

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8970, 8980;
Ruling Date: June 11, 2009; Ruling #2009-2316; Agency: Department of Motor
Vehicles; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling No. 2009-2316
June 11, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Numbers 8979/8980. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

This case concerns two Group II Written Notices given to the grievant on June 9, 2008 and June 25, 2008 for failure to follow a supervisor's instructions and perform assigned work.¹ The grievant was terminated due to accumulation of disciplinary actions.² The hearing officer upheld the Written Notices and termination.³ The hearing officer declined to change the decision on reconsideration.⁴ The grievant now requests administrative review of the hearing 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."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

The grievant appears to assert that the agency did not prove that the disciplinary actions against her were warranted and appropriate, and she also disputes some of the hearing officer's findings of fact. Hearing officers are authorized to make "findings of fact as to the material

¹ Decision of Hearing Officer, Case Nos. 8979/8980, April 28, 2009 ("Hearing Decision"), at 1.

² *Id.*

³ *Id.* at 8.

⁴ Reconsideration Decision of Hearing Officer, Case Nos. 8979/8980-R, May 15, 2009 ("Reconsideration Decision"), at 1.

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

⁶ See *Grievance Procedure Manual* § 6.4.

issues in the case”⁷ and to determine the grievance based “on the material issues and 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 contest issues such as 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.¹¹ Although the grievant has identified certain inconsistencies in the evidence and asserts that the Internal Audit Director committed perjury at the grievance hearing,¹² resolving such issues and determining the credibility of witnesses are precisely the types of questions for which this Department cannot substitute its judgment for that of the hearing officer. In this case, based upon a review of the record, it appears that sufficient evidence supports the hearing officer’s decision. There is no indication that the hearing officer abused his discretion in making these findings. Consequently, this Department has no reason to disturb the hearing decision.

Further, to the extent the grievant argues that the hearing officer erred in failing to mitigate the discipline against her, we first note that the grievant has not asserted any specific grounds for mitigation. Further, this Department will review a hearing officer’s mitigation

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

¹² This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing. *See e.g.*, EDR Ruling #2006-1383. In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment. *See, e.g.*, *Peet v. Peet*, 16 Va. App. 323 (1993); *Jones v. Willard*, 224 Va. 602 (1983). Those courts reasoned that the original trial (or hearing) was the party’s opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. In this case, under the rationale of the courts cited above, the grievant’s claims of perjury, coming after the hearing decision has been issued, would not warrant reopening. Indeed, the grievant had the opportunity at her hearing to question the Internal Audit Director and to attempt to ferret out any perjury at that time.

determinations only for an abuse of discretion.¹³ 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. 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.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons set forth above, this Department will not 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.¹⁴ 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.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Claudia T. Farr
Director

¹³ “‘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.*

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).