

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8265, 8309;  
Ruling Date: June 4, 2009; Ruling #2009-2265; Agency: Virginia Department of  
Health; Outcome: Hearing Decision Affirmed.



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

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Health  
Ruling Number 2009-2265  
June 4, 2009

The grievant has requested that this Department review the hearing officer's decision in Case Number 8265, 8309. For the reasons set forth below, we will not disturb the decision.

FACTS

The full facts of this case are set forth in the February 11, 2009 Decision of Hearing Officer, Case No. 8265, 8309 ("Hearing Decision"). The grievant received a Group II Written Notice for failure to report to work without proper notice and failure to follow her supervisor's instructions.<sup>1</sup> She also received a Group II Written Notice for unauthorized use or misuse of state property and abuse of state time and resources, which led to the termination of her employment.<sup>2</sup> The hearing officer determined that the agency had proven by a preponderance of the evidence that the charges against the grievant were warranted. He thus upheld the discipline, including her discharge.<sup>3</sup>

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>4</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>5</sup> The grievant has advanced two arguments in her request for administrative review which are addressed below.

*Failure to Properly Consider or Review all of the Evidence*

The grievant argues that the hearing officer failed to properly consider or review all the evidence in this case. According to the Rules for Conducting Grievance Hearings, "[a]fter the

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<sup>1</sup> Hearing Decision at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 7.

<sup>4</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

hearing, the hearing officer should deliberate on the evidence admitted at the hearing.”<sup>6</sup> Thereafter, hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>7</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>8</sup> 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.<sup>9</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>10</sup> Moreover, 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.

In this case, the grievant is essentially contesting the hearing officer’s findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses 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. Moreover, the grievant apparently raised with the hearing officer in her request for reconsideration her concern that all evidence was not considered by the hearing officer in reaching his decision. The hearing officer addressed this concern in his Reconsideration Decision stating: “Contrary to Grievant’s assertion the Hearing Officer considered all of the Agency’s and Grievant’s exhibits offered and admitted as evidence during the hearing.”<sup>11</sup> In her request for administrative review to this Department, the grievant has cited no specific evidence that the hearing officer allegedly failed to consider nor explained how any such evidence would have impacted the outcome of the decision. Accordingly, this Department cannot remand or otherwise disturb the decision on the grounds asserted by the grievant.<sup>12</sup>

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<sup>6</sup> *Rules for Conducting Grievance Hearings*, § V(A).

<sup>7</sup> Va. Code § 2.2-3005.1 (C).

<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *See Rules for Conducting Grievance Hearings*, § VI (B).

<sup>10</sup> *Grievance Procedure Manual* § 5.8(2).

<sup>11</sup> March 24, 2009, Reconsideration Decision of Hearing Officer, Case No. 8265, 8309-R (“Reconsideration Decision”) at 2.

<sup>12</sup> The grievant has apparently incorporated, by reference, her Request for Reconsideration by the Hearing Officer into the Request for Administrative Review by the EDR Director. Having reviewed the Request for Reconsideration and the Reconsideration Decision, we have no reason to conclude that the hearing officer did not consider all the evidence before him. For example, the grievant asserts that the hearing officer reached the wrong conclusion about pictures stored on a computer used by several other employees, not just the grievant. This was addressed in the Reconsideration Decision. The hearing officer explained that the grievant confused two different laptops and that the computer that contained pictures of the grievant’s family was the computer upon which discipline was based. He noted that it is unlikely that others would have uploaded pictures of the grievant’s family. Another Exhibit that the grievant asserts that the hearing officer failed to examine was Exhibit E36 (2)&(3) [Facility] Health Department Telephone Procedures. She does not provide further explanation of what in particular was not considered and how it would have made a difference in her case. Nonetheless, in examining E36 (2)&(3), we note that the telephone

*Failure to Hold a Prehearing Conference with Both Parties Present*

In this case, the grievant claims that the hearing officer violated the grievance procedure by not holding a prehearing conference with both parties present. Again, the hearing officer addresses the grievant's concern in his Reconsideration Decision. He states: "Grievant complains that a prehearing conference was held without her. Grievant was informed of all prehearing conferences and invited to participate. Many prehearing conferences were held. Grievant's failure to participate in a prehearing conference is not a basis to alter the outcome of the original Hearing Decision."<sup>13</sup>

The record appears to reflect that at least one prehearing conference (PHC), and likely more, were held in which the grievant participated. For example, it is evident that the grievant received the sort of information typically shared at a prehearing conference, e.g., witness list exchange deadlines. (The hearing officer was required to reduce the grievant's original request for 107 witnesses to ten.<sup>14</sup>) Furthermore, when the grievant provided her substantially limited witness list, she captioned it "Modified List of witnesses Per [sic] teleconference of September 3<sup>rd</sup> 20[08]."<sup>15</sup> Moreover, the grievant has not identified any prejudice that she may have suffered from having separate prehearing conferences. Clearly, EDR prefers that both parties attend the same conference. However, when repeated scheduling conflicts or a party's failure to appear at a joint conference leads to separate conferences, rarely will such an arrangement constitute error, particularly reversible error. Given that the grievant has identified no prejudice as a result of separate conferences, this Department will not disturb the decision on this basis.

CONCLUSION 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>16</sup> 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

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policy states that "Staff who use the telephone for numerous and/or lengthy personal calls may be disciplined." The grievant was disciplined precisely for this sort of conduct. See Exhibit AE2 September 1, 2005 Group II Written Notice for "Unauthorized Use and Misuse of State Property, Abuse of State Time and Resources," which, in an attachment, lists numerous phone calls ranging up to 39 minutes in length. Based on the totality of the circumstances, including but not limited to the record evidence and arguments advanced by the grievant, we can find no error with the hearing officer's consideration of the evidence.

<sup>13</sup> *Id.*

<sup>14</sup> See September 4, 2008 correspondence from the hearing officer to parties in which he states that "[i]f [the grievant] believes that she cannot adequately present her case with 10 witnesses, she may identify the additional witnesses necessary and specify the reasons why the Hearing Officer should hear testimony from those witnesses. We will hold another prehearing conference to address [the grievant's] request for more than 10 witnesses, if she so requests." (Emphasis added).

<sup>15</sup> The date is presumed to be September 3, 2008 but the last two digits were truncated during the facsimile transmission.

<sup>16</sup> *Grievance Procedure Manual* § 7.2(d).

arose.<sup>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>

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Claudia T. Farr  
Director

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<sup>17</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>18</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).