

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8955; Ruling
Date: August 13, 2009; Ruling #2009-2310; Agency: Department of Alcoholic
Beverage Control; Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Alcoholic and Beverage Control
Ruling Number 2009-2310
August 13, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8955. For the reasons set forth below, the decision is remanded to the hearing officer.

PRELIMINARY PROCEDURAL NOTE

This Department received the grievant's original request for an administrative review ("original request") on April 30, 2009 and sent a "Notice of Receipt of Ruling Request" to the parties on the following day indicating that this Department would be issuing a ruling to address the issues raised in the original request. However, after further review, this Department determined that the original request was intended only for the hearing officer and the Director of the Department of Human Resource Management (DHRM). As such, on May 4, 2009, this Department sent a memorandum to the parties advising them to disregard the earlier May 1, 2009 "Notice of Receipt of Ruling Request."

Thereafter, on May 7, 2009, this Department was advised by the grievant's attorney via letter that the original request was in fact intended to be a request for administrative review to the EDR Director. Attached to the May 7, 2009 letter was a copy of the grievant's request for review ("second request for review"). The second request for review however was slightly different from the original request for review. In particular, the second request for review included a claim that the grievant's due process rights were violated when the hearing officer upheld the Written Notice on a charge, abuse of leave, not specifically included on the Written Notice.

The Grievance Procedure Manual provides that "all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."¹ Further, the April 15, 2009 hearing decision clearly advised the parties that any request they may file for administrative review to the hearing officer, the Department of Human Resource Management (DHRM) or EDR must be received by the

¹ *Grievance Procedure Manual* § 7.2(a).

reviewer within 15 calendar days of the date the decision was issued.² In this case, this Department received the grievant's original request for administrative review on April 30, 2009, which was timely. As such, procedural compliance issues contained in the original request for review will be considered and addressed in this ruling. However, the second request for review was received on May 7, 2009, well beyond the 15 calendar days following the April 15, 2009 decision. Furthermore, the grievant has offered no just cause explanation for the delay in raising the due process issue with this Department. As such, any issues raised in the second request for review that were not part of the original request for review (e.g., that the grievant's due process rights were violated), will not be considered and addressed by this Department in this ruling.³

FACTS

On June 11, 2008, the grievant was issued a Group I Written Notice for failure to follow supervisor's instructions, falsifying state reports, abuse of state time and unsatisfactory performance.⁴ The grievant challenged the disciplinary action by initiating a grievance on July 10, 2008.⁵ The grievance was qualified for a hearing by the agency head and a hearing was subsequently held on November 20, 2008.⁶ In a hearing decision dated April 15, 2009, the hearing officer found that the grievant had failed to follow a supervisor's instructions, falsified state reports and performed unsatisfactorily⁷ and as such, upheld the disciplinary action taken against the grievant.⁸ The grievant thereafter sought a reconsideration decision from the hearing officer which the hearing officer denied in a decision dated May 15, 2009.⁹ 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."¹⁰ 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.¹¹

² See Decision of Hearing Officer, Case No. 8955, issued April 15, 2009 ("Hearing Decision") at 9-10.

³ Likewise, any issues raised in the grievant's third request for administrative review received by this Department on May 22, 2009 that were not part of the original request will not be considered or addressed by this Department. The due process objection is also a legal argument that may be raised with the circuit court.

⁴ Hearing Decision at 1.

⁵ *Id.*

⁶ *Id.*

⁷ The hearing officer found that the agency did not meet its burden with regard to the charge of abuse of state time. Hearing Decision at 6-7. However, although not specifically identified on the Written Notice, the hearing officer found that the grievant "abused leave because he claimed to qualify for sick leave when he was not actually sick." *Id.* at 7.

⁸ Hearing Decision at 9.

⁹ Reconsideration Decision of Hearing Officer, Case No. 8955-R, issued May 15, 2009 ("Reconsideration Decision") at 2.

¹⁰ Va. Code § 2.2-1001(2), (3), and (5).

¹¹ *Grievance Procedure Manual* § 6.4.

Challenge to Hearing Officer's Findings of Fact and Conclusions

The grievant challenges the hearing officer's findings and conclusions and argues that the agency did not meet its burden of proof. In addition, the grievant argues that the "evidence presented by the Agency was not credible."

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹² and to determine the grievance based "on the material issues and grounds in the record for those findings."¹³ 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.¹⁴ 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.¹⁵ 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 making his arguments, the grievant appears to contest the hearing officer's findings of 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 the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.¹⁶

Based upon a review of the hearing record, sufficient evidence supports the hearing officer's decision. In particular, the evidence reflects, and the grievant admits, that on occasion, he charged his time away from work to sick leave when he was not actually ill.¹⁷ In addition, the record evidence includes a memorandum from management to the grievant approving the grievant's use of annual leave to pursue further education.¹⁸ The hearing officer determined that this memorandum amounted to an instruction from his supervisor and concluded that the grievant violated the instruction, generally a Group II offense,¹⁹ when he charged his time away from work to attend educational classes to sick leave rather than annual leave.²⁰ Accordingly,

¹² Va. Code § 2.2-3005.1(C).

¹³ *Grievance Procedure Manual* § 5.9.

¹⁴ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁵ *Grievance Procedure Manual* § 5.8.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁷ Transcript of Hearing in Case No. 8955, at page 207; lines 6-17 (testimony of Grievant).

¹⁸ See Agency Exhibit 4

¹⁹ See DHRM Policy 1.60.

²⁰ Hearing Decision at 6; Reconsideration Decision at 2.

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. Consequently, this Department has no basis to disturb the hearing officer's decision based on any of the grievant's factual disputes.²¹

This Department recognizes the apparent inconsistency in the hearing officer's decision regarding whether the grievant "falsified" his time records.²² To the extent that the hearing officer's determinations are erroneous, this Department concludes that such error is harmless in this case because, as noted above, the record evidence supports the hearing officer's findings with regard to another charged offense on the Group I Written Notice: failure to follow a supervisor's instruction.

Adverse Inference

The grievant also argues that the hearing officer erred in refusing to grant the grievant's request for adverse inferences against the agency. More specifically, the grievant requested that the hearing officer draw an adverse inference against the agency as a result of the agency's failure to produce certain documents. In response to the grievant's request that an adverse inference be drawn, the hearing officer states the following in his decision:

Grievant seeks an adverse inference that the Agency's refusal to produce certain documents shows that the Agency's discipline is unjustified, retaliatory, and unlawful. When a party fails to produce documents whose production was ordered by the Hearing Officer, the Hearing Officer may draw an adverse inference regarding what the documents would have revealed. Grievant is asking the Hearing Officer to grant an adverse inference regarding the outcome of the case. Such an inference is not appropriate. The appropriate inference is regarding what information would have been discovered had the documents been produced. That evidentiary inference is one of the many factors that the Hearing Officer must consider in order to determine the outcome of the case.

Grievant contends that the Agency's failure to produce documents used as comparators shows its discipline was unjustified, retaliatory, and unlawful. Grievant alleged that the Agency treated him differently from other employees by requiring Grievant to use annual leave. The Agency failed to produce documents

²¹ The grievant has raised a number of objections to the hearing officer's interpretation of state policy as well. This Department has no authority to assess whether the hearing officer correctly interpreted policy in rendering his decision. 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. 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 policy. In addition to his request for administrative review to this Department, the grievant has requested that the Director of DHRM review the hearing decision on the basis of alleged policy violations.

²² The hearing officer finds that one must have an intent to falsify in order to be found guilty of falsification. See Hearing Decision at 5-6. In this case, the hearing officer finds that the grievant did not have an "actual intent to falsify," but still upholds the discipline for falsification of time records. Hearing Decision at 6.

regarding how other employees accounted for their absences from work while seeking higher education. If the Hearing Officer assumes for the sake of argument that the Agency treated Grievant differently from other employees by requiring Grievant to use annual leave to attend his University, the outcome of this case would not be affected. Grievant's opportunity to challenge the Agency's denial of his request for leave was in 2005. Falsely claiming sick leave would not be the appropriate response to a perceived misapplication of policy occurring in 2005. If the Agency had produced the leave records of other employees and Grievant had been able to show that he was treated differently from those other employees, it would not change the fact that Grievant presented documents to the Agency claiming he was sick when was not actually ill. Grievant's protected activity began on June 15, 2005 which was after the Deputy Director's April 26, 2005 letter saying that Grievant should use annual leave to travel to his classes.²³

Based on the foregoing, the hearing officer appears to only address the grievant's document request as it relates to a claim -- to the extent one exists -- that the agency's April 26, 2005 instruction to the grievant to use annual leave to cover his absences was retaliatory. However, the grievant is alleging that the disciplinary action taken against him in 2008 was retaliatory, not that the April 26, 2005 memorandum was a misapplication or unfair application of policy. In an effort to demonstrate that he was "singled out" when disciplined for using sick leave to cover his absences from work to attend educational classes, the grievant asked for employee leave records of those employees that had, like the grievant, attended educational classes while employed with the agency. These documents, to the extent they exist, appear to be relevant to the grievant's claim of retaliation, yet, as the hearing officer concludes, the agency failed to produce any such documents.

Accordingly, absent a showing of just cause by the agency for its failure to produce the documents, the hearing officer would have the authority to draw an adverse factual inference against the agency with regard to such documents.²⁴ Here, it is unclear whether the hearing officer considered drawing a factual adverse inference against the agency as a result of the agency's failure to produce the requested documents as they relate to the grievant's claim that the disciplinary action taken against him in 2008 was retaliatory.

Moreover, the hearing officer's conclusion that "[i]f the Agency had produced the leave records of other employees and Grievant had been able to show that he was treated differently from those other employees, it would not change the fact that Grievant presented documents to the Agency claiming he was sick when was not actually ill," while true, does not address the question of whether such differential treatment was motivated by retaliatory intent as a result of the grievant's engagement in protected activity. If the grievant could show that he was treated

²³ Hearing Decision at 9.

²⁴ See *Ruling for Conducting Grievance Hearings* § V(B). ("Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered." In such a case, an adverse inference may be drawn "with respect to any factual conflicts resolvable by the ordered documents or witnesses.")

differently than others, it could, depending on the circumstances, demonstrate retaliation by the agency.²⁵ Accordingly, the decision is remanded to the hearing officer for clarification and/or consideration of these issues.

CONCLUSION APPEAL RIGHTS AND OTHER INFORMATION

This matter is remanded to the hearing officer for clarification and/or consideration of the agency's failure to produce leave records of other similarly situated employees as such documents relate to the grievant's claim that his disciplinary action was retaliatory and other potential issues as expressly described in this ruling. This Department finds no other reason to disturb the hearing officer's decision.

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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸

Claudia T. Farr
Director

²⁵ In addition, inconsistent discipline could be a basis for mitigation. See *Rules for Conducting Grievance Hearings* § VI (B)(1).

²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).