

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8774;
Ruling Date: May 7, 2008; Ruling #2008-1995; Agency: Department of Labor
and Industry; Outcome: Hearing Officer's Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Labor and Industry
Ruling No. 2008-1995
May 7, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8774. For the reasons discussed below, this Department will not disturb the hearing officer's decision in this case.

FACTS

The grievant is employed as a Program Support Technician with the agency. The grievant asserts that on February 9, 2007, she ran a report which listed 41 files with overdue abatements. She states that her former supervisor (the Consultation Program Manager) began calling the companies identified in the report the week of February 12, 2007. The grievant reports discovering a file on February 15, 2007 containing 23 serious overdue hazards closed without documentation, except a handwritten note from the Consultation Program Manager indicating that the business had been sold. The grievant claims she called the company to verify that the business had been sold, and that the individual who answered her call informed her that the business had not been sold and no one had offered to buy the company.

The grievant asserts that she was so alarmed by her discovery that she contacted a staff attorney who purportedly recommended that the grievant show the file to the Deputy Commissioner. When it turned out that the Deputy Commissioner was unavailable, the grievant sent the Commissioner an e-mail describing the file and informing him that she had provided the Human Resource Manager with a package of copied reports containing serious violations of abatement procedures. The grievant states that on February 20, 2007, at the request of the Commissioner, she met with him and discussed her allegations of record alterations and falsifications.

The grievant asserts that she has been a victim of retaliation for reporting the Consultation Program Manager's actions. In particular, the grievant asserts that as of May 15, 2007, all of her job duties were transferred to the Consultation Program Manager and she was left with no substantial job responsibilities. Along with the change of duties, the grievant was to report to a new supervisor. In response to the removal of her job

functions, the grievant initiated a grievance on June 8, 2007, challenging the agency's actions (Grievance 1).

On August 10, 2007, the grievant initiated a second grievance (Grievance 2), this one challenging the agency's decision to physically move the Consultation Program Manager from the central office to another location along with all consultation files, which the grievant asserts constitutes the abolition of her job. She asserts that this move was also an act of retaliation.

This Department qualified Grievance 1 and Grievance 2 for hearing and a hearing was held on February 20, 2008. In a decision dated March 10, 2008, the hearing officer found the following:

The Agency's actions with respect to the Grievant were not retaliatory or otherwise improper. Quite the contrary, the Agency thoroughly investigated the grievant's claims, took specific concrete actions to address her concerns about worker safety, kept the Grievant briefed throughout the process and then took proactive steps to reduce the chance of retaliation by physically removing from her workplace the most likely protagonist, the CPM [Consultation Program Manager]. These are not the actions of a person set on retaliation.¹

The grievant now seeks administrative review from this Department of the hearing officer's decision in Case No. 8774.

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."² 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.³

Findings of Fact/Witness Testimony

In her request for administrative review, the grievant primarily disagrees with the hearing officer's findings of facts and alleges that hearing officer erred when he concluded that the agency witnesses testified more credibly than the grievant.

This Department has consistently held that where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that

¹ Decision of Hearing Officer, Case No. 8774 ("Hearing Decision"), issued March 10, 2008 at 8.

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

³ *Grievance Procedure Manual* §§ 6.4; 7.2.

evidence, determine the witnesses' credibility, and make findings of fact. In this case, the hearing decision states:

The testimony of witnesses called by the Agency was both credible and consistent on the material issue before the hearing officer of whether Management acted in retaliation against Grievant in either Grievance 1 or 2. The demeanor of such Agency witnesses at the hearing was candid and forthright. By contrast, actions taken by the Grievant during the Period undercut her positions and her credibility.⁴

These findings regarding record testimony are precisely the kinds of determinations reserved to the hearing officer who observes witness demeanor, takes into account motive and potential bias, and considers potentially corroborating or contradictory evidence. Accordingly, this Department finds no basis to disturb the hearing officer's conclusion that the agency witnesses testified more credibly than the grievant.

Moreover, hearing officers are authorized to make "findings of fact as to the material issues in the case"⁵ and to determine the grievance based "on the material issues and the grounds in the record for those findings."⁶ 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. Here, the hearing officer's finding that the agency did not retaliate against the grievant appears to be based upon evidence in the record, i.e., witness testimony, and as such, this Department cannot find that the hearing officer has erred and/or abused his discretion by concluding that the agency did not retaliate against the grievant.

Challenge to the Agency Investigation

The grievant also raises numerous challenges to the agency's investigation of her allegations of improper behavior by the Consultation Program Manager and the relatively insignificant actions taken against the Consultation Program Manager as a result of this investigation. In this case, it is undisputed that the grievant engaged in a protected activity when she made complaints regarding her former supervisor's alleged fraudulent behavior. The reporting of alleged inappropriate behavior is the important factor here for purposes of the grievant's retaliation claim, not the veracity of the complaint made or the ultimate actions taken against the Consultation Program Manager as a result of the investigation. As such, the procedures employed by the agency, the findings of the investigation itself, and any actions taken against the Consultation Program Manager, while mentioned in the hearing decision (presumably as background evidence), are essentially irrelevant to the grievant's claim of retaliation. Moreover, as stated above, the

⁴ Hearing Decision at 7.

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

hearing officer's findings regarding retaliation appear to be based on evidence in the record and as such, will not be disturbed by this Department.

The grievant further claims that the agency's investigation into the Consultation Services Program Manager's alleged improper behavior was not in compliance with state and federal law. Whether the agency's investigation and findings comport with state and federal laws is not an issue that this Department has the authority to determine on administrative review.

CONCLUSION AND APPEAL RIGHTS

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.⁷ Within 30 calendar days, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁹

This Department's rulings on matters of procedural compliance are final and nonappealable.¹⁰

Claudia T. Farr
Director

⁷ *Grievance Procedure Manual* § 7.2(d).

⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

¹⁰ Va. Code § 2.2-1001(5).