

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8911, 8944, 8945; Ruling Date: December 1, 2008; Ruling #2009-2171; Agency: Department of Military Affairs; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Military Affairs
Ruling Number 2009-2171
December 1, 2008

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8911/8944/8945. 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 two Group II Written Notices given to the grievant for failure to follow a supervisor's instructions resulting in her removal from employment with the agency.¹ In short, the grievant was instructed on multiple occasions to remove a number of air fresheners from her classroom. The grievant both refused to do so and had the air fresheners replaced even after agency management removed them.² Following a hearing on October 7, 2008, the hearing officer found that the agency had sustained its burden of proof and upheld the Written Notices with removal.³ The grievant now requests administrative review of the hearing decision.

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."⁴ 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.⁵

Evidentiary Arguments

The grievant has made certain factual assertions in support of her case. For instance, the grievant argues that evidence regarding use of air fresheners in student barracks and that a gas

¹ Decision of Hearing Officer, Case No. 8911/8944/8945, Oct. 10, 2008 ("Hearing Decision"), at 1.

² *Id.* at 2-4.

³ *Id.* at 6.

⁴ Va. Code § 2.2-1001(2), (3), and (5).

⁵ See *Grievance Procedure Manual* § 6.4.

company came to fix an alleged gas leak supports her retaliation and harassment claim. The grievant further suggests that the agency failed to present evidence to validate a witness's testimony that students complained that the air fresheners aggravated their asthma. The grievant also argues generally that the hearing officer did not address evidence supporting her retaliation claim.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁶ and to determine the grievance based "on the material issues and grounds in the record for those findings."⁷ 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.⁸ 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.⁹ 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.

Here, the grievant's arguments 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.¹⁰ In this case, it appears that substantial evidence supports the hearing officer's decision. The hearing officer found that the agency made reasonable directives to the grievant based on potential risks of harm to students and safety of the workplace.¹¹ These directives were not followed by the grievant, which justified the disciplinary actions.¹² Further, the hearing officer found that the evidence was "overwhelming" that the disciplinary actions were a result of the grievant's misconduct, not any alleged retaliation.¹³ The grievant's factual arguments do not raise any question that the hearing officer's decision was not supported by the hearing record or that the hearing officer otherwise abused his discretion in making his determinations and

⁶ Va. Code § 2.2-3005.1(C).

⁷ *Grievance Procedure Manual* § 5.9.

⁸ *Rules for Conducting Grievance Hearings* § VI(B).

⁹ *Grievance Procedure Manual* § 5.8.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ Hearing Decision at 4-5.

¹² *Id.* at 4-6.

¹³ *Id.* at 6. In light of this finding, the grievant's argument that the hearing officer failed to address evidence submitted in support of her retaliation claim is misplaced. The hearing officer found no evidence of a causal link between the grievant's prior grievance activity and the two Written Notices. *Id.* The hearing officer found that the "overwhelming" evidence supported the agency's action in this case, and was not retaliatory. Thus, there does not appear to be a need to discuss the retaliation claim or any other alleged protected activities (e.g., EEO, OSHA, assuming they were raised at hearing), in more detail.

conclusions. Consequently, this Department has no basis to disturb the hearing decision based on the grievant's arguments.

Prior Grievances/EEO Complaint

The grievant states in her request for administrative review that she had previously grieved other Written Notices she had received prior to those at issue in this matter, but had not received a hearing in those cases. The procedural history of the grievant's other grievances, which did not concern the Written Notices at issue here, has no apparent impact in this matter. The same is true for the grievant's prior EEO complaint, which the grievant states she allegedly filed in November 2006, and is still reportedly pending. To the extent such evidence is included in the hearing record, if at all, the alleged pending status of the grievant's EEO complaint is not material to the hearing decision's ultimate findings and conclusions. The grievant raises no question upon which the hearing decision might be disturbed.

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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

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Director

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).