

Issue: Administrative Review/hearing decision appeal; Ruling Date: January 25, 2007;  
Ruling #2007-1513; Agency: Department of Rehabilitative Services; Outcome: hearing  
officer in compliance



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of the Department of Rehabilitative Services  
Ruling No. 2007-1513  
January 25, 2007

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8458. For the reasons discussed below, this Department will not disturb the decisions of the hearing officer.

FACTS

The pertinent facts of case number 8458, as set forth in the hearing decision issued on December 1, 2006, are set forth below.<sup>1</sup>

The grievant filed a timely grievance from a Group II Written Notice for failure to follow supervisor's instructions and failure to perform assigned work. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing. The Department of Rehabilitative Services (hereinafter referred to as "agency") has employed grievant for 12 years as an administrative and program specialist. She has been previously employed by another state agency for six years.

On Friday afternoon, July 28, 2006, the [Grievant's] supervisor e-mailed grievant requesting her assistance in preparing for a committee meeting to be held Monday, July 31, 2006. Over the years, grievant had performed this responsibility many times for previous committee meetings. Seven people (including grievant and her supervisor) attended the meeting; two additional people participated by telephone.

---

<sup>1</sup> For purposes of clarity, footnotes and some text from the fact section of the December 1<sup>st</sup> decision have been omitted. A copy of the decision in its entirety is available on EDR's website at: <http://www.edr.virginia.gov/searchhearing/2007-8458%20Decision.pdf>.

At the meeting on July 31, 2006, grievant acted as recording secretary and took notes of what transpired. From these, she prepared a formal, typed record of the meeting and submitted it to her supervisor for review. The supervisor made revisions to the minutes and returned the document to grievant with instructions to mail them to committee members. Grievant responded to the supervisor that he had omitted things from the minutes and that she did not want her name on the minutes if the supervisor's changes remained. Over the next three days, a series of acerbic e-mails was exchanged between grievant and her supervisor. Ultimately, on August 10, 2006, the supervisor revised the meeting minutes himself and sent them out over his own name.

Grievant has twice previously been disciplined for failure to follow supervisory instructions. On each occasion she was given a Group I Written Notice. The supervisor consulted with Human Resources and the Assistant Commissioner prior to issuing the disciplinary action on August 23, 2006.

The hearing officer found that while the grievant was within her rights to decline signing her name to meeting note revisions that she did not agree with, once the supervisor directed her to make the revisions he wanted, the grievant's job was to type the minutes as directed and her failure to do so was tantamount to insubordination. Accordingly, the hearing officer upheld the agency imposed discipline.

### 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>2</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>3</sup>

#### *Failure to Schedule a Pre-Hearing Conference*

In this case, the grievant claims that the hearing officer did not schedule a pre-hearing conference. The hearing officer has informed this Department that it is his practice to always hold telephonic pre-hearing conferences (PHC) with the parties. He explained that sometimes grievants do not return calls or respond to his secretary's calls when she schedules the PHC. In such cases, he states that he may talk with each party separately rather than in a conference call because they cannot reach the grievant until after the scheduled conference call. However, the hearing officer explained that once he

---

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

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

finally reaches the grievant, he goes through all the same instructions given to the other party. The hearing officer asserts that he does not have a specific recollection of what happened in this case, but notes that it may have been that he held the grievant's portion of the PHC with her alone and because it would have been just a call between her and the hearing officer, she may not have considered it a formal PHC.

It is not necessary in this case to ultimately determine whether the hearing officer held a PHC.<sup>4</sup> While it is clearly required under the grievance procedure,<sup>5</sup> in this case, if the conference did not occur, the error would have been harmless. While this Department certainly would not condone such an omission, if true, here the grievant has not pointed to any actual prejudice that she suffered as a result of the purported omission. Rather, the grievant states that the failure to hold a PHC resulted in a "lack of knowledge concerning permissible and impermissible evidence and questions." Notwithstanding her general objection, the grievant demonstrates through her appeal that she understood that she could object to evidence proffered by the agency, as evidenced by her objection to the agency's proffer of inactive written notices. Furthermore, she prepared and submitted a notebook containing 14 proposed exhibits, a number of which were cited in the hearing decision. Moreover, the grievant concedes that she availed herself of this Department's *Basic Skills for Presenting Your Case at Hearing* and AdviceLine consultant advice.<sup>6</sup> In sum, based on all of the foregoing, particularly, the lack of any specific prejudice, this Department concludes that any failure to have a PHC would have been a harmless error in this particular instance.

#### *Admission of Inactive Written Notices*

As noted above, the grievant asserts that the hearing officer erred by admitting two inactive written notices introduced by the agency, which the grievant asserts is a violation of the Department of Human Resources Management (DHRM) policy. Under the grievance procedure, a request for an administrative review based on inconsistency with policy must be made to the DHRM Director, with a copy also going to the agency.<sup>7</sup> The grievant has an appeal pending before the DHRM Director. In that appeal, she has raised her policy concerns regarding the two inactive written notices.

---

<sup>4</sup> The hearing officer notes two factors that he believes indicate that he likely did hold a PHC. First, he notes that the grievant did not raise the alleged lack of a PHC as an issue at the hearing. Second, the grievant submitted documentary exhibits and otherwise complied with the instructions that the hearing officer typically gives to parties during the PHC.

<sup>5</sup> *Grievance Procedure Manual* § 5.3.

<sup>6</sup> In addition, both parties were sent a copy of an October 23, 2006 general information memorandum that discussed both witness and document issues and encouraged any party with questions to contact the EDR AdviceLine. Furthermore, on November 2, 2006, both parties were sent a letter that confirmed the hearing date and addressed witnesses and exchange of exhibits issues. The November 2<sup>nd</sup> letter also encouraged the parties to contact the hearing officer if they had any questions.

<sup>7</sup> See *Grievance Procedure Manual* § 7.2(a).

To the extent that the grievant's objection to the admission of the expired written notices is also an objection based on non-compliance with the grievance procedure, this Department finds no error. The hearing officer noted that "While both of these disciplinary actions are now inactive and may be not be used for accumulative purposes, they are nonetheless admissible in this hearing as evidence of a pattern of prior similar conduct for which corrective action was necessary."<sup>8</sup> Consideration of prior written notices for a purpose such as evidence of a pattern of prior similar conduct is appropriate. Similar prior written notices can serve as evidence that the grievant was aware of the rule common to both the expired and instant written notice. Accordingly, this Department finds no error with the manner in which the hearing officer considered the notices in this case.

### *Findings of Fact*

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 grounds in the record for those findings."<sup>10</sup> By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.<sup>11</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.

The grievant complains that the hearing officer misinterpreted exhibits and mischaracterized testimony. The grievant also asserts that the hearing officer would not let her testify as to certain issues, which the hearing officer apparently considered irrelevant. Such challenges simply contest the hearing officer's admission or exclusion of evidence, 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. Such determinations are entirely within the hearing officer's authority.

Here, the grievant was disciplined for failing to follow her supervisor's instruction to revise the meeting minutes. The record contains evidence that supports the hearing officer's findings related to that charge. Accordingly, we will not substitute our judgment for that of the hearing officer with respect to those findings.

### *The Timeliness of the Decision*

---

<sup>8</sup> Decision of Hearing Officer, Case No. 8458, December 1, 2006 ("Hearing Decision"), at 4 footnote 22.

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

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

<sup>11</sup> Va. Code § 2.2-3005(C)(5).

The grievant objects to the prompt issuance of the decision in her case, only one day after the hearing, apparently implying that the decision was not thoroughly considered. The grievant wonders if the facts and testimony were fully considered. As stated above, the hearing decision contains findings supported by record evidence and, moreover, cites to numerous exhibits submitted both by the grievant and agency. Thus, we find no evidence that hearing officer's expediency reflects any failure to fully consider the issues before him.

#### 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>12</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>13</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>14</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>15</sup>

---

Claudia T. Farr  
Director

---

<sup>12</sup> *Grievance Procedure Manual*, § 7.2(d).

<sup>13</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>14</sup> *Id.* See also Va. Dept. of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E. 2<sup>nd</sup> 319, 322 (2002).

<sup>15</sup> Va. Code § 2.2-1001 (5).