

Issue: Administrative Review of Hearing Decision in Case No. 9063, 9096; Ruling  
Date: August 10, 2009; Ruling #2009-2351; Agency: Department of Social Services;  
Outcome: Hearing Decision In Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW OF DIRECTOR**

In the matter of Department of Social Services  
Ruling No. 2009-2351  
August 10, 2009

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 9063, 9096. For the reasons set forth below, this Department determines that there is no basis to disturb the hearing officer's decision.

FACTS

The Department of Social Services ("agency") employed Grievant as an Information Technology Specialist III until his removal.

On August 1, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance. On September 30, 2008, Grievant received an annual performance evaluation with an overall rating of "Below Contributor." He was presented with a Workplan describing his expected performance over a 90-day time period.

Grievant's work performance over the 90-day time period was re-evaluated. On February 4, 2009, Grievant received an overall rating of "Below Contributor." He was removed from employment as a result of the re-evaluation.

The grievant grieved his removal and the "Below Contributor Rating." The grievances advanced to hearing and in the hearing officer's decision in Case Number 9063, 9096 ("hearing decision"), the hearing officer held that the agency presented sufficient facts to support its opinion that grievant's overall work performance was at a level of "Below Contributor" during the 2008 annual evaluation period. The hearing decision further held that the agency has presented sufficient facts to support its opinion that the grievant's overall work performance was at a level of "Below Contributor" during the re-evaluation period. Consequently, the hearing decision upheld the grievant's removal.<sup>1</sup>

The grievant has challenged the hearing decision on the two bases set forth and discussed below.

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<sup>1</sup> This is an abbreviated version of the facts in this case. The full recitation of the facts in the case and the hearing officer's conclusions and supporting reasoning are set forth in Case No. 9063, 9096.

## 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.”<sup>2</sup> 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.<sup>3</sup>

### *Agency Designee*

The grievant asserts that the agency brought to the hearing an individual who was not designated on the witness list that the agency produced prior to the hearing. The grievant claims that this individual was the reviewer of appeals and grievances and that her presence troubled him because he viewed the hearing as his first opportunity for a fair hearing. The grievant asserts that the presence of this reviewer at the hearing caused the grievant “considerable discomfort and disarray.”

Under the Rules for Conducting Grievance Hearings (“Hearing Rules”), “parties to the grievance are the employee and the agency. The agency may select an individual to serve in its capacity as a party.”<sup>4</sup> The Hearing Rules further state that “[t]he fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import,” and that “[e]ach party may be present during the entire hearing and may testify.”<sup>5</sup> The hearing officer appropriately explained the essence of this provision to the grievant within the first couple of minutes of the hearing. We find no error as to this issue.

### *Findings of Fact*

The grievant asserts that the agency did not meet its burden of establishing by a preponderance of the evidence that the actions taken by the agency were warranted and appropriate. He also appears to dispute the hearing officer’s fact findings underpinning the hearing decision.

In cases involving removal for poor performance, the hearing officer reviews the facts *de novo* 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.<sup>6</sup> Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>7</sup> and to determine the grievance based “on the material issues and grounds in the record for those

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<sup>2</sup> Va. Code § 2.2-1001(2), (3), and (5).

<sup>3</sup> See *Grievance Procedure Manual* § 6.4.

<sup>4</sup> *Rules for Conducting Grievance Hearings* § IV(A).

<sup>5</sup> *Id.*

<sup>6</sup> *Grievance Procedure Manual* § 5.8.

<sup>7</sup> Va. Code § 2.2-3005.1(C).

findings.”<sup>8</sup> 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 appear to 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.<sup>9</sup> Based upon a review of the record, it appears that sufficient evidence supports the hearing officer’s decision that the agency met its burden to establish by a preponderance of the evidence that the grievant’s removal was warranted and appropriate.<sup>10</sup> The Project Manager, one of the grievant’s supervisors who was the sole witness for the agency in its case in chief, testified as to numerous problems with the grievant’s performance.<sup>11</sup> The grievant never attempted to discredit or rebut the Project Manager’s testimony through cross-examination.<sup>12</sup> The Technical Program Manager, a rebuttal witness who was also one of the grievant’s supervisors, provided additional testimony regarding the grievant’s performance issues.<sup>13</sup> Consequently, this Department has no reason to disturb the hearing 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.<sup>14</sup> 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.<sup>15</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>16</sup>

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Claudia T. Farr  
Director

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<sup>8</sup> *Grievance Procedure Manual* § 5.9.

<sup>9</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>10</sup> In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. *Grievance Procedure Manual* § 5.8. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *Id.*

<sup>11</sup> Hearing Recording at 13:03 - 33:00.

<sup>12</sup> *Id.* at 33:02.

<sup>13</sup> Hearing Recording beginning at 1:19:35.

<sup>14</sup> *Grievance Procedure Manual* § 7.2(d).

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

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