

Issue: Administrative Review of Case #653/hearing decision; Ruling Date: June 10, 2004; Ruling #2004-677; Agency: Virginia State Police; Outcome: hearing officer in compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of State Police/ No. 2004-677
June 10, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 563. The grievant asserts that the hearing officer committed several errors during the hearing and in the hearing decision. For the reasons set forth below this Department will not disturb the hearing decision nor order the hearing officer to reopen the hearing.

FACTS

The grievant is a Special Agent with the Virginia State Police (VSP or agency). In March 2003, the grievant was assigned to a regional narcotics enforcement task force which was comprised of representatives from three adjacent municipal police forces. Pursuant to a memorandum of understanding, the task force member from the largest of the three cities would serve as the Task Force Coordinator.

In April 2003, the grievant was directed to attend a training class at the agency's training facility in Richmond. On April 15th, the grievant attended a class that was scheduled to last until 4:00 p.m. but ended up finishing at 4:45 due to the volume of training material. The grievant, however, purportedly left the class at 2:15 and did not return when the instructor began a 15 minute mid-afternoon break. The grievant asserted that he left because his wife was out-of-town and thus he had to pick up his children. He failed to inform either the instructor or the training coordinator of his need to leave early.

When the grievant first began working on the task force, he was directed by the Task Force Coordinator to attend a training conference May 5-9, 2003. The grievant informed the Coordinator that he would not be able to attend the last day because of a prior court engagement. He ended up attending the first two days of the conference but left early each day, and he did not attend any of the last three days.

In conjunction with his task force work the grievant was assigned a cellular phone which was funded by contributions from each of the participating agencies. The phone contract allowed for up to 400 free airtime minutes each month. Investigators and agents were allowed to make personal calls so long as the total monthly usage did not exceed the

400 minute limit. While agents are not disciplined for exceeding the limit, they are required to reimburse the agency for any overages.

The Task Force Coordinator, who is charged with review of cellular phone usage, discovered that during the April-May billing month the grievant had used 445 minutes of airtime, and during the May-June period had used 522 minutes of airtime. Upon closer review of the billing records, the Coordinator found that the grievant had made calls significantly removed from the locations of the training and conference sites in April and May of 2003.

In early July, the Coordinator wrote the VSP Lieutenant in charge of criminal investigations in the grievant's area about the issues described above. The Coordinator suggested that he believed that it would be most appropriate for the VSP to deal with the phone/attendance issues. Following an investigation by agency management, the grievant's First Sergeant advised the grievant that he could be subject to disciplinary action for abuse of state time and cell phone usage. The grievant subsequently informed the Sergeant that he was heading immediately to the Coordinator to address the situation. After consulting with the Lieutenant, the Sergeant ordered the grievant not to contact the Coordinator.

The next day, July 29th, in direct contravention to the Sergeant's order, the grievant confronted the Coordinator. The grievant brought with him to the meeting another task force investigator, a Hampton City Police Officer. The grievant informed the Coordinator that he wanted to "come across [his] desk and rip [the Coordinator's] fucking head off." In addition, he repeatedly accused the Coordinator as being "spineless." When the Lieutenant learned of the confrontation, he ordered the First Sergeant to immediately remove the grievant from the task force.

Based on all of the above, the grievant was given a Group III Written Notice, three-day suspension, and was transferred to another division. Specifically, the grievant was charged with (1) abuse of state time; (2) leaving the work site without permission during work hours; (3) unauthorized use of state property (the assigned cellular phone); (4) failure to follow supervisors instructions; (5) engaging in conduct that undermines the efficiency of the agency; and (6) threatening employees, supervisors, or the public.

While the Hearing Officer did not find that the grievant used state property in an unauthorized manner, he found that the grievant did commit the misconduct outlined in the remaining five charges.¹ Accordingly, he upheld the Group Notice, suspension, and transfer.

¹ Regarding the abuse of state time charge, the hearing officer found that the agency did not prove by a preponderance of the evidence that the grievant abused time by not attending the full May 5-9 conference. However, he did conclude that the grievant abused time by leaving the April 15th training before it concluded.

DISCUSSION

The grievant asserts that the Hearing Officer erred by misquoting witnesses, confusing dates, and, apparently, by giving excessive weight to agency witnesses testimony. In addition, the grievant raises other objections, none of which are particularly germane to the outcome of the hearing decision. Selected objections will be addressed below.²

Misquoting times, dates, and testimony

The grievant asserts that the hearing officer mischaracterized witness testimony and erred in his recitation of times and dates in the decision. However, the grievant has provided no explanation of how any of the allegedly incorrect dates or times or mischaracterizations had any bearing on the outcome of the hearing or how he was prejudiced by the alleged errors. Accordingly, this Department has no reason to disturb the decision on the basis of the mere allegation of such error.

Weighing of the Evidence

Hearing officers are authorized to make “findings of fact as to the material issues in the case”³ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁴ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁵ 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 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, as explained below, 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.

² While not each of the objections raised by the grievant will be discussed in this ruling, each has been carefully considered and this Department concludes that there is no reason to disturb the hearing officer’s decision.

³ Va. Code § 2.2-3005(D)(ii).

⁴ *Grievance Procedure Manual* § 5.9, page 15.

⁵ Va. Code § 2.2-3005(C)(5).

For example, the grievant objects to the Hearing Officer's conclusion that the agency's reputation and effectiveness were adversely affected by leaving the task force without an investigator in the wake of his removal from the task force. The grievant asserts that the Hearing Officer reached that conclusion on his own accord because there was purportedly no testimony given to support that finding. As an initial point, the hearing officer's observation that the grievant's removal from the task force must have created a hardship on the agency was merely a parting conclusion in the section of the Ruling that discussed the overall effectiveness of the agency being undermined. The *complete* charge as described by the agency was that the grievant has engaged in "conduct, whether on or off the job, that undermines the effectiveness or the efficiency of the Department's activities. *This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees, in violation of General Order 19, paragraph 14 b (20), a Group III offense.*"⁶

The hearing decision indicates that the grievant told the Coordinator that he wanted to "come across [the Coordinator's] desk and rip [his] fucking head off." (Significantly, the grievant does not, in his ruling request, refute that he made this statement.) Furthermore, the grievance record indicates that the grievant involved another task force investigator from another jurisdiction into the phone/attendance issue after specifically being instructed not to approach the Coordinator. Additionally, the hearing record also shows that the grievant taunted the Coordinator as being "spineless." (Again, in his ruling request, the grievant does not refute that he repeatedly insulted the Coordinator in this manner.) In sum, the hearing record reveals ample evidence in the hearing record to support the hearing officer's conclusion that the grievant's behavior, as a whole, undermined the efficiency and effectiveness of the agency by, among other things, impairing its reputation.

The grievant similarly contends that the hearing officer independently concluded that the grievant's behavior towards the Coordinator was threatening. There is evidence in the record that grievant was upset and/or nervous in approaching the Coordinator—that the grievant's statements were clipped, his mouth dry, his jaw clenched. Moreover, the grievant himself admitted that the reason that he had brought the task force investigator along with him was because he did not trust himself to refrain from possibly assaulting the Coordinator should the Coordinator happen to say something the grievant might find offensive.⁷ Finally, the very nature of the statement--that the grievant wanted to "come across [the Coordinator's] desk and rip [his] fucking head off" -- is, on its face, an

⁶ Emphasis added.

⁷ In Exhibit 3, Memorandum from Coordinator to VSP Lieutenant, July 31, 2003, the grievant was quoted as stating that he brought along the other investigator because "the man in me [the grievant] is big enough to come in here and talk to you [the coordinator] but I brought [the investigator] in here in case because the boy in me doesn't like something you say, [the investigator] is the strongest one in here who could hold me back from coming across the desk." The investigator brought by the grievant to the confrontation with the Coordinator confirmed that the grievant made this statement. Exhibit 3, Memorandum from the First Sergeant to the Captain, August 19, 2003.

inherently threatening statement. Based on the foregoing, this Department cannot conclude that the grievance record did not contain sufficient evidence to support a finding that the grievant's behavior towards the Coordinator was threatening.

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 563 and upholding the agency imposed discipline.⁸

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

Claudia T. Farr
Director

⁸ The grievant raised no credible objection to the charge of failure to follow a supervisor's instruction, by itself a Group II offense.

⁹ *Grievance Procedure Manual* §7.2(d), page 20.

¹⁰ See *Grievance Procedure Manual* §7.3(a), page 20.

¹¹ *Id.*

¹² Va. Code § 2.2-1001(5).