5) acknowledgement letters. The grievant claims that the documents are relevant because they tend to prove that the agency has engaged in a pattern of retaliation against the grievant. The hearing officer determined that the documents were not relevant to the issues being grieved.

Hearing officers have the authority to exclude evidence that is irrelevant, and this Department cannot substitute its judgment for that of the hearing officer with respect to those findings, unless there is sufficient evidence that the hearing officer abused his discretion.

The grievant submitted numerous documents, grouped into five Exhibit "tabs." While this ruling does not discuss with particularity each of specific items submitted, all of those documents have been reviewed and considered in light of this Department's responsibility to assure that the hearing officer's conduct at the hearing and written decision comply with the grievance procedure.

After reviewing the grievance hearing tapes and the documents in question, this Department cannot conclude that the hearing officer abused or exceeded his authority under the grievance procedure. The hearing officer has considerable discretion in making determinations about the relevancy and admissibility of evidence, and there is no evidence that the grievant was not afforded a full opportunity to present relevant evidence or respond to evidence presented by the agency. For example, even though he would not admit the documentation into evidence, the hearing officer permitted the grievant to testify about her use of the grievance procedure and her participation in the OEES investigation, thus establishing that she had engaged in protected activities in the past. With respect to the grievant's evidence of an alleged hostile work environment, the hearing officer clarified that he would accept *specific* examples of hostile and/or retaliatory acts, but that general statements assessing the working environment at the grievant's residency would be insufficient to sustain her retaliation claim. Moreover, he concluded that evidence of the grievant's good performance, such as the grievant's acknowledgment letters, were not relevant because the grievant's performance was not an issue qualified for hearing.[13] In sum, this Department finds no procedural error of abuse of discretion with respect to the hearing officer's rejection of these documents as exhibits.

[13] Under the grievance procedure, "[a]ny issue not qualified . . . cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings*, page 1.

Other Witness Issues & Alleged Factual Errors

The grievant objects to the admission of hearsay testimony and to the fact that Witness KJ left the grievance hearing without testifying.[14] Moreover, she disagrees with factual determinations made by the hearing officer and challenges the credibility of VDOT's witnesses.[15]

As noted above, the formal rules of evidence do not apply in grievance hearings.[16] Accordingly, hearsay evidence, if probative,[17] may be admitted and considered by the hearing officer. In this case, hearsay evidence, including reports of the August 6, 2003 incident, was probative, and thus the hearing officer did not exceed or abuse his authority by considering it. With respect to Witness KJ, upon review of the record, it appears that neither the agency nor the grievant called this individual to testify in the hearing. Under the rules of the grievance procedure, "[e]ach party may call witnesses to testify at the hearing."[18] Accordingly, it is the responsibility of each party to secure his or her own witnesses for hearing. A hearing may not be re-conducted simply because a party determines later that she should have called a certain witness to testify.

The grievant's remaining claims simply contest the 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 were entirely within the hearing officer's authority, and this Department cannot conclude that the hearing officer's findings were without some basis in the record and the material issues in this case. Further, the hearing officer has considerable discretion in making determinations about the relevancy and admissibility of evidence, and this Department cannot merely substitute its judgment for that of the hearing officer.

Inappropriate Comment

Finally, the grievant objects to a question by the hearing officer as to whether she was experiencing PMS on August 6, 2003, the date of the incident at issue. The grievant

---

[14] Witness KJ was on the agency's original witness list submitted prior to the hearing. However, the agency did not call Witness KJ to testify during the hearing.

[15] Specifically, she claims that the hearing officer incorrectly concluded that (1) there was no retaliation against the grievant and (2) the grievant yelled "stupid, stupid, stupid, stupid, stupid, stupid" from a seated position. As evidence that the hearing officer arrived at an incorrect factual determination, the grievant claims that it would be physically impossible for her to yell from a seated position because she has asthma and gets "tongue-tied and winded." The grievant further objects to the fact that VDOT witnesses "heard" but did not "see" the August 6 incident and asserts that "there was doubt about the witness's perception or memory" and that VDOT witnesses provided conflicting testimony.

[16] *Rules for Conducting Grievance Hearings*, page 7.

[17] Probative evidence is that which "affects the probability that a fact is as a party claims it to be." Edward W. Cleary, McCormick on Evidence Ch. 16, p. 542 (1984).

[18] *Rules for Conducting Grievance Hearings*, page 6.

claims that this line of questioning was offensive and sexist. In his Reconsideration Decision, the hearing officer stated that:

> The evidence during the hearing strongly suggested that grievant's actions on that date were atypical. She had no previous history of loud outbursts or verbal abuse of management employees. In an effort to ascertain if there was some other underlying cause for her actions, the hearing officer first asked whether grievant had been experiencing any unusual problems at the time, either personal, home, family, or physical problems. Given grievant's gender it was a natural follow-up question to ask about the possibility that she might have been experiencing PMS at the time.[19]

The hearing officer is charged with conducting grievance hearings "in an orderly, fair, and equitable fashion."[20] Accordingly, "it is essential that the hearing officer establish and maintain a tone of impartiality. Hearing officers should bear in mind, during the pre-hearing conference and throughout the hearing process, that an idle gesture or remark . . . can be perceived as partiality."[21] Hearing officers may question witnesses during the grievance hearing. However, the *Rules for Conducting Grievance Hearings* warns that they "should exercise this discretion sparingly," as the "tone of the inquiry [or] the construct of the question . . . can create an impression of bias."[22]

This Department agrees that the hearing officer's questioning the grievant about PMS was improper. (A general inquiry by the hearing officer as to whether there were any extenuating circumstances surrounding the events of August 6, 2003, would have been more appropriate.) Nevertheless, the hearing officer did not violate a procedural rule, nor did the remark amount to an abuse of authority. Although the remark was understandably offensive to the grievant, there is no evidence that the remark had a material effect on the outcome of the hearing or that the hearing officer was in fact biased against her based on her gender. Indeed, it appears that the question had no bearing in the decision's ultimate conclusion that the grievant engaged in inappropriate behavior on August 6.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department finds that the hearing officer did not abuse his discretion under the grievance procedure in deciding Case Number 537. 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.[23] In addition to the request for administrative review by this Department, the grievant requested administrative review by the hearing

---

[19] Reconsideration Decision, Case No. 537, page 3, issued February 23, 2004.
[20] *Rules for Conducting Grievance Hearings*, page 7.
[21] *Rules for Conducting Grievance Hearings*, page 4.
[22] *Rules for Conducting Grievance Hearings*, page 7.
[23] *Grievance Procedure Manual* §7.2(d), page 20.

officer and the Department of Human Resource Management (DHRM). The hearing officer issued his Reconsideration Decision on February 23, 2004 and DHRM issued its decision on April 13, 2004. Accordingly, the February 10, 2004 hearing decision is now final. 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25] This Department's rulings on matters of procedural compliance are final and nonappealable.[26]

Claudia T. Farr
Director

[24] *See Grievance Procedure Manual* §7.3(a), page 20.
[25] *Id.*
[26] Va. Code § 2.2-1001(5).