

Issue: Administrative Review of Hearing Decision; Ruling Date: June 11, 2004; Ruling #2004-705; 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
Ruling Number 2004-705
June 11, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 616. The grievant claims that the hearing officer's written decision and conduct at hearing do not comply with the grievance procedure. Specifically, the grievant maintains that: (1) the agency failed to demonstrate by a preponderance of the evidence that its disciplinary action was warranted and appropriate; (2) the hearing officer exceeded the scope of his authority by considering an issue not before him; (3) the hearing officer improperly held the grievant to a "higher standard" due to her position within the Virginia Department of Transportation (VDOT or the agency); and (4) the hearing decision is inconsistent with state policy and the Virginia Personnel Act. For the reasons discussed below, this Department concludes that the hearing officer's decision and actions did not violate the grievance procedure.

FACTS

On January 21, 2004, the grievant received a Group III Written Notice with demotion for "failure to provide adequate supervision" over subordinates on a particular VDOT work order. The Written Notice further states that: "[y]ou [grievant] also failed to provide leadership and did not take quick and decisive action in resolving the problem with the work order once it was brought to your attention." Prior to her demotion, the grievant was employed as a District Administrator with VDOT.

On January 26, 2004,¹ the grievant timely initiated a grievance challenging the Group III Written Notice and demotion. Subsequently, the grievance was qualified for hearing and a hearing was held on March 19, 2004. In his decision dated April 16, 2004, the hearing officer found the Group III Written Notice and demotion warranted and appropriate because "[e]rrors that may otherwise seem insignificant if committed by an employee in a low-level position, can have enormous consequences to the Commonwealth when made by a District Administrator. Grievant's failure to act rises to the level of a Group III offense."² In further support of his decision, the hearing officer

¹ The date on the Grievance Form A is erroneously typed as 1/26/03.

² Decision of Hearing Officer, Case Number: 616, page 11, issued April 16, 2004.

states, “[a] fully engaged manager would have acted sooner and with greater involvement than did [g]rievant.”³

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.”⁴ 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.⁵

Preponderance of the Evidence

The grievant asserts that the evidence presented at hearing “failed to establish that the charges leveled against the [g]rievant were anything more than a first-time, single-occasion, work-performance issue for which at most a performance plan was required.” In support of her contention, the grievant cites agency testimony in which the agency head allegedly stated that the grievant’s demotion was not about federal funding or whether she properly supervised a subordinate, but was based upon his determination that the grievant “was not the right person for the position.”⁶

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁸ 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, or aggravating circumstances to justify the disciplinary action.⁹ 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.¹⁰

³ *Id.*

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4(3), page 18.

⁶ To support its claim that VDOT failed to prove its case by a preponderance of the evidence, the grievant seems to rely heavily upon the agency head’s alleged testimony that the grievant’s demotion was not based upon her failure to supervise her subordinate, but on her performance as a manager. It should be noted however that the Written Notice disciplines the grievant not only for her failure to supervise a subordinate, but calls into question the grievant’s actions as a manager by stating that, “[y]ou [the grievant] failed to provide leadership and did not take quick and decisive action in resolving the problem with the work order once it was brought to your [the grievant’s] attention.”

⁷ Va. Code § 2.2-3005(D)(ii).

⁸ *Grievance Procedure Manual* § 5.9, page 15.

⁹ See *Rules for Conducting Grievance Hearings*, § VI(B), page 11.

¹⁰ *Grievance Procedure Manual* § 5.8(2), page 14.

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹¹ 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.

Here, the grievant's argument that the agency failed to prove its case by a preponderance of the evidence, when examined, simply contests the hearing officer's findings of disputed fact, 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, 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. Further, 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.

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 (a high-ranking VDOT employee who testified that it was not routine for him to request a briefing from a District Administrator regarding a work order) was a credible witness, and that the grievant had failed to act with a sense of urgency despite his request.¹² The hearing officer further found that the grievant waited until she received a follow-up call a week later from witness A regarding the work order before she investigated the matter and the actions of her subordinate.¹³ It was this evidence of inaction that led the hearing officer to conclude that the Group III and accompanying demotion were appropriate, especially in light of the grievant's position within the agency. 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.

Issue not before the hearing officer

The grievant claims that the hearing decision's consideration of disciplinary action taken by the grievant against her subordinate violated the grievance procedure, and she asserts that the matter of appropriate discipline for her subordinate was not an issue before the hearing officer for determination. In his decision, the hearing officer states that the grievant's failure to terminate her subordinate for his involvement in the matter for which the grievant had been disciplined "reflects a level of managerial decision-making that places the [a]gency at risk of damage from future rogue employees."¹⁴

¹¹ Va. Code § 2.2-3005(C)(5).

¹² See Hearing Decision, Case No. 616, page 10, issued April 16, 2004.

¹³ See Hearing Decision, Case No. 616, page 10, issued April 16, 2004.

¹⁴ See Hearing Decision, Case No. 616, page 10, issued April 16, 2004.

Issues that are "not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing."¹⁵ The hearing decision in this case, however, did not attempt to provide a remedy for the grievant's failure to remove the subordinate from employment. On the contrary, disciplinary action taken by the grievant against her subordinate was considered as background evidence only -- the agency itself had introduced it at hearing as evidence in support of its contention that the grievant failed to demonstrate leadership and "did not take quick and decisive action to resolve the problem with the work order once it was brought to your [the grievant's] attention." The hearing officer duly considered the issue in his decision, not as a qualified issue to be determined on the merits and for which relief may be ordered, but as evidence to weigh in determining whether the grievant's discipline was appropriate and warranted under the circumstances. Given the agency's stated reasons for discipline, the hearing officer was entirely within his authority under the grievance procedure to consider the level of discipline implemented by the grievant against her subordinate in determining whether to uphold or reverse the grievant's discipline and accompanying demotion.

Consideration of grievant's position within the Agency

The grievant claims that the hearing officer's decision to uphold the disciplinary action taken against her due, in part, to her high-ranking position within the agency was an abuse of discretion and improper under state policy and the Virginia Personnel Act. As stated below, this Department has no authority to determine whether a hearing decision comports with state policy or Virginia law. As such, the only issue to be determined by this Department is whether the hearing officer abused his discretion or exceeded his authority under the grievance procedure by considering the grievant's position within the agency in making his final determination.

As stated above, the responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁶ To do this,

the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had been made yet) to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹⁷

In this case, the hearing officer did not abuse or exceed his authority under the grievance procedure by determining whether the cited actions occurred and whether they constituted misconduct at the Group III level. His determination that the grievant's actions as a District Administrator constituted the highest level of misconduct under state

¹⁵ *Rules for Conducting Grievance Hearings*, page 1.

¹⁶ *Grievance Procedure Manual*, § 5.8, page 14.

¹⁷ *Rules for Conducting Grievance Hearings* § VI (B), page 11, (emphasis added).

policy, a Group III offense, is a matter of state personnel policy subject to review by the Director of the Department of Human Resources Management.

Inconsistency with Policy/Law

The grievant objects to the hearing decision on the basis that it is inconsistent with Department of Human Resource Management (DHRM) Policies 1.40 and 1.60 as well as the Virginia Personnel Act. DHRM, not this Department, has the sole authority to interpret all policies affecting state employees and to ensure that hearing decisions are consistent with state policy.¹⁸ Accordingly, requests for administrative review based on policy conformance must be directed to the DHRM Director. In addition to its appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was incorrect, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy.¹⁹ Additionally, this Department is not authorized to review hearing decisions on the basis of law.²⁰

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 616. Furthermore, it is not for this Department to determine whether the hearing officer's April 16, 2004 decision is consistent with state policy or Virginia law.

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.²¹ In addition to the grievant's request for a ruling from this Department, the grievant requested an administrative review from DHRM. That Department has not yet responded to the grievant's request. Therefore, the hearing decision in this case is not yet 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³ This Department's rulings on matters of procedural compliance are final and nonappealable.

¹⁸ Va. Code § 2.2-3006; *Grievance Procedure Manual* § 7.2 (a)(2), page 19.

¹⁹ *Grievance Procedure Manual* § 7.2 (a)(2).

²⁰ Va. Code § 2.2-3006 (providing that a party may appeal to the circuit court on the basis that the hearing decision is contradictory to law). *See also Grievance Procedure Manual* § 7.2(a)(2) and § 7.3(a), pages 19-20.

²¹ *Grievance Procedure Manual*, § 7.2(d).

²² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²³ *Id.*

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