

Issue: Administrative Review: Hearing Decision Appeal – Case No. 8540; Ruling Date: May 9, 2007; Ruling #2007-1630; Agency: Department of State Police; Outcome: Hearing Decision not in compliance, remanded to Hearing Officer.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of State Police  
Ruling Number 2007-1630  
May 9, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8540. For the reasons set forth below, the grievance is remanded to the hearing officer for further consideration of the grievant's evidence as to his race discrimination claim.

FACTS

This case concerns a grievance over a Group III Written Notice with termination for knowingly making a false statement.<sup>1</sup> The grievant was involved in an on-the-job vehicle collision on May 8, 2006.<sup>2</sup> On that day, the grievant told authorities that an SUV had struck his vehicle causing him to spin out of control.<sup>3</sup> An investigation was conducted by the agency with the resultant finding that the accident was consistent with a single vehicle crash.<sup>4</sup> The grievant later admitted that he had not told the truth about the incident.<sup>5</sup> He wrote and signed a statement indicating that he had lost control of his vehicle.<sup>6</sup>

The grievant was given the Written Notice on December 29, 2006, removing him from employment effective October 4, 2006.<sup>7</sup> Following a two-day hearing on March 20, 2007 and March 30, 2007, the hearing officer upheld the disciplinary action for conduct on the job that undermined the effectiveness or efficiency of the agency's activities.<sup>8</sup> The grievant has now requested administrative review from this Department.

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<sup>1</sup> Decision of Hearing Officer, Case No. 8540, Apr. 3, 2007 ("Hearing Decision"), at 2.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 2-3.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 1, 7.

## 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>9</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>10</sup>

### *Consideration of the Evidence*

The grievant contends that the hearing officer based his decision on false information and hearsay. First, pursuant to the *Rules for Conducting Grievance Hearings*, hearsay is admissible evidence.<sup>11</sup> Consequently, absent any further reason why reliance on specific hearsay testimony was improper, of which the grievant asserts none, the grievant’s argument regarding hearsay is without merit. Further, the grievant has not cited any specific examples of false information upon which the hearing officer based his decision that would warrant remand. The grievant has only stated that the agency offered conflicting evidence regarding the color of the alleged SUV. However, that fact is not determinative to this matter and, as such, the hearing officer’s decision need not be reversed on that basis. In addition, the grievant asserts that a particular agency employee did not visit him in the hospital contrary to the employee’s testimony. The grievant states that he has evidence to prove this contradiction. The grievant had every opportunity to present this evidence at hearing and failed to do so. There is no basis to re-open the hearing for the grievant to present this evidence.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>12</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>13</sup> Further, in 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.<sup>14</sup> 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.<sup>15</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.

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<sup>9</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>10</sup> *Grievance Procedure Manual* § 6.4.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § IV(D).

<sup>12</sup> Va. Code § 2.2-3005.1(C).

<sup>13</sup> *Grievance Procedure Manual* § 5.9.

<sup>14</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>15</sup> *Grievance Procedure Manual* § 5.8.

The grievant cites no specific reason to support the conclusion that the hearing officer's decision was factually incorrect and appears to simply contest the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority. 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 upon a review of the hearing record, substantial evidence was presented by the agency regarding the grievant's material false statement. Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case.

### *Conduct of the Hearing*

The grievant also argues that the hearing officer "kept cutting [the grievant's attorney] off" on various occasions during the hearing and prevented her from presenting certain points. The grievant has not identified any specific examples of such interruptions in his request for administrative review. However, a review of the hearing record reveals no improper conduct on the part of the hearing officer.

"The hearing officer may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive."<sup>16</sup> Most of the limitations placed on the grievant's attorney by the hearing officer involved ending questioning that had extended into irrelevant and immaterial issues.<sup>17</sup> The hearing officer also properly corrected the grievant's attorney from presenting argument during examination of witnesses rather than eliciting their testimony.<sup>18</sup> In sum, there is no evidence that the hearing officer improperly interrupted or "cut off" the grievant's attorney from presenting the grievant's case during the hearing.

### *Witness Issue*

The grievant also argues that the hearing officer failed to subpoena a particular witness for the second day of hearing. Because that witness did not attend the hearing, the grievant was unable to present that witness's testimony. Under the rules of the grievance procedure, "[e]ach party may call witnesses to testify at the hearing."<sup>19</sup> Accordingly, it is the responsibility of each party to secure his or her own witnesses for hearing.<sup>20</sup> To that end, when requested by a party, hearing officers may issue, "an order for the ... appearance of witnesses at hearing."<sup>21</sup>

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<sup>16</sup> *Rules for Conducting Grievance Hearings* § IV(D).

<sup>17</sup> *E.g.*, Hearing Tape 2, Side B, at Counter Nos. 95-98; Hearing Tape 3, Side B, at Counter Nos. 290-91; Hearing Tape 3, Side B, at Counter Nos. 327-30.

<sup>18</sup> *E.g.*, Hearing Tape 2, Side B, at Counter Nos. 203-04.

<sup>19</sup> *Rules for Conducting Grievance Hearings* § IV(A).

<sup>20</sup> *E.g.*, EDR Ruling No. 2004-742; EDR Ruling No. 2004-727.

<sup>21</sup> *Rules for Conducting Grievance Hearings* § III(E).

There is no requirement in the *Rules for Conducting Grievance Hearings* or the *Grievance Procedure Manual* that a hearing officer must order a proposed witness to attend a hearing. Such a duty would only arise if there was a request from a party to issue such an order. The grievant did not request that a new order be issued for the second day of hearing. Moreover, the hearing officer reminded the parties, “it is your responsibility to notify your witnesses of the continuation date [for the hearing]” in his March 23, 2007 letter. Accordingly, it does not appear that the hearing officer violated a substantial provision of the grievance procedure or otherwise abused his discretion in failing to issue this witness order.

Even if the hearing officer had ordered the witness to attend and the witness failed to appear at the hearing, there would not be an issue of noncompliance warranting remand. It is every party’s responsibility to ensure their witnesses attend the hearing. If a witness fails to appear, then it is incumbent upon the party, if the witness’s testimony is necessary, to seek a continuance or an extension of time from the hearing officer to present the witness later. In certain situations, the denial of such a request could be a basis for remand to the hearing officer on administrative review.<sup>22</sup> Neither the grievant nor his attorney requested a continuance in this case. Consequently, the grievant’s argument as to this witness issue is without merit.

#### *Failure to Consider Discrimination/Retaliation Issue*

The grievant asserts that the disciplinary action may have been related to prohibited discrimination based on a protected status, i.e., race, and/or retaliation for reporting race-based treatment. The grievant presented evidence during his case in chief regarding a possible discriminatory and/or retaliatory motive on the part of a superior officer to whom the grievant made the false statement.<sup>23</sup> The grievant testified that he had previously reported this superior officer to another member of management and was treated differently by the superior officer thereafter.<sup>24</sup>

A hearing officer’s decision “must contain ... findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; [and] any aggravating or mitigating circumstances that are pertinent to the decision.”<sup>25</sup> While it is unclear as to whether the grievant has presented sufficient evidence to establish the claim, this issue of alleged race discrimination/retaliation was raised as a material issue in the grievance and at hearing. As such, it was error when the hearing officer failed to consider the grievant’s allegations that the agency disciplined the grievant because of his race. Consequently, remand is required for further consideration of the grievant’s record evidence.

#### CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, the grievance is remanded to the hearing officer to consider the evidence the grievant offered at hearing in support of his claim of race

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<sup>22</sup> See, e.g., EDR Ruling No. 2005-1068.

<sup>23</sup> E.g., Hearing Tape 6, Side B, at Counter Nos. 265-330.

<sup>24</sup> *Id.*

<sup>25</sup> *Rules for Conducting Grievance Hearings* § V(C).

discrimination.<sup>26</sup> 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>27</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>28</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>29</sup>

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Claudia T. Farr  
Director

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<sup>26</sup> As the hearing officer who rendered the initial decision in this matter has resigned his employment with this Department, this case will be remanded to Hearing Officer Carl Wilson Schmidt for consideration of this narrow issue. Mr. Schmidt's review shall be limited to the hearing record as it presently exists.

<sup>27</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>28</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>29</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).