

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8946;
Ruling Date: July 20, 2009; Ruling #2009-2260; Agency: Department of
Conservation and Recreation; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2009-2260
July 20, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8946. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

The grievant is employed as an Accountant Senior with DCR.¹ On March 7, 2007, the grievant applied for a position of General Accounting Manager.² Approximately twenty-nine individuals applied for the position.³ To determine which applicants would be offered interviews, the applications were independently screened by the Human Resources (HR) Director, a HR Generalist, and the Finance Director.⁴ On June 20, 2007, the grievant was informed that he was not selected to be interviewed for the position.⁵

The grievant initiated a grievance on July 19, 2007 challenging the selection process for the General Accounting Manager position.⁶ On July 16, 2008, the EDR Director denied the grievant's request for qualification of his July 19, 2007 grievance.⁷ The grievant appealed the EDR Director's determination and on August 5, 2008, the

¹ Decision of Hearing Officer, Case No. 8946, issued March 6, 2009 ("Hearing Decision") at 2.

² *Id.* at 3.

³ *Id.* at 5.

⁴ *Id.* at 4.

⁵ *Id.* at 7.

⁶ *Id.* at 1.

⁷ *Id.* See also EDR Ruling #2008-1823.

Circuit Court ordered that the grievant's claim of retaliation qualified for a hearing.⁸ A hearing officer was subsequently appointed and a hearing was held on November 5, 2008.⁹

In a decision dated March 6, 2009, the hearing officer denied the grievant's request for relief from alleged retaliation.¹⁰ The grievant timely requested that the hearing officer reconsider his decision, which the hearing officer denied on May 15, 2009.¹¹ The grievant also timely sought an administrative review from this Department as well as from the Director of the Department of Human Resource Management (DHRM). The contentions raised in the grievant's request for administrative review to this Department based on alleged procedural violations are discussed below.¹²

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."¹³ 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.¹⁴

Findings of Fact and Conclusions

The grievant raises numerous objections to the hearing officer's findings of facts and conclusions. More specifically, the grievant asserts that the hearing officer failed to consider and/or dismissed significant information in support of the grievant's retaliation claim. For example, the grievant claims that the hearing officer failed to consider the (1) the implications of the insertion of "progressive" experience and responsibility requirement in the job announcement; (2) "established friction" and history between the

⁸ Hearing Decision at 1.

⁹ *Id.*

¹⁰ *Id.* at 9.

¹¹ See Reconsideration Decision of Hearing Officer, Case No. 8946-R, issued May 15, 2009 ("Reconsideration Decision") at 2.

¹² The hearing officer's interpretation of state and/or agency policy is not an issue for this Department to address. Rather, the Director of 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. Va. Code § 2.2-3006 (A); *Grievance Procedure Manual* § 7.2 (a)(2). Only a determination by DHRM could establish whether or not the hearing officer erred in his interpretation of state and agency policy. In addition to his appeal to this Department on procedural grounds, the grievant has properly appealed to DHRM on the basis of policy. If DHRM finds that the hearing officer's interpretation of policy was not correct, DHRM may direct the hearing officer to reconsider his decision in accordance with its interpretation of policy. *Grievance Procedure Manual* § 7.2 (a)(2).

¹³ Va. Code § 2.2-1001(2), (3), and (5).

¹⁴ *Grievance Procedure Manual* § 6.4.

grievant and the agency witnesses; (3) proximity in time between the grievant's 2006 grievance and the agency's failure to select him for an interview; and (4) "conflicting reasons the [a]gency provided for the [g]rievant's non-selection."

Additionally, the grievant asserts that the hearing officer "ignored the blatant inconsistencies revealed in the cross examination of the three witnesses." In particular, the grievant claims that (1) "the system of grading each applicant was not consistent among the panel members;" (2) "[t]he panel members gave conflicting testimony regarding which parameters each member used in deciding the applicants to interview;" and (3) "[t]he panel members gave conflicting testimony regarding whether they selected the candidates independently or whether they met and decided as a group." Finally, the grievant asserts that the hearing officer erred in assuming that the agency did not know that the grievant would apply for the General Accounting Manager position and that the hearing officer "fail[ed] to make an allowance for the [a]gency's knowledge of why the [g]rievant's experience did not appear as progressive as the other applicants" as well as "ignored [the grievant's] progressive experience since 1964 and [] considered only experience since 1999."

The grievant appears to have raised these same arguments with the hearing officer in his request for reconsideration. In response, the hearing officer states:

Grievant disputes the Hearing Officer's findings of facts. Grievant's assertions of his version of the facts are either incorrect, irrelevant, or immaterial. For example, Grievant asserts that the Hearing Officer did not consider why his experience was not progressive. Grievant contends his experience was not progressive because his position was eliminated in 1994 due to budget cuts. The reason why Grievant's experience was not progressive is irrelevant. The fact remained that Grievant's experience was not progressive and that was a factor the Agency was seeking in its screening progress.

As another example, Grievant asserts that the Human Resource Director did not investigate or find out that Mr. B was a recorder of a prior 2000 grievance hearing filed by Grievant. Mr. B was a witness to Grievant's 2006 grievance. Mr. B knew Grievant engaged in protected activity because he was a witness to the 2006 grievance. Whether Mr. B was a recorder of a 2000 grievance is of little significance because Grievant has already established that Mr. B knew of his protected activity. In other words, whether Mr. B knew of at least two times Grievant engaged in protected activities (in 2000 and in 2006) does not change the conclusion that Mr. B knew Grievant engaged in protected activity. Mr. B's knowledge that Grievant engaged in protected activity on at least one occasion is sufficient to establish the foundation that Mr. B *could* have

retaliated against Grievant. The Hearing Officer took into consideration that Mr. B had knowledge that Grievant engaged in protected activity.¹⁵

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁶ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁷ Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.¹⁸ 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 challenges contest the weight and credibility that the hearing officer accorded to the testimony of a witness at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer’s authority and so 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.

This Department concludes that there was sufficient evidence in the record to support the hearing officer’s determination that the agency did not retaliate against the grievant when it failed to select him for an interview for the General Accounting Manager position. For instance, based on testimony and the hearing officer’s observation of demeanor of those individuals that screened the applications for the General Accounting Manager position, the hearing officer finds:

The Human Resource Director, Mr. B, and Ms. J knew that Grievant had engaged in protected activities such as filing grievances. Simply because they knew Grievant had filed grievances does not show that they screened out Grievant in order to retaliate against him. Ms. J denied she retaliated against Grievant in the screening process. Her denial was very credible. It is highly likely that her denial was truthful. Mr. B denied he retaliated against Grievant in the screening process. His denial was credible. It is more likely than not that his denial was truthful. The Hearing Officer observed the demeanor of the Human Resource Director and can conclude his demeanor did not reveal an intention to retaliate against Grievant.¹⁹

¹⁵ Reconsideration Decision at 1-2 (footnotes omitted).

¹⁶ Va. Code § 2.2-3005.1(C).

¹⁷ *Grievance Procedure Manual* § 5.9.

¹⁸ Va. Code § 2.2-3005(C)(5).

¹⁹ Hearing Decision at 8; Hearing Recording at 2:34:46 - 2:35:22 and 2:57:38 – 2:58:02.

Such credibility determinations and observations of demeanor are precisely the sort of determinations reserved solely to the hearing officer. In addition, the hearing officer finds, and the record evidence supports, that the agency did not interview the grievant for the General Accounting Manager position because he did not meet the minimum qualifications for the position due to his failure to exhibit “progressive” experience and responsibility.²⁰ Moreover, the hearing officer finds and the record supports that the “progressive” criteria were not specifically included in the screening process in order to retaliate against the grievant.²¹ Accordingly, this Department has no reason to second-guess the hearing officer or to remand the decision.

Failure to Issue a Timely Decision

The grievant also challenges the length of time it took for the hearing officer to issue his written decision after the hearing. According to the grievance procedure rules established by this Department, absent just cause, hearing officers are to hold the hearing and issue a written decision within 35 calendar days of their appointment.²² Further, as pointed out by the grievant in his request for administrative review, the *Rules for Conducting Grievance Hearings* state that the decision “should be...written as soon as possible after the hearing when the testimony of the witness is fresh.”²³

In this case, the hearing officer was appointed on September 23, 2008, and the hearing held November 5, 2008. The hearing decision was issued on March 6, 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. Such is the case here.

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.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the

²⁰ Hearing Decision at 8; *See also e.g.*, Hearing Recording at 2:02:55 – 2:05:19 (Testimony of Human Resource Director) and 2:47:37 – 2:48:08 (Testimony of Mr. B).

²¹ Hearing Decision at 8; Hearing Recording at 1:44:00 – 1:44:46 (Testimony of Human Resource Director)

²² *Grievance Procedure Manual* § 5.1.

²³ *Rules for Conducting Grievance Hearings*, § V(C).

²⁴ *Grievance Procedure Manual*, § 7.2(d).

²⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

final hearing decision is contradictory to law.²⁶ This Department's rulings on matters of procedural compliance are final and nonappealable.²⁷

Claudia T. Farr
Director

²⁶ *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319 (2002).

²⁷ Va. Code § 2.2-1001 (5).