

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8629; Ruling  
Date: 08/28/07; Ruling No. 2008-1769; Agency: Virginia Department of  
Transportation; Outcome: Hearing Officer in Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Transportation  
Ruling Number 2008-1769  
August 28, 2007

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8629. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

This case concerns a grievance regarding a Group II Written Notice received by the grievant.<sup>1</sup> His crew was responsible for construction and repair work of an end wall for a pipe arch underneath a secondary road.<sup>2</sup> The agency found that the grievant had failed to implement required erosion and sedimentation measures.<sup>3</sup> The hearing in this matter was held on July 20, 2007.<sup>4</sup> The hearing officer upheld the issuance of the Written Notice and, in a subsequent reconsideration decision, affirmed that decision.<sup>5</sup> The grievant now requests administrative review of the hearing decision. He argues that various inconsistencies and contradictions in the testimony of witnesses support his contention that he was singled out for discipline while other more serious violations by others were not addressed.

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>6</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

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<sup>1</sup> Decision of Hearing Officer, Case No. 8629, July 30, 2007 ("Hearing Decision"), at 1.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 5; Decision Upon Request for Reconsideration, Case No. 8629, Aug. 17, 2007 ("Reconsideration Decision").

<sup>6</sup> Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>7</sup>

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>8</sup> and to determine the grievance based “on the material issues and grounds in the record for those findings.”<sup>9</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 argues that he was singled out in this disciplinary action and that other violations were overlooked. The hearing officer considered the grievant’s evidence and found that it was not sufficient to support a finding that these other instances would have justified the issuance of a Written Notice.<sup>10</sup> The hearing officer further noted in the reconsideration decision that the grievant’s evidence on this issue was “ambiguous and incomplete.”<sup>11</sup> The grievant appears to contest the hearing officer’s findings with regard to these disputed facts, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, and the resulting inferences that he drew. Such determinations are within the hearing officer’s authority. 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. Based upon a review of the hearing record, there is no indication in this case that the hearing officer abused his discretion or that his findings or conclusions were not supported by the hearing record.

#### 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.<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>

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<sup>7</sup> See *Grievance Procedure Manual* § 6.4.

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> Hearing Decision at 3-4.

<sup>11</sup> Reconsideration Decision.

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

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