Issue: Administrative Review of Hearing Officer's Decision in Case No. 8604; Ruling Date: October 1, 2009; Ruling #2009-2335; Agency: Department of State Police; Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2009-2335
October 1, 2009

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8604.

FACTS

The grievant is employed as a Trooper with the Virginia State Police ("VSP"). On January 1, 2006, the grievant co-founded the Virginia Troopers Alliance (VTA), a local of the International Union of Police Associations, AFL-CIO. The grievant claims that since becoming affiliated with the VTA, he has endured significant and frequent acts of discrimination and/or retaliation by VSP. In an October 19, 2006 grievance, the grievant asserted that his 2006 annual performance evaluation rating was lowered as a result of retaliation for his union activity. The grievant received an overall "Contributor" rating on his 2006 performance evaluation.[1] The grievant challenged his performance evaluation by initiating a grievance on October 19, 2006. His grievance also alleges that his 2006 performance evaluation is arbitrary or capricious and that the agency misapplied or unfairly applied policy.

The October 19, 2006 grievance advanced to hearing and on May 21, 2009, the hearing officer upheld the agency's overall contributor rating.[2] The grievant subsequently asked the hearing officer to reconsider his decision and appealed to the EDR Director and the Department of Human Resource Management (DHRM) Director. In a July 24, 2009 Reconsideration Decision the hearing officer affirmed his original Hearing Decision.[3]

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."[4] If the hearing

[1] The VSP rating system has 5 rating categories: "Extraordinary Contributor," "Major Contributor," "Contributor," "Marginal Contributor," and "Below Contributor."
[2] Decision of Hearing Officer, Case No. 8604, issued May 21, 2009, ("Hearing Decision"). The full facts of this case are set forth in Detail in the Hearing Decision which can be found on EDR's website at: http://www.edr.virginia.gov/searchhearing/2009-8604%20Decision.pdf.
[3] Reconsideration Decision of Hearing Officer, Case No. 8604-R, issued July 24, 2009, ("Reconsideration Decision").
[4] Va. Code § 2.2-1001(2), (3), and (5).

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.[5] The grievant has presented several objections in his request for administrative review, which are addressed below.

I. Bias

The grievant claims that the hearing officer was biased. The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has "a direct, personal, substantial [or] pecuniary interest" in the outcome of a case.[6] While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.[7] Because the grievant has not claimed nor presented evidence that the hearing officer had a "direct, personal, substantial or pecuniary interest" in the outcome of the grievance, we find no evidence of actionable bias in this case.

The grievant's claims of alleged bias are based on the grievant's assertion that the hearing decision is inappropriately personal and his claim that "it is alarming how much information this hearing officer has gotten wrong, so much of it has to be deliberate, and when he changed the facts around and picked and chose pieces, they still do not support his decision." The grievant asserts that the decision "defies reason." While these concerns do not appear to relate to any sort of "direct, personal, substantial [or] pecuniary interest" in the outcome of this case, they nevertheless warrant review.

Inappropriately Personal Language

The grievant finds the hearing officer's use of the term "trooper's trooper" to describe the grievant in the original Hearing Decision, a "trite colloquialism." In the original Hearing Decision, the hearing officer had stated that: "[the grievant] is extraordinarily intelligent, hard working, and determined. He is by any objective measure, today and has been for many years, a 'Trooper's Trooper'. Although not expressly stated during the hearing, it was clear to the Hearing Officer that Grievant carried the well-earned respect of every witness."[8] We find no impropriety in this statement. Rather than exhibiting bias through the use of the term "Trooper's Trooper," the hearing officer seems to have used the term in a positive context.

Findings of Fact and Associated Conclusions

As to the issue of factual findings and conclusions, hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance

---

[5] *See Grievance Procedure Manual* § 6.4(3).
[6] Welsh v. Commonwealth, 14 Va. App. 300, 315 (1992) (alteration in original).
[7] *See*, *e.g.*, EDR Ruling No. 2004-640; EDR Ruling No. 2003-113.
[8] Hearing Decision at 18 (emphasis added).
[9] Va. Code § 2.2-3005.1(C).

based "on the material issues and grounds in the record for those findings."[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.

In reviewing this case, we find no evidence that the findings of the hearing officer were tainted in any manner by bias. However, we are remanding the decision for further clarification regarding one of the hearing officer's conclusions and the absence of any discussion of the grounds that support that conclusion. The *Rules for Conducting Grievance Hearings (Rules)* at V(C) state that: "The [hearing] decision must contain a statement of the issues qualified; *findings of fact on material issues and the grounds in the record for those findings*; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency's action has been upheld, reversed, or modified, and clearly listing all required actions and any recommended actions." (Emphasis added). Here, while the hearing officer concludes that the Sergeant did not disregard material facts when evaluating the grievant, as discussed below, the hearing officer does not explain why apparent evidence that the grievant was purportedly not permitted to make up training time and was allegedly told that it was not necessary to do so, are not material facts.

The grievant asserts that he was improperly rated in several categories, one of which related to canine duties.[11] It appears as though the Captain had consulted with the Canine Training Coordinator who had informed the Captain that, based on the missed training, the highest rating that he could give the grievant in the area of canine duties was a "Contributor Rating."[12] The grievant had testified at hearing that he missed several canine trainings because of reasons beyond his control: conflicts in his schedule caused by court appearances and lack of sufficient manpower coverage to allow him to make up the training on other days.[13] He also testified that he was told that he would not be required to make up missed training time.[14] He further testified that despite being told that he did not need to make up the missed time, the missed training was nevertheless held against him.[15]

In the original decision, the hearing officer held that:

> Grievant argues that the Agency scheduled his court dates during the K-9 training and, thus, he could not attend the training. He contends the Agency's assessment

[10] *Grievance Procedure Manual* § 5.9.
[11] An accurate rating for each category is crucial for a number of reasons, not least of which is because a trooper must have a rating of Major Contributor or above on at least 50% of all categories in order to receive an overall rating of "Major Contributor." *See* Hearing Decision at 16.
[12] Hearing beginning at 3:42. Grievant's Exhibit 48 appears to corroborate that the Captain contacted the Canine Training Coordinator who informed the Captain that a "Contributor" rating was the highest rating that he could recommend.
[13] Hearing at 3:46-47.
[14] *Id.* at 3:49. This testimony appears to be corroborated by Exhibit 45.
[15] *Id.*

> of his K-9 duties as being at a "contributor" level is arbitrary. If the Agency had scheduled Grievant's court dates intentionally so that he would miss the K-9 training, Grievant may have an argument towards retaliation. The evidence is unclear how Grievant's court dates were set and by whom. What is clear is that Grievant did not attend the K-9 training. The absence of such training would be a fact for the Agency to consider when concluding to rate Grievant's work performance on the K-9 unit as "contributor".

The grievant reiterated, in his request for administrative review, that he missed training because of scheduling conflicts caused by court appearances and he was not allowed to make up the dates. He asserts that after his involvement with the Virginia Troopers Alliance the missed training was used to downgrade his performance evaluation. In the Reconsideration Decision, the hearing officer responded:

> Grievant argues he attempted to make up missed canine handler meetings but Sergeant C indicted it was unnecessary to do so. In hindsight, it may have been a mistake for the Agency to deny Grievant the opportunity to make up the canine handler meeting dates, but it does not show that his evaluation was arbitrary or capricious.[16] The Sergeant who evaluated Grievant took into consideration that Grievant did not attend the necessary training. He did not disregard material facts as part of his evaluation of Grievant's work performance.

The statement that "[t]here is no reason to believe Grievant was denied the opportunity to retake missed classes in order to retaliate against Grievant or to single out Grievant based on some improper reason," addresses retaliation but does not fully address the grievant's arbitrary or capricious claim because it does not necessarily follow that because a decision is not retaliatory, it cannot be arbitrary. Although the Sergeant who evaluated Grievant may have taken into consideration that the grievant did not attend the necessary training, testimony and evidence that the grievant was not allowed to make up missed training and was told that he did not have to, seems to be, at least on its face, potentially both relevant and material.[17] Thus, the hearing officer is asked to clarify why they are not.

---

[16] Footnote 2 from the Reconsideration Decision is inserted here, which states: "There is no reason to believe Grievant was denied the opportunity to retake missed classes in order to retaliate against Grievant or to single out Grievant based on some improper reason."

[17] At hearing, the Captain who had contacted the Canine Training Coordinator was asked "based on what you knew at the time and based on what you've learned today, have you learned anything at this time that would have caused you to raise his performance evaluation?" Hearing at 5:51. The Captain responded: "I can't say yes or no but one thing I would have done after listening to today was try to delve a little bit deeper into exactly what was happening with his canine activities . . . "If I'd had a little bit more information about what was told to me strictly on a phone conversation compared to the documentation [grievant] has come up with and some of the things he's said, I would have, would have considered giving more weight to his canine training, and looked, delved into it more." Hearing at 5:52-53. (The Captain had previously testified that he offered to meet with the grievant during the grievance process. Hearing at 5:50. Exhibit 48 appears to corroborate this testimony. The Captain testified that the grievant declined his offer. *Id.*)

The grievant has also challenged the hearing officer's characterization of admitted mistakes and deviations from policy by the agency as harmless error. The grievant argues that adherence to policy matters only as it relates to him and that selective application of policies could potentially serve as evidence of a retaliatory motive. We cannot, however, substitute our judgment for that of the hearing officer regarding this matter. The hearing officer has expressly rejected the theory that retaliation motivated the agency. As we have long recognized in qualification rulings, in claims regarding retaliation where intent is critical to the outcome, the hearing officer, as fact finder, is best positioned to determine whether retaliatory intent played a role in management's actions.[18]

<u>Inadequate Time to Present Case at Hearing</u>

The grievant alleges that the hearing officer improperly curtailed the hearing which lasted just over six hours and 17 minutes. The grievant asserts he was prevented from adequately presenting his case as a result of the abbreviated hearing. Specifically, he asserts that the hearing officer did not allow him sufficient time to present evidence that his performance evaluation was tainted by retaliation for his union activity.

The hearing officer addressed this contention in the Reconsideration Decision. In Note One of the Hearing Decision the hearing officer stated that:

> Grievant contends he was denied his "one day" for the hearing. The Grievance Procedure Manual does not give one day to the Grievant to present his case. It authorized one day for the grievance hearing which would include the Agency's response. The Hearing Officer allowed Grievant substantially more time than was allowed to the Agency. The theory of Grievant's case is not complex, yet Grievant dwelled on every "sin" of the Agency regardless of whether that alleged facts related to the theory of his case. Grievant inefficiently used the ample time afforded to him to present his case.

We begin with several observations. Reasonable minds might disagree as to whether the detail provided by the grievant was excessive, unnecessary, or tended to focus on irrelevant facts. It is certainly possible that the grievant's presentation could have been pared without omitting necessary evidence. On the other hand, although as the hearing officer asserts that the "<u>theory</u>" of this case is "not complex," establishing a claim of retaliation can be involved as such claims often hinge on circumstantial evidence[19] and the presentation of potential evidence linking a

---

[18] *See,* Ross v. Communications Satellite Corp., 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, *quoting* Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) (a summary judgment decision in which the courts observes that "[r]esolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross examination.'"). *See also* EDR Ruling 2007-1727, (a qualification decision holding that "[a] hearing officer, as a fact finder, is in a better position to determine questions of fact, motive and credibility and decide whether retaliatory intent contributed to the grievant's reassignment.")

[19] (Emphasis added.) *See* Durant v. Indep. Sch. Dist. No. 16, 990 F.2d 560, 564 (10th Cir. 1993) ("[A]llegations of retaliation are often supported only by circumstantial evidence**."**); Webster v. Dep't of Army, 911 F.2d 679, at 689-

materially adverse action to a protected act may take longer than the presentation of direct evidence.

We fully acknowledge that a hearing officer's task of keeping the hearing moving at an appropriate pace is a difficult task. A hearing officer may be subject to criticism for exhibiting patience with a party who may not be presenting his or her case in the most concise manner. Yet, when he admonishes a party to keep focused, avoid repetition, and so on, he may be charged, as is the case here, with not allowing sufficient time to present the case. In addition, while the *Rules* state that: "[t]he hearing on a grievance may be divided into one or more sessions, but generally should last no longer than a total of 8 hours," the *Rules* also state the "hearing may continue beyond 8 hours, however, if necessary to a full and fair presentation of the evidence by both sides."[20] Thus, the general one day/8 hour standard is not to be applied in a rigid, absolute manner. Finally, there is no express *Rules* requirement that a hearing officer inform the parties of time constraints that will be imposed upon the parties, although it would be a sound practice for any hearing officer to adopt.[21]

Based on the totality of circumstances in this case, we cannot conclude that the hearing officer denied the grievant a fair opportunity to present his retaliation argument or otherwise abused his discretion in curtailing the length of the hearing. In his Reconsideration Decision, the hearing officer addressed the grievant's contention that he had an insufficient opportunity to present his case. He states:

> Grievant contends he was denied the opportunity to present his full case regarding retaliation.[22] Grievant had more than an ample opportunity to present his case for retaliation. He presented many facts and arguments regarding retaliation. The Hearing Officer has no reason to believe Grievant failed to present any material evidence regarding his claim for retaliation. Grievant did not manage his time well during the hearing. He presented many irrelevant and redundant facts and assertions regarding his performance evaluation and apparently did so at the expense of his claim for retaliation. Following the hearing, the Hearing Officer sent Grievant a letter asking him to proffer the additional evidence he wished to present. He offered no details regarding the additional facts he wished to present. It appears that Grievant simply wishes to talk more about the issue. Such a

---

90 (Fed. Cir. 1990). (Like intent, the nexus requirement for retaliation is often demonstrated through circumstantial evidence.).

[20] *Rules* at III(B).

[21] With such information, a party may present to the hearing officer reasons that presentation of the case may require additional time. If the request is denied, then the party can modify its presentation accordingly.

[22] The following text is from footnote 1 in the Reconsidered Decision:

> Grievant contends he was denied his "one day" for the hearing. The Grievance Procedure Manual does not give one day to the Grievant to present his case. It authorized one day for the grievance hearing which would include the Agency's response. The Hearing Officer allowed Grievant substantially more time than was allowed to the Agency. The theory of Grievant's case is not complex, yet Grievant dwelled on every "sin" of the Agency regardless of whether that alleged facts related to the theory of his case. Grievant inefficiently used the ample time afforded to him to present his case.

> discussion appears to be cumulative as the thrust of Grievant's claim of retaliation has already been presented.

Based on a review of the entire hearing recording, we must agree with the hearing officer that throughout the hearing the grievant referred to and advanced arguments relating to his union activity and alleged retaliation. Moreover, as reflected in the Reconsideration Decision, the hearing officer offered the grievant the opportunity to proffer any additional evidence he wished to present. The hearing officer asserts that the grievant did not accept his offer and the grievant has provided no evidence to the contrary. Thus, based on the totality of the circumstances, we cannot find that the grievant was not provided a sufficient opportunity to present his case.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

This case is remanded to the hearing officer for further clarification and consideration as set forth above. Both parties will 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).[23] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[24]

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

____
Claudia T. Farr
Director

[23] *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056.
[24] *See Grievance Procedure Manual* § 7.2(a).
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).