

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8766; Ruling  
Date: February 27, 2008; Ruling #2008-1953; Agency: Department of Social  
Services; Outcome: Hearing Decision In Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Social Services  
Ruling Number 2008-1953  
February 27, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8766. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

The grievant received a Group I Written Notice for inadequate or unsatisfactory job performance on August 21, 2007.<sup>1</sup> The agency disciplined the grievant because on certain specified occasions inspections conducted by the grievant took less time than was necessary to complete the inspections satisfactorily.<sup>2</sup> The grievant initiated a grievance to challenge the disciplinary action on August 28, 2007.<sup>3</sup> After proceeding through the management steps of the grievance process, the grievant pursued her claim to a hearing, which was held on January 25, 2008.<sup>4</sup> The hearing officer found that the agency had sustained its burden of proof and upheld the Written Notice.<sup>5</sup> The grievant sought reconsideration from the hearing officer on February 8, 2008, asserting three arguments: 1) the hearing officer failed to consider that the grievant "had problems with [her] computer during this time period;" 2) the agency only asked providers when the grievant arrived at the particular facility, but failed to ask providers for information about how long the grievant was at the facility; and 3) an agency policy regarding "Conducting an Inspection" does not provide for any guidelines for time frames in conducting an investigation. The hearing officer issued a Reconsideration Decision on February 12, 2008, which addressed these grounds and affirmed his prior decision.<sup>6</sup> The grievant now seeks administrative review from this Department based on the three arguments raised with the hearing officer on reconsideration.

DISCUSSION

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<sup>1</sup> Decision of Hearing Officer, Case No. 8766, Jan. 28, 2008 ("Hearing Decision"), at 1.

<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> *Id.* at 1.

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

<sup>5</sup> *Id.* at 4-5.

<sup>6</sup> Reconsideration Decision of Hearing Officer, Case No. 8766-R, Feb. 12, 2008 ("Reconsideration Decision").

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>7</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>8</sup>

### *Factual Arguments*

The grievant’s first two arguments, regarding her computer problems and the information the agency did and did not collect from providers, challenge the hearing officer’s assessment of the facts. 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> Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.<sup>11</sup> Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>12</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’s arguments appear to contest the hearing officer’s findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer’s authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.<sup>13</sup> Based upon a review of the hearing record, substantial evidence supports the hearing officer’s decision. 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. Consequently, this Department has no reason to disturb the hearing decision or the manner in which the hearing officer addressed the grievant’s arguments on reconsideration.

### *Policy Issue*

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<sup>7</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4.

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

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

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>12</sup> *Grievance Procedure Manual* § 5.8.

<sup>13</sup> *Rules for Conducting Grievance Hearings* § VI(B).

The grievant's third issue asserts that the hearing decision is inconsistent with an agency policy, Standard Operating Procedure (SOP) 301. An allegation that a hearing decision is inconsistent with state or agency policy is a matter more properly addressed by the Department of Human Resource Management (DHRM).<sup>14</sup> In this case, it appears the grievant has already raised this issue with DHRM. Therefore, this Department will not rule on the grievant's policy argument.

#### 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>15</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>16</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>17</sup>

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Claudia T. Farr  
Director

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<sup>14</sup> Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a).

<sup>15</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>16</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>17</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).