

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8960; Ruling
Date: February 19, 2009; Ruling #2009-2219; Agency: Department of Minority
Business Enterprise; Outcome: Remanded to Hearing Officer.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Minority Business Enterprise
Ruling Number 2009-2219
February 19, 2009

INTRODUCTION

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8960. For the reasons set forth below, the case is remanded to the hearing officer for clarification and further consideration of the issue of whether the grievant had a reasonable time in which to choose whether to resign in lieu of termination.

FACTS

In this case, the grievant filed a grievance to challenge her resignation as involuntary.¹ The grievant resigned after being notified that the agency was planning on issuing her a Group II Written Notice with termination.² The grievant claims that a human resources representative told her that if she resigned, her personnel file would not be given to a future state employer if she chose to pursue employment with another state agency. As such, the grievant asserts that this alleged misrepresentation caused her resulting resignation to be involuntary.³ In a substituted decision dated January 21, 2009, the hearing officer found that the grievant had not sustained her burden of proof to show that the resignation was involuntary and no relief was awarded.⁴ 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."⁵ 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.⁶ In her request for administrative review, the grievant has challenged the hearing officer's determinations on certain factual and procedural issues. These claims are addressed below.

¹ Decision of Hearing Officer, Case No. 8960-S, Jan. 21, 2009 ("Hearing Decision"), at 1.

² *Id.* at 2-3.

³ *Id.* at 4-5.

⁴ *Id.* at 5-6.

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

⁶ *See Grievance Procedure Manual* § 6.4(3).

Credibility

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁷ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”⁸ 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 essentially challenges the hearing officer’s determinations of weight and credibility between her testimony and that of another witness. An assessment of the credibility of a witness is precisely the type of issue that is within the hearing officer’s discretion. Upon review of the exhibits and testimony, nothing the grievant has presented on administrative review would allow this Department to find that the hearing officer abused his discretion or that his determinations were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

Evidentiary Issue

The grievant argues that the hearing officer did not enter certain of her offered exhibits into evidence. However, upon review of the hearing proceedings, this Department found no exhibits that the hearing officer excluded. While the hearing officer expressed doubt as to the relevance of these exhibits, the documents were ultimately accepted into evidence.⁹ Therefore, the grievant’s argument is without merit.

Reasonableness of Time

The grievant also challenges the hearing officer’s assessment that she had a reasonable time to decide whether to resign. This issue arose in the hearing officer’s consideration of whether the grievant’s resignation was the result of coercion or duress. A resignation may be found to be involuntary if in the totality of circumstances it appears that the employer’s conduct effectively deprived the employee of free choice in the matter.¹⁰ “Factors to be considered are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation.”¹¹

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ Hearing Recording at 07:45 – 10:00.

¹⁰ *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 174 (4th Cir. 1988) (emphasis added).

¹¹ *Id.*

Based on the hearing decision, it is unclear how the hearing officer determined that the grievant had a reasonable time to consider her options.¹² If it is assumed that the grievant's time for consideration of her options occurred only from the beginning of the final meeting to the time she resigned,¹³ which is not necessarily clear, there may be some basis to the grievant's argument that this period was not reasonable.¹⁴ Because the grievant raises a potentially valid point in her request for administrative review, and the basis of the hearing officer's decision is not clear, the matter must be remanded for further clarification. This Department cannot determine how this one element might affect the hearing officer's ultimate determination of the totality of the circumstances as to duress or coercion. Therefore, the hearing officer must reconsider his decision on these issues.

APPEAL RIGHTS AND OTHER INFORMATION

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

Claudia T. Farr
Director

¹² See Hearing Decision at 6 (concluding that grievant "was given a reasonable time to choose whether to resign").

¹³ See Hearing Decision at 3.

¹⁴ See, e.g., *Stone*, 855 F.2d at 177 (finding that when considering the other surrounding circumstances, the fact that plaintiff had several hours to consider his options was not sufficient to raise a genuine issue as to the voluntariness of his resignation); *Shealy v. Winston*, 929 F.2d 1009, 1013 (4th Cir. 1991) (holding that one to two days after meeting was reasonable time); *Herron v. Va. Commonwealth Univ.*, 366 F. Supp. 2d 355, 365-66 (E.D. Va. 2004) (holding that twenty-four hours was reasonable time); *Wolford v. Angelone*, 38 F. Supp. 2d 452, 459 (W.D. Va. 1999) (holding that resignation tendered in the same day as interviewed by supervisors is unclear to affirm employee had reasonable time, thus denied motion for summary judgment); *Fox v. Experiment in Int'l Living, Inc.*, No. 92-1448-LFO, 1993 U.S. Dist. LEXIS 7043, at *11-12 (D.D.C. May 26, 1993) (holding that two to three days was reasonable time).

¹⁵ *Grievance Procedure Manual* § 7.2(d).

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

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