

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8535;
Ruling Date: July 26, 2007; Ruling #2007-1713; Agency: Department of
Motor Vehicles; Outcome: Hearing Officer In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Motor Vehicles

Ruling Number 2007-1713

July 26, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8535. The grievant claims that the hearing officer erred by failing to mitigate the discipline imposed by the Department of Motor Vehicles (DMV or the agency). The grievant also contends that the hearing decision is inconsistent with law. For the reasons set forth below, this Department finds no reason to disturb the hearing decision.

FACTS

The facts as set forth in the March 22, 2007 hearing decision issued in Case Number 8535 are as follows:¹

Grievant filed a grievance from a Group II Written Notice for failure to follow supervisory instructions. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant as an administrative and program specialist for 35 years.

In February 2006, grievant's Division Manager counseled grievant, in writing, about improperly leaving her telephone off the hook. In April 2006, grievant complained to the Deputy Director that the office manager was harassing her. Grievant told him that the medical reviewers could do their work without a supervisor. As a result of this discussion, the Deputy Director interviewed employees who work in close proximity to grievant. His investigation did not reveal any evidence of harassment. One

¹ For the sake of brevity, a number of the footnotes from the original decision have been omitted.

coworker (grievant's sole witness at the hearing) told the Deputy Director that there was stress in the workplace only when grievant was present. She also related that grievant often threatened to go to the Commissioner when she disagreed with something.

Also in April 2006, the Director of Driver Services (fourth management level above grievant) found it necessary to counsel grievant about her disruptive behavior. In addition, because of concerns about grievant's behavior toward her then supervisor, the agency required grievant to meet with a licensed clinical psychologist. The psychologist concluded that grievant was not dangerous to others around her but noted that grievant is defensive, not open to criticism, and not skillful at self-analysis. The psychologist recommended that grievant receive further counseling with a professional psychotherapist. Grievant agrees that she is not dangerous to others but disagrees with the rest of the psychologist's findings. The human resources employee relations manager has met with grievant in the past regarding her loud and disrespectful behavior.

Four specialists, including grievant, comprise the medical review unit; one of the specialists supervises the remaining three specialists including grievant. The current supervisor was hired in May 2006 as a reviewer and was made supervisor in October 2006. In addition to reviewing medical requests, the unit responds to telephone inquiries from the public and agency employees. The practice of the unit is to have two reviewers available to answer telephones at all times. On a rotating basis, each reviewer is given one day off the phones to work on other work. The two people assigned to telephones are required to log on their telephone in the morning and be available for incoming calls throughout the day.² When assigned to be on the telephone, a reviewer may place the telephone in auxiliary (AUX) mode only for lunch, breaks, or other required time away from the work station. A red light appears on the telephone when it is placed in AUX mode. The proper telephone procedures have been discussed with the reviewers in monthly meetings, e-mails, and other memoranda. The reviewer who is not assigned to telephone duty is not to log on her telephone.³

On November 16, 2006, grievant was not assigned to telephone duty and therefore should have been logged off. At one point during the morning, the supervisor noticed that grievant's telephone and one other reviewer's telephone were in the AUX mode even though both employees were at their work stations. The third reviewer's telephone was logged off even though that employee was on telephone duty that day. In this

² Reviewers' telephones require entry of an individual code to log on for receipt of calls from the public.

³ Even though a telephone is logged off for calls from the public, the phone has a separate line on which the employee can receive and make calls.

situation, no calls from the public could be received. The supervisor immediately told the reviewers to open their telephones (cancel AUX mode). The employee who had been logged off promptly logged on, and the other reviewer promptly canceled the AUX mode on her telephone. Grievant told the supervisor that she needed time off the telephone because she had not gotten time off three days earlier. Grievant also said that she had placed her telephone in AUX in order to receive personal calls. However, witnesses testified that personal calls can be received on the phone's other line while the public line is logged off, i.e., there is no need to be in AUX to receive personal calls. The supervisor nevertheless told grievant to open her telephone for incoming calls. Grievant became argumentative, loud, and refused to comply with the supervisor's instructions. Grievant continued to refuse to open her telephone. At noon when one of the other reviewers left work, grievant opened her telephone to receive calls.

For some time, the practice had been for the reviewers to submit their time sheets to the supervisor each Friday afternoon. In October 2006, the supervisor told the reviewers that she was changing the practice by extending the time to submit timesheets to the following Monday, thereby giving reviewers one extra day to fill out their timesheets. She sent the reviewers a reminder e-mail in November 2006. At 4:50 p.m. on Monday, November 20, 2006, the supervisor called for timesheets and the other two reviewers gave their timesheets to the supervisor.⁴ On the following morning, grievant had still not submitted her timesheet so the supervisor asked grievant to give it to her. Grievant loudly protested that she was tired of the supervisor picking on her about her timesheet. Grievant argued that she had previously done timesheets and that they were not as important as the supervisor was making them out to be. The grievant continued to be loud and argumentative. Five other employees in the nearby area heard grievant loudly arguing with her supervisor. They described grievant as disrespectful and increasingly loud during the discussion; the supervisor maintained a soft tone during the incident. Finally, when the supervisor told grievant that she could not get paid without turning in her timesheet, grievant submitted it to the supervisor about one half to one hour later.

On November 27, 2006, the supervisor met privately with grievant to ask grievant why she had displayed hostility and been argumentative when the supervisor gave her instructions. She gave grievant a memorandum documenting the two incidents (addressed in the preceding paragraphs); grievant rejected the memorandum.⁵ Grievant told the

⁴ Grievant's regularly scheduled work hours are 8:15 a.m. to 5:00 p.m.

⁵ The supervisor asserts that grievant threw the memorandum back across the table; grievant denies this, contending only that she disagreed with certain words in the document.

supervisor that she didn't mind taking the supervisor "upstairs" (presumably to the Commissioner or other upper management employees). The supervisor told grievant that when she yelled and argued with the supervisor in the open work area where others could overhear, she was disrespecting the supervisor. Grievant told the supervisor that the supervisor did not show respect to the reviewers.

After reviewing the November incidents, the agency determined that grievant should be disciplined because she had reverted to the unacceptable behavior for which she had been counseled in the spring of 2006. The agency decided that disciplinary action was needed to get grievant's full attention. However, in view of grievant's length of service and otherwise good work performance, the agency did not impose a suspension.⁶

The hearing officer held that the agency established, by a preponderance of evidence, that the grievant failed to follow supervisory instructions on November 16 and 20, 2006 by failing to turn her phone on and not answering calls after being instructed to do so.⁷ He also found that she failed to turn in her time sheet when so directed.⁸ The hearing officer found that the grievant compounded her insubordinate behavior by loudly arguing with her supervisor about these instructions in front of other agency employees.⁹ Noting that the agency did not suspend the grievant although it could have under policy, the hearing officer found no mitigating circumstances that warranted a reduction in the discipline meted out by the agency.¹⁰ The hearing officer accordingly upheld the discipline in its entirety, concluding, based on the totality of the evidence, that the agency's disciplinary action was within the tolerable limits of reasonableness.¹¹

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."¹² 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.¹³

Findings of Fact/Mitigating Circumstances

⁶ March 22, 2007 Hearing Decision in Case 8535 (Hearing Decision), pp. 2-4.

⁷ Hearing Decision p. 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*, at 7.

¹¹ *Id.*

¹² Va. Code § 2.2-1001(2), (3), and (5).

¹³ See *Grievance Procedure Manual* § 6.4(3).

The grievant argues that the hearing officer failed to comply with the grievance procedure by not mitigating the disciplinary action against her. Specifically, she asserts that the hearing officer should have mitigated based on inconsistencies in testimony by a supervisor, and what the grievant appears to declare as favorable testimony by another employee.¹⁴

As an initial point, mere disagreement with the hearing officer's findings does not constitute a mitigating factor. Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁵ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁶ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹⁷ 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.

The grievant's challenge here simply contests 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. Here, the hearing officer's findings are based upon evidence in the record and the material issues of the case. Accordingly, this Department has no reason to remand the decision.¹⁸

Secondly, under the *Rules for Conducting Grievance Hearings*, a hearing officer is required to consider mitigating circumstances in determining whether a disciplinary action was "warranted and appropriate under the circumstances."¹⁹ This Department will find that a hearing officer failed to comply with the grievance procedure by not mitigating disciplinary action only where the hearing officer's action constituted an abuse of discretion. Here, the hearing officer noted that the grievant has many years of state

¹⁴ The grievant asserts that an employee testified that her e-mails had been doctored. The grievant asserts, however, that the hearing officer asserted that he would give the testimony little evidentiary weight because this witness was patently incredible.

¹⁵ Va. Code § 2.2-3005.1(C).

¹⁶ *Grievance Procedure Manual*, § 5.9.

¹⁷ Va. Code § 2.2-3005(C)(5).

¹⁸ Here, for example, the hearing officer found that the grievant's "demeanor during cross-examination reflected controlled hostility, condescension, evasiveness, and argumentativeness." Hearing Decision, p. 6. He concluded that "testimony and evidence in this case suggest that grievant does not recognize that, while it is acceptable to disagree with a supervisor, such disagreements should be addressed in private and in a calm and respectful manner." *Id.* This is precisely the sort of determination left solely to the hearing officer. We find no reason in this case to disturb his findings.

¹⁹ See *Rules for Conducting Grievance Hearings*, § VI.B.

service and her work performance has been generally satisfactory. Moreover, the hearing officer observed that “[r]ecognizing these mitigating factors, the agency elected not to impose a suspension in conjunction with this disciplinary action.”²⁰ Presumably based on the agency’s apparent mitigation, the hearing officer did not find that the discipline exceeded the limits of reasonableness.²¹ Under the facts presented by this case, we cannot conclude that the hearing officer abused his discretion in finding that the discipline imposed on the grievant did not exceed the limits of reasonableness.

Decision Inconsistent with Law

The grievant contends that the hearing decision is inconsistent with law. Such appeals are directed to the circuit court in the jurisdiction in which the grievance arose rather than this Department.²²

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵ This Department’s rulings on matters of procedural compliance are final and nonappealable.²⁶

Claudia T. Farr
Director

²⁰ Hearing Decision at 7.

²¹ *Rules for Conducting Grievance Hearings*, § VI.B.

²² See *Grievance Procedure Manual* §7.3(a).

²³ *Grievance Procedure Manual*, § 7.2(d).

²⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²⁵ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).

²⁶ Va. Code § 2.2-1001 (5).