

Issue: Third Administrative Review of Hearing Officer's Decision in Case No. 8975;
Ruling Date: April 17, 2009; Ruling #2009-2275; Agency: University of Virginia;
Outcome: Hearing Decision In Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the University of Virginia
Ruling Number 2009-2275
April 17, 2009

The grievant has again requested that this Department administratively review the hearing officer's decision in Case Number 8975.¹ For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

In this case, the grievant received a Group III Written Notice with removal for falsifying records and leaving work without permission.² In a decision dated November 26, 2008, the hearing officer found that, although the University charged the grievant with falsifying records on five separate dates, the evidence supported only one of those instances, which led the hearing officer to uphold the disciplinary action.³ In numerous requests for reconsideration and administrative review, the grievant has raised various issues, including an argument in mitigation of the offense regarding the University's alleged inconsistent application of policies.⁴ In the grievant's April 8, 2009 request for administrative review, he argues that the hearing officer abused his discretion by rejecting "unrebutted evidence" submitted by the grievant.

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 ...

¹ Although this is the third EDR administrative review ruling in this case, this Department has held that following remand to a hearing officer, both parties have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision). *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056; EDR Ruling Nos. 2007-1563, 2007-1637, 2007-1691; EDR Ruling No. 2007-1556. The issues raised by the March 24, 2009 hearing decision, and challenged in the grievant's current ruling request, could not have been part of the first two administrative review requests. As such, the ruling request is appropriate to consider.

² Decision of Hearing Officer, Case No. 8975, Nov. 26, 2008 ("Hearing Decision"), at 1.

³ *Id.* at 7-8.

⁴ *See* EDR Ruling No. 2009-2236; EDR Ruling No. 2009-2192.

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

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 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.⁹ 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.¹⁰ 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 arguments essentially contest the hearing officer’s assessment of the evidence submitted. 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.¹¹ Further, simply because there is “unrebutted evidence” does not mean that the evidence supports the suppositions and conclusions argued by the grievant. As demonstrated in the March 24, 2009 decision, the hearing officer has considered the evidence of inconsistent application of policies presented by the grievant.¹² Regardless of whether proffered evidence is “unrebutted,” the hearing officer must still determine whether the evidence is credible and what it actually shows. Although the grievant disagrees with the hearing officer’s evidentiary determinations, such determinations are for the hearing officer to make. The hearing officer determined that there was no credible evidence to support the conclusions drawn by the grievant.¹³ Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record.

Further, the evidence about which the grievant argues goes to the issue of mitigation. As stated in a previous ruling in this matter, this Department will review a hearing officer’s

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

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

⁷ Va. Code § 2.2-3005.1(C).

⁸ *Grievance Procedure Manual* § 5.9.

⁹ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁰ *Grievance Procedure Manual* § 5.8.

¹¹ See *Rules for Conducting Grievance Hearings* § VI(B).

¹² Decision of Hearing Officer, Case No. 8975, Response to Second EDR Request, Mar. 24, 2009.

¹³ *Id.* at 2.

mitigation determinations only for an abuse of discretion.¹⁴ Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the “exceeds the limits of reasonableness” standard or that the determination was otherwise unreasonable.¹⁵ Based upon a review of the record, there is nothing to indicate that the hearing officer’s mitigation determination was in any way unreasonable or not based on the actual evidence in the record. As such, this Department will not disturb the hearing officer’s decision.¹⁶

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.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹

Claudia T. Farr
Director

¹⁴ “‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion.” Black’s Law Dictionary 10 (6th ed. 1990). “It does not imply intentional wrong or bad faith ... but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts ... or against the reasonable and probable deductions to be drawn from the facts.” *Id.*

¹⁵ The previous remands on this issue were to assure that the hearing officer had *considered* the evidence presented in mitigation of the grievant’s offense under this standard. EDR Ruling No. 2009-2236; EDR Ruling No. 2009-2192. The hearing officer has since demonstrated consideration of the evidence on mitigation in subsequent reconsidered decisions.

¹⁶ The grievant’s requests for a new hearing and/or new hearing officer are entirely without merit. There is no evidence of arbitrary or capricious action by the hearing officer, much less any bias, in this case. The grievant’s baseball analogy is unsupported and inappropriate.

¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).