

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9058;
Ruling Date: June 22, 2009; Ruling #2009-2331; Agency: Department of
Mental Health, Mental Retardation and Substance Abuse Services; Outcome:
Hearing Decision in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
And Substance Abuse Services
Ruling Number 2009-2331
June 22, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9058. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On January 8, 2009, the grievant was issued a Group II Written Notice for workplace harassment.¹ The grievant challenged the disciplinary action by initiating a grievance on January 21, 2009.² During the management resolution steps of the grievance process, the second step-respondent reduced the Group II Written Notice to a Group I Written Notice.³ The grievance proceeded to hearing on May 18, 2009 and in a hearing decision dated May 19, 2009, the hearing officer upheld the Group I Written Notice.⁴ The grievant subsequently sought reconsideration of the hearing decision which the hearing officer denied on June 3, 2009.⁵ The grievant now seeks an administrative review decision from this Department.

DISCUSSION

The grievant's request for administrative review to this Department challenges the hearing officer's findings of fact and conclusions, and asserts that two witnesses made "false statements" at the hearing.

¹ Decision of Hearing Officer, Case No. 9058, issued May 19, 2009 ("Hearing Decision") at 1.

² *Id.*

³ *Id.* at 5.

⁴ *Id.* at 1 and 5.

⁵ Reconsideration Decision of the Hearing Officer, Case No. 9058-R, issued June 3, 2009 ("Reconsideration Decision") at 1.

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.”⁶ 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.⁷

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁸ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁹ 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.¹⁰ 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.¹¹ 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’s challenge to the witness’ testimony simply contests the weight and credibility that the hearing officer accorded to the testimony of those 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, This Department concludes that there was sufficient evidence in the record to support the hearing officer’s determination that the grievant engaged in workplace harassment against her co-worker, Mr. M. For example, based upon this Department’s review of the hearing record in this case, Mr. M. testified at hearing, and the hearing officer appropriately found, that

On the first day that Grievant met Mr. M, Grievant told him she had a daughter, she was blessed, and she had not had sex in 15 years. On other days, Grievant would get in front of Mr. M, look at him and turned her head and then laugh at him. When Mr. M would talk to female coworkers, Grievant would sometimes approach the group place her hands on her hips and position her body as if to ask, "Who do you think you are, talking to him?" Other staff mentioned to Mr. M that Grievant liked him. On one

⁶ Va. Code § 2.2-1001(2), (3), and (5).

⁷ *Grievance Procedure Manual* § 6.4.

⁸ Va. Code § 2.2-3005.1(C).

⁹ *Grievance Procedure Manual* § 5.9.

¹⁰ *Rules for Conducting Grievance Hearings* § VI(B).

¹¹ *Grievance Procedure Manual* § 5.8.

occasion, Grievant and Mr. M were called into a supervisor's office. The supervisor asked Mr. M if he wanted Grievant's body. Mr. M said "no". The supervisor asked Grievant if she wanted Mr. M's body. Grievance said "yes". On one occasion when Mr. M and two other women were walking away from Grievant, Grievant turned so that her rear end was facing them and pointed to her rear end.¹²

Accordingly, 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.¹³

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 and, if ordered by EDR or DHRM the hearing officer has issued a revised decision.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

¹² Hearing Decision at 2. *See also*, Hearing Recording at 39:25 through 44:48.

¹³ Moreover, this Department has consistently held that a request for a rehearing or reopening cannot be granted except in extreme circumstances, for example, where a party can clearly show that a fraud was perpetrated upon the hearing process. *See e.g.*, EDR Ruling #2006-1383. Virginia Court opinions are instructive as to the issues of perjury and the hearing process. 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 changed evidence or 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 agency witnesses about their testimony, and to attempt to ferret out any perjury at that time.

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 (2002).