

Issue: Administrative Review/Hearing Decision; underlying issues/discrimination/political affiliation; discipline/failure to follow instructions; retaliation/other protected right; Ruling Date: December 29, 2006; Ruling #2007-1490; Agency: Department of State Police; Outcome: hearing officer in compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia State Police
Ruling No. 2007-1490
December 29, 2006

The grievant has requested that this Department administratively review the hearing officer's decisions in Case Number 8415.

FACTS

The grievant is employed as a Trooper with the Virginia State Police (VSP or the agency). On July 6, 2006, the grievant initiated a grievance challenging a Group III Written Notice with 5 day suspension and transfer for "insubordination or serious breach of discipline" in violation of agency policy.

The July 6th grievance was subsequently qualified for a hearing and the hearing was held on September 19, 2006. In an October 3, 2006 decision, the hearing officer reduced the Group III Written Notice to a Group II Written Notice for failure to follow supervisor's instructions and upheld the suspension.¹ The agency was further ordered to reverse the grievant's transfer and reinstate him to his former position or, if occupied, to an objectively similar position.²

On October 18, 2006, the grievant e-mailed the hearing officer his request for reconsideration. Also on October 18th, the grievant e-mailed the DHRM Director his request for administrative review of the hearing officer's decision based on alleged violations of policy. The hearing officer denied the grievant's request for reconsideration in a decision dated November 9, 2006.³ Thereafter, on November 13, 2006, the grievant

¹ See Decision of Hearing Officer ("Hearing Decision"), Case No. 8415, issued October 3, 2006, at 7.

² *Id.*

³ See Reconsideration Decision of Hearing Officer ("Reconsideration Decision"), Case No. 8415-R, issued November 9, 2006.

requested an administrative review by the EDR Director of the hearing officer's original and reconsidered opinions.

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."⁴ 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.⁵

Testimony by the Grievant's Supervisor

The grievant asserts that his Supervisor committed perjury and the hearing officer erred and/or abused his discretion by finding in his reconsideration decision that (1) the Supervisor testified credibly at the hearing; and (2) the Supervisor's untruthfulness is not relevant. Additionally, the grievant claims that because his Supervisor lied, an act he could not have anticipated in advance of hearing, he should be allowed to present witness testimony at a reopened hearing to contradict what the Supervisor said at the original hearing. Moreover, fairly read, the grievant's request for administrative review asserts that the hearing officer's finding that the Supervisor testified credibly constitutes bias in favor of the agency.⁶

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁷ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁸ By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.⁹ 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 his reconsideration decision, the hearing officer states:

⁴ Va. Code §§ 2.2-1001(2), (3), and (5).

⁵ *Grievance Procedure Manual* §§ 6.4; 7.2.

⁶ In his request for administrative review to this Department, the grievant states "[i]f the hearing office [sic] feels that [the Supervisor's] truthfulness is not a relevant element in this case then I request that a hearing officer, that can fully comply with the rules of the grievance procedure and will properly administer a grievance hearing, be assigned to this case."

⁷ Va. Code § 2.2-3005.1(C)(ii).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ Va. Code § 2.2-3005(C)(5).

Grievant seeks reconsideration in order to present testimony from an Explosives/Weapons Detection Canine Handler regarding alterations to a State vehicle. Grievant contends the Supervisor lied about whether he inspected Grievant's vehicle when required to do so. Grievant contends the Supervisor lied about whether Grievant received an Interim Performance Evaluation. None of this testimony is relevant to the disciplinary action. Grievant was not disciplined for altering his vehicle, he was disciplined for failing to comply with his Supervisor's instruction.¹⁰

Moreover, the hearing officer states that he found the Supervisor's testimony credible despite the grievant's assertions to the contrary.¹¹ This finding regarding record testimony is precisely the kind of determination reserved to the hearing officer who observes witness demeanor, takes into account motive and potential bias, and considers potentially corroborating or contradictory evidence. Further, the hearing officer does not say that witness untruthfulness is irrelevant, as alleged by the grievant, rather he is saying that those issues the grievant claims the Supervisor lied about in this case (i.e., inspection of the grievant's State vehicle and the grievant's receipt of an Interim Performance Evaluation) are irrelevant, because the grievant was disciplined for failing to comply with his Supervisor's instructions.

Finally, this Department concludes that the hearing officer's finding that the Supervisor testified credibly does not demonstrate bias in favor of the agency. In particular, the Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has a "direct, personal, substantial [or] pecuniary interest" in the outcome of a case.¹² While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.¹³ In this case, the grievant has not claimed nor presented evidence that the hearing officer had a direct, personal, substantial or pecuniary interest in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer showed bias in this case.¹⁴

Newly Discovered Evidence

The grievant further claims that the hearing officer erred by failing to consider "newly discovered evidence" of alleged retaliatory acts that have occurred since the conclusion of the grievance hearing. In his reconsideration decision, the hearing officer

¹⁰ Reconsideration Decision at 1 (footnote omitted).

¹¹ See Reconsideration Decision at 1, footnote 1.

¹² *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E. 2d 451, 460 (1992) (alteration in original).

¹³ See, e.g., EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.

¹⁴ The grievant further claims that the hearing officer's conclusions in this case contradict his conclusions in Case No. 8116. In Case No. 8116-R3, the hearing officer reopened the hearing to take additional evidence that was excluded in error at the original hearing.¹⁴ In this case, however, the grievant has not alleged, nor has this Department found, that the hearing officer wrongly excluded evidence at the original hearing, thus warranting a reopening like occurred in Case No. 8116-R3.

broadly concludes that the grievant's request for reconsideration "does not identify any newly discovered evidence", but does not specifically say why the retaliatory acts that allegedly occurred after the grievance hearing are not considered newly discovered evidence.¹⁵ While the better practice may have been for the hearing officer to state specifically why the alleged retaliatory acts are not considered newly discovered, the hearing officer's failure to do so does not constitute error or an abuse of discretion.

It should be noted however that "newly discovered evidence" as defined under case law does not include events that occurred after the trial or hearing.¹⁶ Rather, newly discovered evidence is evidence that was in existence at the time of the trial, but was not known (or discovered) by the aggrieved party until after the trial ended.¹⁷ While not dispositive for purposes of the grievance procedure, this definition of newly discovered evidence is nevertheless instructive here. In this case, the acts of retaliation cited by the grievant allegedly occurred after the hearing ended. As such, these were not facts in existence at the time of the hearing and thus, under the rules set forth above would not be considered newly discovered evidence warranting a reopening of the hearing.¹⁸

Retaliation and Discrimination Claims

The grievant also claims that the hearing officer erred and/or abused his discretion by failing to appropriately consider the close relationship between the VSP and the Virginia State Police Association (VSPA) in support of his claims of retaliation and discrimination. More specifically, the grievant contends that the VSPA, which has allegedly expressed an "anti-union sentiment," has a close involvement with the VSP and that VSPA members, including his Supervisor, are retaliating and discriminating against the grievant because of his membership in a local union.

As stated above, hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁹ and 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. In his October 3, 2006 hearing decision, the hearing officer finds:

¹⁵ See Reconsideration Decision at 2.

¹⁶ See *Lowe v. Mercedes Benz of N. Am., Inc.*, Nos. 95-3038, 96-1501, 1996 U.S. App. LEXIS 31215 at *8 (4th Cir. Dec. 5, 1996) ("Events occurring after trial are not 'newly discovered evidence' within the meaning of 60(b)(2).").

¹⁷ *Id.*; *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989) (granting relief based upon newly discovered evidence, requires the party to show: "(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.") (quoting *Taylor v. Texgas Corp.*, 831 F. 2d 255, 259 (11th Cir. 1987)).

¹⁸ The alleged acts of retaliation would, however, be considered new management action, which could be challenged in accordance with the rules of the grievance procedure.

¹⁹ Va. Code § 2.2-3005.1(C)(ii).

Grievant contends the Agency retaliated against him because he achieved prominence as the President of a local union on January 1, 2006. Grievant's argument fails because he has presented no credible evidence to suggest that the Agency took disciplinary action against him or otherwise took action against him because of his membership in the local union. Grievant's assertion that the Agency retaliated against him remains speculation. The Agency presented credible evidence to show that it took disciplinary action against Grievant because it believed Grievant had engaged in behavior warranting disciplinary action. Grievant's request for relief from retaliation must be denied.²⁰

Additionally, with regard to the grievant's discrimination claim, the hearing officer concludes that "[n]o credible evidence was presented showing that the Agency acted against him because of any union or political activity on Grievant's part."²¹ In support of his findings, the hearing officer states that although the grievant points to comments by co-workers to support his claim of retaliation, he finds "[n]one of these comments are sufficient to counter the Lieutenant Colonel's credible testimony stating that he did not consider Grievant's union membership when taking disciplinary action."²² Likewise, in his reconsideration decision, the hearing officer concludes that "[t]he Lieutenant Colonel credibly testified that he did not consider Grievant's involvement in a union as part of the decision to discipline Grievant. Grievant's allegation of retaliation is untrue. The Agency disciplined Grievant because of his behavior and not because of his political affiliation."²³

Based on the foregoing, this Department concludes that there was evidence in the record (i.e., witness testimony) to support the hearing officer's decision that the disciplinary action taken against the grievant was neither retaliatory nor discriminatory and as such, this Department cannot substitute its judgment for that of the hearing officer with respect to such findings.

Inclusion of 2005 Case Information

²⁰ Hearing Decision at 6-7 (footnotes omitted).

²¹ Hearing Decision at 7.

²² Hearing Decision at 6, footnote 12.

²³ Reconsideration Decision at 2.

The grievant contends that VSP violated Virginia law²⁴ by considering prior disciplinary action against the grievant²⁵ when issuing him the July 6, 2006 Group III Written Notice and that the hearing officer erred and/or abused his discretion by not reconsidering and/or reopening the hearing to address VSP's improper consideration of past disciplinary action and how such consideration influenced management's current disciplinary action. Additionally, the grievant claims that the improper and illegal consideration of the 2005 disciplinary action shows "the animosity towards me from some supervisors and management of the Department of State Police" and resulted in an improper transfer, which the agency was obligated to rescind on the day of the hearing.

In the October 3rd hearing decision, the hearing officer finds that

[a]t the time the Lieutenant Colonel issued the Group III Written Notice with suspension and transfer, Grievant had a prior active Group III Written Notice under appeal. The local Circuit Court reversed the Hearing Officer's decision and removed the Group III Written Notice against Grievant. As of the date of this hearing, Grievant had no prior active disciplinary action. The Lieutenant Colonel testified that one of the reasons he decided to transfer Grievant was because Grievant had a prior active Group III Written Notice. If Grievant had not had an active Group III Written Notice, the Lieutenant Colonel testified he would have issued the Group III Written Notice but would not have transferred Grievant.²⁶

As a result of the above findings and because the hearing officer concluded that the grievant's actions amounted to a Group II level of offense, the hearing officer ordered the agency to reverse the grievant's transfer and reinstate the grievant "to his former position

²⁴ Although not specifically stated in his request for administrative review, a review of the hearing tapes by this Department has revealed that the grievant believes that Va. Code § 2.2-3006(C) was violated when VSP considered prior unwarranted disciplinary action against the grievant in issuing the disciplinary action at issue here. Va. Code § 2.2-3006(C) states: "The hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion of any administrative review and judicial appeal, and shall be implemented immediately thereafter, unless circumstances beyond the control of the agency delay such implementation." The grievant appears to interpret Va. Code § 2.2-3006(C) to say that although the hearing officer upheld the March 8th discipline, the hearing officer's decision was not a final decision (as it was still subject to judicial review) and as such, the agency was prohibited from considering the prior disciplinary action in determining the level of appropriate discipline in this case. Because the grievant is alleging a violation of a Virginia grievance procedure statutory provision, this Department deems it appropriate to point out that we believe the grievant's interpretation of Va. Code § 2.2-3006(C) to be erroneous. More specifically, Va. Code § 2.2-3006(C) does not forbid or restrict an agency from considering past disciplinary action against a grievant when contemplating new disciplinary action just because that prior disciplinary action is currently being appealed through the grievance process. Rather, Va. Code § 2.2-3006(C) merely sets forth when a hearing decision becomes effective and must be implemented by the agency.

²⁵ The grievant was issued a Group III Written Notice in 2005. The grievant challenged the disciplinary action through the grievant process and the Group III was ultimately rescinded by the local circuit court in September of 2006.

²⁶ Hearing Decision at 3.

or, if occupied, to an objectively similar position.”²⁷ As such, in rendering his decision, the hearing officer appears to have taken into account that the agency based its current disciplinary action, in part, on the prior disciplinary action which was ultimately reversed by the local circuit court and thus, has not erred and/or abused his discretion by not reconsidering his decision as to this issue.

Further, while the grievant may be disappointed that VSP did not rescind his transfer after the Lieutenant Colonel allegedly acknowledged at hearing that the grievant’s transfer was implemented because of the active Group III Written Notice (which was later rescinded by the Circuit Court), the grievant has failed to state what specific requirement of the grievance procedure has been violated by the hearing officer with regard to this issue.²⁸

Finally, to the extent the grievant is arguing that VSP’s consideration of his prior disciplinary action and failure to rescind his transfer on the day of the hearing should have been considered in support of his claim that the disciplinary action was based on improper motives (i.e., retaliation and discrimination), as stated above, this Department concludes that there was evidence in the record (i.e., witness testimony) to support the hearing officer’s decision that the disciplinary action taken against the grievant was neither retaliatory nor discriminatory and as such, this Department cannot substitute its judgment for that of the hearing officer with respect to such findings.

Failure to Issue Reconsideration Decision within 15 Calendar Days

Finally, the grievant claims that the hearing officer’s failure to issue his reconsideration decision within 15 calendar days of receipt of the grievant’s request constitutes noncompliance with the grievance procedure. Section 7.2(c) of the *Grievance Procedure Manual* states, “[t]he hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request.”²⁹

In this case, the hearing officer issued his reconsideration decision 22 days after his receipt of the grievant’s request. However, as stated above, the grievance procedure does not *require* that a decision on a request for reconsideration to the hearing officer be issued within 15 calendar days from receipt, rather the *Grievance Procedure Manual* says a written decision *should* be issued within this time frame. And while the hearing officer should always strive to issue his decision on a request for reconsideration within 15 calendar days of receipt, failure to do so is not a violation of the grievance procedure.

²⁷ Hearing Decision at 7.

²⁸ See Grievance Procedure Manual § 7.2(a) (“A challenge that the hearing decision does not comply with the grievance procedure is made to the Director of EDR... This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance.”)

²⁹ *Grievance Procedure Manual* § 7.2(c).

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, this Department will not disturb the hearing decision. 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.³⁰ 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.³¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³²

Claudia T. Farr
Director

³⁰ *Grievance Procedure Manual* § 7.2(d).

³¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³² *Id.*; see also *Virginia Dep't of State Police vs. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).