

Issue: Administrative Review/agency requests administrative review of hearing officer's third reconsideration decision in case #8116; Ruling Date: July 10, 2006; Ruling #2006-1376; Agency: Old Dominion University; Outcome: hearing officer in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF THE DIRECTOR

In the matter of Old Dominion University

Ruling No. 2006-1376

July 10, 2006

Old Dominion University (ODU or the agency) has requested an administrative review of the hearing officer's third reconsideration decision in Case No. 8116.

FACTS

The grievant was employed by the agency as a Law Enforcement Officer II in its internal police department.¹ He was removed from employment effective March 22, 2005 after receiving a Group III Written Notice for allegedly making a false official statement, undermining the effectiveness of the police department, impairing the efficiency of the department, and shirking official duty.²

On April 15, 2005, the grievant filed a grievance challenging the disciplinary action.³ After the parties failed to resolve the grievance in the management resolution steps, the grievant requested a hearing.⁴ The hearing was held on July 14, 2005.⁵ On July 20, 2005, the hearing officer issued a decision reducing the disciplinary action against the grievant to a Group I Written Notice and ordering that the grievant be reinstated to employment.⁶ The hearing decision also found that the grievant had not proven that the Written Notice was issued as a result of discrimination.⁷

By letter dated August 2, 2005, the agency, through its counsel, requested an administrative review by this Department of the hearing officer's decision.⁸ By letter dated August 4, 2005, the grievant's counsel also requested an administrative review by this Department. In addition, the grievant requested reconsideration of the decision by the hearing officer and an administrative review of the hearing decision by the Department of Human Resource Management (DHRM).

¹ Hearing Decision dated July 20, 2005 (Hearing Decision) at 2.

² *Id.* at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1, 6.

⁷ *Id.* at 4.

⁸ The agency also requested an administrative review by the Department of Human Resource Management.

The hearing officer issued his reconsideration decision on August 26, 2005.⁹ In his decision, the hearing officer affirmed his earlier ruling and also awarded attorneys' fees to the grievant.¹⁰ On September 1, 2005, the agency requested an administrative review by EDR of the reconsideration decision, with respect to that portion of the decision awarding attorneys' fees. By letters dated September 9, 2005, the grievant also requested an administrative review by this Department and DHRM of the reconsideration decision.¹¹

On November 22, 2005, the Director of this Department issued a ruling addressing the claims raised by the grievant in his first and second requests for administrative review and by the agency in its first request for administrative review.¹² In that ruling, the Director concluded that the hearing officer had erred with respect to the scope of the issue qualified for hearing and directed that the hearing officer reconsider his decision accordingly.¹³

The hearing officer subsequently advised the parties that he would reopen the hearing to take additional evidence. The agency objected, and on December 20, 2005, the EDR Director issued a ruling concluding that the hearing officer had not abused his discretion in re-opening the hearing to take additional evidence.¹⁴

A re-opened hearing was held the week of March 6, 2006. On May 25, 2006, the hearing officer issued a third reconsideration decision, in which he found in favor of the grievant.¹⁵ On June 9, 2006, the agency requested an administrative review of the hearing officer's decision. The agency argues that the hearing officer failed to comply with the grievance procedure by accepting and purportedly relying on a post-hearing brief submitted by the grievant's counsel. The agency also asserts that the hearing officer erred by failing to respond to its March 10, 2006 objection to the grievant's post-hearing brief.

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."¹⁶ If the hearing officer's exercise of authority is not in compliance with the

⁹ Reconsideration Decision dated August 26, 2005 (Reconsideration Decision) at 1.

¹⁰ *Id.* at 1-5.

¹¹ In addition, he asked the hearing officer for reconsideration of his reconsideration decision. The hearing officer subsequently denied the grievant's request for a second reconsideration, on the ground that he no longer had jurisdiction over the grievance.

¹² EDR Ruling Nos. 2006-1099, 2006-1104. The hearing officer issued his addendum decision addressing attorney's fees on September 12, 2005. By letter dated September 13, 2005, the agency also requested an administrative review of this addendum.

¹³ *Id.* at 3-5.

¹⁴ EDR Ruling No. 2006-1202.

¹⁵ *See* Third Reconsideration Decision, dated May 25, 2006.

¹⁶ Va. Code § 2.2-1001(2), (3), and (5).

grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.¹⁷

The agency argues that the hearing officer lacked the authority to accept or consider the grievant's post-hearing brief, as no such power is explicitly granted in the *Rules for Conducting Grievance Hearings* (the *Rules*) or the *Grievance Procedure Manual* (the *Manual*). While the agency is correct that neither the *Rules* nor the *Manual* expressly authorizes the submission or acceptance of post-hearing briefs, it is equally true that neither of those documents specifically prohibits these actions. The agency asserts that in the absence of an express authorization to accept a post-hearing brief, the hearing officer lacks this power. We cannot accept this unduly limiting interpretation of a hearing officer's authority, however, as it is inconsistent with the broad language of § 5.7 of the *Manual*, which grants hearing officers the authority to "[r]ule on procedural requests" and to "take other actions as necessary or specified in the grievance procedure." Rather, as this Department has previously held, an action taken by a hearing officer in the exercise of his authority to determine procedural matters will only be disturbed where it constitutes an abuse of discretion.¹⁸

The burden of proving that an abuse of discretion has occurred belongs to the objecting party—in this case, the agency.¹⁹ The agency asserts that the hearing officer erred in failing to rule on its March 10, 2006 "objection" to the post-hearing brief, and that this failure "denied [the agency] the opportunity to respond to Grievant's brief." While the better practice may have been for the hearing officer to respond, in order to avoid any possible ambiguity or confusion, we do not agree with the agency that § 5.7 of the *Manual* required the hearing officer to issue a ruling. To the contrary, that section simply provides that a hearing officer has the authority to rule on procedural requests: it does not concurrently impose an obligation for a hearing officer to issue rulings on all such requests. Further, a review of the March 10th communication from agency counsel to the hearing officer shows that the objection in question consisted of a one-paragraph e-mail, in which counsel merely advised the hearing officer that the agency objected to consideration of the brief, without expressly asking the hearing officer to issue a ruling or take other formal action.²⁰ In addition, as the grievant's counsel has noted, the agency had ample opportunity either to submit its own post-hearing brief or to seek leave to submit such a brief, but apparently chose not to take either of these actions. Under these circumstances, when considered in the aggregate, we cannot find that the hearing officer's failure to rule on the March 10th "objection" constituted error or an abuse of discretion.

Moreover, the agency has failed to demonstrate that it was prejudiced by the hearing officer's actions. In its request for administrative review, the agency states,

¹⁷ See *Grievance Procedure Manual* § 6.4(3).

¹⁸ See EDR Ruling No. 2006-1202; see also EDR Ruling No. 2003-123, EDR Ruling No. 2004-742, EDR Ruling No. 2004-934, and EDR Ruling No. 2005-1037.

¹⁹ See, e.g., EDR Ruling No. 2003-124; EDR Ruling No. 2003-123.

²⁰ We note that while the March 10th e-mail made the conclusory allegation that the grievant's post-hearing brief contains "gross misrepresentation," the e-mail did not specifically identify even one such misrepresentation.

Following receipt of all the evidence from both sides, immediately before closing argument at the conclusion of the March 7 hearing, the Hearing officer stated on the record, that, “I’ll tell you what I don’t see. I don’t see the smoking gun with respect to [the grievant].” Seventy-nine (79) days later he reaches the polar opposite conclusion in his May 25 decision. The only item introduced in that 79 day period was the improper brief to which the Agency did not have a chance to respond. (citations omitted)

As an initial matter, we must disagree with the agency’s suggestion that the hearing officer’s statements demonstrate that he had reached a conclusion in the agency’s favor prior to the receipt of the grievant’s post-hearing brief. To the contrary, the transcript clearly indicates that the hearing officer had not yet reached a determination in favor of the agency, and that he was continuing—and would continue—to assess the evidence.²¹ However, even if we were to assume that the hearing officer had changed his mind between the closing of the evidence and the issuance of his decision, we cannot accept the agency’s unsubstantiated claim that his sole reason for doing so was the grievant’s post-hearing brief, as mere speculation is insufficient to establish prejudice to the agency. Similarly, the agency’s assertion that the post-hearing brief contains new allegations and arguments is insufficient to demonstrate prejudice, as the agency has failed to identify any such allegation or argument or to demonstrate that the hearing officer relied upon the purported new allegations and arguments.

Accordingly, for all the foregoing reasons, we cannot find that the hearing officer failed to comply with the grievance procedure in regard to the grievant’s post-hearing brief. Pursuant to § 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s decision becomes final once all timely requests for administrative review have been decided. 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.²² Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²³ This Department’s rulings on matters of procedural compliance are final and nonappealable.²⁴

Claudia T. Farr
Director

²¹ The hearing officer stated, “I’ll tell you what I don’t see. I don’t see the smoking gun with respect to [the grievant]. I do see it with respect to Sergeant [B], at least I think I see it. *I’m going to go back and look at all this, and maybe I’ll change my mind.*” (emphasis added)

²² Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²³ *Id.*

²⁴ Va. Code § 2.2-1001 (5).