

Issue: Administrative Review/hearing decision; Ruling Date: June 21, 2006; Ruling #2006-1330; Agency: Department of Health; Outcome: hearing officer in compliance



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

ADMINISTRATIVE REVIEW RULING OF DIRECTOR

In the matter of Department of Health  
Ruling Number 2006-1330  
June 21, 2006

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8286. For the reasons set forth below, we will not disturb the hearing officer's decision in this case.

FACTS

The underlying facts of this case, as set forth in the hearing decision are as follows:

The Department of Health employed Grievant as an Information Technology Specialist until his removal effective December 20, 2005. He had been employed by the Agency for approximately seven years. His duties included building databases, web pages, and generating reports. No evidence of prior active disciplinary action against Grievant was presented during the hearing.

Grievant worked in a building with restricted access. To gain access to the building, he and other employees used their State-issued security cards. Employees could leave the building without using their security cards.

Grievant had four personal computers assigned to him. He had one computer monitor and would use a switch box to access data stored on each computer. One of the computers was a Gateway Pentium III desktop. Another computer was an IBM NetVista personal computer. The two remaining computers are not of significance in this grievance. Grievant had access to the Agency's computer network and to the Internet using the personal computers assigned to him. Grievant was assigned a unique identification and password to enable him to log onto the personal computers and Agency network.

On October 10, 2002, the hard drive in the Gateway computer was reformatted<sup>1</sup> and a new hard drive was installed. Grievant determined what files on the computer were to be retained and reinstalled following the upgrade.

On September 1, 2005, Grievant started working in a new position within the Agency. He received a new computer and relinquished his old computer. While Agency employees were preparing Grievant's old computers to be reused, they noticed offensive pictures stored on the computer. The matter was reported and the Agency began an investigation.

The Agency's Information System Security Officer (ISSO) and Information System Specialist I performed a forensic examination of Grievant's personal computers. They made an identical copy of the information on Grievant's computers and examined the copy. They discovered at least 200 pictures showing women in provocative poses, partially clothed, or nude.<sup>2</sup>

On December 28, 2005, the grievant initiated a timely grievance challenging the Group III Written Notice with removal issued to him by the agency.<sup>3</sup> After the parties failed to resolve the grievance during the management resolution steps, the grievance was qualified for hearing. A hearing was held on March 20, 2006, and on March 31, 2006, the hearing officer issued a written decision upholding the disciplinary action.<sup>4</sup> The grievant sought reconsideration by the hearing officer; and on April 17, 2006, the hearing officer issued a decision denying the grievant's request for reconsideration, on the basis that the request did "not identify any newly discovered evidence or any incorrect legal conclusions."<sup>5</sup>

### 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."<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup> Reformatting a hard drive has the effect of erasing any data existing on the drive.

<sup>2</sup> Hearing Decision at 2-3.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> Hearing Decision at 1, 8.

<sup>5</sup> Reconsideration Decision at 1.

<sup>6</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>7</sup> *See Grievance Procedure Manual* § 6.4(3).

The grievant challenges a number of the hearing officer's findings and conclusions. Specifically, he alleges that the hearing officer erred in finding that he engaged in the conduct for which he was disciplined.<sup>8</sup> Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>9</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>10</sup> 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 this case, grievant's objections are primarily challenges to 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. As stated above, such determinations are entirely within the hearing officer's authority.

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

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Claudia T. Farr  
Director

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<sup>8</sup> In particular, the grievant asserts that there were discrepancies between his work hours and the time stamps of alleged inappropriate activity, and that other employees had access to his computer. The hearing officer considered similar, if not identical, claims in his reconsideration, and determined that even if the allegations were true, the outcome of the initial decision upholding the disciplinary action would not change. Reconsideration Decision at 1.

<sup>9</sup> Va. Code § 2.2-3005.1(C)(ii).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Grievance Procedure Manual*, § 7.2(d).

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

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

<sup>14</sup> Va. Code § 2.2-1001 (5).