

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8586; Ruling
Date: August 7, 2007; Ruling #2008-1747; Agency: Virginia Polytechnic Institute and
State University; Outcome: Hearing Decision In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2008-1747
August 7, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8586. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

Virginia Polytechnic Institute and State University ("the University") previously employed the grievant as a banquet manager.¹ The agency issued the grievant three Written Notices and terminated him based on accumulation of disciplinary actions on January 31, 2007.² The grievant received 1) a Group II Written Notice for failure to perform assigned work and comply with established performance standards related to his management of two banquet events on December 30, 2006;³ 2) a Group I Written Notice for failure to follow written policy by not contacting the appropriate supervisor when he was ill on December 31, 2006;⁴ and 3) a Group II Written Notice for unauthorized use of State property in that the grievant performed personal tasks on a State computer system.⁵ The hearing in this matter was held on May 15, 2007. The hearing officer upheld the agency's disciplinary actions.⁶ The grievant now requests administrative review from this Department.

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 ...

¹ Decision of Hearing Officer, Case No. 8586, July 9, 2007 ("Hearing Decision"), at 2.

² *Id.* at 1.

³ *Id.* at 1, 3-4.

⁴ *Id.* at 1, 4.

⁵ *Id.* at 1, 4-5.

⁶ *Id.* at 9. However, the hearing officer did reverse the suspension of the grievant in conjunction with one of the Group II Written Notices. *Id.*

on all matters related to procedural compliance with the grievance procedure.”⁷ 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.⁸

Timeliness of the Hearing Decision

The grievant asserts that the hearing officer erred because the hearing decision was not issued within thirty-five days of the appointment of the hearing officer. According to the grievance procedure and rules established by this Department, absent just cause, hearing officers are to hold the hearing and issue a written decision within 35 calendar days of appointment.⁹ In this case, the hearing officer was appointed on April 5, 2007, and the hearing held May 15, 2007.¹⁰ The hearing decision was issued on July 9, 2007. Preferably, hearings take place and decisions are written within the 35-day timeframe set forth in the grievance procedure. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.¹¹ There is no indication of inappropriate or improper delay in this case.

Witness Issues

The grievant raises two concerns regarding witnesses not appearing for the hearing. First, the grievant argues that the delay of the hearing until after graduation prevented certain witnesses, who were students at the University, from testifying because they had left for the summer or graduated. As an initial matter, to the extent the grievant is challenging the propriety of the hearing officer’s continuance of the hearing date, that matter should have been raised as an issue of noncompliance with the hearing officer. If an allegation of noncompliance arises in pre-hearing matters, the grievant should first make an objection to the hearing officer at the time the noncompliance occurs.¹² However, there is simply no indication that the decision to delay the hearing was improper. Under the circumstances, this Department could not conclude that the hearing officer abused his discretion by granting the extension in this case.

Under the rules of the grievance procedure, “[e]ach party may call witnesses to testify at the hearing.”¹³ Accordingly, it is the responsibility of each party to secure his or her own witnesses for hearing.¹⁴ The grievant became aware of the delay in the hearing date no later than April 24, 2007. As such, he had more than three weeks to prepare for the absence of his witnesses. The grievant could have taken steps to obtain witness statements, affidavits, or arranged for the witnesses to testify at the hearing by telephone. Therefore, it does not appear

⁷ Va. Code § 2.2-1001(2), (3), and (5).

⁸ See *Grievance Procedure Manual* § 6.4.

⁹ *Grievance Procedure Manual* § 5.1.

¹⁰ The hearing was first scheduled for April 20, 2007. However, due to the tragic events that took place at the University on April 16, 2007, the hearing was postponed until after graduation.

¹¹ See, e.g., EDR Ruling No. 2006-1135.

¹² *Grievance Procedure Manual* § 6.4.

¹³ *Rules for Conducting Grievance Hearings* § IV(A).

¹⁴ E.g., EDR Ruling No. 2004-742; EDR Ruling No. 2004-727.

that the hearing officer violated a substantial provision of the grievance procedure or otherwise abused his discretion with regard to the grievant's failure to have his witnesses appear for the hearing.

The grievant also argues that an error in letters sent by the hearing officer regarding the rescheduled hearing date led to one of the grievant's witnesses not attending the hearing. The letters sent by the hearing officer on April 24, 2007, and May 8, 2007, referred to the date of the rescheduled hearing as "Tuesday, May 16." However, the hearing actually was scheduled for Tuesday, May 15. Consequently, the grievant argues that one of his witnesses had planned to attend the hearing on May 16, instead of the actual hearing on May 15.

While the error in the letters certainly could cause confusion, there is no evidence that it caused any problem for the parties or their representatives in attending the hearing on the appropriate date. Moreover, these letters were sent to the agency's attorney, the grievant's attorney, and the grievant; *not* to the witnesses. Consequently, there is no evidence that the error in these letters could have contributed to the grievant's witness's mistake regarding the hearing date. As stated above, it is the responsibility of each party to secure his or her own witnesses for hearing. Indeed, the hearing officer's April 24, 2007 letter specifically stated, "[p]lease remember that it is your responsibility to contact your witnesses and inform them of the hearing date and location."¹⁵ The grievant was aware of the appropriate hearing date and should have made his witnesses aware of that information, as well. There is no basis to remand the case for further proceedings because of these witness issues.

Factual Arguments - Staffing

Lastly, the grievant raises issues regarding the lack of available staff during the events of December 30, 2006, and the hearing officer's consideration of that evidence as to how it affected the grievant's performance.¹⁶ Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁷ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁸ 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 hearing officer appears to have found as a matter of fact that there were no material staffing issues on December 30, 2006. The hearing decision states, "[a]pproximately one

¹⁵ The grievant could have also attempted to have absent witnesses testify by telephone if they were unable to arrive later on the day of the hearing.

¹⁶ The grievant also provided additional documents regarding staffing practices at other University events subsequent to December 30, 2006. However, this evidence was not offered at hearing and it is not part of the hearing record. As such, it is not appropriate to consider this new evidence at this time. There is no indication that the grievant was prevented from presenting such information at the hearing.

¹⁷ Va. Code § 2.2-3005.1(C)(ii).

¹⁸ *Grievance Procedure Manual* § 5.9.

employee is necessary to work for every 20 guests attending a plated dinner.”¹⁹ Because there were a total of 208 people attending both events, and there were “approximately” eleven employees working,²⁰ it was reasonable for the hearing officer to conclude that the staffing of the events was sufficient or at a minimum not material to the disciplinary action. A review of the hearing record reveals conflicting evidence on the sufficiency of the number of staff. However, as stated above, it is within the hearing officer’s authority to weigh the conflicting evidence and make a finding. This Department cannot determine that the hearing officer abused his discretion in making these findings or that these facts were not supported by the hearing record.

It is apparent that the hearing officer considered the surrounding circumstances of the events of December 30, 2006, throughout his determinations as to whether the Group II Written Notice was appropriate.²¹ Indeed, the hearing officer found that some of the alleged acts of misconduct were not the fault of the grievant because of these factors.²² However, the hearing officer did find that the University met its burden in showing that the grievant’s lack of planning, irrespective of alleged staffing issues, led to the problems for which the grievant was responsible.²³ This Department cannot conclude that the hearing officer’s findings or conclusions in this regard are unsupported by the record evidence. Consequently, remand is not appropriate on this issue.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not disturb the hearing officer’s 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.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁶

Claudia T. Farr
Director

¹⁹ Hearing Decision at 3.

²⁰ *Id.* The hearing decision also notes that three additional employees working elsewhere at the Facility left their duties to assist the grievant and his staff on December 30, 2006. *Id.*

²¹ *Id.* at 5-6.

²² *Id.* at 6.

²³ The hearing officer found that 1) the grievant failed to have the rooms for the wedding completely set fifteen minutes before the start time, as required by the University’s policy; 2) a sufficient number of champagne bottles were not set out; 3) no napkins were on the hors d’oeuvres station; and 4) table settings were not complete. *Id.* at 5-6.

²⁴ *Grievance Procedure Manual* § 7.2(d).

²⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁶ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).