

Issue: Administrative Review/claims that hearing officer improperly admitted evidence;
Ruling Date: June 28, 2005; Ruling #2005-1027; Agency: Department of Social
Services; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2005-1027
June 28, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8031. The grievant claims that the hearing officer improperly admitted into evidence an exhibit which the agency failed to identify prior to the hearing. For the reasons discussed below this Department concludes that the hearing officer did not violate the grievance procedure.

FACTS

The grievant was employed by the Department of Social Services (DSS or the agency) as a program support technician. On December 28, 2004, the agency issued the grievant a Group III Written Notice for intentional fraud in obtaining disaster food stamp benefits and terminated her employment with the agency effective December 29, 2004. On January 26, 2005, the grievant initiated a grievance challenging the disciplinary action and her termination. After the parties failed to resolve the grievance during the management resolution steps, the agency head qualified the grievance for hearing.

A hearing was held in this matter on April 12, 2005. At the hearing, the agency sought to introduce into evidence several documents which it had previously failed to identify as exhibits. The grievant's representative objected to the admission of these exhibits on the ground of "undue surprise." Although the hearing officer agreed with the grievant's representative that the agency erred by failing to identify the exhibit prior to hearing, he explained that he considered the documents to be relevant to the grievance and therefore was obligated to admit the documents into evidence under the grievance procedure.

The hearing officer issued a written decision upholding the disciplinary action and termination on April 13, 2005. The grievant subsequently requested reconsideration of his decision by the hearing officer. In a decision dated May 6, 2005, the hearing officer concluded that there was no basis either to reopen the hearing or to change his previous 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 decisions...on all matters related to procedural compliance with the grievance procedure.”¹ 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.²

The grievant, through her representative, argues that the hearing officer failed to comply with the grievance procedure when he admitted Hearing Exhibit 7 into evidence, because the agency did not identify this exhibit prior to hearing. Although the grievant apparently does not challenge the relevance of Exhibit 7, she asserts that under the grievance procedure, the hearing officer was required to exclude Exhibit 7 and preclude the agency’s witness from testifying about the documents which comprise the exhibit.

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 Moreover, 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

By statute, hearing officers have the duty to receive probative evidence and to exclude evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive.⁷ Where a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer’s prehearing orders, the hearing officer may adjourn the hearing to allow the opposing party time to respond. However, this remedy is required only when requested and when the opposing party would otherwise be materially prejudiced by the failure to identify an exhibit. In this case, the grievant did not request the hearing officer to adjourn the hearing. Moreover, we find no material prejudice in admitting the evidence.

Here, the agency charges that the grievant intentionally misstated her income and expenditures in order to obtain disaster food stamp assistance. In particular, the agency alleges, with respect to income, that the grievant failed to include in her application for benefits her income from a second job, child support payments she received, her

¹ Va. Code § 2.2-1001(2), (3), and (5).

² See *Grievance Procedure Manual* § 6.4(3).

³ Va. Code § 2.2-3005(D)(ii).

⁴ *Grievance Procedure Manual* § 5.9.

⁵ *Rules for Conducting Grievance Hearings*, § IV(D).

⁶ *Id.*

⁷ Va. Code § 2.2-3005(C)(5).

husband's income, the income of an adult son she claimed as a household member, and the amount of funds available to her in checking and savings accounts. The agency also challenges the grievant's claimed expenditures on a nebulizer (a medical device). Exhibit 7 consists of the following documents: copies of the grievant's own official pay records from DSS, a printout from a system maintained by DSS showing child support payments to the grievant, a cover letter to and response from her second employer showing her income from that employer, a fax page to and response from her adult son's employer showing his income from that employer, a form showing her husband's income, two summaries of the grievant's interviews with the agency investigator which are both signed by the grievant, a written statement by the person paid by the grievant to provide child care to her children during the benefit period, and a bill for the grievant's purchase of a nebulizer. These documents are clearly relevant to the disciplinary action being grieved and were therefore properly admitted.

Although the grievant argues that she was prejudiced because she had no advance opportunity to prepare a rebuttal to Exhibit 7, this Department cannot conclude that the grievant was harmed by the admission of the exhibit. First, we note that at hearing, the grievant's representative conceded that they had no objection to the grievant's DSS pay records, the statement by the child care provider, or the bill for the nebulizer. Moreover, while the grievant argues that the agency's failure to identify Exhibit 7 prior to hearing constituted "undue surprise," other documents identified by the agency as exhibits prior to hearing should have put the grievant on notice of the agency's intent to show that the grievant omitted available funds and income from her application for benefits.⁸ We also note that the grievant had been aware of many, if not all, of the agency's specific claims since at least October 4, 2004, when an administrative disqualification hearing was held on the grievant's application for benefits, and that the information contained in the documents at issue was already known to the grievant, either through her own personal knowledge⁹ or through documents shared with the grievant by the agency.¹⁰ Finally, while the grievant hypothesizes that she would have been able to challenge the documents contained in Exhibit 7 had she known of the agency's intent, she does not appear to dispute the accuracy of the information contained in those documents. Rather, her challenge focuses on the agency's assertion that she made intentional misrepresentations on her application for benefits. She admits, for example, that she worked a second job and that she received child support. She also does not dispute that

⁸ For example, Hearing Exhibit 2 includes a bank statement showing direct deposit of her husband's income to the checking account the grievant shared with her husband, as well as an agency "Review of Application" form identifying the grievant's income from her second job, the amount of child support received by the grievant, her son's income and her husband's income.

⁹ The grievant presumably had personal knowledge of her income from her second job, as well as the amount of child support she received and the amount of money in her personal accounts.

¹⁰ On April 9, 2004, the agency investigator met with the grievant regarding her application for benefits. The notes from that meeting, signed by the grievant and the investigator, indicate that the investigator showed the grievant the first 8 pages of Exhibit 7, which included the grievant's pay records from DSS, as well as the documentation regarding child support, her earnings from her second job, her son's earnings, and her husband's earnings.

her adult son and husband had income during the relevant time period, although she denies that she wrongfully omitted these amounts from her application for benefits.

In sum, while this Department in no way condones the agency's failure to identify Exhibit 7 in a timely manner, under the circumstances present, we cannot find that the hearing officer erred either in admitting Exhibit 7 into evidence or in not adjourning the hearing to allow the grievant additional time to respond.

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.¹¹ 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.¹² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹³ This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁴

Claudia T. Farr
Director

¹¹ *Grievance Procedure Manual*, § 7.2(d).

¹² Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹³ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

¹⁴ Va. Code § 2.2-1001 (5).