

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8915/8916; Ruling Date: May 4, 2009; Ruling #2009-2245; Agency: Division of Capitol Police; Outcome: Hearing Decision In Compliance.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Division of Capitol Police  
Ruling Number 2009-2245  
May 4, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's February 17, 2009 decision in Case Number 8915 / 8916.

FACTS

On April 16, 2008, the grievant was issued a Group II Written Notice for "fail[ure] to conduct an inventory. . . that he was instructed to perform by his current and past supervisors. . ." Also on April 16, 2008, the grievant was issued a Group III Written Notice with suspension and demotion for making "false statements to [Captain B] that the inventory was progressing and near completion. . ." and for making a false statement to Major H that the inventory would be complete by January 9, 2008. The grievant challenged the disciplinary actions by initiating two grievances on May 13, 2008. The grievances were subsequently qualified and consolidated for a single hearing which was held on September 24, 2008. In a February 17, 2009 hearing decision, the hearing officer upheld both the Group II Written Notice and the Group III Written Notice with suspension and demotion.<sup>1</sup> The grievant sought reconsideration of the hearing decision from the hearing officer, which the hearing officer denied on March 23, 2009.<sup>2</sup> The grievant now seeks administrative review from this Department.

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>3</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>4</sup>

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<sup>1</sup> Decision of Hearing Officer, Case No. 8915 / 8916, issued February 17, 2009 ("Hearing Decision") at 6.

<sup>2</sup> Reconsideration Decision of Hearing Officer, Case No. 8915 / 8916-R, issued March 23, 2009. ("Reconsideration Decision") at 2.

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

<sup>4</sup> *Grievance Procedure Manual* § 6.4.

*Challenge to Hearing Officer's Findings of Fact and Conclusions*

The grievant also challenges a number of the hearing officer's findings and conclusions. In particular, the grievant appears to dispute the hearing officer's determination that the disciplinary actions against him were warranted and appropriate under the circumstances. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>5</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>6</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>7</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>8</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.

The grievant's challenges to the hearing officer's findings of facts and conclusions appear to simply contest the hearing officer's findings of disputed 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 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, this Department concludes that there was sufficient evidence in the record to support the hearing officer's determination that the grievant failed to conduct the inventory and to follow his supervisor's instructions to complete the inventory, thereby warranting the issuance of the Group II Written Notice for failure to follow a supervisor's instruction.<sup>9</sup> Moreover, there is sufficient evidence in the record to support the hearing officer's determination that the grievant made a false statement regarding when the inventory would be complete, thereby warranting the

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<sup>5</sup> Va. Code § 2.2-3005.1(C).

<sup>6</sup> *Grievance Procedure Manual* § 5.9.

<sup>7</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>8</sup> *Grievance Procedure Manual* § 5.8.

<sup>9</sup> For example, the hearing officer finds, and the grievant does not appear to dispute, that the grievant was asked on numerous occasions by various supervisors regarding the status of the inventory. *See* Hearing Decision at 3. It appears that the hearing officer found these inquiries to be implicit instructions to the grievant to complete the inventory, which he failed to do. *See* Hearing Decision at 4. Such determinations are within the hearing officer's authority and this Department finds no basis to disturb these findings on administrative review.

issuance of the Group III Written Notice.<sup>10</sup> Accordingly, this Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence and the material issues in the case.

### *Failure to Grant a Continuance*

In his request for administrative review, the grievant claims that the hearing officer erred and/or abused his discretion by not granting the grievant's request for a continuance of the hearing date so that a witness possessing "invaluable information" could be present to testify. The EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure, which would include whether the hearing officer abused his discretion by failing to grant a party's request for an extension of the 35-day timeframe established in the *Grievance Procedure Manual*.<sup>11</sup>

Grievance hearings should be held and a written decision issued within 35 calendar days of the hearing officer's appointment.<sup>12</sup> The *Rules for Conducting Grievance Hearings* (the *Rules*) and the grievance procedure permit a hearing officer to extend the 35-day timeframe upon a showing of "just cause."<sup>13</sup> "Just cause" in this context is defined as "circumstances beyond a party's control."<sup>14</sup> Examples of "circumstances beyond a party's control" include, but are not limited to, accident, illness, or death in the family.<sup>15</sup>

Further, case law from the Virginia Court of Appeals addressing a court's decision to grant or deny a continuance would by analogy lend support to the position that a hearing officer's decision on a motion for a continuance should be disturbed only if (1) the hearing officer's refusal to grant the extension was an abuse of discretion;<sup>16</sup> and (2) the objecting party suffered specific prejudice by the refusal to grant the continuance.<sup>17</sup> In addition, courts have found that the test for whether there was an abuse

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<sup>10</sup> For instance, the hearing officer finds that the grievant, at the time he stated that he would have the inventory complete by January 9, 2008, "knew or should have known that he could not complete the inventory by that date" and that despite his testimony to the contrary, the grievant's past failure to complete the inventory when he said he would indicates that he never actually intended to complete the inventory by January 9, 2008. Hearing Decision at 5. Credibility determinations such as this are entirely within the hearing officer's authority and cannot be disturbed by this Department on administrative review.

<sup>11</sup> Va. Code § 2.2-1001 (5); *Grievance Procedure Manual* § 5.1.

<sup>12</sup> *Grievance Procedure Manual*, § 5.1.

<sup>13</sup> See *Grievance Procedure Manual*, §§ 5.1 and *Rules for Conducting Grievance Hearings*, § III(B).

<sup>14</sup> *Rules for Conducting Grievance Hearings*, § III(B).

<sup>15</sup> *Id.*

<sup>16</sup> "Abuse of discretion" in this context has been defined by the courts as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." U.S. v. Bakker, 925 F.2d 728, 735 (4<sup>th</sup> Cir. 1991), quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

<sup>17</sup> *Cf. Venable v. Venable*, 2 Va. App. 178 (1986). "The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." *Venable* at 181, citing to *Autry v. Bryan*, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). See also U.S. v. Bakker, 925 F.2d 728, 735, citing to U.S. v. LaRouche, 896 F.2d 815, at 823-25

of discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented at the time that request is denied.<sup>18</sup> While not dispositive for purposes of the grievance procedure, the standard set forth by the courts is nevertheless instructive and has been used by this Department in past rulings.<sup>19</sup>

In light of the rules and standards set forth above, the EDR Director will only find that a hearing officer abused his discretion by denying a request for an extension of the 35 calendar day timeframe if it appears that (1) circumstances beyond the party's control existed justifying such an extension; and (3) the objecting party suffered undue prejudice.

On September 1, 2008, the grievant, by and through his representative, requested a continuance of the hearing date due to the recent discovery that a witness could not be present to testify on the scheduled hearing date of September 24, 2008.<sup>20</sup> This witness, according to the grievant's request for continuance, "knows well Grievant's character for truth," "knows key facts about what Grievant's working assignments and duties and work conditions were" and "possesses invaluable information both relevant and material to the issues involved in this case." In a letter dated September 2, 2008, the hearing officer denied the grievant's request for a continuance for lack of "just cause", but told the parties that at the conclusion of the hearing, he would "entertain any motion [the grievant] may have regarding the importance of [the witness'] testimony and determined [sic] at that time whether to receive [the witness'] testimony on a date subsequent to the hearing."

It appears that the witness' unavailability was beyond the control of the parties. However, as noted above, the grievant became aware of the needed delay in the hearing date no later than September 1, 2008. As such, he had more than three weeks to prepare for the absence of this witness. The grievant could have taken steps to obtain a witness statement, affidavit, or possibly arranged for the witnesses to testify at the hearing by telephone. Therefore, it does not appear that the hearing officer violated a substantial provision of the grievance procedure or otherwise abused his discretion when he denied the grievant's request for a continuance of the hearing date. Of particular significance is the hearing officer's invitation to the grievant to discuss at the hearing the importance of this witness, but a review of the hearing record in this case revealed that the grievant made no motion or argument at the hearing regarding the alleged importance of this witness. We also note that the grievant has not identified any specific prejudice suffered as a result of the hearing officer's decision. Under these circumstances, this Department cannot conclude that the hearing officer erred or otherwise abused his discretion by failing to grant the grievant's request for an extension.

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(4<sup>th</sup> Cir. 1990) ("to prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby.").

<sup>18</sup> See LaRouche, at 823.

<sup>19</sup> See e.g. Compliance Rulings of Director Nos. 2003-130, 2002-213, and 2001-124.

<sup>20</sup> The witness was apparently unavailable due to his attending a conference out of state.

*Failure to Consider Mitigating Circumstances*

The grievant also claims that the hearing officer failed to consider the grievant's years of service, otherwise satisfactory past job performance, lack of proper training and lack of any prior disciplinary action as mitigating factors. Under the *Rules for Conducting Grievance Hearings*, a hearing officer is required to consider mitigating circumstances in determining whether a disciplinary action was "warranted and appropriate under the circumstances."<sup>21</sup> A hearing officer may not mitigate a disciplinary action unless, under the record evidence, he finds that the discipline exceeds the limits of reasonableness.<sup>22</sup>

In this case, the Hearing Decision does not expressly address the grievant's years of service, satisfactory job performance and lack of prior disciplinary action; however, the decision does state that "[n]o evidence of prior active disciplinary action against Grievant was introduced during the hearing"<sup>23</sup> and "[i]n light of [the standard set forth in the *Rules for Conducting Grievance Hearings* regarding mitigation], the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action."<sup>24</sup> Moreover, in his Reconsideration Decision, the hearing officer states "[c]ontrary to the grievant's assertion, the Hearing Officer considered his years of employment and otherwise satisfactory job performance regarding whether the disciplinary action against him should be mitigated. Grievant objects to the lack of training he received. Grievant's assertion that he lacked sufficient training to perform an inventory is consistent with the Agency's contention that he did not actually intend to conduct an inventory even though he stated he would do so."<sup>25</sup> In light of the foregoing, this Department concludes that the hearing officer did consider the grievant's stated mitigating circumstances and, under the facts of this case, this Department cannot conclude that the hearing officer abused his discretion in finding that the discipline imposed on the grievant did not exceed the limits of reasonableness.<sup>26</sup>

*Timeliness of the Hearing Decision*

The grievant asserts that the hearing officer erred because the hearing decision was not issued until more than four months after the hearing took place. As stated above, absent just cause, hearing officers are to hold the hearing and issue a written decision

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<sup>21</sup> See *Rules for Conducting Grievance Hearings*, § VI.B.

<sup>22</sup> *Id.*

<sup>23</sup> Hearing Decision at 3.

<sup>24</sup> Hearing Decision at 6.

<sup>25</sup> Reconsideration Decision at 1-2.

<sup>26</sup> It should further be noted that this Department has ruled previously that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. See EDR Ruling No. 2009-2091; EDR Ruling No. 2008-1903; and EDR Ruling No. 2007-1518. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

within 35 calendar days of appointment.<sup>27</sup> In this case, the hearing officer was appointed on August 12, 2008, and the hearing held September 24, 2008. The hearing decision was issued on February 17, 2009. Preferably, hearings take place and decisions are written within the 35-day timeframe set forth in the grievance procedure. This Department recognizes, however, that circumstances may arise that impede the issuance of a timely decision, without constituting noncompliance with the grievance procedure so as to require a rehearing.<sup>28</sup> There is no indication of delay in this case such that a rehearing is required.

### *Policy Interpretation*

The grievant appears to challenge the hearing officer's interpretation of agency policy. The hearing officer's interpretation of state policy is not an issue for this Department to address. Rather, the Director of the Department of Human Resource Management (DHRM) (or her designee) has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy.<sup>29</sup> Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state policy. The grievant appears to have requested an administrative review by DHRM; however, because his request for review was received outside the 15 calendar day period following the issuance of the hearing decision, DHRM ruled the grievant's request untimely.<sup>30</sup>

### 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.<sup>31</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction

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<sup>27</sup> *Grievance Procedure Manual* § 5.1.

<sup>28</sup> See, e.g., EDR Ruling No. 2006-1135.

<sup>29</sup> Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2).

<sup>30</sup> It should be noted that this Department has long held that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period. EDR Ruling Nos. 2008-1811; 2007-1635. See also, Virginia Department of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 at \*6-7 (January 15, 2008). (Court affirmed EDR's determination that an appeal based on inconsistency with policy which should have been raised with the Department of Human Resource Management (DHRM) but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM.) The reason for this rule is that the determination of the appropriate administrative reviewer—which, depending on the issue to be reviewed, could be the hearing officer, EDR, or DHRM—can be somewhat perplexing for parties not familiar with the process. However, this is not a case of a party not knowing the identity of the proper administrative reviewer for the issue to be reviewed. Instead of confusion about the review process, it appears that the grievant knew he needed to submit a request for administrative review to the DHRM Director, but failed to do so within the prescribed time limit. See also e.g., EDR Ruling No. 2009-2109.

<sup>31</sup> *Grievance Procedure Manual*, § 7.2(d).

in which the grievance arose.<sup>32</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>33</sup> This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>34</sup>

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Claudia T. Farr  
Director

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<sup>32</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

<sup>33</sup> *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

<sup>34</sup> Va. Code § 2.2-1001 (5).