

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9025;
Ruling Date: June 18, 2009; Ruling #2009-2303; Agency: Virginia
Department of Transportation; Outcome: Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2303
June 18, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9025. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On September 30, 2008, the grievant was issued a Group III Written Notice with removal for theft or unauthorized use of VDOT property.¹ The grievant challenged the disciplinary action by filing a grievance.² The grievance proceeded to hearing on February 19, 2009.³ The facts, as set forth in the hearing decision issued in Case Number 9025, are as follows:

The Virginia Department of Transportation employed Grievant as a Crewmember at one of its Facilities. He had been employed by the Agency for approximately four years prior to his removal effective September 30, 2008. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 9, 2008, Grievant was working as a member of a crew assigned to patch potholes on Virginia roads. The crew passed a home with an asphalt driveway in need of repair. The homeowner saw the VDOT workers and walked down to a few of the workers. The homeowner wanted a pothole in his driveway filled. He spoke with Grievant and Mr. S. Grievant and Mr. S took asphalt from a VDOT truck and took it to the pothole on the homeowner's driveway. Grievant filled the pothole with the asphalt. The homeowner paid the two men "a couple of twenty dollar bills."

¹ Decision of Hearing Officer, Case No. 9025, issued April 20, 2009 ("Hearing Decision") at 1.

² *Id.*

³ *Id.*

The pothole Grievant fixed on the driveway was not in the VDOT right of way. It was on private property.

On the day the Agency learned of the incident, the Superintendent spoke with several employees and Grievant. Mr. S informed the Superintendent that the money had been returned to the homeowner.

Possibly two other employees were involved in filling the pothole. When Grievant was asked to identify the two other employees, he initially said he would do so but later refused.⁴

In his April 20, 2009 decision, the hearing officer upheld the Group III Written Notice with removal.⁵ Moreover, on May 15, 2009, the hearing officer denied the grievant's request for reconsideration.⁶ The grievant now seeks administrative review from this Department of the hearing officer's 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.”⁷ 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.⁸

Hearing Officer's Findings of Fact

The grievant challenges a number of the hearing officer's findings and conclusions and believes that the hearing officer did not “listen to the witness testimony.” Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and grounds in the record for those findings.”¹⁰ 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.¹¹ Thus, in disciplinary actions the hearing officer has the authority to determine whether

⁴ *Id.* at 2.

⁵ *Id.* at 4.

⁶ Reconsideration Decision of Hearing Officer, Case No. 9025-R, issued May 15, 2009, (“Reconsideration Decision”) at 2.

⁷ Va. Code § 2.2-1001(2), (3), and (5).

⁸ *Grievance Procedure Manual* § 6.4.

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

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

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.¹² 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.

This Department concludes that there was sufficient evidence in the record to support the hearing officer's determination that the grievant engaged in theft or unauthorized removal of State property, thereby warranting the issuance of the Group III Written Notice with removal. 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.¹³ Accordingly, this Department cannot find that the hearing officer exceeded or abused his fact-finding authority.

VEC Statements

The grievant claims that the hearing officer erred by failing to consider statements about his eligibility for unemployment benefits made during a Virginia Employment Commission (VEC) proceeding. According to Virginia law, information provided to VEC and decisions rendered by VEC cannot be used in any other judicial or administrative proceeding.¹⁴ Moreover, the standard used by hearing officers to determine whether a grievant is entitled to relief through the grievance process is different from the standard used by VEC to establish whether an employee is entitled to unemployment benefits.¹⁵ As such, this Department concludes that the VEC

¹² *Grievance Procedure Manual* § 5.8.

¹³ For example, based on witness testimony, the hearing officer finds that (1) the hearsay statements from the homeowner that he paid a couple twenty dollar bills to two slender African American male VDOT employees was not contradicted; (2) other crew members observed the grievant talking to the homeowner; and (3) Mr. S and the grievant did not deny that they filled the homeowner's pothole when asked by the Superintendent. Hearing Decision at 3. *See also, e.g.*, Hearing Recording, Case No. 9025 at 07:52 - 09:47; 1:11:41 - 1:14:04; 1:18:25 - 1:19:05; and 1:47:06 - 1:47:19.

¹⁴ *See* Va. Code § 60.2-623(B) ("Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties. Neither such information, nor any determination or decision rendered under the provisions of §§ 60.2-619, 60.2-620 or § 60.2-622, shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title.")

¹⁵ The VEC can deny a claimant unemployment benefits if it finds the claimant was discharged for misconduct connected with work. Va. Code § 60.2-618(2). The Supreme Court of Virginia has defined "misconduct connected with his work" in the context of VEC unemployment benefits to mean deliberately violating a company rule designed to protect legitimate business interests or acting with *willful disregard* of those interests and the duties and obligations he owes his employer. *Branch v. Virginia Employment*

determination has no bearing on whether the hearing officer abused his discretion or exceeded his authority in finding the grievant's removal appropriate under the grievance procedure. However, it should be noted that the issue of whether statements made during a VEC proceeding can be used in any other administrative proceeding appears to be an issue of law, more appropriately addressed by a circuit court, should review of the hearing decision reach that point.¹⁶

Legal Representation

The grievant states that he did not have ample time to secure legal representation and was told that he had to give 35 days notice if he was to be represented by counsel.¹⁷ As to the grievant's contention that he did not have ample time to obtain legal representation, the grievant was disciplined on September 30, 2008 and filed his grievance in this matter on October 20, 2008. Because the grievant was challenging formal disciplinary action, he knew or should have known at the time he initiated his grievance that the grievance would likely proceed to a hearing at a later time.¹⁸ Accordingly, the grievant had several months to obtain legal representation for the February 19, 2009 hearing.

As to the grievant's claim that he was told he had to give 35 days notice if he was to be represented by counsel, the grievant has failed to offer any specifics with regard to this contention. Further, the *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings* do not contain such a requirement and during this Department's review of this case, no evidence was found to support the grievant's contention. We note, however, that in response to the agency's request for the appointment of a hearing officer, this Department did send a standard memorandum to the grievant on December 23, 2008, advising him to begin preparing for the upcoming hearing by obtaining a representative should he desire to have one. More specifically, the memorandum advised: "Grievants are not required to have someone represent them at the hearing. However, if a representative is selected, the grievant should direct the representative to call the Division of Hearings to let us know of the representation. Representatives should be able to handle your case within the 35 calendar day time frame referenced above." Significantly, if this memorandum is the basis of the grievant's appeal, it does not say that the parties have to give 35 days notice to this Department in order to be represented at the hearing; rather, it says that if a party is represented, that representative should be available within the next 35 days.

Commission, 219 Va. 609, 611, 249 S.E.2d 180, 182 (1978) (emphasis added). This is not a definition or standard used in the context of state employee grievances administered by this Department.

¹⁶ See *Grievance Procedure Manual* § 7.3.

¹⁷ According to the *Rules for Conducting Grievance Hearings*, a party may represent themselves or be represented by legal counsel or another individual of their choice. See *Rules for Conducting Grievance Hearings*, § IV (A).

¹⁸ A grievance involving formal disciplinary action automatically qualifies for hearing. Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1(a).

Based on the foregoing, this Department has no basis to remand or otherwise disturb the decision on these bases.

Other Alleged Errors

Finally, the grievant states that he “felt rushed during the hearing.” However, in his request for administrative review to this Department, the grievant has not stated specifically why he felt rushed during the hearing and explained how this alleged action impacted the outcome of the decision. Accordingly, this Department has no reason to remand or otherwise disturb the decision on this basis.

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.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹ This Department’s rulings on matters of procedural compliance are final and nonappealable.²²

Claudia T. Farr
Director

¹⁹ *Grievance Procedure Manual*, § 7.2(d).

²⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

²¹ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319(2002).

²² See Va. Code § 2.2-1001 (5); 2.2-3003(G).