

Issue: Administrative Review of Hearing Decision; Ruling Date: July 30, 2004; Ruling #2004-701; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health Mental Retardation and
Substance Abuse Services
Ruling Number 2004-701
July 30, 2004

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 647. 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 hearing officer failed to send his decision by certified mail to the grievant in a timely manner; (2) the hearing officer failed to consider important evidence presented; (3) the hearing officer demonstrated bias in favor of the agency; and (4) the hearing officer failed to consider mitigating circumstances.

FACTS

Prior to her termination on January 21, 2004, the grievant was employed as an MR Specialist I with the Department of Mental Health Mental Retardation and Substance Abuse Services (MHMRSAS or the agency). On January 21, 2004, the grievant was issued a Group III Written Notice with termination for fighting in the workplace.

On February 2, 2004, the grievant timely initiated a grievance challenging the Group III Written Notice and termination. Subsequently, the grievance was qualified for hearing and a hearing was held on April 7, 2004. In his decision dated April 8, 2004, the hearing officer found the Group III Written Notice and termination warranted and appropriate because the grievant had engaged in a fight with a coworker in the workplace, which is a Group III offense under the Department of Human Resource Management (DHRM) Policy 1.60.¹ The hearing officer upheld his April 8, 2004 decision in a May 6, 2004 reconsideration decision.

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

¹ Decision of Hearing Officer, Case Number: 647, page 4, issued April 8, 2004.

decisions...on all matters related to procedural compliance with the grievance procedure.”² 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.³

Failure to Send Decision by Certified Mail

The grievance procedure provides that the hearing officer is to send his decision to each party by certified mail, return receipt requested.⁴ Additionally, “all requests for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision.”⁵

The grievant claims that the hearing officer failed to send her the April 8, 2004 hearing decision by certified mail and that such failure impeded “development and quality of the requested review/appeals.” Under the grievance procedure, the grievant had until April 18, 2004 to request any administrative review of the April 8, 2004 hearing decision. After numerous alleged attempts to obtain a copy of the April 8, 2004 hearing decision, the grievant claims that her representative received a copy of the decision on April 16, 2004 and she received it the following day, April 17, 2004.

The hearing officer has presented evidence that the decision was sent to the grievant on April 8, 2004 by certified mail, return receipt requested, but was later returned to sender for delivery failure. Accordingly, this Department cannot conclude that the hearing officer failed to comply with the grievance procedure on the basis that the decision was not sent by certified mail. In any event, the grievant timely requested an administrative review of the hearing decision and was permitted to provide supplemental evidence in support of her request for administrative review. As such, the late receipt of the hearing decision did not prejudice the grievant in any way.

Failure to Consider Important Facts/Evidence

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁶ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁷ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.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. Further, in cases involving discipline, it is the

² Va. Code § 2.2-1001(2), (3), and (5).
³ See *Grievance Procedure Manual* § 6.4(3), page 18.
⁴ *Grievance Procedure Manual*, § 5.9, p. 15.
⁵ See *Grievance Procedure Manual* § 7.2(a), page 18.
⁶ Va. Code § 2.2-3005(D)(ii).
⁷ *Grievance Procedure Manual* § 5.9, page 15.
⁸ Va. Code § 2.2-3005(C)(5).

responsibility of the hearing officer to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.⁹ 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 and whether they constituted misconduct.¹⁰

In the present case, the grievant objects to the hearing officer's consideration of evidence presented. While this ruling does not address every piece of evidence cited by the grievant that was allegedly disregarded or inappropriately considered, all her arguments have been reviewed and considered in light of this Department's responsibility to assure that the hearing officer's conduct of the hearing and written decision comply with the grievance procedure.

The grievant's challenge to the hearing officer's consideration of evidence 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 that the cited actions occurred and constituted misconduct 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.

Here, the record evidence provides sufficient support for the hearing officer's determination that the cited actions occurred and that they constituted misconduct.¹¹ The hearing officer found credible witness testimony and/or written statements that the grievant's physical actions were extreme and thus concluded that the grievant exceeded the force necessary for self-defense in this case. Accordingly, the hearing officer neither exceeded nor abused his authority in determining that the cited actions occurred and constituted misconduct.

Alleged Bias

The *Rules for Conducting Grievance Hearings* require the hearing officer to establish and maintain a tone of impartiality throughout the hearing process¹² and avoid the appearance of bias.¹³ However, as the Virginia Court of Appeals has indicated, as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.¹⁴ While

⁹ *Grievance Procedure Manual*, § 5.8, page 14.

¹⁰ *Rules for Conducting Grievance Hearings* § VI (B), page 11, (emphasis added).

¹¹ Neither the grievant, nor the coworker she engaged in the fight with testified at the hearing. As such, the hearing officer relied on written witness statements and hearsay testimony presented at the hearing.

¹² See *Rules for Conducting Grievance Hearings*, § III(D), page 4.

¹³ See *Rules for Conducting Grievance Hearings*, § II, page 2.

¹⁴ *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (1992) (brackets in original).

not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.¹⁵

In this case, the grievant has not claimed nor presented evidence that the hearing officer had a “direct, personal, substantial or pecuniary interest” in the outcome of the grievance. Therefore, we find no actionable bias on the part of the hearing officer. Moreover, the grievant has presented insufficient evidence that the hearing officer acted with partiality toward either party; she merely states that the hearing officer’s reconsideration decision “confirms the opinion that the hearing officer operated with agency bias.” And while the appearance of impartiality is to be avoided, there is insufficient evidence in this case that the hearing officer conducted the hearing inappropriately or abused or exceeded his authority under the grievance procedure.

Failure to Mitigate

The grievant alleges that her termination is inconsistent with agency discipline imposed in other incidences of fighting in the workplace and as such, she should be reinstated. This Department agrees that an agency’s inconsistency in disciplining similarly situated employees could be unfair and could be used by a grievant in an appropriate case to demonstrate mitigating circumstances.¹⁶

However, under the grievance procedure, “the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct.”¹⁷ Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee’s length of service.¹⁸ The grievance procedure, however, does not require hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate can not be viewed as a procedural violation.

¹⁵ See e.g. Compliance Ruling of Director #2003-113.

¹⁶ Under the *Rules for Conducting Grievance Hearings*, once the hearing officer has determined that the employee committed the charged act, that the action constituted misconduct, and that the agency’s discipline was consistent with law and policy, the hearing officer may mitigate the agency’s discipline only after giving due deference to the agency’s right to exercise its good faith business judgment in managing employee matters and its operations. This deference standard comports with that established in other merit system case law, which allows for mitigation only where the agency’s penalty exceeds the “tolerable limits of reasonableness.” See *Davis v. Department of Treasury*, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5 (1981) citing to *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981)). The MSPB “will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”

¹⁷ *Rules for Conducting Grievance Hearings*, page 12, (emphasis added).

¹⁸ *Id.*

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.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹ This Department's rulings on matters of procedural compliance are final and nonappealable.²²

Claudia T. Farr
Director

¹⁹ *Grievance Procedure Manual*, § 7.2(d).

²⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²¹ *Id.* See also Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).

²² Va. Code § 2.2-1001 (5).