Issue: Administrative Review/Hearing Decision; Ruling Date: July 30, 2004; Ruling #2004-691; Agency: Virginia Department of Taxation; Outcome: hearing decision will not be disturbed

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Taxation
Ruling Number 2004-691
July 30, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 603. The grievant claims that the hearing officer did not make a fair decision in his case. Specifically, the grievant maintains that: (1) the decision references and relies upon two documents that were not introduced at hearing; and (2) the grievant has evidence that he was the victim of retaliation. For the reasons discussed below, the hearing decision will not be disturbed.

FACTS

The grievant filed a timely grievance from a Group III Written Notice issued for falsifying leave records.[1] The grievant was removed from employment on December 2, 2003 as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The agency alleged that the grievant understated his leave on five occasions, each of which is addressed separately below:

1. May 1, 2003. The grievant submitted a leave form on April 28, 2003 indicating that he would take annual leave on May 1, 2003 from 8:15 a.m. to 12:15 p.m. The grievant actually utilized six hours of leave on May 1, 2003, arriving at work just before 3:00 p.m. The grievant acknowledges that he should have submitted a supplemental leave form for the additional two hours of leave but did not remember to do so. The grievant's supervisor did not tell grievant to submit a supplemental leave form at any time prior to grievant's removal from employment.

2. July 3, 2003. The grievant submitted a leave form on July 3, 2003 stating that he had taken annual leave from 8:15 a.m. to 10:45 a.m. The door access computer

[1] Exhibit 4. Group III Written Notice, issued December 11, 2003.
[2] Exhibit 1. Grievance Form A, filed January 6, 2004.

log and grievant's computer log-in report reflect that grievant arrived and logged in at 11:02 a.m. The agency contends that grievant understated his leave by .4 of an hour. The grievant maintains that he followed his supervisor's instructions by factoring in his break time to the recorded leave. The supervisor and timekeeper both approved the leave form.

3. September 12, 2003. The grievant submitted a leave form for this date indicating two hours of leave without pay. The door access log and grievant's computer log both show that grievant arrived and logged in at 10:36 a.m. The agency contends that grievant understated his leave by .4 of an hour; grievant factored in his 15-minute break time (8:15 a.m. – 10:15 a.m. + 15 minutes break) and arrived at 10:30 a.m.[3] The grievant's supervisor and the timekeeper both approved the leave form.

4. September 17, 2003. The grievant submitted a leave form for 2.5 hours of leave without pay from 8:15 a.m. to 10:45 a.m. The grievant maintains that he arrived at 11:00 a.m. on this date, and that he began taking telephone calls shortly after arrival. The door access log recorded 2:19 p.m. as the first time grievant swiped his card on September 17, 2003. The agency asserts that he logged into the STARS account system at 2:20 p.m. and received his first incoming call at 2:23 p.m. The Rockwell log reflects that the grievant had not logged out of his computer the preceding day; therefore, there is no log-in time recorded for September 17, 2003.

5. November 25, 2003. The grievant submitted a leave form claiming one hour of annual leave from 8:15 a.m. to 9:15 a.m. The grievant first swiped his door access card at 11:10 a.m. The agency claims that he logged into the STARS account system at 11:12 a.m. and received his first incoming telephone call at 11:13 a.m. The grievant avers that he arrived at work at 9:30 a.m. and worked on correspondence until he logged into his computer shortly after 11:00 a.m. The grievant's supervisor conducted a training class on the morning of November 25, 2003 and, therefore, did not observe the grievant's arrival at work. However, a co-worker was asked by the supervisor to note the grievant's arrival time; she reported that he arrived between 11:15 a.m. and 11:30 a.m.[4]

The day after the grievant's March 24, 2003 hearing, the hearing officer issued his decision upholding the Written Notice and discharge. The hearing officer found that the grievant's explanation of leave taken on May 1, July 3, and September 12, 2003 were sufficient to overcome the agency's allegation of deliberate falsification. However, the hearing officer found, by a preponderance of the evidence, that the grievant did falsify his leave slips on September 17 and November 25, 2003.

[3] No written policy was offered to show how many minutes leeway are permitted before charging an employee with tardiness.
[4] Exhibit 1. Executive Commissioner's response to grievance, January 21, 2004.

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."[5] 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.[6]

Evidence of Retaliation

In his request for administrative review, the grievant cites to several examples of evidence of retaliation. This evidence, however, was not introduced at hearing nor was it recently discovered. Accordingly, this Department will not consider it now or disturb the hearing officer's decision with regard to his finding on retaliation.

Weighing Evidence

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] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[9] 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 the 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.

The STARS Report

The grievant asserts that the hearing decision references and relies upon a "STARS" report that the agency never provided to him or the hearing officer, and which had not been introduced as evidence at the grievant's hearing. The STARS report is an agency account management tool that reflects entries to accounts, when they were made, and by whom. According to the grievant, the STARS report would show, by virtue of its

[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3), page 18.
[7] Va. Code § 2.2-3005(D)(ii).
[8] *Grievance Procedure Manual* § 5.9, page 15.
[9] Va. Code § 2.2-3005(C)(5).

time tracking feature, that he was at work earlier than the agency asserts. The agency, on the other hand, disputes this contention.[10]

The hearing officer apparently relied upon agency testimony describing the contents of the STARS report in reaching his factual findings as to the grievant's arrival times at work.[11] As to September 17th, the hearing officer states in his Findings of Fact that the grievant "logged into the STARS account system at 2:20 p.m. and received his first incoming call at 2:23 p.m."[12] Furthermore, in reaching his conclusion that the grievant has "not satisfactorily rebutted the evidence with regard to leave he took on September 17, 2003," the hearing officer cites to the log-on to the STARS system as evidence of his arrival time.[13] Similarly, as to November 25, 2003, the hearing officer finds that the grievant "logged into the STARS account system at 11:12 a.m. and received his first incoming telephone call at 11:13 a.m."[14] Significantly, the hearing officer observed that "[s]ince grievant had not logged onto STARS until 11:12 a.m., his explanation is not credible."[15]

Clearly the better evidence as to the contents of the STARS report would have been the report itself, not someone's testimony as to its purported contents.[16] And while grievance hearings are informal, (e.g. the technical rules of evidence do not apply and most probative evidence is admitted), less reliable evidence should not serve as a substitute for more reliable evidence that is readily available.[17] Unquestionably, the more reliable source of the specific times that grievant entered data was the STARS report itself as opposed to someone's recollection of the report's contents. Sole reliance upon an individual's ability to recollect the contents of an available document would create an unnecessary risk of mistake and unreliability.

<u>Hearsay Testimony</u>

The grievant also objects to a reference in the hearing decision to a co-worker who purportedly noted the grievant's time of arrival on November 25th. The co-worker was never called as a witness nor was this individual's written statement regarding the arrival time introduced as evidence at hearing. Instead, another agency witness testified that the co-worker had claimed that the grievant arrived at or around 11:15 a.m. Reliance

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[10] Though the grievant had asked the agency for a copy of the STARS report during the management resolution steps, the agency did not provide it and the grievant did not pursue an order from this Department or the hearing officer that the agency produce the report.
[11] The hearing officer does not cite to the source of his conclusions regarding the STARS report but they appear to be derived from testimony as to the content of the report, not from the actual report itself, which was not introduced into evidence by either party.
[12] Hearing Decision, pg. 5.
[13] *Id*., pg. 7.
[14] *Id*., pg. 5.
[15] *Id*., pg. 8.
[16] "Generally speaking, documents are the best evidence of their contents." Local Union No. 42 v. Supervalu, Inc. 212 F.3d 59, 69 (1st Cir. 2000).
[17] *Rules,* IV (D).

solely upon hearsay testimony to establish when the grievant's co-worker allegedly observed the grievant's arrival at work appears to allow for unnecessary risk of mistake and unreliability. The better practice would have been for the agency to have called the co-worker as a witness, who then could have been cross-examined.

However, in this case, the hearing officer's finding that the grievant had falsified his September 17 and November 25 leave slips does not rest solely on the STARS report or the above hearsay testimony. The hearing decision and record contain other grounds to support the hearing officer's findings regarding the grievant's arrival times at the workplace on those dates. For example, the hearing officer cites to other computer records that support the agency's claims as to the grievant's arrival time (e.g. Door Scan Reports and Phone Log Reports).[18] Clearly, this constitutes relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and thus, this Department will not disturb the hearing officer's findings or decision.[19]

APPEAL RIGHTS AND OTHER INFORMATION

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.[20] 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.[21] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[22] This Department's rulings on matters of procedural compliance are final and nonappealable.[23]

Claudia T. Farr
Director

[18] Exhibit 8.
[19] The 'substantial evidence' rule is used in cases involving adjudication by federal agencies pursuant to the Federal Administrative Procedure Act (APA). While this Department is not bound by either the federal APA or the Virginia APA, cases applying the "substantial evidence" standard are nonetheless instructive and persuasive here.
[20] *Grievance Procedure Manual* §7.2(d), page 20.
[21] *See Grievance Procedure Manual* §7.3(a), page 20.
[22] *Id.*
[23] Va. Code § 2.2-1001(5).